

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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ORIGINAL

IN RE: Application of)
NORTH FORT MYERS UTILITY, INC.)
for extension of wastewater)
service in Lee County, Florida.)

RECORDS AND)
REPORTING)
Docket No. 981781-SU)

RESPONSE TO ORDER TO SHOW CAUSE
AND DEMAND FOR FORMAL HEARING

Applicant, NORTH FORT MYERS UTILITY, INC. ("NFMU"), by and through its undersigned attorneys, files this Response to Order to Show Cause and Demand for Formal Hearing pursuant to Public Service Commission Order No. PSC-99-0492-SC-SU ("Order") and Section 120.57(1), Florida Statutes.

The Show Cause portion of the Order contains numerous statements which purport to be "facts", but are actually conclusory statement not based upon any fact. While the Commission believed that "earlier events" were relevant to its decision, the only "earlier events" relied upon was that in 1987 NFMU filed an application to extend its service area and as a result of an objection from the owner of Buccaneer Estates (the residents did

not file an objection), that territory was excluded from NFMU's request and the owner of Buccaneer Estates withdrew its objection.

PSC Order No. 19059 which granted NFMU's application, included a legal description of a large area and then excepted from that description the following:

The service area certificated by the Florida Public Service Commission by Tamiami Utility

- ACK _____
- AFA _____
- APP _____
- QAF _____
- CMU _____
- CTR _____
- EAG _____
- LEG 1
- LIN 3
- OPC _____
- RCH _____
- SEC 1
- WAS _____
- OTH _____

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FPSC-RECORDS/REPORTING

Company, Vista Villages, Inc., Mobile Land and Title Company, Laurel Estates Mobile Village, Inc., Lazy Days Mobile Village, Florida Cities Water Company, Buccaneer Mobile Estates and less and except . . .¹

It is important to note that all of those specifically named entities had wastewater utility systems which were certificated by the PSC with one exception -- Buccaneer Mobile Estates.

On January 14, 1991, Lee County adopted Ordinance No. 91-01 requiring mandatory interconnections of small, inefficient, on-site package wastewater treatment plants to central sewer systems within 365 day after notification that a collection line abutted the property. This Ordinance was adopted in furtherance of the State of Florida's pollution control policies, such as that now set forth in Section 381.0065, Florida Statutes. Pursuant to such Ordinance, Bonita Springs Utilities, in southern Lee County, and North Fort Myers Utility, Inc., in northern Lee County, have between them to date eliminated approximately 50 on-site package-type wastewater treatment plants in the County.

NFMU utilizes reuse as its method of effluent disposal and is environmentally the most favorable entity to treat wastewater from residents in North Fort Myers, including the mobile home parks which were certificated by the PSC. Subsequent to the adoption of Ordinance No. 91-01, NFMU began to connect the mobile home parks which were receiving wastewater service from systems not in

¹This metes and bounds less and except is irrelevant to this proceeding.

compliance with the Department of Environmental Protection's regulations.

Six mobile home parks were specifically excepted from NFMU's service area in the 1988 extension proceeding. In five cases, NFMU subsequently filed applications to extend its service area. Tamiami Utility Company was approved by the PSC in Order No. PSC-95-0576-FOF-SU on May 9, 1995. Vista Villages, Inc. (Forest Park) was approved by the PSC in Order No. PSC-92-0588-FOF-SU on June 30, 1992. Mobile Land and Title Company (Carriage Village) was approved by the PSC in Order No. PSC-94-0450-FOF-SU on April 14, 1994. Laurel Estates Mobile Village, Inc. was approved by the PSC in Order No. PSC-93-1821-FOF-SU on December 22, 1993. Lazy Days Mobile Village, Inc. was approved by the PSC in Order No. PSC-96-0345-FOF-SU on March 11, 1996.

