BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for transfer of facilities and Certificates Nos. 353-W and 309-S in Lee County from MHC Systems, Inc. d/b/a FFEC-Six to North Fort Myers Utility, Inc., holder of Certificate No. 247-S; amendment of Certificate No. 247-S; and cancellation of Certificate No. 309-S.	DOCKET NO. 000277-WS ORDER NO. PSC-01-0360-PAA-WS ISSUED: February 9, 2001

The following Commissioners participated in the disposition of this matter:

LILA A. JABER
BRAULIO L. BAEZ
MICHAEL A. PALECKI

ORDER DENYING MOTION FOR SUMMARY FINAL ORDER AND GRANTING MOTION TO STRIKE UNTIMELY FILED RESPONSE
AND
NOTICE OF PROPOSED AGENCY ACTION
ORDER SETTING RATE BASE AT THE TIME OF TRANSFER AND EXCLUDING ACQUISITION ADJUSTMENT FROM RATE BASE CALCULATION IF TRANSFER APPLICATION IS APPROVED AT A LATER DATE

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the actions discussed herein setting rate base at the time of transfer and excluding an acquisition adjustment from the calculation of rate base are preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

BACKGROUND

MHC Systems, Inc. d/b/a FFEC-Six (MHC or utility) is a Class B utility which provides water and wastewater services in Lee County to 1,847 water and 1,839 wastewater customers. MHC's

service area is a water-use caution area as designated by the South Florida Water Management District. The utility's 1999 annual report shows that the operating revenue was $408,638 and $460,317 and the net operating income was $70,384 and $81,391, for the water and wastewater systems, respectively. The utility's facilities consist of four systems: one water treatment plant, one water transmission and distribution system, one wastewater collection system, and one wastewater treatment plant. Rate base was established for the utility by Order No. PSC-95-1444-FOF-WS, issued November 28, 1995, in Docket No. 950193-WS, as $1,018,482 for water and $1,903,971 for wastewater.

On March 2, 2000, North Fort Myers Utility, Inc. (NFMU) filed an application for approval of the transfer of the facilities and Certificates Nos. 353-W and 309-S currently held by MHC to NFMU. On May 18, 2000, Mr. Alexander William Varga, a customer, filed an objection to the transfer application. On May 30, 2000, NFMU filed a Motion to Dismiss Mr. Varga's objection. By Order No. PSC-00-1649-PCO-WS, issued September 15, 2000, in this docket, NFMU's motion was denied. Accordingly, this matter has been set for an administrative hearing.

On October 24, 2000, NFMU filed a Motion for Summary Final Order and a Request for Oral Argument on the Motion. Correspondingly, the Office of Public Counsel (OPC) filed a timely amicus response on November 6, 2000, and Mr. Varga filed an untimely response on November 8, 2000. As a result of Mr. Varga's untimely response, NFMU filed a Motion to Strike on November 11, 2000, and Mr. Varga filed a timely response to NFMU's Motion to Strike on November 20, 2000.

By Order No. PSC-00-2349-PCO-WS, issued December 12, 2000, the Prehearing Officer granted petitions for intervention by Pine Lakes Homeowners Association II, Inc. (PLHOA) and Pine Lakes Estates Homeowners' Association (PLEHOA). Further, NFMU's request for official recognition was granted in part.

By this Order, we dispose of NFMU's Motion for Summary Final Order and Motion to Strike. We shall also address the Proposed Agency Action (PAA) issues of rate base and acquisition adjustment because, if protested, a Section 120.57(1), Florida Statutes, hearing would follow. By addressing these issues at this time, if

protested, they may be incorporated into the Section 120.57, Florida Statutes, hearing.

We have jurisdiction pursuant to Sections 367.011(2), 367.071, and 367.121, Florida Statutes.

REQUEST FOR ORAL ARGUMENT

On October 24, 2000, NFMU filed a Request for Oral Argument with its Motion for Summary Final Order, pursuant to Rule 25-22.038, Florida Administrative Code. In support of its request, NFMU stated that oral argument would "aid the Commission in analyzing the arguments raised in the protest as they relate to the facts."

At the January 16, 2001, agenda conference, we found that oral argument would aid us in understanding and evaluating the complex issues in this matter. Further, due to the finality of the relief sought by NFMU, we found that it would be beneficial to allow oral argument on the Motion for Summary Final Order. Therefore, we granted NFMU's Request for Oral Argument. Oral argument was limited to ten minutes for each party and OPC.

