

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for transfer) DOCKET NO. 940963-SU
of territory served by TAMIAMI) ORDER NO. PSC-96-0675-FOF-SU
VILLAGE UTILITY, INC., in Lee) ISSUED: May 22, 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 GRANTING PETITION FOR ORDER TERMINATING ESCROW,
AUTHORIZING RELEASE OF ALL FUNDS RELATED TO ESCROW ACCOUNT TO
NORTH FORT MYERS UTILITY, INC., AND CLOSING DOCKET

BY THE COMMISSION:

BACKGROUND

On September 9, 1994, North Fort Myers Utility, Inc., (NFMU or utility) 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, we approved a special service availability agreement entered into between NFMU and TVU by which NFMU proposed to collect the same rates and charges as were 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, which motion was dismissed by Order No. PSC-96-0269-FOF-SU, issued February 26, 1996.

On March 18, 1996, in its Case No. 95-3205, the First District Court of Appeal rendered a per curiam affirmance without opinion of Orders Nos. PSC-95-0576-FOF-SU and PSC-95-0965-FOF-SU in this docket. On April 3, 1996, the Court issued its mandate on the matter to the Director, Division of Records and Reporting, commanding that further proceedings be had in accordance with the Court's decision.

PETITION FOR ORDER TERMINATING ESCROW

Pursuant to Order No. PSC-95-1431-FOF-SU, NFMU entered into an escrow agreement with First Union Bank and the Commission. The agreement provides that First Union Bank shall disburse funds only upon order of the Commission issued in this docket. On March 25,

1996, NFMU filed the instant Petition for Order Terminating Escrow. In the Petition, NFMU cites to Lawyers Title Ins. Corp. v. Reitzes, 631 So. 2d 1100 (Fla. 4th DCA 1993), in arguing that because there is no rehearing to a court's per curiam affirmance without opinion, Orders Nos. PSC-95-0576-FOF-SU and PSC-95-0965-FOF-SU are final and NFMU's entitlement to the escrow funds has been established. NFMU requests that we issue an order terminating the escrow agreement and directing that all funds escrowed be released to NFMU. Although served a copy, OPC did not file a response to the Petition.

We disagree with NFMU that the Reitzes opinion stands for the proposition that a rehearing of an appellate court's affirmance without opinion is per se unavailable. In Reitzes, the 4th District Court of Appeal, among other things, denied the appellant's motion for rehearing because the motion reargued the merits of the case, in violation of Rule 9.330(a), Florida Rules of Civil Procedure. Id. at 1101-02. The Court merely notes at the beginning of its opinion that the appellant filed a motion for rehearing "notwithstanding [the] court's per curiam affirmance without opinion." Id. at 1100.

Nevertheless, pursuant to Rule 9.330(a), Florida Rules of Civil Procedure, a motion for rehearing must be filed within fifteen days of rendition of the decision on appeal, and the time for filing a motion for rehearing of the appellate court's decision in this cause has expired. Therefore, Orders Nos. PSC-95-0576-FOF-SU and PSC-95-0965-FOF-SU are the final determinations in this docket.

In consideration of the above, and in compliance with the mandate of the First District Court of Appeal for further proceedings in accordance with the decision on appeal, we find it appropriate to grant the utility's Petition for Order Terminating Escrow. We hereby authorize the release of all funds related to the escrow account to NFMU.

Because we find that Orders Nos. PSC-95-0576-FOF-SU and PSC-95-0965-FOF-SU are the final determinations in this docket and that the escrowed funds may be released, no further action is necessary and this docket shall be closed.

Based on the foregoing, it is

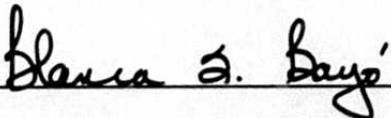
ORDERED by the Florida Public Service Commission that the Petition for Order Terminating Escrow filed by North Fort Myers Utility, Inc., is hereby granted. It is further

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ORDERED that all funds related to the escrow account shall be released to North Fort Myers Utility, Inc. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission, this 22nd day of May, 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 final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) 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 and/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 Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.