

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for amendment  
of Certificate No. 247-S to  
extend service area by the  
transfer of Buccaneer Estates in  
Lee County to North Fort Myers  
Utility, Inc.

DOCKET NO. 981781-SU  
ORDER NO. PSC-00-0370-FOF-SU  
ISSUED: February 21, 2000

The following Commissioners participated in the disposition of  
this matter:

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

ORDER GRANTING IN PART AND DENYING IN PART  
MOTIONS FOR RECONSIDERATION

BY THE COMMISSION:

BACKGROUND

On December 1, 1998, North Fort Myers Utility, Inc. (NFMU or utility) filed an Application for Amendment to Certificate of Authorization to include the wastewater service area of Buccaneer Utility (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 our staff's request for additional information on the connection of Buccaneer with a letter referencing various parts of Chapter 723, Florida Statutes.

On December 10, 1998, NFMU mailed a notice to the Buccaneer 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, the Commission received numerous customer protests concerning the application of NFMU's monthly rates and connection fees. Among the protesting customers were Mr. Donald Gill, Mr. Joseph Devine and Mr. Ronald Ludington, whose

DOCUMENT NUMBER-DATE

02364 FEB 21 8

770

FPSC-RECORDS/REPORTING

ORDER NO. PSC-00-0370-FOF-SU  
DOCKET NO. 981781-SU  
PAGE 2

protest letters were filed on December 18, 1998, December 21, 1998, and December 21, 1998, respectively. On January 14, 1999, several customers filed letters requesting that the Office of Public Counsel (OPC) represent the Buccaneer residents in this matter. However, the Commission's records indicate that neither Messrs. Gill, Devine nor Ludington agreed to be represented by OPC or other counsel, nor did they file requests to be considered qualified representatives pursuant to Rule 28-106.106, Florida Administrative Code. Therefore, these three individuals were considered pro se litigants.

On December 21, 1998, OPC filed a Response to the Emergency Motion to Implement Rates and Charges. On January 14, 1999, OPC filed a Notice of Intervention pursuant to Section 350.0611, Florida Statutes, which was acknowledged by Order No. PSC-99-0180-PCO-SU, issued January 29, 1999.

On September 2, 1999, OPC and the utility filed an executed proposal for the settlement of the case. Messrs. Gill, Devine and Ludington opposed the proposed settlement agreement and refused to sign it. We considered staff's recommendation on the Settlement Agreement at the September 7, 1999, agenda conference, and deferred ruling on the OPC/NFMU proposal. We instructed that the matter proceed to hearing and that the Settlement Agreement could be presented for our consideration at that time.

On September 7, 1999, a Motion for Dismissal of Settlement Agreement was filed by Mr. Ludington. On September 9, 1999, a Motion to Strike Settlement Agreement was filed by Mr. Gill.

A hearing was held on October 13, 1999, in North Fort Myers, Florida, and continued to November 16, 1999, in Tallahassee, Florida. By Order No. PSC-99-2444-AS-SU, issued December 14, 1999, we accepted the proposed settlement offered by OPC and NFMU, approved the transfer of Buccaneer to NFMU, and amended NFMU's certificate of authorization to include Buccaneer Estates.

On December 22, 1999, Mr. Gill and Mr. Devine timely filed a joint Motion to Reconsider and Rehear Order No. PSC-99-2444-AS-SU. On December 27, 1999, Mr. Ludington's Motion For Reconsideration of Order No. PSC-99-2444-AS-SU was timely filed. Both of these motions also included requests for oral argument. Additionally, the Commission received several letters from customers, who are not parties to this proceeding, requesting that the Commission reconsider its decision.

On December 28, 1999, NFMU timely filed its responses to Mr. Gill and Mr. Devine's motion and Mr. Ludington's motion. On December 29, 1999, OPC timely filed its responses to these motions.

In their motions for reconsideration, the movants requested that oral argument be granted. Although we believe there is sufficient information in their pleadings to apprise us of their positions, in an exercise of our discretion, we allowed oral argument limited to five minutes each.

