

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Complaint and Petition) DOCKET NO. 920649-WS
of Cynwyd Investments Against)
TAMIAMI VILLAGE UTILITY, INC.)
Regarding Termination of Water)
and Wastewater Services in Lee)
County.)
_____)
In Re: Complaint Against) DOCKET NO. 930642-WS
TAMIAMI VILLAGE UTILITY, INC. by) ORDER NO. PSC-93-1386-PCO-WS
CYNWYD INVESTMENTS, and Request) ISSUED: 9/22/93
for Emergency Order Requiring)
the Utility to Reestablish Water)
and Wastewater Service to)
Cynwyd's Friendship Hall in Lee)
County.)
_____)

ORDER DENYING MOTION TO VACATE OR DISSOLVE INJUNCTION,
PETITIONS FOR RECONSIDERATION AND BOND REQUEST,
PETITION FOR RECONSIDERATION OF
ORDER ESTABLISHING PROCEDURE AND PETITION FOR
RECONSIDERATION OF ORDER GRANTING MOTION TO COMPEL, AND
MOTION FOR EXTENSION OF TIME TO ANSWER STAFF INTERROGATORIES

Background

Tamiami Village Utility, Inc., (TVU or utility) is a Florida Corporation that operates its water and wastewater utility service in Lee County, Florida. Cynwyd Investments (Cynwyd) is a Pennsylvania General Partnership that owns an RV park and other parcels of property, including the Friendship Hall recreation center, either adjoining or within the Tamiami Village Mobile Home community in Lee County, Florida. Cynwyd's RV park is a bulk customer of TVU, while its other parcels are on separate meters.

Cynwyd first filed a complaint on June 24, 1992, followed by a request for emergency relief filed on July 6, 1992. Cynwyd alleged that TVU threatened to terminate service to the RV Park because of excessive infiltration into TVU's wastewater system from faulty lines. Thereafter, Cynwyd filed a second request for emergency relief, on July 1, 1993, based upon TVU's alleged threat to disconnect service to the Friendship Hall recreation center. The disagreement in this complaint was over the purported unauthorized use of an open drain around the pool which caused excessive infiltration into TVU's wastewater system. Cynwyd

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complied with TVU's request and disconnected the open drain. Subsequently, it was billed \$801 by the utility for prior unauthorized use. Cynwyd has refused to pay this disputed amount. July 26, 1993, by Order No. PSC-93-1086-PCO-WS, this Commission consolidated complaint Dockets Nos. 920649-WS and 930642-WS after our determination that both dockets involve essentially the same facts, the same parties, and some of the same witnesses.

There have been numerous motion and petitions for reconsideration filed by the utility, each of which will be addressed by this Order.

TVU'S MOTION TO VACATE OR DISSOLVE INJUNCTION

On June 25, 1993, TVU filed a motion to vacate or dissolve a ex parte injunction purportedly granted in Order No. PSC 92-0636-PCO-WS, issued July 9, 1992. However, that Order was superseded by Order No. PSC-92-0854-FOF-WS, issued August 24, 1992. This later order prohibited TVU from terminating service to Cynwyd pending a resolution of the underlying dispute concerning excessive infiltration. Subsequently, on May 25, 1993 this Commission issued Proposed Agency Action Order No. PSC 93-0810-FOF-WS, which assigned responsibility for maintenance and repair of the lines within the RV park to Cynwyd regardless of any question of ownership of the lines being argued in the circuit court. Further, the Commission ordered Cynwyd to file a plan for the repair of the lines with the Commission within 15 days. However, on June 14, 1993, Cynwyd filed a timely objection to Order No. PSC 93-1810-FOF-WS and a formal hearing has been set for October 14 and 15, 1993.

Based on the above history, it is apparent that a request for relief by vacating Order No. PSC 92-0636-PCO-WS at this time is inappropriate. Further, as stated previously in Order No. PSC 92-0854-FOF-WS, since "Cynwyd disputes the factual and legal premises for TVU's terminating service, we do not think that it would be appropriate or in the public interest to allow TVU to terminate Cynwyd's service...." Therefore, the Motion to Vacate and Dissolve Injunction is denied.

TVU'S MOTIONS FOR RECONSIDERATION AND BOND REQUEST

On July 12, 1993, a Motion for Reconsideration of Order No. 93-0985-PCO-WS was received from TVU. The pleading claimed that the Order was not in compliance with Florida Rules of Civil Procedure, Rules 1.610 and 1.610(b) governing the issuance of

injunctions and the provision for a bond. An accompanying letter requested that bond be set at \$150,000. Cynwyd filed its response on August 2, 1993. Cynwyd argued that both Tamiami's petition for reconsideration and request for \$150,000 bond should be denied because TVU did not interpret correctly Rule 1.610 of the Florida Rules of Civil Procedure. Cynwyd accurately stated that this Commission granted "an emergency order that enforced Tamiami's statutory obligation to furnish service to Cynwyd," not an injunction. Further Cynwyd stated that

Pursuant to Article V, Section 20(3) of the Constitution of the State of Florida, and Section 26.012, Florida Statutes, the power to issue an injunction lay within the domain of the circuit court. The Commission is not empowered to issue an injunction.

