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-SU
In Re: Application for limited proceeding for approval of current service rates, charges, classifications, rules and regulation, and service availability policies for customers of LAKE ARROWHEAD VILLAGE, INC. in Lee County, by NORTH FORT MYERS UTILITY, INC.	DOCKET NO. 930379-SU ORDER NO. PSC-94-1553-FOF-SU ISSUED: December 13, 1994

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON
DIANE K. KIESLING

APPEARANCES:

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On behalf of the Citizens of The State of Florida

PAUL COGGINS, President, Lake Arrowhead Homeowners Association, Inc., 2969 Longview Lane, North Fort Myers, Florida 33917
On behalf of Lake Arrowhead Homeowners Association, Inc.

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On behalf of Laurel Estates Lot Owners Association, Inc.

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FINAL ORDER APPROVING SERVICE AVAILABILITY CHARGE AND DENYING REQUEST TO IMPLEMENT SENIOR CITIZEN MOBILE HOME CLASS OF CUSTOMER

BY THE COMMISSION:

BACKGROUND

North Fort Myers Utility, Inc. (NFMU or utility) is a Class B utility which provides regional wastewater service to approximately 2,700 customers in northern Lee County. The utility's 1993 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, which were served by Lake Arrowhead Village, Inc. (LAVI). On April 13, 1993, NFMU filed for a limited proceeding to establish rates and charges to those subdivisions.

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. Continued operation of the wastewater plant serving the subdivisions would place the system in serious violation of environmental regulations. The system was operating under a Consent Order from the Florida Department of Environmental Protection (DEP). NFMU agreed to take over the on-site collection lines and the two existing lift stations, and to construct, at its

own expense, the necessary force main to the master lift station of Lake Arrowhead.

Prior to NFMU's taking over the system, the service territory of the two subdivisions was served by LAVI under Certificate No. 240-S and consisted 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.

In Order No. PSC-93-1821-FOF-WS, issued on December 22, 1993, as proposed agency action (PAA), we approved the request to amend NFMU's certificate and the limited proceeding to charge its current rates and charges in the approved territory. An objection to the order was timely filed by Lake Arrowhead Homeowners Association, Inc. (LAHA) and Laurel Estates Lot Owners Association, Inc. (LELO). We acknowledged the intervention of the Office of Public Counsel (OPC) in this docket by Order No. PSC-94-0173-PCO-WS, issued February 11, 1994.

On January 18, 1994, NFMU filed a Motion to Convert Protest to Informal Proceeding, on the grounds that there were no disputed issues of material fact. On January 25, 1994, OPC filed a Motion to Clarify Order No. PSC-93-1821-FOF-WS. The parties subsequently filed a stipulation for our review and approval. In the stipulation, the parties agreed that the only remaining issues to be resolved were the appropriate amount of service availability charges to be paid to NFMU, and whether LAVI should be required to pay all or any portion of the service availability charges payable to NFMU. The protestors agreed to withdraw their protests to the order as it related to granting NFMU an amendment of its certificate, cancelling LAVI's certificate, imposing NFMU's rates on LAVI's current customers, and imposing NFMU's charges (with the exception of the service availability charges) on LAVI's current customers. NFMU agreed not to collect any service availability charges from customers of LAVI until we made a final determination of the proper amount of service availability charge. NFMU and OPC also agreed to withdraw their pending motions. On June 15, 1994, we issued Order No. PSC-94-0737-FOF-SU, which approved the stipulation and ordered that the portions of Order No. PSC-93-1821-FOF-WS that were not in dispute were made final and effective.

The Prehearing Conference was held on July 22, 1994, in Tallahassee, Florida. At that conference, the parties and our staff identified six issues to be addressed at the formal hearing and acknowledged the stipulations addressed in Order No. PSC-0737-FOF-SU. The Prehearing Order was issued August 10, 1994, as Order No. PSC-94-0966-PHO-SU.

