

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Complaint and petition) DOCKET NO. 920649-WS
of Cynwyd Investments against)
TAMIAMI VILLAGE UTILITY, INC.)
regarding termination of water)
and wastewater services in Lee)
County.)
_____)
In Re: Complaint against) DOCKET NO. 930642-WS
TAMIAMI VILLAGE UTILITY, INC. by) ORDER NO. PSC-94-0718-FOF-WS
CYNWYD INVESTMENTS, and request) ISSUED: June 9, 1994
for emergency order requiring)
the utility to reestablish water)
and wastewater service to)
Cynwyd's Friendship Hall in Lee)
County.)
_____)

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK
JULIA L. JOHNSON

ORDER DENYING CYNWYD INVESTMENTS'
MOTION FOR RECONSIDERATION OR CLARIFICATION
AND MOTION FOR ORAL ARGUMENT

BY THE COMMISSION:

Tamiami Village Utility, Inc., (TVU or utility) is a Florida Corporation that operates its water and wastewater utility in Lee County, Florida. Cynwyd Investments (Cynwyd) is a Pennsylvania General Partnership that owns a recreational vehicle (RV) park and other parcels of property, including the Friendship Hall recreation center, either adjoining or within the Tamiami Village Mobile Home community in Lee County, Florida. Cynwyd's RV park is a bulk customer of TVU, while its other parcels are on separate meters.

TVU'S last rate case culminated in Order No. PCO-92-0807-FOF-WS, issued August 11, 1992. In that Order the Commission determined that certain repair expenses which the utility incurred in repairing lines within the RV park could not be charged to the general ratepayers. In making this decision the Commission found that Cynwyd, as a bulk service customer, had the responsibility of repairs to the lines within the RV park from the point of delivery. The Order also disallowed expenses for treating the excess

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infiltration caused by the lines within the RV park. Subsequently, the utility attempted to have the RV park make repairs to the remaining lines within the RV park which were causing excessive infiltration. When it was unsuccessful in these efforts, the utility took steps to terminate service to the RV park, purportedly in accordance with the terms of its tariff.

On June 24, 1992, Cynwyd filed a complaint which was followed by a request for emergency relief filed on July 6, 1992. Cynwyd alleged that TVU threatened to terminate service to the RV park because of excessive infiltration into TVU's wastewater system from faulty lines which TVU argued were Cynwyd's responsibility to maintain. Subsequently, we issued proposed agency action Order No. PSC-93-0810-FOF-WS, on May 25, 1993. Cynwyd timely objected to that Order and the matter was set for formal hearing.

Subsequently, Cynwyd filed a second complaint and request for emergency relief on July 1, 1993, as a result of TVU's alleged threat to disconnect service to the Friendship Hall recreation center. The disagreement in this complaint was over the purported unauthorized use of an open drain around the pool which caused excessive infiltration into TVU's wastewater system. Cynwyd complied with TVU's request and disconnected the open drain. Subsequently, it was billed \$800 by the utility for prior unauthorized use. Cynwyd had refused to pay this disputed amount. On July 26, 1993, by Order No. PSC-93-1086-PCO-WS, we consolidated complaint Dockets Nos. 920649-WS and 930642-WS because both dockets involve essentially the same facts, the same parties, and some of the same witnesses.

The hearing was held on October 14, 1993, in Fort Myers, Florida. Both parties filed briefs on November 19, 1993, and the utility filed several post-hearing motions. In Order No. PSC-94-0210-FOF-WS, issued on February 21, 1994, we denied the complaints filed by Cynwyd, disposed of the post-hearing motions, and made findings of fact and conclusions of law. Order No. PSC-94-0210-FOF-WS mandated the following:

TVU will not be responsible for the repair and maintenance of the lines within Cynwyd's RV park.

TVU will be responsible for the repair and maintenance of the two wastewater lines which serve both the RV park and other utility customers.

Cynwyd is responsible for the repair and maintenance of the lines in its RV park.

Cynwyd will submit its repair plan to the Commission within 30 days of the order.

Cynwyd will complete repairs to the lines within three months of the date of the order.

If Cynwyd does not complete the repairs, TVU may exercise its right to discontinue water and wastewater service, subject to the Commission's approval.

Cynwyd will pay \$168.20 to TVU for unauthorized wastewater service with 30 days of the order.

The docket will remain open for staff to monitor the repairs made by Cynwyd, and will be administratively closed upon approval of the repairs.

On March 8, 1994, Cynwyd filed a timely Motion for Reconsideration or Clarification of Order No. PSC-94-0210-FOF-WS. Cynwyd's motion concerned the decision that Cynwyd is responsible for the lines within its RV park and was premised upon two grounds: that we failed to take into account the binding effect of past Commission orders, and that our decision was based on a non-rule policy which was not properly explained or developed in the record. Cynwyd requests that, in the alternative, the Commission issue an order clarifying Order No. PSC-94-0210-FOF-WS. Cynwyd filed a motion for oral argument on the same date.

