BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for amendment of Certificate No. 247-S by NORTH FORT MYERS UTILITY, INC. and cancellation of Certificate No. 240-S issued to LAKE ARROWHEAD VILLAGE, INC. in Lee County.	DOCKET NO. 930373-WS
In Re: Application for limited proceeding for approval of current service rates, charges, classifications, rules and regulation, and service availability polices for customers of LAKE ARROWHEAD VILLAGE, INC. in Lee County, by NORTH FORT MYERS UTILITY, INC.	DOCKET NO. 930379-WS ORDER NO. PSC-93-1821-FOF-WS ISSUED: December 22, 1993

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
SUSAN F. CLARK
JULIA L. JOHNSON
LUIS J. LAUREDO

ORDER PROVIDING FOR TEMPORARY RATES IN THE EVENT OF PROTEST
AND
NOTICE OF PROPOSED AGENCY ACTION ORDER
GRANTING AMENDMENT OF CERTIFICATE NO. 247-S BY
NORTH FORT MYERS UTILITY, INC., CANCELLING CERTIFICATE NO.
240-S ISSUED TO LAKE ARROWHEAD VILLAGE, INC.,
AND APPROVING RATES AND CHARGES

BY THE COMMISSION:

Notice is hereby given by the Florida Public Service Commission that the action discussed herein, except for the granting of temporary rates in the event of protest, is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

BACKGROUND

North Fort Myers Utility, Inc. (NFMU or applicant) is a Class B utility which provides regional wastewater service to approximately 2,700 customers in northern Lee County. The utility's 1992 annual report indicates an annual operating revenue of $687,000 and a net operating deficit of $204,000.

On April 9, 1993, NFMU filed an application for amendment of its Wastewater Certificate No. 247-S to include service to the Lake Arrowhead Village and Laurel Estates subdivisions. Also, on April 13, 1993, NFMU filed for a limited proceeding to establish rates and charges to those subdivisions. Continued operation of the wastewater plant (Lake Arrowhead Village, Inc. or LAVI) serving the subdivisions would place the system in serious violation of environmental regulations. The system is currently operating under a Consent Order from the Florida Department of Environmental Protection (DEP) and must be upgraded or disconnected by December 30, 1993 in order to meet environmental standards by the time the annual tourist season begins. A private engineering firm (Johnson Engineering, Inc.) has recommended that the system be connected to a central wastewater treatment facility. When service begins to be provided by NFMU, the package plant and effluent disposal systems will be dismantled. NFMU will take over the on-site collection lines, the two existing lift stations and will construct, at its own expense, the necessary force main to the master lift station of Lake Arrowhead.

The service territory of the two subdivisions is currently served by LAVI under Certificate No. 240-S and consists of approximately 550 mobile homes. The NFMU treatment plant and disposal system has a capacity of 2 million gallons per day and has considerable excess capacity. NFMU's primary means of disposal is by effluent spray irrigation. NFMU and LAVI entered into a wastewater service agreement dated April 1, 1993 for connection to NFMU, the payment of service availability charges and the implementation of NFMU's monthly service charges.

NFMU is in a designated critical use area and utilizes spray irrigation of treated effluent as its primary means of disposal with backup disposal by means of a deep well injection system.

A customer meeting was held in the service territory on July 1, 1993 for the purpose of hearing the customers' comments concerning the interconnection. Approximately 350 customers

attended the meeting which began at 7:30 pm and lasted several hours. Several dozen customers were sworn in and made statements of their concerns before general questions were taken by Staff. Generally, the customers opposed the connection charges and the increase in rates. They believed that the owner of LAVI should pay the connection charges because they "had been given assurances" that wastewater service would be the responsibility of the utility owner when they purchased their home sites.

A petition was filed with the Commission on July 19, 1993 requesting permission to intervene in these dockets by Laurel Estates Lot Owners, Inc. and Lake Arrowhead Mobile Home Owners Association, Inc. However, since this decision herein is proposed agency action, a decision on the petition has been held in abeyance pending the issuance of this proposed agency action and any timely protests.

APPLICATION FOR AMENDMENT

On April 9, 1993, NFMU filed its application for amendment of its wastewater certificate to include additional territory in Lee County. We find that the application is in compliance with Section 367.045, Florida Statutes, and other pertinent statutes and administrative rules concerning an application for amendment of certificate. NFMU has provided evidence that the utility owns the land upon which the utility's treatment and disposal facilities are located in the form of a warranty deed as required by Rule 25-30.036(1)(d), Florida Administrative Code.