On August 12, 1994, OPC filed a Motion to Amend the Prehearing Order, on the grounds that the parties had entered into a stipulation which limited the issues in this docket. On August 16, 1994, the Prehearing Officer issued Order No. 94-0990-PHO-SU, which granted OPC's motion and amended the Prehearing Order. Four of the issues were deleted from the Order, and any testimony and exhibits pertaining to those issues were stricken from the record. The following issues remained for our determination:

1. What is the appropriate amount of service availability charge to be collected by NFMU to serve the customers formerly served by LAVI?

2. Should the Commission establish a new "senior citizen mobile home owners" class of customer for service availability charges?

The formal hearing was held in this matter on August 17, 1994, in Fort Myers, Florida. Approximately 300 customers attended the hearing, and 22 customers offered testimony. A.A. Reeves, III, testified on behalf of the utility. Kimberly H. Dismukes testified on behalf of OPC.

We received testimony from residents of Lake Arrowhead Village and Laurel Estates, the two subdivisions at issue in this docket. The residents stated that because they believed that their average usage was less than 200 gallons per day, the service availability charge should be less for the residents in order to hook-up to the utility. The residents expressed concern about paying the charge while living on a fixed income. Residents of other subdivisions also testified and raised similar concerns.

Pursuant to Rule 25-22.056(3)(a), Florida Administrative Code, each party shall file a post hearing statement. Any issue or position not included in the post-hearing statement shall be waived. The parties were advised of this requirement in the Order Establishing Procedure (Order No. PSC-94-0235-PCO-SU, issued March 3, 1994). On September 14, 1994, OPC and NFMU filed post-hearing briefs. Three parties in this docket, LAVI, LAHA, and LELO, did not file post-hearing briefs. Therefore, we have not considered their issues and positions which were raised in the Prehearing Order. However, we note that the positions of LAHA and LELO are identical to that of OPC, and LAVI's participation was essentially eliminated once the parties stipulated to remove several issues from the docket.

FINDINGS OF FACT, LAW AND POLICY

Having considered the evidence presented, we hereby enter our findings of fact, law and policy.

SERVICE AVAILABILITY CHARGE

We first address the question of how much the customers formerly served by LAVI who are now being served by NFMU should pay in service availability charges in order to connect to NFMU. OPC argued that the charge should be based upon an average flow of approximately 120 gallons per day (GPD). This amount is based upon the analysis of Witness Kimberly H. Dismukes of the annual average of monthly averages of the flows for the two communities. The utility contended that the basis for the service availability charge should be the result of an assumption of peak flow per household of 200 GPD per customer. This amount comes from Rule 10D-6.48, Florida Administrative Code, indicating the standardized flow from a mobile home.

The resolution of this issue involves a two-part determination of what the utility's proper tariff is, and whether we should deviate from that tariff in order to require the utility to charge the customers in this docket a service availability charge based upon the average daily flows of the mobile home parks.

NFMU's Tariff

OPC contended in its post-hearing brief that this Commission has never approved the utility's service availability charge for mobile home service, and that the approval was only made administratively, by the Commission Staff. There initially appeared to be some confusion as to the order in which the charge was implemented and a tariff sheet filed. However, the approval of the mobile home service availability charge was not based upon a mistake. In Order No. PSC-92-0588-FOF-SU, issued June 30, 1992, and Order No. PSC-92-1357-FOF-SU, issued November 23, 1994, this Commission considered similar requests by NFMU to amend its certificate to serve customers of mobile home parks. In both instances, this Commission acknowledged that the utility would charge less to mobile home customers, and that the charge was based upon a reduction of the amount approved in the tariff for single-family homes. Moreover, in Order No. PSC-94-0450-FOF-SU, issued April 14, 1994 (In re: Application for Amendment of Certificate No. 247-S to Include Territory Held by Carriage Village Landowner's Association, Inc., Cancellation of Certificate No. 57-S, and for Limited Proceeding to Impose Current Rates in Lee County by North

Fort Myers Utility), we specifically addressed and approved the calculation of the mobile home charge:

> The charges are correctly based on NFMU's approved tariffs on file with the Commission 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 for a mobile home [was appropriate], resulting in a basic charge of 200/275 x $635 = $462 per ERC. (Id. at pg. 6).