On March 21, 1994, TVU filed a timely response which opposed Cynwyd's Motion for Reconsideration or Clarification on the grounds that there it alleges no legitimate issue of law or fact that has not already been considered by the Commission. TVU also opposed Cynwyd's motion for oral argument.

CYNWYD'S MOTION FOR ORAL ARGUMENT

Rule 25-22.060(f), Florida Administrative Code, permits oral argument on a motion for reconsideration solely at the discretion of the Commission. An oral argument on a petition for reconsideration is not an absolute right. Sentinel Star Express Co. v. Florida Public Service Commission, 322 So.2d 503, 505 (Fla. 1975). Cynwyd requested oral argument on its motion on the grounds that it would benefit the Commission in comprehending and evaluating the issues raised by Cynwyd. TVU opposed Cynwyd's motion because Cynwyd has already had the opportunity to raise its arguments before the Commission on several occasions, and that TVU cannot afford to send counsel to an oral argument in Tallahassee.

We find that the pleadings contain sufficient argument to render a fair and complete evaluation of the merits of the issues without oral argument. Therefore, Cynwyd's request for oral argument is denied.

CYNWYD'S MOTION FOR RECONSIDERATION AND CLARIFICATION

Rule 25-22.060, 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. The standard for determining whether reconsideration is appropriate is set forth in Diamond Cab Company of Miami v. King, 146 So.2d 889 (Fla. 1962). In Diamond Cab, the Court held that the purpose of a petition for reconsideration is to bring to an agency's attention a point which was overlooked or which the agency failed to consider when it rendered its order. That point is generally a mistake in law or a mistake in fact. In Stewart Bonded Warehouses v. Bevis, 294 So.2d 315 (Fla. 1974), the Court held that a petition for reconsideration should be based upon specific factual matters set forth in the record and susceptible to review. We do not think that Cynwyd has met this standard.

Cynwyd's request for reconsideration relied upon two points: that the Commission misapprehended Order No. 21421, and that the Commission relied upon a non-rule "bulk customer" policy to make its determination. We disagree with both of these points. In Order No. PSC-94-0210-FOF-WS, we considered Order No. 21421 in the appropriate context. Furthermore, we did not rely upon a non-rule policy in making our decision.

Cynwyd's first claimed that the rationale set forth on pages 11-13 of Order No. PSC-94-0210-FOF-WS demonstrated that the Commission misapprehended or overlooked Order No. 21421. We do not agree with this assessment. Our determination that Cynwyd is responsible for the repair of the wastewater lines within its RV park as set forth in Order No. PSC-94-0210-FOF-WS does not overlook or misapprehend the previous order. A review of the utility's brief (pgs. 5-18), and staff's recommendation (pgs. 12-16) demonstrates that the Order was brought to our attention. We did not mischaracterize Order No. 21421, as page 11 of Order No. PSC-94-0210-FOF-WS contains a proper summary of Order No. 21421's findings as they relate to this case. Order No. PSC-94-0210-FOF-WS clearly reflects Cynwyd's citation and reliance upon Order No. 21421.

It appears that Cynwyd has overemphasized the language of Order No. 21421. Cynwyd stated on page 5 of its Motion that the

Commission "required TVU to maintain the sewer mains within the RV park." However, aside from the reference to the rule which required that the acquiring utility adopt the rates and classifications of the prior utility, Order No. 21421 does not overtly require TVU to maintain the lines within the RV park. Order No. 21421 was one of many factors to be considered. We also considered the utility's tariff and the applicable rules.

In its motion, Cynwyd essentially recognized that the matter was brought before the Commission, but argued that we did not consider it when making our decision. We see no error or failure of consideration on the Commission's part. Each point raised by a party does not require a detailed explanation by the agency in its final decision. We addressed Cynwyd's argument that Order No. 21421 controlled the determination, because TVU was bound to the tariff of the previous owner, and found the argument to be unpersuasive. Order No. 21421 was not directly cited in the rationale, but we certainly recognized the substance of Cynwyd's contention. On page 12 of Order No. PSC-94-0210-FOF-WS, we stated that "we agree with TVU that the policy of the previous owners is meaningless to the extent that it violates the present tariff."

Cynwyd's argument would seem to preclude the Commission from ever issuing an order which modifies or corrects a previous order. As a quasi-judicial body, the Commission acts on a continuum, constantly modifying, refining, even overturning past decisions. Contrary to Cynwyd's argument on page 5 of its motion, we did not directly order TVU to maintain the sewer mains in the RV park by Order No. 21421. Order No. 21421 required TVU to continue the rates and charges of the previous utility. The specific issue of who would maintain the lines does not appear to have been raised before the Commission until the 1992 rate case, when TVU attempted to recover expenses for repairs to the lines. We did not "ignore" Order No. 21421 at that point. We analyzed past orders and interpreted Commission rules dealing with repairs to the lines. Although Cynwyd was not a party in the 1992 docket, it did have the opportunity to argue its position and essentially relitigate the issue in this docket. It is clear from the record that it did so, and that we ruled against its position based upon the evidence in the record and the application of Commission rules.