MOTIONS FOR SUMMARY FINAL ORDER AND TO STRIKE UNTIMELY RESPONSE

As previously noted, on October 24, 2000, NFMU filed a Motion for Summary final Order. OPC filed an "amicus response" on November 6, 2000, and Mr. Varga filed an untimely response on November 8, 2000. NFMU filed a Motion to Strike Mr. Varga's untimely response on November 11, 2000, and Mr. Varga filed a timely response to NFMU's Motion to Strike on November 20, 2000.

NFMU's Motion for Summary Final Order

NFMU moves this Commission for summary final order pursuant to Rule 28-106.204(4), Florida Administrative Code. In support of its Motion, NFMU states that "the pleadings, depositions, and admissions along with the attached affidavit show that there is no genuine issue of material fact and NFMU is entitled to a final order on the issues of financial and technical ability as a matter

of law, even drawing every possible inference in favor of Mr. Varga's argument."

NFMU argues that Mr. Varga's objection is based upon the claim that NFMU does not have the financial or technical ability to operate the MHC system. NFMU alleges that Mr. Varga lacks any real evidence to support his positions and that he is "fast and loose with the truth." In support of this claim, NFMU cites to Mr. Varga's deposition in which he claims that the FBI had seized files from NFMU's attorney's offices which supported his position. However, when questioned further, Mr. Varga admitted that he was mistaken and that the FBI had not seized files from NFMU's attorney's offices.

As to Mr. Varga's challenge to NFMU's financial ability, NFMU argues that Mr. Varga states in his deposition that his claim that NFMU is on the verge of bankruptcy is based upon an analysis of NFMU's annual reports for 1997, 1998, and 1999 on file with this Commission. NFMU argues that even though Mr. Varga claims that NFMU is on the verge of bankruptcy and that its parent company must be keeping it afloat, Mr. Varga has provided no such evidence and he stated under oath that he had no knowledge that NFMU was not meeting its financial obligations.

Next, NFMU argues that the issue of its financial ability was addressed by the Commission in the final hearing in Docket No. 981781-SU on October 13, 1999. Following that hearing, by Order No. PSC-99-2444-AS-SU, the Commission concluded that NFMU had the financial ability to provide service to the nearby mobile home community of Buccaneer Estates. Further, NFMU argues that as recent as October 16, 2000, in Order No. PSC-00-1892-PAA-SU, this Commission made a similar finding that NFMU has the financial ability to provide service.

Moreover, NFMU attached to its Motion an affidavit of Mr. A. A. Reeves, Vice President and Utility Manager of NFMU, which states that NFMU's financial status is unchanged since this Commission's most recent finding that NFMU has the financial ability to provide service. NFMU argues that it is entitled to summary disposition because the Commission has already found that NFMU has financial ability based upon the same annual reports which Mr. Varga relies upon in asserting that NFMU does not have the financial ability to

serve the Pine Lakes and Fairways communities. In addition, NFMU asserts that Mr. Varga has failed to present any new evidence that has not been considered by the Commission.

As to technical ability, NFMU alleges that Mr. Varga's objection is based upon the Consent Order entered into with the Florida Department of Environmental Protection (DEP), OGC File No. 00-1116-36-DW. NFMU argues that there is no genuine issue of material fact because Mr. Varga states in his deposition that all of the DEP violations can be attributed to MHC and none of them to NFMU. In addition, NFMU argues that in Order No. PSC-99-2444-AS-SU, after an evidentiary hearing, the Commission found that NFMU had the technical ability to provide wastewater service in North Fort Myers. Further, NFMU states that by Order No. PSC-00-1892-PAA-SU, issued October 16, 2000, the Commission found that NFMU had the technical ability to provide wastewater service.

As to rate base, NFMU states that it accepts the Commission's audit which established a water rate base of $754,108 and a wastewater rate base of $1,466,007.76. Further, pursuant to the affidavit of Mr. Reeves, NFMU has already booked the entries consistent with the Commission's audit. NFMU also argues that it has not asked for an acquisition adjustment but reserves the right to raise the issue, if appropriate, in a future proceeding. Further, NFMU states that it is charging the same rates and charges which were approved for MHC pursuant to Rule 25-9.044, Florida Administrative Code.