Adequate service territory and system maps and a territory description have been provided as prescribed by Rule 25-30.036(1)(e),(f) and (i), Florida Administrative Code. A description of the territory requested by the utility is appended to this memorandum as Attachment A. The utility has submitted an affidavit consistent with Section 367.045(2)(d), Florida Statutes, that it has tariffs and annual reports on file with the Commission.

In addition, the application contains proof of compliance with the noticing provisions set forth in Rule 25-30.030, Florida Administrative Code, with the exception that notice to the customers of the amendment application by NFMU to acquire the territory served by LAVI was not timely done. The customers were given notice of the amendment as part of the notice regarding the

customer meeting, which was held with regard to the limited proceeding to change rates. However, the timing of the notice was not in accordance with Rule 25-30.030, Florida Administrative Code. Therefore, the decision herein is issued as proposed agency action in order to afford customers an opportunity to protest the amendment. Although an objection to the notice of the amendment was filed April 12, 1993, by Buccaneer Mobile Estates, it was subsequently withdrawn because the basis of the protest did not involve the amended territory or any matters associated with it. No other objections to the notice of application have been received.

NFMU has been operating a wastewater treatment facility in the area for a number of years with adequate technical and financial ability, and is expected to continue to do so. Although the utility's annual report shows a deficit in net operating income, this deficit is due to a large amount of excess capacity and the necessity for a large used and useful adjustment. It is operating its system in accordance with a DEP permit which expires May 30, 1995. DEP has indicated that there are no problems regarding compliance with environmental regulations by NFMU. The expansion will be financed by the collection of service availability charges to cover system capacity for the subdivisions. No material impact will occur regarding the applicant's capital structure. Since service in this territory has continued for an extensive period of time, the interconnection will not conflict with the local comprehensive plan.

By connecting the LAVI system to a regional system now, the customers will benefit in the long term by reduced costs, significantly improved service, and benefits to the environment. While some of the customers expressed a desire to conduct a feasibility study to determine the best course of action, and to perhaps refurbish the LAVI system, there is no time left in which a plant refurbishment can be accomplished within the constraints of the DEP Consent Order. A feasibility study, which would be costly to LAVI, is not appropriate in that it would not provide adequate grounds to delay or prohibit connecting to the NFMU system. In addition, at the Agenda Conference on August 31, 1993, customers stated that they had no objection to the interconnection of LAVI with NFMU.

NFMU, LAVI and DEP were contacted concerning the decision to connect the system to NFMU as soon as possible versus LAVI's taking action to bring the current wastewater plant into compliance with environmental regulations. All respondents to the inquiry agreed that it was more desirable and prudent to connect the system to NFMU for a variety of economic and environmental reasons. The current DEP Consent Order with LAVI places a high level of urgency on resolving the problems of the plant as it is today. In July, a portion of the berm surrounding the percolation pond failed and effluent flowed into adjacent surface waters. Land is at a premium in the territory and there is no land available at a reasonable price upon which to construct percolation ponds to replace the current ones that have failed. In addition, the current treatment facility was designed under considerations which are outdated (late 1960's) in terms of today's environmental regulations. If an effort was made to bring the system into compliance, a significant amount of funds would need to be invested, and the customers served by LAVI would see a considerable increase in their service rates.

Based on the above information, we find that it is in the public interest to grant the application of North Fort Myers Utility, Inc. for amendment of Certificate No. 247-S, to grant the transfer of the collection system of LAVI to NFMU, and to cancel LAVI's wastewater Certificate No. 240-S. NFMU has returned the certificate for entry to include the additional territory and has filed revised tariff sheets which reflect the amended territory description. LAVI will be responsible for the payment of regulatory assessment fees and filing of annual reports through the last month that it provides service.

RATES AND CHARGES

NFMU's approved rates and charges were effective August 2, 1993 pursuant to a 1993 Price Index increase. A comparison of the rates currently charged by LAVI and by NFMU is shown below.

Lake Arrowhead Village, Inc.
A flat monthly charge of $9.32 per residence.

NFMU

Base Facility Charge (monthly)	$10.09
Gallonage Charge per 1,000 gallons (Maximum 10,000 gallons)	$ 3.66

The utility has indicated that the proposed amendment will have no significant impact on its existing rates and charges. The Commission-approved rates and charges of NFMU shall be applied to customers in the new service territory. NFMU will bill each customer in the service area based upon metered water flows provided by Lee County.

