BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for amendment of Certificate No. 247-S to extend wastewater service area by the transfer of Buccaneer Estates in Lee County to North Fort Myers Utility, Inc.	DOCKET NO. 981781-SU ORDER NO. PSC-99-0492-SC-SU ISSUED: March 9, 1999

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
SUSAN F. CLARK
E. LEON JACOBS, JR.

ORDER TO SHOW CAUSE AND ORDER DENYING EMERGENCY MOTION TO IMPLEMENT RATES AND CHARGES

BY THE COMMISSION:

BACKGROUND

North Fort Myers Utility, Inc. (NFMU or utility) is a Class A utility located in Lee County which provides only wastewater service. According to the 1997 annual report, the utility has 5,753 wastewater customers and reported operating revenues of $1,958,553 and a net loss of $598,220.

On or about August 24, 1998, NFMU executed a Developer Agreement with the owners of Buccaneer Mobile Estates, MHC-DeANZA Financial Limited Partnership (Park Owner) and Buccaneer Utility (Buccaneer). This Developer Agreement was filed with the Commission on September 4, 1998, and deemed approved by the utility on October 4, 1998 pursuant to Rule 25-30.550, Florida Administrative Code.

Buccaneer consists of 971 manufactured home sites which had previously received wastewater service from the Park Owner as part of the lot rental amount. Pursuant to a letter dated May 14, 1976 from the Florida Public Service Commission, the provision of service in this manner rendered the wastewater utility system

exempt from regulation pursuant to Section 367.022(5), Florida Statutes.

Water service to Buccaneer is provided by Buccaneer Water Service, a PSC regulated utility. The water utility purchases its water from Lee County Utilities, and therefore, does not have a water treatment plant. All tenants are charged metered rates for water, pursuant to Order No. PSC-96-1466-FOF-WU, issued December 3, 1996.

On November 23, 1998, Buccaneer's existing wastewater permit expired. NFMU connected to Buccaneer on November 24, 1998. On December 1, 1998, NFMU filed an Application for Amendment to Certificate of Authorization to include the wastewater service area of Buccaneer. On December 7, 1998, NFMU filed an Emergency Motion to Implement Rates and Charges with respect to the interconnection of existing wastewater customers within the Buccaneer Estates mobile home community to NFMU. On December 9, 1998, NFMU responded to a staff request for additional information on the mandatory connection of Buccaneer, with a letter referencing various parts of Chapter 723, Florida Statutes.

On December 10, 1998, NFMU mailed the notice to customers which stated that utility service had been assigned to NFMU, that connection fees would be collected, and that effective December 1, 1998, the utility would begin billing for monthly service and the lot rent would decrease by a specific amount.

On December 18, 1998, numerous customer protests concerning the application of NFMU's monthly rates and connection fees were received by the Commission. On December 21, 1998, the Office of Public Counsel (OPC) filed a Response to the Emergency Motion to Implement Rates and Charges.

This matter is set for hearing September 14 and 15, 1999. This order addresses whether a show cause proceeding should be initiated with respect to the utility's interconnection of Buccaneer without prior Commission approval and the utility's emergency motion to implement rates and charges.

SHOW CAUSE

Section 367.045(2), Florida Statutes, requires that no utility delete or extend its service outside the area described in its certificate of authorization until it has obtained an amended

certificate of authorization from the Commission. As stated earlier, NFMU extended its service to Buccaneer customers without Commission approval on or about November 24, 1998. This is an apparent violation of 367.045(2), Florida Statutes.

Section 367.161(1), Florida Statutes, authorizes the Commission to assess a penalty of not more than $5,000 for each offense, if a utility is found to have knowingly refused to comply with, or to have willfully violated, any provision of Chapter 367, Florida Statutes.

Earlier, we state the recent series of events surrounding this interconnection. There is, however, a long history between the two utilities with respect to interconnection, dating back to as early as 1987. The earlier events are relevant to our decision to issue an order to show cause.

On November 10, 1987, NFMU filed a notice of intent to extend sewer service in Lee County with the Commission. Order No. 19059, issued March 29, 1988, noted that because NFMU withdrew the territory description which included Buccaneer from its application, the objections were withdrawn, and the territory was excluded.

On January 14, 1991, the Board of County Commissioners of Lee County enacted Ordinance No. 91-01, requiring mandatory interconnections to central sewer systems within 365 days after notification that collection lines have been installed abutting the territory. By letter dated November 18, 1996, the utility contacted the Park Owner, indicating that the utility had contacted them on numerous occasions regarding the Ordinance. The letter again informed the Park Owner of the ordinance and stated that the utility was ready, willing, and able to serve the park. By letter dated November 19, 1997, the utility strongly encouraged the Park Owner to allow Buccaneer to interconnect with the system, citing numerous environmental problems that Buccaneer's sewer system was experiencing.