Since NFMU filed extension applications in each case where the territory was previously certificated by the PSC, the obvious question is what would NFMU have to gain by not filing an application regarding Buccaneer Estates had it believed such an application was required? Public Counsel would probably respond that NFMU wanted to avoid objections. Such a response is ridiculous. NFMU has had to fight objections by Public Counsel in most of the five previous proceedings and was always successful. The basic fact is that NFMU had nothing to gain by willfully violating Section 367.045(2), Florida Statutes, in providing service to Buccaneer Estates. When NFMU's oversight was brought to its attention, it

immediately filed an application without having to be ordered to do so by the PSC. In addition, NFMU has provided the Staff with information which it requested informally and has otherwise cooperated with the Staff. In light of that cooperation, NFMU was offended by the Staff's position to issue an Order to Show Cause. This is not true in the many cases where the PSC has discovered a utility serving outside of its service area, but has nonetheless penalized such utilities. In fact, in most cases, this Commission did not even issue an Order to Show Cause. In even issuing the Order to Show Cause in this case, the PSC has departed from its prior orders and the procedure established thereby.

If the language of Order No. 19059 issued March 29, 1988 is analyzed, it is not hard to understand how the error occurred. The legal description is that Order excepts therefrom "the service area certificated by the Florida Public Service Commission to" All of the named entities had wastewater certificates from the PSC except Buccaneer Mobile Estates. Thus, when reviewed many years after Order No. 19059 was issued, it is not unreasonable to believe that since Buccaneer Mobile Estates did not have a wastewater "service area certificated by the Florida Public Service Commission" that such area was already included within NFMU's certificated territory.

On November 18, 1996, NFMU first contacted the owner of Buccaneer Estates regarding interconnection in accordance with Ordinance No. 91-01. That contact was made more than eight years

after Order No. 19059 was issued. At that time, all other mobile home parks excepted from NFMU's service area by Order No. 19059 had been included by subsequent PSC actions.

There is absolutely no evidence that NFMU knowingly refused to comply with Section 367.045(1), Florida Statutes. In fact, the PSC seems to agree since its bases the Order to Show Cause on the assertion that NFMU willfully violated a statute and relies upon PSC Order No. 24306 in concluding that if the act done by the utility was intended, it is irrelevant as to whether there was an intent to violate the statute.

As that standard relates to the instant case, NFMU admits that it intended to extend its wastewater service to Buccaneer Estates. NFMU did not intend to violate the statute. Assuming that standard is lawful, the question then becomes what penalty, if any, should be imposed.

There was no intent by NFMU to violate any statutes, and in light of the wording of the legal description in Order No. 19059, the oversight was not unreasonable. Further, as soon as the oversight was brought to the attention of NFMU, it immediately filed the required application, and cooperated fully with the Staff in its investigation. At most, a nominal penalty of \$100.00 would be appropriate.

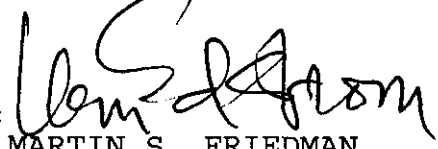
There is absolutely no precedence for the PSC to impose more than a minimal penalty. NFMU discussed at length at the February 16, 1999 Agenda Conference the large number of cases where

utilities were serving outside of their service area due to some mistake. In almost all of these cases, the PSC did not even issue an Order to Show Cause, much less impose a penalty.

WHEREFORE, NFMU requests this Commission to accept this Response and not impose any penalty as none is warranted in this instance; however, NFMU would stipulate to payment of an amount not to exceed \$500.00 to reimburse the Commission for its costs and expenses in this regard. Alternatively, NFMU requests a formal administrative hearing pursuant to Section 120.57(1), Florida Statutes.

Respectfully submitted on this
30th day of March, 1999, by:

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By: 
MARTIN S. FRIEDMAN
For the Firm

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Order to Show Cause and Demand for Formal Hearing has been forwarded via U.S. Mail to Steve Reilly, Esquire, Office Of Public Counsel, 111 West Madison Street, Suite 812, Tallahassee, FL 32301-1906, Cleveland Ferguson, Esquire, Florida Public Service Commission, Legal Division, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399-0850, Ronald & Gwen Ludington, 509 Avanti Way, North Fort Myers, FL 33917 and Donald Gill, 674 Brigantine Boulevard, North Fort Myers, FL 33917 on this 30th day of March, 1999.

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