OPC's Amicus Response

On November 6, 2000, OPC filed an Amicus Response to NFMU's Motion for Summary Final Order.[1]

OPC states that by Order No. PSC-00-1649-PAA-WS, issued September 15, 2000, the Commission granted Mr. Varga's objection and set this matter for a Section 120.57(1), Florida Statutes, hearing. Next, OPC states that in every transfer docket there are always at least two broad issues pursuant to Section 367.071,

[1]No party objected to OPC's filing and we do not address the nature of the filing herein.

Florida Statutes. As argued by OPC, these broad issues are as follow:

1) Does the utility have the financial and technical ability to provide quality service to the customers, and is the transferee utility committed to provide that service?

2) Is the proposed transfer in the public interest?

In addition to these issues, OPC argues that every transfer docket also contains various sub-issues depending upon the unique facts of each case.

OPC concurs with NFMU that the holding of Green v. CSX Transportation, Inc., 626 So. 2d 974 (Fla. 1st DCA 1993) is the standard which must be met in order for NFMU's Motion for Summary Final Order to be granted. According to OPC, the holding of Green is that a party moving for summary judgment is required to conclusively demonstrate the non-existence of any issue of material fact, and the Court must draw every possible inference in favor of the party against whom summary judgment is sought. OPC argues that it will be difficult for NFMU to meet this burden for the issues of financial and technical ability to serve. Further, OPC states that "it is impossible for NFMU to meet the burden of this extreme standard as it relates to the statutorily required broad issue of whether it is in the public interest to approve the proposed transfer."

Next, OPC makes several comments in support of Mr. Varga's arguments concerning the financial ability of NFMU and raises a new argument concerning contributions in aid-of-construction (CIAC). Generally, OPC argues that the resolution of the financial ability issue involves many disputable issues of fact.

As to technical ability, OPC states that the Commission has never concluded that NFMU has the technical ability to provide water service and the resolution of this issue will most likely involve disputed issues of material fact.

Finally, OPC argues that there are many disputable issues of material fact which must be tested with cross-examination before this Commission can conclude that the proposed transfer is in the

public interest. OPC argues that the parties have a statutory right to present evidence as to why this transfer is not in the public interest and why other alternatives are more in the public interest. Finally, OPC argues that the process of assessing competing disputed material facts cannot take place unless the customers are allowed the opportunity to present evidence as to why the public interest will be better served if the transfer is denied.

Mr. Varga's Untimely-Filed Response

On November 8, 2000, Mr. Varga untimely-filed a response to NFMU's Motion for Summary Final Order. Mr. Varga's response addresses the preliminary issues raised by our staff at the informal issue identification meeting on October 24, 2000. Mr. Varga states that staff's preliminary issues are expressly designed to limit a plaintiff's ability to present meaningful arguments in opposition to a proposed transfer. Further, Mr. Varga states that he will introduce evidence "concerning three utilities and, in part, NFMU and their efforts to sell their assets to the Lee County Board of Commissioners for a deliberately inflated and exorbitant price. . . ."

Further, Mr. Varga raises issues concerning the financial and technical ability of NFMU to provide service. Mr. Varga's financial concerns pertain primarily to NFMU's cash flow and its parent company's ability to provide financial backing. As to Mr. Varga's technical concerns, he states that "while NFMU may be considered to have the technical 'ability' to maintain MHC Systems, Inc.'s wastewater plant, their recent intent and performance may not have been considered in the public interest."

NFMU's Motion to Strike Mr. Varga's Response

On November 13, 2000, NFMU filed a Motion to Strike Mr. Varga's response to its Motion for Summary Final Order. In support of its Motion, NFMU states that pursuant to Rules 28-106.204(1) and 25-106.103, Florida Administrative Code, parties may file a response within 12 days after service of a motion. Therefore, a response, if any, should have been filed by November 6, 2000. Further, NFMU states that pursuant to Rule 28-106.104, Florida Administrative Code, filing means "received by the office of the

agency clerk during normal business hours." Therefore, NFMU argues that since Mr. Varga's response was not filed until November 8, 2000, it should be stricken as untimely.

Mr. Varga e-mailed his response to staff counsel and the parties on Saturday, November 4, 2000. NFMU states that this is not the first time that Mr. Varga has ignored procedural rules. NFMU notes that Mr. Varga's initial objection was 42 days late and this Commission accepted the untimely objection under the doctrine of equitable tolling by concluding that Mr. Varga in good faith thought that his e-mail would serve as an objection. NFMU argues that "Mr. Varga cannot make that argument with regard to his most recent filing since it was made clear to him that the Commission had no rules to allow for filings by e-mail." Further, NFMU states that striking Mr. Varga's response is not unprecedented because in In re: Investigation of utility rates of Aloha Utilities, Inc., Order No. PSC-99-1233-PCO, and In re: Complaint of Mother's Kitchen against Florida Public Utilities Company, Order No. PSC-98-1254-FOF-GU, the Commission struck untimely-filed responses.