A wastewater service agreement was executed between NFMU and Lake Arrowhead Village, Inc. on April 1, 1993. In that agreement, the parties agreed that the charges for service availability (plant capacity) for each residential customer would be $740 for system capacity and the income tax gross-up on contributions-in-aid-of-construction (CIAC). The charges are based upon NFMU's tariff which calls for payment based upon $635 per equivalent residential connection (ERC) at 275 gallons per day (GPD) per ERC. NFMU took the position that 200 GPD was appropriate for a mobile home resulting in a basic charge of 200/275 x $635 = $462 per ERC. The corporate tax rate of 37.63 percent results in a grossed-up charge of $740 per ERC. In addition, the agreement has a payment schedule which allows each customer to elect to pay the full charge or to amortize the charge over a five year term at a 10 percent interest rate. The amortized payment amounts to a monthly fee of $15.72 for each customer electing this method of payment. We find that this service availability charge is correctly based upon the approved tariff.

At the customer meeting and at our Agenda Conferences, several customers of LAVI raised concerns about paying the connection charge described above. The customers stated that they had no objection to connecting to the NFMU system and understood the need to do so. However, the customers believe that the owner of LAVI collected $500 per connection from purchasers of homes in the subdivisions. The owner stated that no such collections had been made and none were identified in reviewing the books and records in the earlier staff assisted rate case. In addition, the sales agreement reviewed by Staff indicated that only in instances where the purchaser obtained a mobile home from a sales facility other than the owner would a $500 fee be charged. That charge was not

specifically for connection to the wastewater system but was more likely a charge associated with locating a mobile home unit on the purchased lot which was not purchased as a package from the owner of the subdivisions. We find the customers' concerns over this issue to be a contractual dispute between the customers and the seller of the home sites, which is not within our jurisdiction. It is a dispute more appropriately within the purview of the circuit court.

If no timely protest is filed, the NFMU rates will be effective for charges on or after the stamped approval date of the tariffs applicable to this proceeding. If a timely protest is filed, the NFMU rates will go into effect, subject to refund with interest should the amendment be denied.

REFUND OF PURCHASE PRICE

The service agreement between LAVI and NFMU of April 1, 1993 indicated in paragraph 4 that a payment of $30,000 was to be made to LAVI for the purchase of the collection lines and lift stations. Several customers requested that this payment be refunded to customers who purchased home sites, as a contribution-in-aid-of-construction (CIAC) was included in the cost of the site.

We find that a refund to the customers or off-set of connection fees is not appropriate because customers of utilities do not have any proprietary claim to utility assets. Although customers pay a return on utility investment through rates for service, they do not have any ownership rights to the assets, whether contributed or paid for by utility investment. Furthermore, the customers are not affected by the payment to LAVI for the on-site facilities since there is no effect on the rate base of NFMU.

In addition, we find that the owner of LAVI is entitled to receive value for the sale of the utility, including the collection system. The property rights that rest in the ownership of the utility land and facilities are constitutionally protected. To deny this property interest would constitute an unconstitutional taking by this Commission. Any contribution to the system by the customers would have no value without the risk and investment of the utility owner(s) in the land and facilities that are now being removed from utility service. Given the customers' lack of proprietary claim and the utility's fundamental property rights, we

find no refund of the purchase price to the customers to be appropriate.

In reaching our decision we have also considered and rejected several alternatives. We first examined whether any gain on sale should be passed on to the customers. The costs to dismantle the plant would range from $20,000 to $50,000, depending on the public health and other sanitary requirements for the intended use of the land where the treatment and disposal facilities are located. Therefore, even if the few lots which might be created by clearing the former plant site were sold, a significant portion of the gain would be greatly offset by the cost of clearing the site and preparing the lots for sale.

We also examined whether LAVI rather than the customers should be required to pay the gross-up on CIAC related to the connection to NFMU. We find that such a payment would not be appropriate. NFMU has authorization to collect CIAC gross-up in its tariffs. Therefore, unless NFMU is willing to pay the income taxes on the CIAC it collects from the customers, the customers must be responsible for the tax on their individual share.

Finally, we examined whether it would be in the public interest for LAVI to remain a utility by becoming a bulk customer of NFMU. Whether or not LAVI remains a utility, the customers will be required to pay for the connection to NFMU and for the capacity required to serve them. All costs incurred by LAVI if it were to continue as a utility, such as connection charges, gross-up for CIAC on the interconnection, and lift station improvements, would be borne by LAVI and passed on to the customers through increased rates. We find that such a rate increase would likely result in higher rates than the customers will pay NFMU after connection to its system. Therefore, we find that this alternative would not be appropriate.

In consideration of the foregoing, we approve the transfer without any requirement that LAVI distribute the sale proceeds to the customers.