MR. LUDINGTON'S MOTION FOR RECONSIDERATION

In support of his motion for reconsideration, Mr. Ludington alleges that no response was ever filed with respect to his September 7, 1999 motion for dismissal of the OPC/NFMU settlement agreement, and that the motion was never ruled upon. Mr. Ludington argues that the settlement agreement was therefore dismissed as the motion to strike in effect went unopposed. Mr. Ludington also alleges that staff incorrectly represented the level of support by the Buccaneer residents for the NFMU/OPC settlement agreement, and that a great many of the homeowners supported Mr. Ludington's proposed settlement agreement instead. Mr. Ludington states that staff refers to Mr. Ludington several times (presumably in Order No. PSC-99-2444-AS-SU) as "customer Ludington," which is offensive in that Mr. Ludington does not consider himself a customer of NFMU. Mr. Ludington also argues that the signatures of Messrs. Gill, Devine and Ludington were required to make the OPC/NFMU settlement agreement a "completed settlement," and that as these signatures were not obtained, the OPC/NFMU proposal therefore fails. Mr. Ludington alleges that the NFMU/OPC proposal never properly obtained the approval of a majority of the homeowners, and thus the agreement was never bonafide. Mr. Ludington also states that "staff still insists that this settlement agreement was modified by staff recommendations made on September 7th, but the final order clearly shows that it was the earlier version, as filed on September 2, 1999 which was ordered approved." Finally, Mr. Ludington states that he understands Order No. PSC-99-2444-AS-SU to allow NFMU to come back to the Commission in the future and ask the PSC for a change in rates to cover a "CIAC shortfall."

Attached to Mr. Ludington's Motion for Reconsideration are three exhibits marked L-1, L-2 and L-3. The exhibits consist of various letters and a signature page of the executed agreement. We note that the various letters, Exhibits L-1 and L-2, are not a part of the record of this proceeding. However, Exhibit L-3, the

signature page of the executed agreement, is contained in the record within Exhibit No. 3.

In response to Mr. Ludington's Motion for Reconsideration, OPC states that Prehearing Order No. PSC-99-1786-PHO-SU, issued September 13, 1999, clearly deferred a ruling on the Motion to Dismiss Settlement Agreement to the evidentiary hearing which was ultimately scheduled on October 13, 1999. At that hearing, we again deferred ruling on the motion to dismiss, finding instead that evidence should be presented on both proposed settlement agreements. After considering the evidence, the parties' closing arguments and staff's recommendation, we rendered our approval of the NFMU/OPC proposal, thereby effectively rejecting the motion to dismiss.

With respect to Mr. Ludington's allegations that Commission staff incorrectly represented the homeowners' support for the NFMU/OPC proposal, OPC notes that no evidence supporting such an allegation has ever been furnished to the Commission or subjected to critical review or cross-examination. Further, OPC states that since it executed the settlement agreement, OPC would have supported the proposal even if the homeowners' association had taken a contrary view, because OPC continues to believe that the proposal offers the best legally permissible resolution of the matter. OPC further notes that when the three customer intervenors refused to sign the agreement, it became a proposal, an offer of settlement, endorsed by OPC and NFMU, and that the intervenors' signatures were not necessary to present the proposal for our consideration. OPC also clarifies that the only "modification" made to the NFMU/OPC proposal was to remove references and signature blanks of the three intervenors, since they refused to execute the agreement.

Finally, OPC states that the allegation that Order No. PSC-99-2444-AS-SU permits NFMU to later request a change in rates to cover a "CIAC shortfall" is an example of Mr. Ludington misunderstanding what he reads. What the Order actually sets forth is that we reserve the right to impute any uncollected CIAC in a future rate proceeding, which OPC states would be to the utility's detriment, and not that of the customers.

In its response, NFMU notes that the purpose of a motion for reconsideration is to bring to our attention some point of fact or law which we overlooked or failed to consider when we rendered our decision, and not to merely reargue a case because the losing party

disagrees with the decision. Diamond Cab Co. of Miami v. King, 146 So. 2d 889 (Fla. 1962). Furthermore, a motion for reconsideration should be based upon specific factual matters set forth in the record. Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974).