The Department of Environmental Protection (DEP) issued a proposed consent order on June 10, 1998, which was not signed by the Park Owner or the residents of Buccaneer. DEP's consent order gave the Park Owner the option to fix all of the problems with Buccaneer wastewater system within 90 days of the date of the proposed consent order, be in full compliance with respect to the wastewater treatment plant and disposal system pursuant to Chapter

403, Florida Statutes, or connect to a regional sewer system. The Consent Order also indicated that Buccaneer would be required to pay $10,500 in penalties.

Since both the Park Owner and Buccaneer declined to sign the consent order, the order had no force or effect against the wastewater plant. Buccaneer's five-year operating permit was up for renewal in 1998, and it appeared it would take a fair amount of investment to correct the problems at the plant.

NFMU continued to encourage Buccaneer's interconnection with the system, which resulted in a contract entered into by the parties on or about August 24, 1998, and filed (inappropriately) as a Developer Agreement on September 4, 1998. The Agreement included a copy of a notice to customers, stating that because the Park Owner assigned the right to serve the Park via developer agreement, it would be billing the customers directly. Therefore, some customers of Buccaneer Estates began signing up for wastewater service by NFMU.

The utility's motion suggests that both the utility and our staff believed that the developer agreement filed on September 4, 1998, met our requirements of Section 367.045(2), Florida Statutes. OPC suggests in its Response to the utility's motion, that the utility's position is disingenuous owing to the amount and length of communication between the utility and the Park, as well as its apparent knowledge of our Statutes and Rules. We agree. Our staff's review of the agreement focused on the contractual language, and not on whether the "developer" (in this case, Buccaneer) was within the NFMU service area. The very nature of a developer agreement assumes the party contracting for service is within the utility's current territory. The purpose of filing a developer agreement with us pursuant to Rule 25-30.550, Florida Administrative Code, shall not be used to obfuscate the Commission's process by, in effect, having an amendment, transfer, sale, or assignment approved administratively, without a public interest determination as mandated by 367.045 and 367.071(1), Florida Statutes.

NFMU has been communicating with Buccaneer since 1987. According to document filings, the utility has encouraged Buccaneer to interconnect pursuant to Lee County Ordinance 91-01, since the Ordinance's enactment. The utility increased its communication in 1997 when Buccaneer's wastewater treatment plant began experiencing operational problems.

In a letter dated December 9, 1998, the utility informed our staff that its law firm informed the members of Buccaneer that it was invoking the provision of a Lee County Ordinance 91-01 "requiring mandatory hook-ups to central sewer systems when they are available to property previously served by an on-site disposal system." This "hook-up" has resulted in two dozen protests and OPC's intervention.

We considered whether circumstances existed to mitigate the utility's actions. We find that there are no mitigating circumstances. The utility actively encouraged the interconnection over many years. The interconnection was not actually an emergency event. The utility could have filed an application for amendment of its service territory pursuant to 367.045(2), Florida Statutes, prior to interconnecting the mobile home park. In fact, as OPC stated, the only emergency that exists, is one created by the utility from the illegal connection of Buccaneer to its system.

Utilities are charged with the knowledge of the Commission's rules and statutes. Additionally, "[i]t is a common maxim, familiar to all minds that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833). Thus, any intentional act, such as the utility's extension of territory without Commission approval, would meet the standard for a "willful violation." In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL titled In Re: Investigation Into The Proper Application of Rule 25-14.003, F.A.C., Relating To Tax Savings Refund for 1988 and 1989 For GTE Florida, Inc., the Commission, having found that the company had not intended to violate the rule, nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "'willful' implies an intent to do an act, and this is distinct from an intent to violate a statute or rule." Id. at 6.

Failure to obtain approval of the Commission prior to serving territory outside of its certificate is an apparent violation of Section 367.045(2), Florida Statutes. Therefore, NFMU is ordered to show cause, in writing, within 21 days, why it should not be fined $5,000 for an apparent violation of Section 367.045(2), Florida Statutes.