Mr. Varga's Response to NFMU's Motion to Strike

Mr. Varga timely responded to NFMU's Motion to Strike on November 20, 2000. Mr. Varga argues that the U.S. Mail between Tallahassee and North Fort Myers is unpredictable. Mr. Varga also argues that NFMU's motion is a pointless and transparent attempt to harass because all of the parties received his e-mail on November 4, 2000. However, Mr. Varga states that if his response is stricken, he will rely upon OPC's Amicus Response to NFMU's Motion.

In further support of his position that e-mail is an appropriate means of filing a response, Mr. Varga states the following:

> In effect, the Public Service Commission's Petition for Exception from the Uniform Rules of Procedure (Final Order No. APA 98-007) was a deliberate act, resulting in my inability to file my objections electronically, on a timely and reasonably expected date. In effect, the Commission's thoughtless act discriminated against me, and others, preventing our filing electronically and

> quite possibl[y] violating our constitutional rights to free speech.

Rulings

We note that Rule 28-106.204(4), Florida Administrative Code, states that "[a]ny party may move for summary final order whenever there is no genuine issue as to any material fact. The Motion may be accompanied by supporting affidavits. All other parties may, within seven days of service, file a response in opposition, with or without supporting affidavits." A summary final order shall be granted if it is determined from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final summary order. See Section 120.57(1)(h), Florida Statutes (1999).

Under Florida law, it is well established that a party moving for summary judgment must show conclusively the absence of any genuine issue of material fact and the court must draw every possible inference in favor of the party against whom a summary judgment is sought. See Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985) and Green v. CSX Transportation, Inc., 626 So. 2d 974 (Fla. St. DCA 1993) (citing to Wills v. Sears, Roebuck & Co., 351 So. 2d 29 (Fla. 1977)). "A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law." Moore 475 So. 2d at 668 (citing Shaffran v. Holness, 93 So. 2d 94 (Fla. 1957)); McCraney v. Barberi, 677 So. 2d 355 (Fla. 1st DCA 1996). "Summary judgment should be cautiously granted. . . . If the evidence will permit different reasonable inferences, it should be submitted to the jury as a question of fact." McCraney, 677 So. 2d at 355 (citing Lashley v. Bowman, 561 So. 2d 406, 408 (Fla 5th DCA 1991)).

The burden is on the movant to demonstrate that the opposing party cannot prevail. Christian v. Overstreet Paving Co., 679 So. 2d 839 (Fla. 2nd DCA 1996) (citing Snyder v. Cheezem Dev. Corp., 373 So. 2d 719 (Fla. 2nd DCA 1979)). If the record reflects the existence of any issue of material fact, possibility of an issue, or even raises the slightest doubt that an issue might exist, summary judgment is improper. Id. The trial court must draw every

possible inference in favor of the party against whom summary judgment is sought. Albelo v. Southern Bell, 682 So. 2d 1126 (Fla. 4th DCA 1996) (citing Moore, 475 So. 2d at 666). "Even where the facts are undisputed, issues as to the interpretation of such facts may be such as to preclude the award of summary judgment." Franklin County v. Leisure Properties, Ltd., 430 So. 2d 475, 479 (Fla. 1st DCA 1983).

We further note that in order for information to be considered by the court, it needs to have been properly introduced before the court. In Bifulco v. State Farm Mut. Auto. Inc. Co., 693 So. 2d 707, 709 (Fla. 4th DCA 1997), the Court stated that

> Merely attaching documents which are not 'sworn to or certified' to a motion for summary judgment does not, without more, satisfy the procedural strictures inherent in Fla.R.Civ.P. 1.510(e). Moreover, rule 1.510(e) by its very language excludes from consideration . . . any document that is not one of the enumerated documents or is not a certified attachment to a proper affidavit.