For the limited purposes of reconsideration, it is only necessary to consider whether the Commission failed to comprehend the orders. It is not appropriate to determine the merits of the decision. Cynwyd's motion attempts to raise or relitigate substantive arguments which were addressed in the administrative

hearing. In essence, Cynwyd's motion seeks to reargue the weight given to Order No. 21421, in order to support its position that it should not be responsible for the line repair.

As noted above in Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315, 317 (Fla. 1974), the granting of a petition for reconsideration "should not be based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." The Court in Stewart also noted that granting reconsideration is similar to granting a new trial after a verdict has been rendered. If we were to grant Cynwyd's motion, we would be saying in essence that, although we considered Order No. 21421 on the first go-round, we have changed our mind and now agree with Cynwyd's interpretation. This reweighing or re-analysis is completely improper.

Cynwyd also claimed that our decision in Order No. PSC-94-0210-FOF-WS was based upon a non-rule policy which was not properly examined or developed in the record. Cynwyd argued that we created a non-rule policy when we determined that Cynwyd's status as a bulk customer led to the determination that Cynwyd was responsible for the lines. This argument is not persuasive.

We did not rely upon an unarticulated non-rule policy. Rather, we interpreted our own rules to determine their proper application. This was demonstrated on pages 11-12 of Order No. PSC-94-0210-FOF-WS, where we acknowledged the applicable rules and the parties' conflict in their interpretation. Rules 25-30.225 and 25-30.231, Florida Administrative Code, both state that the utility must maintain the equipment related to the delivery of wastewater service up to and including the point of delivery into the piping owned by the customer. Rule 25-30.210, Florida Administrative Code, defines the term "main" to mean a pipe, conduit or facility which conveys service to individual services or other mains. Order No. PSC-94-0210-FOF-WS noted that "Cynwyd and TVU interpret these rules and, consequently, their responsibilities differently." The next two pages of the Order contain our consideration and interpretation of those rules. Fundamental to that determination was the consideration of where the point of delivery lies. As noted in Order No. PSC-92-0807-FOF-WS, the pivotal question is, "Who is the customer?" The fact that Cynwyd is a bulk customer is a reasonable factor to consider when determining the point of delivery, both in Docket No. 910560-WS, and in this docket.

Cynwyd stated that, even if the Commission was developing an incipient policy at the hearing, McDonald v. Dept. of Banking and Finance, 346 So.2d 569 (1st DCA 1977), requires that the Commission

develop it on the record to allow parties the opportunity to challenge it. We find that our decision in this matter does not rise to the level of "incipient policy" contemplated by McDonald. We did not "create" a rule or even an incipient policy that bulk customers should be required to maintain their own lines. We applied the existing rule that the utility must maintain equipment up to the point of delivery, and determined where the point of delivery would be.

Cynwyd also asked for clarification of the Commission's order. Cynwyd argued that even if Order No. PSC-94-0210-FOF-WS should stand, we should provide further explanation of our decision. In its prayer for relief, Cynwyd requested that the Commission reconsider and retract from its early decision, or amend the order to reject Cynwyd's claim directly. Order No. PSC-94-0210-FOF-WS properly reflects our decision in this docket and adequately explains the rationale. Therefore, we find that no modification or clarification of Order No. PSC-94-0210-FOF-WS is necessary.

The findings and conclusions of the Final Order are supported by competent and substantial evidence. We have explained our decision in this case sufficiently for judicial review. We did not overlook or fail to consider Order No. 21421, nor have we unlawfully established a rule or policy for determining the point of delivery. We made our determination based on the record before us in this docket and an interpretation of the applicable rules. In consideration of the foregoing, Cynwyd's motion for Reconsideration or Clarification is denied.

This docket shall remain open until our staff has verified that Cynwyd has made the line repairs as required by Order No. PSC-94-0210-FOF-WS.

Based on the foregoing, it is, therefore,


ORDERED by the Florida Public Service Commission that Cynwyd Investments' Motion for Oral Argument is hereby denied. It is further

ORDERED that Cynwyd Investments' Motion for Reconsideration or Clarification is hereby denied. It is further

ORDERED that this docket shall remain open pursuant to Order No. PSC-94-0210-FOF-WS in order to verify Cynwyd Investments' repair to the lines.

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By ORDER of the Florida Public Service Commission, this 9th
day of June, 1994.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

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

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting 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 sewer 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 Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.