Therefore, we have clearly acknowledged the service availability charge of $462, based upon 200 GPD, and that the charge was reflected in NFMU's tariff. The currently approved charges are set forth below:

Single Family	$635
Multi-Family	$520
Mobile Home	$462

The above listed charges are based upon peak flow assumptions of 275, 225 and 200 GPD, respectively.

Appropriate Service Availability Charge

It is standard practice in the industry to design wastewater systems based upon the anticipated peak flow from the connected load which is forecasted to exist when the system is serving the built out territory. The customer mix is taken into account along with a standard flow for each type of forecasted customer. Total design flow is then determined and the design of the plant results in sufficient capacity to serve the entire service territory at build out including any margin designed to accommodate infiltration or any other factor which needs to be considered in the context of total capacity requirements. At no time is average flow utilized in the design of a wastewater system. To do so would ignore the requirement imposed on utility systems by regulatory statutes that require sufficient capacity to be on hand to serve the connected load during times of peak flow under the most stringent or critical conditions that the system can be expected to encounter.

Average flows, or averages of monthly or daily averages, simply do not indicate, in any useful way, the peak flow encountered at the plant. In fact, averages of averages have the undesirable effect of masking the actual peak flow. Even a daily flow recorded at the treatment plant will not give any useful indication of the peak flow coming into the plant during the 24

hour period. The only useful way to determine the peak flow is to have a system by which flows are continuously monitored and recorded and which will graphically show the peak flow at any given point in time at the plant. In the absence of such a recording system, and in recognition of the errors, cost and problems associated with measuring peak wastewater in-flows for the purpose of determining the amount of peak capacity to reserve for each customer on the system or intending to connect to the system, standard flows per customer are utilized to determine the service availability charge to each customer in each class. There is no precedent in the industry, whether it be investor owned utilities or regulatory agencies or municipalities, which would lend credence to utilizing averages or averages of averages to either design a wastewater plant or to determine service availability charges.

We find that the assignment of peak flows for each sub-class in the residential class appears to be reasonable and adequately addresses the potential flow differentiation among the three categories. The utility's categorization of flows in its tariff is consistent with industry practices and with our practice regarding determination of service availability charges. To determine service availability charges based upon some averaging process would render the service availability charge determination process more of a bargaining encounter between the utility and the customers than one promoting stability and consistency. Furthermore, the utility was not required to establish a mobile home rate and could have charged the residential charge to the mobile home customers.

We also note that the service availability charge determination process does not exist in a vacuum, separate and apart from service rates. If the utility determines a service availability rate that is too low, such as basing it on an average of averages, the rate base will increase and the rates will, of necessity, reflect the additional return on investment required in such a circumstance and be higher throughout the life of the utility. On the other hand, service availability charges based upon a standard level of peak flow insures that sufficient investment is recovered by the utility through service availability charges and the result is that the rates reflect the lower return on investment required in such a circumstance. In addition, a standard level of peak flow insures that service availability charges take up the slack during plant expansion or improvement and current rate payers avoid the burden of paying for growth.

We are not persuaded that we should depart from a standard peak flow per customer in determining service availability charges. Furthermore, there does not appear to be any merit in attempting to

base service availability charges on average flow considerations since to do so simply ignores the reality that averages have virtually nothing to do with peak flows at any given time at the treatment facility. It is the peak flow that dictates the level of plant capacity that the utility is statutorily required to provide in its service territory. In Order No. 25393, in Docket No. 900380-WU (Gulf Utility Company) issued November 25, 1991, this Commission found that "engineering standards require calculating ERC gallonage for service availability based on peak flows. Water treatment plants are generally designed to meet flow demands on days, or even hours, when flows peak." That same criteria is obviously employed in designing wastewater plants. The plant that the utility is statutorily required to provide is the basis for the utility's authorized return on investment and authorized service availability charges.