Therefore, a court may not properly consider information which has not been properly authenticated in deciding a motion for summary judgment. Daeda v. Blue Cross & Blue Shield of Florida, Inc., 698 So. 2d 617, 618 (Fla. 2nd DCA 1997). See also Booker v. Sarasota, Inc., 707 So. 2d 886, 889 (Fla. 1st DCA 1998) (stating that a court may not consider an unauthenticated document even where it appears that such document, if properly authenticated, may have been dispositive). To consider or rely on an unauthenticated document in ruling on a motion for summary judgment constitutes reversible error. Bifulco at 709.

Next, once a movant has tendered competent evidence to support his or her motion, the opposing party must produce counter evidence sufficient to show a genuine issue because it is not enough to merely assert that an issue exists. Golden Hills Golf & Turf Club, Inc. v. Spitzer, 475 So. 2d 254, 254-255 (Fla. 5th DCA 1985) (citing Landers v. Milton, 370 So. 2d 368 (Fla. 1979)).

In Order No. PSC-98-1538-PCO-WS, issued November 20, 1998, in Docket No. 970657-WS, the Commission stated that

> Pursuant to Section 120.54(5)(a)1., Florida Statutes, the uniform rules, not the Florida Rules of Civil Procedure (except for discovery), are the rules to be used by administrative agencies. Although the cited cases reference the rule for summary judgment under the Florida Rules of Civil Procedure, we believe the same principles and standards apply to a summary judgment proceeding initiated under the uniform rules since the language which specifies which documents may be considered in such proceeding mirrors the language used in the Florida Rules of Civil Procedure.

Further, this Commission has recognized that policy considerations need to be taken into account by stating that

> We are also aware that a decision on a motion for summary judgment is also necessarily imbued with certain policy considerations, which are even more pronounced when the decision also must take into account the public interest. Because of this Commission's duty to regulate in the public interest, the rights of not only the parties must be considered, but also the rights of the Citizens of the State of Florida are necessarily implicated, and the decision cannot be made in a vacuum. Indeed, even without the interests of the Citizens involved, the courts have recognized that
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> > [t]he granting of a summary judgment, in most instances, brings a sudden and drastic conclusion to a lawsuit, thus foreclosing the litigant from the benefit of and right to a trial on the merits of his or her claim. Coastal Caribbean Corp. v. Rawlings, 361 So. 2d 719, 721 (Fla. 4th DCA 1978). It is for this very reason that caution must be exercised in the granting of summary judgment, and the procedural strictures inherent in the Florida Rules of Civil Procedure governing summary judgment must be observed. Page v. Staley, 226 So. 2d 129, 132 (Fla. 4th DCA 1969). The procedural strictures are designed to protect the constitutional right of the

> litigant to a trial on the merits of his or her claim. They are not merely procedural niceties nor technicalities.
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> Id.

NFMU states that there are no genuine issues of material fact because the Commission found in Order No. PSC-99-2444-AS-SU, issued December 14, 1999, that NFMU had the financial and technical ability to operate the Buccaneer Estates system and in Order No. PSC-00-1892-PAA-SU, issued October 16, 2000, that it had the financial and technical ability to operate the Forest Park system. However, in his objection, Mr. Varga raises the issue of whether NFMU has the financial and the technical ability to operate the MHC system by stating that "NFMU reported losses of over $600,000 in their last annual report to the Florida Public Service Commission." He elaborated on this point in his deposition. Further, Mr. Varga stated in his objection that the transfer will place the communities in physical jeopardy.

After reviewing the pleadings, Mr. Varga's deposition, Mr. Reeves' affidavit, and the docket file, we find it appropriate to deny NFMU's Motion for Summary Final Order. We do not believe that NFMU has shown that the facts in this case are so crystallized that nothing remains but questions of law. After drawing every possible inference in favor of Mr. Varga, we find that NFMU has failed to meet its burden of showing that no genuine issue as to any material fact exists. Although this Commission found in past transfer dockets that NFMU had the financial and technical ability to operate specific wastewater systems, this Commission has not determined whether NFMU has the financial and technical ability to operate this water and wastewater utility.

We further find that NFMU has failed to show that it is in the public interest for this Commission to grant a summary final order and preclude the objecting parties from their right to a Section 120.57(1), Florida Statutes, hearing. In this instance, the pleadings and deposition indicate that disputable issues of material fact exist as to NFMU's financial and technical ability and whether the proposed transfer is in the public interest. For the foregoing reasons, NFMU's Motion for Summary Final Order is denied. This matter shall proceed to hearing, as scheduled.