In addition, Cynwyd emphasized that a "utility customer should not have to post a bond in order to have the utility conform to its obligation to provide service."

Cynwyd's remarks are correct. Rule 1.610(b) of the Florida Rules of Civil Procedure provides for a bond when a temporary injunction is entered. Although the utility persists in referring to the Commission's emergency orders as injunctions, they are, in fact, not injunctions. Section 367.121(g), Florida Statutes, allows the Commission to exercise judicial powers, however, the right to issue an injunction is reserved to the circuit court, as noted above. Therefore, the Motion for Reconsideration is denied.

TVU'S RECONSIDERATION OF ORDER ESTABLISHING PROCEDURE

On July 28, 1993, TVU filed a petition for reconsideration of Order No. PSC-93-1053-PCO-WS, issued July 19, 1993. In its Motion, the utility argues that it should not be required to file its testimony first because, in a complaint proceeding, the "putative Plaintiff" has the burden of proof. Further, the utility objected to the holding of the prehearing conference in Tallahassee, Florida, stating that it would cause TVU to incur undue expense.

Upon review of the petition, the Motion for Reconsideration is denied.

In Order No. PSC-93-0043-PCO-WS, issued January 11, 1993, involving Placid Lakes Utilities, Inc., this Commission addressed the issue of burden of proof. As a regulated utility, TVU has the

burden of proof, that is, the ultimate burden of persuasion that it is in compliance with Commission statutes, rules and orders. Further, the order states:

Section 367.111(3), Florida Statutes, declares that the regulation of utilities is in the public interest and that Chapter 367 is an exercise of the police power of the state for the protection of the public, health, safety and welfare. Section 367.111(2), Florida Statutes, requires utilities to provide safe, efficient and sufficient service. Therefore, the ultimate burden of persuasion that its operation is in the public interest must be the regulated utility's.

Rule 25-22.038 (4) (c), Florida Administrative Code, states that all parties and the hearing officer shall attend the final prehearing conference. Although there have been rare occasions when such conferences have been done by telephone, the prehearing officer believes that, in light of the contentiousness of the parties, it is in the best interest of the parties and the prehearing officer that the final prehearing conference be conducted in Tallahassee.

TVU's RECONSIDERATION OF ORDER GRANTING MOTION TO COMPEL

Upon consideration, the Prehearing Officer finds it appropriate to deny the Utility's Petition for Reconsideration of Order No. PSC-93-1243-PCO-WS filed on September 3, 1993. TVU's argument that this docket was put in abeyance indefinitely by an informal letter dated April 19, 1993, from Patrick K. Wiggins to Mr. Matthew Feil, former staff counsel, is inaccurate. While the Commission did allow a lengthy informal delay, once it issued its order establishing procedure, Order No. PSC-93-1053-PCO-WS, on July 19, 1993, all parties were informed that this proceeding was continuing in accordance with the dates set forth in the order.

TVU'S MOTION FOR EXPENSION OF TIME TO ANSWER
STAFF INTERROGATORIES

On September 10, 1993, TVU filed a Motion for Extension of Time to Answer Commission Staff Interrogatories until October 1, 1993 pleading that due to other pressures it could not meet deadline.

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In order for staff and other parties to be properly prepared for the prehearing conference, currently scheduled for September 27, 1993, it is necessary to have the interrogatories answered prior to that date. Therefore, the request for extension of the responses to interrogatories is granted until for September 24, 1993.

Based on the foregoing, it is, therefore,

ORDERED by Susan F. Clark, as Prehearing Officer, that Tamiami Village Utility, Inc.'s Motion to Vacate or Dissolve Injunction ordered in Order No. PSC-92-0636-PCO-WS is hereby denied.

ORDERED that Tamiami Village Utility, Inc.'s Petition for Reconsideration and Bond Request, filed July 12, 1993, is hereby denied. It is further

ORDERED that Tamiami Village Utility, Inc.'s Petition for Reconsideration of the Order Establishing Procedure, Order No. PSC 93-1053-PCO-WS, is hereby denied. It is further

ORDERED that Tamiami Village Utility, Inc.'s Petition for Reconsideration of Order No. PSC-93-1243-PCO-WS is hereby denied. It is further

ORDERED that Tamiami Village Utility, Inc.'s Motion for Extension of Time to Answer Staff Interrogatories is granted as set forth in the body of this Order.

By ORDER of Commissioner Susan F. Clark, as Prehearing Officer, this 22nd day of September, 1993.



SUSAN F. CLARK, Commissioner and
Prehearing Officer

(S E A L)

SLE/ES

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 of Appeal, in the case of a water or wastewater 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.