ACQUISITION ADJUSTMENT

Order No. 18292, issued October 15, 1987, established a rate base for LAVI. There have been no additions or retirements to plant

since the test year ending March 31, 1987, nor have there been any additions to CIAC. Rate base for purposes of a transfer normally represents the net book value of the system at the time of transfer and does not include used and useful adjustments. Therefore, we have adjusted the utility plant-in-service reflected in the rate case docket to remove the used and useful adjustment. In addition, we updated the accumulated depreciation and amortization of CIAC to December 31, 1993, the assumed date of transfer of the collection system and interconnection with NFMU. Based on our calculations, the net book value of the system as of December 31, 1993, is $64,101. The rate base established in that docket and our adjustments described herein are shown on Schedules Nos. 1 and 2 attached to this Order.

The collection system of LAVI was completely contributed and the utility has no investment in it. Therefore, the transfer rate base of $64,101 represents only the net book value of the treatment and disposal system. As mentioned previously, the treatment and disposal system is to be completely dismantled and the owner will not recover any investment because the cost of dismantling will probably exceed any possible recovery through sale in land or equipment. Therefore, we find there is no rate base associated with the collection system as of the date of transfer from LAVI to NFMU. Accordingly, we find that no acquisition adjustment is appropriate.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that the application for amendment of territory for Certificate No. 247-S, held by North Fort Myers Utility, Inc., is hereby approved. It is further

ORDERED that Certificate No. 240-S, held by Lake Arrowhead Village, Inc., is hereby cancelled. It is further

ORDERED that the authorized rates and charges of North Fort Myers Utility, Inc. shall be the authorized rates and charges for the customers of the amended territory. It is further

ORDERED that the provisions of this Order, except for the granting of temporary rates in the event of protest, are issued as proposed agency action and shall become final unless an appropriate

petition for formal proceeding is received by the Division of Records and Reporting, 101 East Gaines Street, Tallahassee, Florida, 32399-0870, by the close of business on the date indicated in the Notice of Further Proceedings or Judicial review. It is further

ORDERED that, in the event of a protest, North Fort Myers Utility, Inc. is authorized to collect its rates and charges on a temporary basis, subject to refund. It is further

ORDERED that if no timely protest is filed, these dockets may be closed.

By ORDER of the Florida Public Service Commission, this 22nd day of December, 1993.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

CB

Commissioner Luis Lauredo dissented on the issue of refunding the purchase price.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

As identified in the body of this order, our action herein, except for the granting of temporary rates in the event of protest, is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting at his office at 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on January 12, 1994. In the absence of such a petition, this order shall become effective on the date subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

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.

If the relevant portion of this order becomes final and effective on the date described above, any party adversely affected may request judicial review by the Florida Supreme Court in the case of an 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. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

Any party adversely affected by the Commission's final action in this matter may request: (1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

ATTACHMENT A

North Fort Myers Utility, Inc.
TERRITORY DESCRIPTION

The following described lands located in portions of Section 27, Township 43 South, Range 24 East, Lee County, Florida:

Commencing at the Southeast corner of the NE 1/4 of Section 27, Township 43 South, Range 24 East for a Point of Beginning; then North along the East section line of the NE 1/4 of said section a distance of 1,556 feet; then South 89 42 20 W a distance of 200 feet; then South 0 03 10 E a distance of 250 feet; then South 89 42 20 W a distance of 1,244 feet; then South 36 28 20 E a distance of 1,275 feet; then South 0 03 10 E a distance of 307 feet; then South 89 44 20 E a distance of 705.80 feet to the Point of Beginning.

SCHEDULE NO. 1

Lake Arrowhead Village, Inc.
SCHEDULE OF WASTEWATER RATE BASE

As of 12/31/93

DESCRIPTION	PER ORDER NO. 18292	COMMISSION ADJUSTMENTS	FINAL BALANCE
Utility Plant in Service	$ 399,071	$ 63,744	$ 462,815
Land	2,280	---	2,280
Plant Held For Future Use	(18,514)	18,514	---
Accumulated Depreciation	(98,470)	(130,849)	(229,319)
Contributions-in-aid-of-Construction	(286,889)	(39,397)	(326,286)
CIAC Amortization	63,333	$ 91,278	$ 154,611
TOTAL	$ 60,811	$ 3,290	$ 64,101

SCHEDULE NO. 2

Lake Arrowhead Village, Inc.

SCHEDULE OF WASTEWATER RATE BASE ADJUSTMENTS

EXPLANATION	ADJUSTMENT
Utility Plant in Service	
To adjust to 100% used and useful	$ 63,744
Plant Held for Future Use	
To adjust to 100% used and useful	$ 18,514
Accumulated Depreciation	
To adjust to 100% used and useful	$(15,261)
To adjust to 12/31/93	(115,588)
Contributions-in-aid-of-Construction	
To adjust to 100% used and useful	$(39,397)
CIAC Amortization	
To adjust to 100% used and useful	$ 9,788
To adjust to 12/31/93	81,490