NFMU argues that there is no requirement that a response be filed to a motion, and that Mr. Ludington's motion to dismiss is not automatically granted merely because no response was filed to it. Further, NFMU states that the motion was effectively denied when we adopted the NFMU/OPC proposal.

With respect to the proposal, whether it had the approval of the homeowners' association, and whether such approval was properly obtained, NFMU argues that such arguments are irrelevant, because no legal basis has been stated which would allow a withdrawal from the settlement agreement. Crown Ice Machine Company v. Senter Farms, Inc., 174 So. 2d 614 (Fla. 2d DCA 1965).

NFMU states that it was patently clear that the NFMU/OPC proposal was not legally binding upon the intervenors who did not sign it. The proposal became effective only upon the Commission's approval pursuant to Order No. PSC-99-2444-AS-SU. Also, the only modification made to the agreement was one made orally at the Prehearing Conference to eliminate references to the customer intervenors who did not wish to be signatories to the proposal.

Further, NFMU states that there is nothing in the record which indicates that the homeowners were intimidated or coerced into approving the OPC/NFMU approval. The homeowners' association president and board members testified at the hearing and Mr. Ludington failed to provide any examination or evidence that such improper conduct took place. NFMU notes that certain quotations contained in Mr. Ludington's Motion for Reconsideration, purportedly from a prior homeowners' association meeting, are not in the record and cannot properly be considered. NFMU also notes that statements made by Mr. Ludington that approval of the homeowners, or the executory signature of OPC, was never properly obtained with regard to the NFMU/OPC proposal is merely argument, and has no basis in testimony or any other evidence.

Rule 25-22.060(1)(a), Florida Administrative Code, permits a party who is adversely affected by an order of the Commission to file a motion for reconsideration of that order. NFMU correctly notes that the standard for determining whether reconsideration is

appropriate is set forth in Diamond Cab Co. of Miami v. King, 146 So. 2d 889, 891 (Fla. 1962), which states that the purpose of a petition for reconsideration is to bring to an agency's attention a point of law or fact which it overlooked or failed to consider when it rendered its order. In Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974), the Court found that the granting of a petition for reconsideration should be based upon specific factual matters set forth in the record and susceptible to review.

There is merit to Mr. Ludington's argument that no explicit ruling was made with regard to his motion to dismiss the NFMU/OPC offer of settlement. OPC and NFMU correctly note in their respective responses that a ruling on the motion was deferred at the Prehearing Conference, and again deferred at the October 13th hearing in order to allow the parties to present evidence and conduct cross-examinations on the agreements proposed by both Mr. Ludington and by OPC and NFMU. However, we find that the motion was effectively denied when we approved the NFMU/OPC proposal. If the lack of an explicit ruling constitutes error, we believe the error to be harmless, in that, under the circumstances, no party appears to have been prejudiced by not having had an explicit ruling on the motion.

For the reasons stated above, we find that Mr. Ludington's Motion for Reconsideration shall be granted in part, for the limited purpose of clarifying that the Motion to Dismiss Settlement Agreement filed by Mr. Ludington was denied by virtue of the fact that we approved the NFMU/OPC Agreement. We approved the NFMU/OPC Agreement because the NFMU/OPC Agreement provided a fair and reasonable resolution of the matter, and we were persuaded by the fact that the utility and OPC jointly endorsed the proposed offer of settlement. Mr. Ludington's proposed settlement agreement was premised on the idea of a bulk wastewater agreement between NFMU and the park owner, and there is no such agreement in the record upon which we could base a decision in the matter.

With respect to the remainder of Mr. Ludington's Motion for Reconsideration, we are persuaded by the arguments set forth in NFMU and OPC's responses. We note that the references to Mr. Ludington as "customer Ludington" are not intended to be offensive or prejudicial, nor were they intended to confer status as an NFMU customer. Clearly, Mr. Ludington is a customer of Buccaneer Estates and the designation as "customer Ludington" simply refers to that status.