Therefore, we find that the amount of service availability charge to be collected by NFMU to serve the customers formerly served by LAVI should be $740 per mobile home connection ($462 plus gross-up) based upon those charges set forth in the agreement between NFMU and LAVI and set forth in NFMU's tariff and which includes the tariff approved gross-up for income taxes. Pursuant to the agreement between NFMU an LAVI, the utility has agreed to allow customers to pay for the charge on an installment plan, if they so choose.

SENIOR CITIZEN MOBILE HOME OWNERS CLASS OF CUSTOMERS

OPC proposed that the Commission establish a new class of customer for NFMU: a senior citizen mobile home customer. OPC argued that because this group of customers uses less water and therefore sends less sewage back to the plant for treatment, it would be reasonable to create a separate service availability charge for this group, since it places less demand upon the system.

NFMU argued that OPC's technical witness does not possess the expertise to address service availability charges. NFMU also contended that OPC did not introduce deed restrictions, and that even if it did, such restrictions might be in violation of the Fair Housing Amendment Act of 1988, 42 U.S.C. Section 3601-3619, which prohibits discrimination based upon familial status. NFMU pointed out that it does not appear that any state, county, or other jurisdiction which permits a special charge for senior citizens, and that the DEP does not consider age when addressing plant capacity.

Although OPC asserted that the class is not based upon a specific social group, its proposal identifies a class of customer

based upon age. Nevertheless, OPC argued that the proposed rate is based upon usage, not age, and there would be no special rate because the customers are senior citizens, but simply because they have a lower usage.

We believe that OPC's proposal does identify a specific social group for rate classification. It is based upon both the usage and by the particular class of individual, and would exclude those who might have the same rationale for receiving the lower rate but are not senior citizens. It would exclude seniors who do not live in a mobile home but have lower usage, and it would exclude those who live in mobile homes but are not seniors. Furthermore, a senior citizen residing in a mobile home but who does not live in a mobile home park designated as "55 and over" would not receive the same treatment.

It is possible to identify many particular classes and establish a different usage pattern for that class. Even if the charge is based upon the supposed usage difference, the rate is still identified with a particular class, and excludes those who may have similar usage patterns but do not fit into the social class. Furthermore, OPC's proposal does not consider the fact that other customers who live in a mobile home park, or who simply have lower usage, are excluded from this proposed classification because they are not senior citizens.

The utility has already recognized the distinction among the different types of residences by establishing the mobile home classification. The classification proposed by OPC would base it upon a further distinction among mobile home customers: age. While we understand the concerns faced by senior citizens, who are often on a fixed-income, we cannot reconcile OPC's proposal with serious regulatory and constitutional concerns. According to Section 367.101, Florida Statutes, the service availability charges set by the Commission must be just and reasonable. The imposition of a classification based upon age must be considered in light of Section 367.101, and equal protection concerns. Customers of utilities are "entitled to equal protection provisions of the law and utility service must be provided and administered in all respects fairly, reasonably, and free from opposition and discrimination." Williams v. City of Mt. Dora, 452 So.2d 1143, 1146 (Fla. 5th DCA 1984).

We have recently addressed the issue of subsidizing low-income customers in the telecommunications industry in Docket No. 930693-TL (In re: Request for approval of proposed tariff to introduce Lifeline Assistance Plan by Bellsouth Telecommunications, Inc. d/b/a Southern Bell Telephone and Telegraph Company). In that

docket, the utility proposed the implementation of a plan which would waive a portion of the subscriber line charge for qualifying low-income customers. We considered the issue of whether the Lifeline Program was violative of the prohibitions against discriminatory treatment as set forth in Sections 364.08, 364.09, and 364.10, Florida Statutes In Order No. PSC-94-0242-FOF-TL, issued March 4, 1994, we approved the program, noting that the program did not violate the statutory provisions. We found that the program was "specifically targeted to the group most economically in need."

