

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for transfer) DOCKET NO. 940963-SU
of territory served by TAMIAMI) ORDER NO. PSC-96-0269-FOF-SU
VILLAGE UTILITY, INC., in Lee) ISSUED: February 26, 1996
County to NORTH FORT MYERS)
UTILITY, INC., cancellation of)
Certificate No. 332-S and)
amendment of Certificate No.)
247-S; and for a limited)
proceeding to impose current)
rates, charges, classifications,)
rules and regulations, and)
service availability policies.)
_____)

The following Commissioners participated in the disposition of this matter:

JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

ORDER DISMISSING MOTION FOR PARTIAL REINSTATEMENT
OF ORDER NO. PSC-95-0576-FOF-SU

BY THE COMMISSION:

Background

On September 13, 1994, North Fort Myers Utility, Inc., (NFMU) filed an application for amendment of its Wastewater Certificate No. 247-S to include territory served by Tamiami Village Utility, Inc., (TVU) and cancellation of TVU's Wastewater Certificate No. 332-S, which was processed under Section 367.071, Florida Statutes, as an application for transfer of TVU's territory to NFMU, cancellation of Certificate No. 332-S, and amendment of Certificate No. 247-S. On the same date, NFMU also filed a request for a limited proceeding to impose its current rates, charges, classifications, rules and regulations, and service availability policies upon TVU's existing customers and service area.

Upon notification, numerous customer objections to the application were timely filed. Consequently, a formal hearing was held on February 2, 1995, in Fort Myers, Florida. By Order No. PSC-95-0576-FOF-SU, issued May 9, 1995, we approved NFMU's application to transfer the territory served by TVU to NFMU, to cancel TVU's Certificate No. 332-S, to amend NFMU's Certificate No.

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247-S, and to impose NFMU's current rates, charges, classifications, rules and regulations, and service availability policies upon the customers of TVU. We also approved NFMU's request to allow these customers the option to pay the service availability charge on an installment plan.

On May 24, 1995, the Office of Public Counsel (OPC) filed a Motion for Reconsideration and Motion for Clarification of Order No. PSC-95-0576-FOF-SU. By Order No. PSC-95-0866-FOF-SU, issued July 17, 1995, in Docket No. 950522-SU, the Commission approved a special service availability agreement entered into between NFMU and TVU by which NFMU proposed to collect the same rates and charges as are reflected in TVU's tariff for the provision of bulk service to the customers of TVU pending the outcome of OPC's motion for reconsideration in the instant docket. By Order No. PSC-95-0965-FOF-SU, issued August 8, 1995, the motion for reconsideration was granted in part and denied in part, and the motion for clarification was denied. On September 7, 1995, OPC filed a Notice of Appeal of Orders Nos. PSC-95-0576-FOF-SU and PSC-95-0965-FOF-SU.

On September 8, 1995, NFMU filed a Motion to Vacate Stay Pending Review, pursuant to Rule 9.310, Florida Rules of Appellate Procedure, and Rule 25-22.061(3), Florida Administrative Code. By Order No. PSC-95-1431-FOF-SU, issued November 27, 1995, we granted that motion and required the utility to escrow \$365 of each \$740 service availability charge collected, or 50% of each installment, pending the outcome of the appeal of Orders Nos. PSC-95-0576-FOF-SU and PSC-95-0965-FOF-SU. We also required the utility to escrow the difference between its wastewater rates and TVU's wastewater rates during the pendency of the appeal.

On November 27, 1995, NFMU filed a Motion for Partial Reinstatement of Order No. PSC-95-0576-FOF-SU. Although served a copy, OPC did not file a response to the motion.

Motion for Partial Reinstatement of Order No. PSC-95-0576-FOF-SU

As grounds for its Motion for Partial Reinstatement of Order No. PSC-95-0576-FOF-SU, NFMU states that OPC presented practically no evidence at hearing on the issue of NFMU's certificate amendment application, having devoted substantially all of its evidence to the issue of the appropriate amount of the service availability charges due from the former customers of TVU. NFMU states that OPC's post-hearing filings addressed those issues in a similar fashion. In its Motion for Reconsideration of Order No. PSC-95-0576-FOF-SU, OPC did not address the Commission's granting of the amendment to NFMU's certificate, nor the imposition of NFMU's monthly rates upon the new customers.

Moreover, NFMU states that in OPC's initial brief filed in the First District Court of Appeal on November 16, 1995, OPC does not argue that the Commission erred in granting the certificate amendment to NFMU. NFMU cites to White v. White, 627 So. 2d 1237 (Fla. 1st DCA 1993), and to Polyglycoat Corp. v. Hirsch Distributors, Inc., 442 So. 2d 958 (Fla. 4th DCA 1983), review dismissed, 541 So. 2d 848 (Fla. 1984), for the proposition that because OPC omitted from its initial brief any points, position, facts, or supporting authorities on the issue of the certificate amendment, OPC is deemed to have waived or abandoned its appeal of those portions of the orders on appeal which relate to that issue and to the Commission's approval of NFMU's request to impose its monthly rates upon the TVU customers. NFMU requests that we reinstate all portions of the orders on appeal, except the issue of the appropriate amount of service availability charges to be paid to NFMU by the former customers of TVU. As stated earlier, although served a copy, OPC did not file a response to NFMU's motion.