Section 120.57(1)(b), Florida Statutes, mandates that all parties have an "opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination, and submit rebuttal evidence." Exhibits L-1 and L-2 of Mr. Ludington's motion for reconsideration, as well as a substantial portion of the allegations contained in the motion itself, are outside of the record of this case. Thus, the other parties in this case had no opportunity to cross-examine this information. To the extent Mr. Ludington raises matters which are not outside of the record, we find that they largely consist of reargument, and thus are not an appropriate basis upon which reconsideration can be granted. Finally, Mr. Ludington's motion fails to set forth any point of fact or law which we overlooked or failed to consider in making our decision.

For the foregoing reasons, we deny Mr. Ludington's Motion for Reconsideration, except for the limited purpose of clarifying Order No. PSC-99-2444-AS-SU, as discussed above.

MR. DEVINE AND MR. GILL'S MOTION FOR RECONSIDERATION

In support of their Motion for Reconsideration, Mr. Gill and Mr. Devine allege that the attorney who authored the Settlement Agreement entered into by OPC and NFMU had a pecuniary interest in the outcome of this matter because he was representing the Buccaneer Estates Homeowners' Association in Circuit Court. Further, they state that the special meeting of the Buccaneer Estates residents was improperly called by the Board of the Homeowners' Association. Citing to excerpts of a transcript of a Homeowners' Association meeting, they contend that the OPC/NFMU proposal was not properly ratified by the Buccaneer Estates residents. Also, they assert that the Board of the Homeowners' Association, OPC, Commission staff, and NFMU misled the Commission as to the will of the Buccaneer Estates residents when they stated that the residents were in favor of the Settlement Agreement entered into by OPC and NFMU. Moreover, they state that because they did not stipulate to the Settlement Agreement, it should be considered null and void. Finally, they assert that they were "completely surprised" when OPC changed its position at the November 16, 1999, hearing in favor of the Settlement Agreement and that the whole administrative process has been "laced with fraud, deception and surprise."

In its response to Mr. Gill and Mr. Devine's motion, NFMU cites to In Re: Investigation of Rates of Gulf Utility Company,



Order No. PSC-97-1544-FOF-WS, issued December 9, 1997, in Dockets Nos. 960234-WS and 960329-WS, and Diamond Cab Company of Miami v. King, 146 So. 2d 889 (Fla. 1962), for the proposition that the purpose of a motion for reconsideration is to bring to the Commission's attention a point of fact or law which was overlooked by the Commission or which the Commission failed to consider when it rendered its order, and it is not intended as a procedure for rearguing a case merely because the losing party disagrees with the decision. Further, NFMU cites to Stewart Bonded Warehouse v. Bevis, 294 So. 2d 315 (Fla. 1974), which held that a motion for reconsideration should be based upon specific factual matters set forth in the record, and NFMU states that there is no evidence in the record to support the statements made by Mr. Gill and Mr. Devine in their motion with regard to: who prepared the Settlement Agreement; that the Settlement Agreement was not properly ratified; what the "will of the residents" was, other than the President of the Association testifying that over 300 people voted to accept the Settlement Agreement; or any references to excerpts of Buccaneer Estates' Homeowners' Association meetings. Moreover, NFMU contends that OPC never withdrew its support for the Settlement Agreement and that there is no legal basis for OPC to withdraw from the Settlement Agreement pursuant to Crown Ice Machine Leasing Company v. Senter Farms, Inc., 174 So. 2d 614 (Fla. 2d DCA 1965). Therefore, according to NFMU, all of Mr. Gill and Mr. Devine's allegations that they were surprised or prejudiced by OPC's change in position in support of the Settlement Agreement are unfounded.