With respect to Mr. Varga's Response, because the circumstances surrounding it fail to warrant the application of the doctrines of equitable tolling or excusable neglect, we find it appropriate to strike the Response as untimely-filed. As stated in NFMU's Motion, the Response was untimely by two days. We note that Mr. Varga is aware of this Commission's current policy on e-mail filings. Indeed, we have previously addressed his failure to adhere to the filing rules of this Commission. See Order No. PSC-1649-PCO-WS, issued September 15, 2000, in this docket (the Order which allowed Mr. Varga's objection)[2]. Therefore, NFMU's Motion to Strike Mr. Varga's Response is granted.

RATE BASE

We find it appropriate to address this PAA issue at this time because, if protested, a Section 120.57(1), Florida Statutes, hearing would follow. By addressing this issue now, if it is protested, the issue may be incorporated into the already-scheduled Section 120.57, Florida Statutes, hearing in this docket. Our calculation of rate base at the time of transfer shall apply only in the event that the utility's application for transfer is approved at a later date.

According to the application, the net book value of the system was $1,056,929 for water and $1,606,752 for wastewater as of December 31, 1989. Rate base was previously established by this Commission in Docket No. 950193-WS, which was an application for transfer. By Order No. PSC-95-1444-FOF-WS, issued November 28, 1995, rate base was set at $1,018,482 for water and $1,903,971 for wastewater as of December 31, 1994.

Our staff has conducted an audit of the books and records of the utility to determine the rate base (net book value) as of February 29, 2000, which is the transfer date. The auditors reported that the books and records of MHC were in general compliance with Commission rules. According to the utility's

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[2] As noted in Order No. PSC-00-1649-PCO-WS, the Commission has established an e-filings task force which is preparing an implementation plan and schedule for an electronic filing system.

books, as of February 29, 2000, the net book value was $784,145 for the water system and $1,467,097 for the wastewater system.

The audit report contained several exceptions. The exceptions included adjustments to Accumulated Depreciation, Accumulated Amortization of CIAC, and equipment that was not transferred to the new owners of the utility. The utility did not file a response to the audit report. We find it appropriate to make the following adjustments as a result of the rate base audit.

Utility Plant-in-Service

The utility's books showed plant-in-service account balances as $2,017,076 and $3,506,998, respectively, for water and wastewater as of the transfer date. However, the utility did not transfer some automobiles, office equipment, and shop equipment to the new owners of the utility. Therefore, these items shall be removed from rate base.

We have removed the costs of these plant items from the plant-in-service balances. Accordingly, the plant-in-service balances shall be decreased by $22,092 for water and $19,088 for wastewater. Further, the accumulated depreciation balances shall be decreased by $22,092 for water and $13,998 for wastewater to remove the related accumulated depreciation for the plant that was not transferred.

Based on these adjustments, the plant-in-service balances are $1,994,984 and $3,487,910, for the respective water and wastewater systems as of February 29, 2000.

Accumulated Depreciation

The utility's books showed the accumulated depreciation account balances as $878,112 and $1,461,208, respectively, for water and wastewater as of February 29, 2000. Our auditor calculated accumulated depreciation from January 1, 1995, to February 29, 2000, and reconciled adjustments from the last rate order to the books. Based upon those calculations, we find that the correct accumulated depreciation balances are $882,072 for water and $1,443,970 for wastewater.

There were several plant and accumulated depreciation adjustments required by Order No. PSC-95-1444-FOF-WS, issued November 28, 1995, in Docket No. 950193, that the utility did not post. The plant adjustments did not change the total plant balances. However, the accumulated depreciation balances changed because the utility used the incorrect depreciation rate for office furniture for six years and did not post the adjustments required by Order No. PSC-95-1444-FOF-WS. In addition, the utility did not depreciate assets in 1999. The affect of these adjustments results in an increase of $26,052 for water and a decrease of $3,240 for the wastewater accumulated depreciation balances. In addition, as noted above, accumulated depreciation shall be adjusted to remove the related depreciation for the automobiles and plant equipment that was not transferred. This results in a net increase of $3,960 for water and a net decrease of $17,238 for wastewater.

Accumulated Amortization of CIAC

The utility recorded accumulated amortization of CIAC balances of $218,169 for water and $390,544 for wastewater, as of February 29, 2000. The utility applied the composite depreciation rate that was applied in Order No. PSC-95-1444-FOF-WS, issued November 28, 1995, in Docket No. 950193-WS. The utility used this composite rate to amortize CIAC each year instead of calculating a composite rate each year to amortize CIAC. In addition to applying an incorrect amortization rate, the utility booked no amortization for the year 2000.