NFMU's response to the show cause order must contain specific allegations of fact and law. Should NFMU file a timely written response that raises material questions of fact and makes a request for a hearing pursuant to Section 120.57(1), Florida Statutes, a

further proceeding will be scheduled before a final determination of this matter is made. Alternatively, if the utility files a response that raises questions of fact and law, the issues could be addressed in the hearing already scheduled in this docket. A failure to file a timely written response to the show cause order shall constitute an admission of the facts herein alleged and a waiver of the right to a hearing. In the event that NFMU fails to file a timely response to the show cause order, the fine is deemed assessed with no further action required by the Commission. If the utility responds timely but does not request a hearing, our staff shall prepare a recommendation for our consideration regarding the disposition of the show cause order. If the utility responds to the show cause by remitting the penalties, the show cause matter shall be considered resolved.

EMERGENCY MOTION TO IMPLEMENT RATES AND CHARGES

Prior to November 24, 1998, Buccaneer provided wastewater service as a part of its lot rental amount and as such, was an exempt entity, pursuant to Section 367.022(5), Florida Statutes.

On December 7, 1998, NFMU filed an Emergency Motion to Implement Rates and Charges, wherein it seeks to implement its rates and charges, subject to refund, during the pendency of this proceeding. On December 21, 1998, the OPC filed a Response to the Emergency Motion to Implement Rates and Charges.

In support of its December 7, 1998 Emergency Motion to Implement Rates and Charges, NFMU states that if the amendment application is protested, it could take twelve to eighteen months before a final resolution, during which time a significant amount of revenue will accrue. As a result, residents might have to make a substantial payment at the conclusion of the proceeding and NFMU is in the position of providing service for zero compensation until we make a decision. As further explanation, NFMU states that Buccaneer was not in compliance with environmental regulations and had been ordered to interconnect with NFMU. Subsequently, pursuant to Chapter 723, Florida Statutes, Buccaneer passed through to the residents the service availability charges it was obligated to pay to NFMU and NFMU and Buccaneer initially codified this arrangement in a Developer Agreement entered into on August 25, 1998. According to NFMU, the developer agreement authorized NFMU to be the agent for Buccaneer in the collection of these charges from the residents. Buccaneer residents were notified as of December 1,

1998, that they were to pay NFMU the service availability charges and monthly rates pursuant to NFMU'S tariff.

In its December 21, 1998 Response, OPC basically states that NFMU was not ordered to interconnect the Buccaneer wastewater facility and is inappropriately seeking relief from us (via the emergency motion) concerning the imposition of capital costs or utility charges upon the lessees of mobile home lots (and not property owners). OPC states that those matters should be resolved in Circuit Court, pursuant to the requirements of Chapter 723, Florida Statutes. In support of its allegations, OPC states that:

1. The park residents of Buccaneer should continue to pay the flat rates under the terms of its landlord/tenant contract pursuant to Chapter 723, Florida Statutes, and should not be expected to pay any money to NFMU, since Buccaneer is not located within NFMU's service territory; and

2. the various lease agreements include the lifetimer lease agreements which have special obligations placed on Buccaneer and all of these disputes should be resolved in the Lee County Circuit Court since it is not within the jurisdiction of this Commission to determine if, under the facts of this case, the Park Owner can impose a pass-through charge to his lessees under Chapter 723, Florida Statutes, or if under Chapter 723, the Park Owner has properly abrogated his responsibilities to his lessees to provide wastewater service.

Jurisdiction to Rule on Emergency Motion to Implement Rates and Charges

We have the jurisdiction to entertain the utility's emergency motion to implement rates and charges. Whether we should, as a matter of policy, grant the petition, is discussed in greater detail below. Section 367.011(2), Florida Statutes, provides that the Commission "shall have exclusive jurisdiction over each utility with respect to its authority, service, and rates." Additionally, Section 367.011(4) Florida Statutes, states that Chapter 367, Florida Statutes "shall supersede all other laws on the same subject." NFMU is a utility within the jurisdiction of the Commission. As such, we are statutorily obligated to set fair, just, and reasonable rates and charges for NFMU. For Chapter 723, Florida Statutes, to have any effect on our determination of appropriate rates and charges, the Legislature would have to have enacted it after Chapter 367, Florida Statutes with "express

reference" to supersede Chapter 367 Florida Statutes. No express reference exists in Chapter 723, Florida Statutes.

Coincidentally, we previously considered this issue in Docket No. 960133-WU, Order No. PSC-96-1466-FOF-WU, issued December 3, 1996, Application for Staff-Assisted Rate Case in Lee County by MHC-DeANZA Financing Limited Partnership d/b/a Buccaneer Water Service, for the Buccaneer water system. There, the customers objected to a change in rates by the utility, because there were various lease agreements between the lessees and the Park Owners (lifetimers and non-lifetimers) which provided for either no charge, or a charge lower than the tariffed utility rate. The customers believed that requiring the utility to charge the approved tariffed rates to all customers would exceed the lease agreement contractual rates and force a breach of contract.