We note that in its motion, NFMU is silent on whether we have jurisdiction to grant its request pending appellate review. We find that we do not retain jurisdiction for this purpose.

According to Rule 9.600(a), Florida Rules of Appellate Procedure, Jurisdiction of Lower Tribunal Pending Review, prior to the time the record on appeal is transmitted to the appellate court, the lower tribunal has concurrent jurisdiction to render orders on procedural matters relating to the case, subject to the control of the appellate court. However, this rule does not apply here because the record has already been transmitted to the First District Court of Appeal.

Rule 9.600(b), Florida Rules of Appellate Procedure, states that "[i]f the jurisdiction of the lower tribunal has been divested by an appeal from a final order, the court by order may permit the lower tribunal to proceed with specifically stated matters during the pendency of the appeal."

NFMU essentially requests that we relieve the utility of its requirement under Order No. PSC-95-1431-FOF-SU to escrow the difference between its wastewater rates and TVU's wastewater rates pending the outcome of the appeal. According to the First District Court of Appeal in the White opinion cited by NFMU in its motion, "[w]hen points, positions, facts and supporting authorities are omitted from the brief, a court is entitled to believe that such are waived, abandoned, or deemed by counsel to be unworthy." 627 So. 2d at 1239 (quoting Polyglycoat, 442 So. 2d at 960). What NFMU fails to note, however, is that the courts have not conferred this

entitlement upon the lower tribunals. NFMU also fails to note that according to the Polyglycoat court, although appellate courts basically work within the framework of the briefs, "there are instances where errors are so glaring or fundamental that a court will adjudicate them on its own initiative." 442 So. 2d at 960. Until the court speaks on the matters posed by NFMU in its motion, we will not know whether it will find any such "glaring or fundamental errors" worthy of adjudication despite the fact that they were not argued in OPC's initial brief. Thus, it is not for the Commission to determine whether OPC's failure to present argument on certain issues in its initial brief constitutes a waiver or abandonment of those issues on appeal. This is a matter within the power and authority of the appellate court. And as stated by the Second District Court of Appeal, "a trial court is divested of jurisdiction upon notice of an appeal except with regard to those matters which do not interfere with the power and authority of the appellate court or with the rights of a party to the appeal which are under consideration by the appellate court." Palma Sola Harbour Condominium, Inc. v. Huber, 374 So. 2d 1135, 1138 (Fla. 2d DCA 1979). We decline to act on the utility's request absent an express direction of the reviewing court to do so, in accordance with Rule 9.600(b), Florida Rules of Appellate Procedure.

We secondarily note that Orders Nos. PSC-95-0576-FOF-SU and PSC-95-0965-FOF-SU have not been vacated by virtue of the fact that they are currently on appeal. Nor have the orders been stayed. As noted earlier, by Order No. PSC-95-1431-FOF-SU, we granted NFMU's Motion to Vacate Automatic Stay Pending Review of Orders Nos. PSC-95-0576-FOF-SU and PSC-95-0965-FOF-SU. It is therefore unnecessary for us to "reinstate" any portion(s) of those orders at NFMU's request, as they remain in full force and effect pending the outcome of the appeal. See, e.g., FMS Management Systems, Inc. v. IDS Mortgage Corp., 402 So. 2d 474 (Fla. 4th DCA 1981) (holding that lower tribunal may enforce its final judgment pending appeal in the absence of a supersedeas or stay).

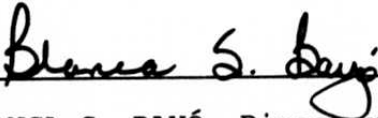
Because the First District Court of Appeal has not permitted us to act on NFMU's Motion for Partial Reinstatement of Order No. PSC-95-0576-FOF-SU pending the outcome of the appeal, we hereby dismiss the motion for lack of jurisdiction. We suggest that NFMU may move the appellate court for temporary relinquishment of jurisdiction to the Commission under the authority of Rule 9.600(b), Florida Rules of Appellate Procedure, if it chooses to pursue the relief it currently requests.

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Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that North Fort Myers Utility, Inc.'s Motion for Partial Reinstatement of Order No. PSC-95-0576-FOF-SU is hereby dismissed.

By ORDER of the Florida Public Service Commission, this 26th day of February, 1996.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

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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 dismissal of this matter may: 1) file a motion to set aside the dismissal in accordance with Rule 25-22.042, Florida Administrative Code. The motion must state with particularity the grounds upon which the dismissal should be set aside, and must be received by the Director of the Division of Records and Reporting by no later than fourteen (14) days from the date of the issuance of this Order; or 2) 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 wastewater 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 Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.