OPC also timely filed a response to Mr. Gill and Mr. Devine's motion, in which it states that its response is "to correct many of the inaccurate statements" made by Mr. Gill and Mr. Devine in their motion. OPC asserts that Mr. Gill and Mr. Devine's motion incorrectly alleges that Mr. Burandt, attorney for the Homeowners' Association, authored the OPC/NFMU proposal, and OPC further states that it knows of no pecuniary interest Mr. Burandt would have in the outcome of this matter before the Commission. OPC also states that, as for the meeting of the Buccaneer Estates' residents in which a vote was taken to determine the support of the residents for the Settlement Agreement, it was "only one of many factors which prompted OPC to execute the Settlement Agreement" and that the primary reason that OPC entered into the agreement was that "it offered the best legally permissible result for the customers." Moreover, OPC contends that it never made any representations that the Settlement Agreement was the will of the residents, although the only official vote taken by the residents concerning the agreement indicated overwhelming support for the agreement. Also,



in regard to Mr. Gill and Mr. Devine's allegation that OPC failed to timely notify them of OPC's change in position with respect to support for the Settlement Agreement, OPC states that it never withdrew its support of the agreement despite the fact that the Board of the Homeowner's Association requested that OPC withdraw its support of the agreement.

We agree with the standard for reconsideration set forth in the utility's response. Mr. Gill and Mr. Devine's allegation that the attorney who they contend authored the Settlement Agreement had a pecuniary interest in the outcome of the proceeding is not appropriate for a motion for reconsideration pursuant to Bevis because there is nothing in the record pertaining to this allegation. Likewise, their reliance on excerpts from a Buccaneer Homeowner's Association meeting in support of their allegation that the Settlement Agreement was not properly ratified is also improper under Bevis because the transcript to the Homeowner's Association meeting is also outside of the record of this case. Further, their statement that the Settlement Agreement is null and void because they did not agree to it is a reargument of their case, which is inappropriate for a motion for reconsideration pursuant to Diamond Cab.

As for Mr. Gill and Mr. Devine's assertion that they were prejudiced by OPC's alleged change in position, there is only evidence in the record showing that OPC supported the Settlement Agreement, even after the Board of the Homeowner's Association asked OPC to withdraw its support of the agreement. There are no facts in the record to support Mr. Gill and Mr. Devine's allegation. Therefore the argument is inappropriate for a motion for reconsideration. Mr. Gill and Mr. Devine's statement that OPC, NFMU, and Commission staff misled the Commission about the will of the residents was one of the primary contentions in their case. It is a reargument of their case, and therefore is not appropriate for reconsideration.

During his argument at the February 1, 2000 Agenda Conference, Mr. Gill argued as grounds for reconsideration that his motion to strike the OPC/NFMU settlement agreement, filed September 9, 1999, had never been explicitly ruled upon. We note that Mr. Gill failed to raise this argument in his Motion for Reconsideration, which contravenes the requirements of Section 25-22.060, Florida Administrative Code. Nevertheless, we will grant reconsideration for the limited purpose of clarifying Order No. PSC-99-2444-AS-SU,

ORDER NO. PSC-00-0370-FOF-SU  
DOCKET NO. 981781-SU  
PAGE 10

in that the motion to strike was effectively denied when we approved the NFMU/OPC proposal.

We find that Mr. Gill and Mr. Devine's motion fails to bring to our attention a point of fact or law, set forth in the record, which was overlooked or which we failed to consider when we rendered our order. Mr. Gill and Mr. Devine's Motion to Reconsider and Rehear is therefore denied, except for the limited purpose of clarifying that the motion to strike was effectively denied when we approved the OPC/NFMU proposal, as discussed above.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Mr. Ludington's Motion for Reconsideration is hereby granted in part for the limited purpose of clarifying Order No. PSC-99-2444-AS-SU, and denied in part, as set forth in the body of this Order. It is further

ORDERED that Mr. Gill and Mr. Devine's Motion for Reconsideration and Rehear is hereby granted in part for the limited purpose of clarifying Order No. PSC-99-2444-AS-SU, and denied in part, as set forth in the body of this Order. It is further

ORDERED that this docket is closed.

By ORDER of the Florida Public Service Commission this 21st day of February, 2000.

BLANCA S. BAYÓ, Director  
Division of Records and Reporting

By: \_\_\_\_\_

*Kay Flynn*  
Kay Flynn, Chief  
Bureau of Records

( S E A L )

JSB

ORDER NO. PSC-00-0370-FOF-SU  
DOCKET NO. 981781-SU  
PAGE 11

NOTICE OF 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.

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 wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, 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.