

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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| In re: Application for a rate |) | DOCKET NO. 900757-SU |
| increase in Collier County by |) | ORDER NO. 25392 |
| NAPLES SEWER COMPANY |) | ISSUED: 11/25/91 |
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The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
MICHAEL MCK. WILSON

ORDER DENYING MOTION FOR RECONSIDERATION
AND MOTION FOR STAY PENDING JUDICIAL REVIEW

BY THE COMMISSION:

Case Background

Naples Sewer Company (NSC or utility) is a class "C" wastewater utility which has been providing service to an industrial park in Naples, Florida, since 1974. Upon granting NSC a grandfather certificate in 1986, the Commission approved NSC's then-existing rates. The instant rate proceeding is the utility's first before this Commission.

NSC filed its application for increased rates on February 27, 1991. NSC did not meet the minimum filing requirements (MFRs) until April 23, 1991, which became the official date of filing for this proceeding. The test year for final rates is the projected twelve-month period ended December 31, 1991; the projected period is based upon the historical year ended December 31, 1990. The utility requested final rates designed to generate a revenue requirement of \$292,079, an increase of 334%.

The utility requested interim wastewater rates designed to generate \$181,202 in annual revenues, which exceeded interim test year revenues by \$113,872, or 169%. By Order No. 24737, issued July 1, 1991, this Commission authorized NSC to collect interim wastewater rates designed to generate \$143,646 in annual revenues, revenues 113% higher than interim test year revenues.

The utility asked that its request for rate relief be considered at a formal administrative hearing, so a formal administrative hearing was scheduled for September 5, 1991. However, by Order No. 24922, issued August 16, 1991, the Commission

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dismissed NSC's rate case because NSC did not comply with the noticing requirement of Rule 25-22.0406(5), Florida Administrative Code, and, thus, denied its customers procedural due process. The Commission further ordered that any interim revenues collected by NSC be refunded with interest.

On August 23, 1991, NSC filed a timely Motion for Reconsideration and a Motion for Stay Pending Judicial Review. On August 30, 1991, NSC filed an Amended Motion. The instant order addresses these motions.

Motion For Reconsideration

In its Amended Motion for Reconsideration, NSC argues several points. First, it argues that the Commission improperly decided the factual question of whether NSC complied with the noticing requirements because the Commission did not give NSC notice or the opportunity for a hearing. NSC asserts that the Commission violated its own rules, Chapter 120, Florida Statutes, and procedural due process by dismissing NSC's case on its own motion. Secondly, NSC argues that its alleged noncompliance with the noticing requirement, without any evidence of prejudice, is not as a matter of law sufficient grounds for dismissal. Finally, NSC argues that Order No. 24922 erroneously states that customers had to intervene before July 18, 1991, when their testimony was due.

"The purpose of a Petition for Reconsideration is merely to bring to the attention . . . of the administrative agency, some point which it overlooked or failed to consider when it rendered its order in the first instance. It is not intended as a procedure for re-arguing the whole case merely because the losing party disagrees with the judgement or order." Diamond Cab Company of Miami v. King, 146 So.2d 889, 891 (Fla. 1962) (citations omitted). The standard for judging the motion filed in this case, therefore, is whether or not the Commission made a mistake or an oversight in fact or law in rendering the final order.

We do not believe that NSC's motion meets the above standard. NSC's first argument, that the Commission's dismissing the case on its own motion is procedurally flawed, has already been considered by the Commission. NSC refused its opportunity to address the Commission at the July 30th Agenda Conference at which we considered our staff's recommendation to dismiss the case and,

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instead, filed written opposition to the recommendation. Even though our rules do not sanction written responses to recommendations, we considered the response at the July 30th Agenda Conference. In its Amended Motion, NSC makes the same argument regarding procedural error that it made in its written opposition. In its written opposition, NSC complained its constitutional and statutory rights would be violated by dismissal "on the basis of a 'Memorandum' of [staff's] own discussed and acted upon at the Commission's regular agenda conference." We considered NSC's written opposition and, thus, this argument at the July 30th Agenda Conference when we voted to dismiss NSC's case. NSC has not elaborated on this argument at all in its Amended Motion. In addition, we do not believe that the argument has any merit on a substantive basis.

NSC would have this Commission believe that it could never take action on its own motion. NSC is affected by the result of our action, but NSC cannot claim to be prejudiced by the procedure. NSC does not deny that it received a copy of our staff's recommendation or the notice that the recommendation would be considered at the July 30th Agenda Conference; indeed, NSC filed a response to the recommendation. NSC has failed to cite any legal authority, statutes, cases, or rules, which support its argument. We therefore conclude that NSC's argument on this point is without merit.

NSC's second argument, that its alleged noncompliance with the noticing requirement is not as a matter of law sufficient grounds for dismissal, also fails to meet the standard for reconsideration. Like its first argument, NSC raised this second argument in its July 23rd written opposition, wherein NSC stated that if noticing had not taken place "[t]he remedy is not summary dismissal of a substantive proceeding." We have already considered this argument and found it unpersuasive.

By the Order Establishing Procedure entered in this case, Order No. 24539, issued May 15, 1991, NSC was required to comply with the noticing requirements of Rule 25-22.0406, Florida Administrative Code. We determined that NSC did not comply with the Rule. The remedy to be had was a matter for this Commission's discretion, and, in this case, we chose dismissal. NSC has presented no authority for the proposition that this Commission's abused its discretion. We conclude that NSC's argument on this point is without merit.

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Finally, NSC argues that Order No. 24922 erroneously states that customers had to intervene before July 18, 1991, when their prefiled testimony was due. Since NSC does not quote the language in the Order which it complains of, we can only presume that NSC is referring to page 3 of Order No. 24922 wherein we stated, "Were NSC's customers to intervene, they would have had to prefile direct testimony on July 18, 1991." Although, taken alone, the quoted statement may be subject to two interpretations, we do not think that the meaning given to it by NSC is one of the possible interpretations.

Furthermore, even if the Order said what NSC claims it does, we do not think such a statement would have any bearing on our reconsidering our decision. The case was dismissed because the customers were denied due process and effectively denied the right to file testimony in support of their case. In its Amended Motion, NSC provides no explanation of the significance of this supposed error in the Order. We therefore reject this argument as well.

In consideration of the foregoing, we hereby deny NSC's Amended Motion for Reconsideration.

Motion For Stay Pending Judicial Review

Pursuant to Rule 25-22.061(1)(a), Florida Administrative Code, NSC asked that the Commission stay the effectiveness of Order No. 24922. We believe that the cited rule is inapplicable because it pertains only to stays pending judicial appeal, and an appeal has not yet been filed in this case.

We therefore shall not grant a stay at this time. If the utility appeals this case, the utility would be entitled to a stay if it complies with the requirements of Rule 25-22.061, Florida Administrative Code.

It is, therefore

ORDERED by the Florida Public Service Commission that Naples Sewer Company's Motion for Reconsideration is hereby denied. It is further

ORDERED that Naples Sewer Company's Motion For Stay Pending Judicial Review is hereby denied.

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By ORDER of the Florida Public Service Commission, this
25th day of NOVEMBER, 1991.



STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

MJF

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 the Commission's final action in this matter may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.