We have calculated the appropriate composite rates for all years and for two months of the year 2000. To correct the accumulated amortization of CIAC balances, the water balance shall be decreased by $3,984 and the wastewater balance shall be increased by $761. Based on the foregoing, we find that the appropriate accumulated CIAC amortization balances are $214,185 for water and $391,305 for wastewater.

Acquisition Adjustment

An acquisition adjustment results when the purchase price differs from the rate base for transfer purposes. We calculate the acquisition adjustment resulting from the transfer of MHC as follows:

Purchase Price:	$4,200,000
Commission Calculated Rate Base:	2,220,117
Positive Acquisition Adjustment:	$1,979,883

NFMU stated in its application that it was not seeking an acquisition adjustment. Therefore, a positive acquisition adjustment shall not be included in the calculation of rate base if the utility's transfer application is approved at a later date. Moreover, in the absence of extraordinary circumstances, it is Commission practice that a subsequent purchase of a utility system at a premium or discount shall not affect the rate base calculation. We find that there are no extraordinary circumstances regarding this purchase which justify an acquisition adjustment to rate base. This finding is consistent with previous decisions of this Commission.

Rate Base

Our calculation of rate base is shown on Schedules Nos. 1 and 2 for the water and wastewater systems, respectively. Adjustments to rate base are itemized on Schedule No. 3. Based on the adjustments set forth herein, we find that rate base for MHC is $754,109 for the water system and $1,466,008 for the wastewater system as of February 29, 2000, if the transfer application is approved at a later date. This rate base calculation is used solely to establish the net book value of the property being transferred and does not include the normal rate making adjustments of working capital calculations and used and useful adjustments.

RATES AND CHARGES

The utility's current rates for service were changed pursuant to a statutory price index proceeding effective January 17, 2000. The utility's approved service availability charges were effective March 27, 1998, pursuant to Order No. PSC-95-1444-FOF-WS, issued November 28, 1995, in Docket No. 950193-WS.

Rule 25-9.044(1), Florida Administrative Code, provides that:

> In cases of change of ownership or control of a utility which places the operation under a different or new utility . . . the company which will thereafter operate the utility business must adopt and use the rates, classification and regulations of the former operating company (unless authorized to change by the Commission) . . . .

NFMU has not requested a change in the rates and charges of the utility and we see no reason to change them at this time. Accordingly, if the utility's transfer application is approved at a later date, the utility shall continue operations under the existing tariff and apply the approved rates and charges until authorized to change by this Commission in a subsequent proceeding.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that North Fort Myers Utility, Inc.'s Motion for Summary Final Order is hereby denied. It is further

ORDERED that North Fort Myers Utility, Inc.'s Motion to Strike the untimely-filed Response to its Motion for Summary Final Order is hereby granted. It is further

ORDERED that the findings made within the body of this Order are incorporated herein in every respect. It is further

ORDERED that Schedules Nos. 1, 2, and 3, attached to this Order, are incorporated by reference herein. It is further

ORDERED that if the application for transfer is approved at a later date, rate base at the time of transfer is $754,109 and $1,466,008 for the wastewater system, respectively, as of February 29, 2000. It is further

ORDERED that if the application for transfer is approved at a later date, an acquisition adjustment shall not be included in the calculation of rate base. It is further

ORDERED that if the application for transfer is approved at a later date, North Fort Myers Utility, Inc. shall continue charging the rates and charges approved for this utility system until authorized to change by this Commission in a subsequent proceeding. It is further

ORDERED that the provisions of this Order issued as proposed agency action shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission this 9th day of February, 2001.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

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Commissioner Jaber dissents in a separate opinion as follows:

I respectfully dissent from the decision of the majority to deny the Motion for Summary Final Order filed by NFMU.

Section 120.57(1)(h), Florida Statutes, and Rule 28-106.204(4), Florida Administrative Code, provide that a party may move for summary final order upon a showing that there is no genuine issue as to any material fact. I believe this mechanism was designed to allow administrative agencies to act more efficiently and cost-effectively in responding to issues that may not need to go to hearing. In fact, it is obvious that the notion of summary final order is wisely borrowed from rules of court that permit summary judgment under similar circumstances and for similar considerations of economy. I am also mindful that the cost of administrative hearings incurred by a utility is potentially passed on to the ratepayers in future rate case proceedings. The standard for review of this type of pleading is that if after looking at the pleadings, depositions and admissions there remains no genuine issue of material fact, the agency shall grant a motion for summary final order.

