

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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| In re: Complaint of FOYE BUILDERS,) | DOCKET NO. 890400-SU |
| INC. and FRANK AND MAUREEN ESPOSITO) | |
| against SANIBEL SEWER SYSTEM PARTNERS,) | ORDER NO. 21562 |
| LTD. for violation of Rule 25-30.310(2)) | |
| and (3), F.A.C., regarding initiation) | ISSUED: 7-17-89 |
| of service in Lee County.) | |

The following Commissioners participated in the disposition of this matter:

MICHAEL MCK. WILSON, CHAIRMAN
 THOMAS M. BEARD
 JOHN T. HERNDON

ORDER GRANTING IN PART AND DENYING IN PART
THE UTILITY'S MOTION TO DISMISS AND DEFERRING
SHOW CAUSE PENDING UTILITY'S ANSWER TO COMPLAINT

BY THE COMMISSION:

On March 15, 1989, we received a formal Complaint (the Complaint) from Foye Builders, Inc., and Frank and Maureen Esposito (the Complainants) against Sanibel Sewer System Partners, Ltd. (Sanibel or the utility), for Sanibel's failure to provide sewer service without unreasonable delay. Our Division of Records and Reporting docketed and sent the Complaint to Sanibel on March 20, 1989.

The Complaint states that Sanibel has consistently failed to comply with the Consent Order it entered into with the Department of Environmental Regulation (DER) on January 23, 1987. The Consent Order required that Sanibel have its new tertiary effluent filter completed and in service no later than April 30, 1988, with an extension granted through June 30, 1988. The Complainants cite Rule 25-30.310, Florida Administrative Code, as the authority under which they file their Complaint. Rule 25-30.310(2), Florida Administrative Code, provides as follows:

(2) Upon an applicant's compliance with utility's reasonable rules regarding service initiation, the utility shall initiate service without unreasonable delay. To ensure effectiveness of its rules regarding service and the initiation of

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service, a utility shall set out its rules or policies in its tariff, and these rules or policies shall have uniform application.

The Complainants state that the utility has violated this Rule by not initiating service without unreasonable delay and by not informing them of its rules or policies. The Complainants' demands for relief are that the Commission compel Sanibel to make "the applicable system fully operational" so that it can provide sewer service to the applicants on or before April 15, 1989, and that the Commission compel Sanibel to reimburse the Complainants for their damages itemized in the Complaint. In addition, the Complainants request that the Commission grant them a hearing on their Complaint.

Sanibel responded with a timely filed Motion to Dismiss. In its Motion, Sanibel moves us to dismiss the Complaint because, it alleges, the Consent Order with DER prohibits it from further connections at this time. The utility states that "Whether connections are made or not is under the jurisdiction of DER and not under the jurisdiction of this Commission, and the Commission therefore cannot grant the relief requested by the Complainants." In a second paragraph, the utility states that the Complainants' demand for damages is inappropriate because this Commission does not have jurisdiction to assess damages.

The Complainants have itemized throughout their Complaint and the Addendum to their Complaint the damages they have allegedly suffered as a result of this utility's failure to provide them sewer service. It is certainly true that this Commission does not have authority to assess money damages. In that respect, the Motion to Dismiss is correct and we find it appropriate to grant the Motion to that extent. However, this Commission does have jurisdiction to enforce its own Rules. The Complainants have alleged that Sanibel has violated Rule 25-30.310, Florida Administrative Code, by not providing sewer service without unreasonable delay. The utility has not provided any explanation as to why the provisions of the Consent Order, requiring that the tertiary effluent filter system be operational by no later than April 30, 1988, (with an apparent extension granted through June 30, 1988), have not been complied with. We do not concern ourselves with the enforcement of another agency's Consent Order, but we must enforce our Rule regarding the initiation of service.

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The Complainants, Foye Builders, Inc., first requested service from the utility by letter dated October 17, 1988. They received several letters from the utility and the City of Sanibel and DER indicating that the utility should be ready to serve them by the end of 1988. It is now mid-June, 1989.

The utility's tariff provisions regarding its service availability policy have been modified by Order No. 18529 issued in Docket No. 861112-WU. That Order provides that the utility will collect cash service availability charges of \$300 per equivalent residential connection (ERC) and that it will not accept actual line donations from developers. There has been no indication that the Complainants have failed in any way to comply with the utility's rules or policies in this matter.

The utility clearly believes that the existence of the Consent Order is an absolute defense to its alleged failure to comply with Rule 25-30.310, Florida Administrative Code. However, we find nothing in the four corners of that Consent Order, nor in the Motion to Dismiss, that offers any reasonable explanation as to why this utility has not provided timely sewer service to these Complainants.

The Motion to Dismiss filed by the utility tolled the time for filing a response to the Complaint. However, since we are denying the Motion to Dismiss in part, the utility has ten days from the date of this Order to file an Answer to the Complaint. As discussed above, Sanibel has apparently violated Rule 25-30.310, Florida Administrative Code, by not providing sewer service to Foye Builders, Inc., and Frank and Maureen Esposito, without unreasonable delay. The utility has not denied the allegations raised by the Complainants, but has offered that the Consent Order that it entered into with DER has prevented it from providing such service. Upon the filing of such an Answer, or upon the expiration of the allowable time period for filing such an Answer, we will consider the appropriateness of issuing an order to require Sanibel to show cause why it should not be fined \$10,000 for its failure to comply with this Rule.

Based on the foregoing, it is therefore,

ORDERED by the Florida Public Service Commission that Sanibel Sewer System Partners, Ltd.'s Motion to Dismiss the

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Complaint of Foye Builders, Inc., and Frank and Maureen Esposito be granted as to the request for money damages and denied as to the alleged violation of Rule 25-30.310, Florida Administrative Code, as set forth in the body of this Order. It is further

ORDERED that Sanibel Sewer System Partners, Ltd., shall have 10 days from the date of this Order to file an Answer to the Complaint.

By ORDER of the Florida Public Service Commission
this 17th day of July, 1989.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

by: Kay Flynn
Chief, Bureau of Records

SFS

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or 3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court

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of Appeal, in the case of a water or sewer utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.