We found that we have the authority to allow the implementation of nondiscriminatory rates, which superseded the existing contractual arrangements authorized under Chapter 723, Florida Statutes. Further, we found that this action placed all customers of Buccaneer Water on equal footing.

Order No. PSC-96-1466-FOF-WU contained a thorough discussion of our authority to approve nondiscriminatory utility rates, which supersede existing contractual arrangements authorized under Chapter 723, Florida Statutes. The issue of whether the contract takes precedence over our statutes has also been considered by the Courts. In Cohee v. Crestridge Utilities Corp., 324 So.2d 155 (Fla. 2nd DCA 1975), the Court stated that:

> [D]espite the fact that Crestridge had a pre-existing contract concerning its rates, now that Crestridge is under the jurisdiction of the Public Service Commission, these rates may be ordered changed by that body. The Public Service Commission has authority to raise as well as lower rates established by a pre-existing contract when deemed necessary in the public interest. State v. Burr, 1920, 79 Fla. 290, 84 So. 61.

The Court also stated, after setting out the full text of Section 367.081(2), Florida Statutes, that ". . . it would appear that the Commission would not even be authorized to take into consideration the pre-existing contract in its determination of reasonable rates."

We have determined in similar situations that a pre-existing contract is not determinative in setting rates for a utility under our jurisdiction. It has the authority to set rates which we find to be in the public interest, even if they are contrary to a contractual agreement. See Order No. PSC-94-0171-FOF-WS, issued February 10, 1994 in Docket No. 930133-WS (In re: application for water and wastewater Certificates in Lake County by Lake Yale Corporation d/b/a Lake Yale Utility Company). See also Order No. 21680, issued August 4, 1989 (In re: application of Continental Country Club, Inc., for an increase in water and wastewater rates in Sumter County) In a case involving Shady Oaks Mobile-Modular Estates, the Second District Court of Appeal, citing past precedent, held that the Commission's authority to set rates preempted contractual agreements which had set rates based upon a yearly fee. Public Service Commission v. Lindahl, 613 So.2d 63 (Fla. 2nd DCA 1993).

In consideration of the foregoing, we have the jurisdiction to act on the utility's emergency motion. Our determination, however, does not stop there. NFMU connected the Buccaneer facility without prior approval and as such, has no approved rates. It is, however, providing service. Therefore, we find it appropriate for us to consider whether it is appropriate to grant, as a matter of policy, some or all of the utility's motion.

Connection Charges or Pass-through Charges

The initial developer agreement included the contract provisions detailed in the Assignment and Assumption Agreement between NFMU and the Park Owner with respect to the collection of pass-through or connection charges. In this Assignment agreement, the Owner of Buccaneer Estates mobile home park assigned to NFMU, all of the Owner's right, title and interest in and to the pass-through charges. The result of this assignment was that the Owner would pay to NFMU the total amount of pass-through charges to connect to NFMU. The pass-through charges identified under Chapter 723, Florida Statutes, equate to the connection fees or service availability charges identified in a utility's tariff, pursuant to Chapter 367, Florida Statutes.

Concurrent with this payment, the Owner was to deliver written notice of the pass-through charge to the residents of Buccaneer, and also assign to NFMU the right to collect those charges from the residents. In consideration of this assignment, NFMU agreed to pay to the Owner, the total the total connection cost for all 971 lots

of $448,602 at the time the developer agreement was executed (about August 24, 1998), and the estimated value of the collection lines ($139,987) ninety days after delivery to the residents of the Pass-Through Notice by the Owner (December 10, 1998).

The Pass-Through Notice stated that the Owner had agreed to pay the Total Connection cost to NFMU in advance on behalf of the residents of Buccaneer, subject to the obligation of the Residents to repay that amount. Each Resident will have the option to pay the per site connection cost either (i) in a single lump sum payment of $462 on or before December 1, 1998, or (ii) in monthly installments of $7.01 each (which includes interest on the unpaid balance of the per site connection cost at the rate of 10% per annum) on the first day of each calendar month over the eight-year period commencing December 1, 1998 and continuing through November 30, 2006. Further, the utility was to begin charging its monthly service rates to the customers as of December 1, 1998.

Also effective December 1, 1998, the monthly base rent payable under each resident's lot rental agreement was reduced by $6.07. This average monthly cost was determined by averaging, on a per month basis, the cost to the Owner of providing wastewater service to Buccaneer over the last twelve months.