The Lifeline program approved in Docket No. 930693-TL can be distinguished from the senior citizen mobile home charge. First, Docket No. 930693-TL dealt with a company-initiated proposal. The cost of implementing the program was partially off-set by federal funds, and was intended to further the Federal Communications Commission's policy of making telephone service more available nationwide. Unlike the Lifeline program, the senior citizen mobile home classification would not target all those in economic need, but only those who live in a mobile home park and are senior citizens. It excludes those who may be economically disadvantaged but do not live in the mobile home parks, but would include those who are not disadvantaged but live in the mobile home parks. It would also exclude those who are economically disadvantaged but are not senior citizens.

Utility regulatory commissions in other jurisdictions have addressed the issue of special rates with varying results. Some jurisdictions, such as Michigan, allow electric utilities to charge lower rates based upon senior citizen status. See Re: Detroit Edison Co., 149 PUR 4th 161 (1994). However, other jurisdictions have expressly rejected special classes of customers. In Re: Narragansett Electric Co., 57 PUR 4th 120 (1983), the Rhode Island Public Service Commission rejected a reduced rate for electric customers who had exhausted their unemployment benefits. That commission found that the rate was discriminatory and had no reasonable basis. In Mountain States Legal Foundation v. Utah Public Service Commission, 636 P2d 1047 (1981), the Utah Supreme Court rejected a senior citizen classification because the classification did not have a rational nexus with the criteria for determining just and reasonable rates. These cases, while clearly not controlling or on point to the situation in this docket, demonstrate the concern that must be exercised in considering an age-based classification for service availability charges.

This case has a narrow customer focus: the residents of two mobile home parks, Lake Arrowhead Village and Laurel Estates. The charges imposed upon the other customers of NFMU are not directly

at issue in this docket. However, it is essential to address the impact that the creation of the mobile home class would have upon the other customers. The reduction of service availability charges would lead to an increased rate base, which could lead to increased monthly rates. In effect, the other customers may subsidize the senior citizen rate with higher rates. The category might also cause customers who do not live in senior mobile home parks but who have the same usage patterns to believe that they are being discriminated against.

While NFMU provides a public service, it is a privately-owned utility. OPC's proposal raises concerns about requiring a private business to implement policies which attempt to address issues of social class or income distribution. Rates and charges based upon age would also require the utility to "police" its customers in order to determine whether they qualify for the reduced charge. It would also cause problems in planning because the age of customers would always be a variable.

After a review of the positions set forth by the parties and an evaluation of the impact of an imposition of a senior citizen class, we hereby reject the proposal create a service availability charge based upon a senior citizen mobile home user class of customers.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction to determine the wastewater rates and charges of North Ft. Myers Utility, Inc., pursuant to Sections 367.081 and 367.101, Florida Statutes.

2. As the applicant in this case, North Ft. Myers Utility, Inc. has the burden of proof that its proposed rates and charges are justified.

3. The rates and charges approved herein are just, reasonable, compensatory, not unfairly discriminatory and in accordance with the requirements of Section 367.101(2), Florida Statutes, and other governing law.

This Order addressees all remaining issues in this docket. Therefore, this docket shall be closed.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that North Fort Myers Utility, Inc., shall charge the customers formerly

served by Lake Arrowhead Village, Inc., a service availability charge of $462 plus gross-up, totalling $740. The customers may choose to pay under the payment plan proposed by the utility. It is further

ORDERED that the proposal to create a senior citizen mobile home user class of customers is hereby denied. It is further

ORDERED that each of the findings made in the body of this Order is hereby approved in every respect. It is further

ORDERED that these dockets shall be closed.

By ORDER of the Florida Public Service Commission, this 13th day of December, 1994.

Blanca S. Bayó

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 and/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 Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.