In this case, there has been a deposition of the protestor which explored his assertions that NFMU does not have the financial or technical ability to operate the utility systems being acquired. We also have before us NFMU's affidavit certifying as to its financial viability. No genuine issue of material fact survives my consideration of the pleadings, deposition, and affidavit. I believe we should issue a summary final order that would obviate the need for, and very considerable expense of, a hearing. For that reason, I dissent from the majority opinion and would grant the Motion for Summary Final Order.

My dissent in this case rests on the law and on the procedure rather than on merits. Normally, in water and wastewater certification cases, if there are no protests, staff files a recommendation for our consideration with a full analysis and discussion of the applicant's financial ability, technical ability, and other related issues including the overall public interest. In this case, I am not persuaded that there are any genuine issues of material fact that warrant the additional time and cost that will be incurred in an administrative hearing. I believe that the

thorough staff evaluation of the case which would precede final Commission action would address the concerns raised by the protestor.

I note in passing that the provisions of Section 367.045(04), Florida Statutes, are subject to a reading that would virtually require the Commission to hold an evidentiary hearing upon the filing of a written objection. Such a reading may present conflict with Section 120.57(1)(h), Florida Statutes, which grants parties the option of filing a summary final order.

I have chosen to harmonize the potential conflict between the two sections by finding that the "proceeding" mentioned in Section 367.045(04), Florida Statutes, is essentially the same as the "proceeding" mentioned in Section 120.57(1)(h), Florida Statutes, in that in both instances, the Commission has final order authority. I think any other reading would thrust the Commission into a resource consuming hearing upon the filing of a written objection, without any preliminary point of entry for any party to suggest to the Commission that there is no genuine issue of material fact to be addressed by hearing.

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.

As identified in the body of this order, our actions setting rate base at the time of transfer and excluding an acquisition adjustment from the calculation of rate base are preliminary in nature. Any person whose substantial interests are affected by the actions proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition 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 2, 2001. If such a petition is filed, 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. In the absence of such a petition, this order shall become effective and final upon the issuance of a Consummating Order.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

Any party adversely affected by the Commission's procedural or intermediate action in this matter 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.

SCHEDULE NO. 1

MHC SYSTEMS, INC.

SCHEDULE OF WATER RATE BASE

As of February 29, 2000

DESCRIPTION	BALANCE PER UTILITY	COMMISSION ADJUSTMENTS		BALANCE PER COMMISSION
Utility Plant in Service	$2,017,076	($22,092)	(3)	$1,994,984
Land	$ 4,733	0		4,733
Accumulated Depreciation	($ 878,112)	($ 3,960)	(1,3)	($882,072)
CIAC	($ 577,721)	0		($577,721)
CIAC Amortization	$ 218,169	($ 3,984)	(2)	214,185
TOTAL	$784,145	($ 30,036)		$754,109

SCHEDULE NO. 2

MHC SYSTEMS, INC.

SCHEDULE OF WASTEWATER RATE BASE

As of February 29, 2000

DESCRIPTION	BALANCE PER UTILITY	COMMISSION ADJUSTMENTS		BALANCE PER COMMISSION
Utility Plant in Service	$3,506,998	($19,088)	(3)	$3,487,910
Land	$ 55,213	0		$ 55,213
Accumulated Depreciation	($1,461,208)	$17,238	(1,3)	($1,443,970)
CIAC	($1,024,450)	0		($1,024,450)
CIAC Amortization	$ 390,544	761	(2)	$ 391,305
TOTAL	$1,467,097	($ 1,089)		$1,466,008

SCHEDULE NO. 3

MHC SYSTEMS, INC.

SCHEDULE OF RATE BASE ADJUSTMENTS

As of February 29, 2000

AD #	EXPLANATION	ADJUSTMENTS WATER	ADJUSTMENTS WASTEWATER
	PLANT IN SERVICE		
3	Adjustment to Remove items not transferred	($22,092)	($19,088)
	ACCUMULATED DEPRECIATION		
1	Adjustments to reflect unrecorded Accum. Depr.	($26,052)	$3,240
3	Adjustment related to Plant items not transferred	$22,092	$13,998
	Total Adjustment	($3,960)	$17,238
	ACCUMULATED AMORT. CIAC		
2	Adjust. to reflect the correct composite rate	($3,984)	$ 761