In its Emergency Motion, the utility alleges its right to collect the pass-through via the Assignment Agreement, and further stated that it was authorized to do so when required by a governmental body to connect, pursuant to Chapter 723, Florida Statutes. OPC alleges that NFMU was never "ordered" to interconnect. In addition, OPC states that NFMU's request to us for relief is inappropriate and should be resolved in circuit court, because it relates to circumstances and actions outlined in Chapter 723, Florida Statutes. These circumstances include the idea that the customers of Buccaneer are lessees and not lot owners, and that we cannot determine whether the Park Owner can impose a pass-through charge to his lessees.

Our staff informally requested a copy of any such order to connect from a governmental entity, but was instead provided references to various sections in Chapter 723, Florida Statutes in a letter dated December 9, 1998. The staff also spoke informally to the local Department of Environmental Protection (DEP) engineer, and was told that the DEP did have a proposed consent order. While DEP had not forced the system to connect, the disposal system was failing and Buccaneer was out of compliance with its permit. The

DEP engineer further explained that the usual process was for the utility to obtain the letter or proposed consent order from the DEP, then present it to the city or county. Then, the city or county "activates" the local ordinance requiring interconnection to a regional system.

At this time, it does not appear that an order from the local government has been issued to require interconnection of Buccaneer to any other system. Although both parties have stated that the provision for a pass-through of connection fees is outlined in Chapter 723, Florida Statutes, the staff believes that this is not clear and would be a subject for the hearing. We note that OPC attempts to make a distinction between the customers of Buccaneer Utility and the lessees with the Park Owner, however we have made no such distinction in evaluating the appropriate water rates for the utility. Further, the staff believes that the Commission does have the jurisdiction to evaluate the appropriateness of collecting the charge, contrary to OPC's arguments.

Since the origin of the language requiring an interconnection of mobile home parks and collection of pass-through charges is not clear at this time, and OPC has alleged that we cannot impose a connection fee on lessees (as opposed to lot owners), we find it inappropriate to approve a connection fee at this time. The customers have requested a hearing in this docket. As such, all of these issues shall be fully explored at the September 14-15, 1999 hearing. In addition, NFMU has illegally connected the customers to its service, thus reserving the issue of collecting connection fees until the hearing sends an appropriate signal to the utility.

Monthly Service Rates

NFMU stated in its Motion that the customers of Buccaneer were now receiving service from NFMU, and had been notified to remit payment to NFMU for monthly service, starting December 1, 1998. If its Application to Amend Territory was protested, twelve to eighteen months could pass without the it receiving any revenues. Each resident could end up being required to make a substantial payment at the conclusion of the proceeding.

OPC's Response seems to suggest that, if we act on this request, during the pendency of the docket, NFMU should collect bulk service charges from the Park Owner for service to the Park, until the Commission determines whether it is in the public

interest to serve the Park. Further, the residents of the Park should pay the old flat rate for monthly wastewater service.

The foregoing notwithstanding, NFMU interconnected the park without our approval and we believe the legal obligation to serve the residents of Buccaneer remains with the owner. NFMU has not followed our process to establish itself as the legal entity to provide service to Buccaneer. NFMU should look to the Park Owner to pay the bulk rate or whatever is fair an reasonable to make sure that service is provided. Until we determine that it is in the public interest that this transfer takes place, that is when we will determine what a fair, just, and reasonable rate is. To do otherwise would send a mixed signal on how we are going to handle situations wherein a transfer has occurred without our prior approval. Accordingly, the utility's Emergency Motion to Implement Rates and Charges is denied in its entirety.

The customers of Buccaneer Estates have protested and requested a hearing. This matter is set for hearing on September 14-15, 1999. Therefore, this docket shall remain open.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that North Fort Myers Utility, Inc., show cause, in writing, within 21 days, why it should not be fined $5,000 for an apparent violation of Section 367.048(2), Florida Statutes. It is further

ORDERED that the North Fort Myers Utility, Inc.'s Emergency Motion to Implement Rates and Charges is denied. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission this 9th day of March, 1999.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any person whose substantial interests are affected by the show cause portion of this order, may file a response within 21 days of issuance of the order as set forth herein. This response must be received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on March 30, 1999.

Failure to respond within the time set forth above shall constitute an admission of all facts and a waiver of the right to a hearing and a default pursuant to Rule 28-106.111(4), Florida Administrative Code. Such default shall be effective on the day subsequent to the above date.

If an adversely affected person responds to the show cause portion of this order, requests a hearing within the time prescribed above, and is denied relief, that party may request judicial review by the Florida Supreme Court in the case of any electric, gas or telephone utility or by 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 of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure.

Any party adversely affected by the denial of the utility's Emergency Motion to Implement Rates and Charges in this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, 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.