

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for amendment
of Certificate No. 247-S to
extend service area by the
transfer of Buccaneer Estates in
Lee County to North Fort Myers
Utility, Inc.

DOCKET NO. 981781-SU
ORDER NO. PSC-99-1786-PHO-SU
ISSUED: September 13, 1999

Pursuant to Notice and in accordance with Rule 28-106.209, Florida Administrative Code, a Prehearing Conference was held on August 30, 1999 and continued on September 8, 1999, in Tallahassee, Florida, before Commissioner E. Leon Jacobs, Jr., as Prehearing Officer.

APPEARANCES:

Martin S. Friedman, Esquire, Rose, Sundstrom & Bentley,
LLP, 2548 Blainstone Pines Drive, Tallahassee, Florida
32301
On behalf of North Fort Myers Utility, Inc.

Steve Reilly and Jack Shreve, Esquires, Office of Public
Counsel, c/o The Florida Legislature, 111 West Madison
Street, Suite 812, Tallahassee, Florida 32399-1400
On behalf of the Citizens of Florida.

Joseph Devine, 688 Brigantine Boulevard, North Fort
Myers, Florida 33917
On behalf of himself

Donald Gill, 674 Brigantine Boulevard, North Fort Myers,
Florida 33917
On behalf of himself

Ronald Ludington, 509 Avanti Way, North Fort Myers,
Florida 33917
On behalf of himself

Jennifer S. Brubaker, Samantha M. Cibula and Rosanne
Gervasi, Esquires, Florida Public Service Commission,
2540 Shumard Oak Boulevard, Tallahassee, Florida,
32399-0850
On behalf of the Commission Staff.

DOCUMENT NUMBER-DATE

10964 SEP 13 600

FPSD-RECORDS/REPORTING

PREHEARING ORDER

I. CONDUCT OF PROCEEDINGS

Pursuant to Rule 28-106.211, Florida Administrative Code, this Order is issued to prevent delay and to promote the just, speedy, and inexpensive determination of all aspects of this case.

II. CASE BACKGROUND

North Fort Myers Utility, Inc. (NFMU or utility) is a Class A utility located in Lee County which provides only wastewater service. According to the 1997 annual report, the utility has 5,753 wastewater customers and reported operating revenues of \$1,958,553 and a net loss of \$598,220.

On or about August 24, 1998, NFMU executed a Developer Agreement with the owners of Buccaneer Mobile Estates, MHC-DeANZA Financial Limited Partnership (Park Owner) and Buccaneer Utility (Buccaneer). This Developer Agreement was filed with the Commission on September 4, 1998, and deemed approved on October 4, 1998 pursuant to Rule 25-30.550, Florida Administrative Code.

Buccaneer consists of 971 manufactured home sites which had previously received wastewater service from the Park Owner as part of the lot rental amount. Pursuant to a letter dated May 14, 1976 from the Florida Public Service Commission, the provision of service in this manner rendered the wastewater utility system exempt from regulation pursuant to Section 367.022(5), Florida Statutes.

Water service to Buccaneer is provided by Buccaneer Water Service, a Commission-regulated utility. The water utility purchases its water from Lee County Utilities, and therefore does not have a water treatment plant. All tenants are charged metered rates for water, pursuant to Order No. PSC-96-1466-FOF-WU, issued December 3, 1996, in Docket No. 960133-WU.

On November 23, 1998, Buccaneer's existing wastewater permit expired. NFMU connected to Buccaneer on November 24, 1998. On December 1, 1998, NFMU filed an Application for Amendment to Certificate of Authorization to include the wastewater service area of Buccaneer. On December 7, 1998, NFMU filed an Emergency Motion to Implement Rates and Charges with respect to the interconnection of existing wastewater customers within the Buccaneer Estates

mobile home community to NFMU. On December 9, 1998, NFMU responded to a staff request for additional information on the connection of Buccaneer, with a letter referencing various parts of Chapter 723, Florida Statutes.

On December 10, 1998, NFMU mailed notice to the Buccaneer customers which stated that utility service had been assigned to NFMU, that connection fees would be collected, and that effective December 1, 1998, the utility would begin billing for monthly service and the lot rent would decrease by a specific amount.

Beginning on December 18, 1998, numerous customers began filing protests concerning the application of NFMU's monthly rates and connection fees. Among the protesting customers were Mr. Donald Gill, Mr. Joseph Devine and Mr. Ronald Ludington, whose letters of protest were timely filed with the Commission on December 18, 1998, December 21, 1998, and December 21, 1998, respectively. On January 14, 1999, certain letters from the Buccaneer Mobile Home Park were filed requesting that the Office of Public Counsel (OPC) represent the Buccaneer residents in this matter. However, Commission records indicate that neither Messrs. Gill, Devine nor Ludington agreed to be represented by OPC or other counsel, nor have they filed requests to be considered qualified representatives pursuant to Rule 28-106.106, Florida Administrative Code. Therefore, these three individuals are considered pro se litigants.

On December 21, 1998, the OPC filed a Response to the Emergency Motion to Implement Rates and Charges. On January 14, 1999, OPC filed a Notice of Intervention pursuant to Section 350.0611, Florida Statutes, which was acknowledged by Order No. PSC-99-0180-PCO-SU, issued January 29, 1999. By Order No. PSC-99-0420-PCO-SU, issued March 1, 1999, the matter was set for an administrative hearing on September 14 and 15, 1999.

At the February 16, 1999 agenda conference, the Commission considered staff's recommendation addressing whether a show cause proceeding should be initiated with respect to the utility's interconnection of Buccaneer without prior Commission approval, and the request to collect rates and charges by NFMU from Buccaneer customers, pending the outcome of the hearing. Counsel for NFMU and OPC addressed the Commission regarding their respective positions. The Commission issued Order No. PSC-99-0492-SC-SU, on March 9, 1999, which ordered NFMU to show cause, in writing, within 21 days, why it should not be fined \$5,000 for an apparent

violation of Section 367.045(2), Florida Statutes, for the failure to obtain approval of the Commission prior to serving territory outside of its certificate. The Order also denied NFMU's Emergency Motion to Implement Rates and Charges, stating that (1) the Commission has the jurisdiction to entertain the utility's motion; (2) it was inappropriate to approve a connection fee at that time; and (3) the Commission would not set monthly service rates until a determination is made as to whether the transfer is in the public interest.

On March 10, 1999, NFMU filed a Motion for Reconsideration of Order No. PSC-99-0492-SC-SU. A Request for Oral Argument was filed by NFMU on March 17, 1999. On March 22, 1999, OPC filed a response to NFMU's Motion for Reconsideration. On that same date, an Objection to NFMU's Motion for Reconsideration was filed by Mr. Donald Gill, one of the pro se litigants in this case. On April 14, 1999, NFMU filed a Notice of Additional Authority, in support of its Motion for Reconsideration. On July 27, 1999, the Commission issued Order No. PSC-99-1463-FOF-SU denying the utility's motion for reconsideration and notice of additional authority.

On August 27, 1999, the utility filed a Motion to Strike Parties. By its motion, the utility asserted that Messrs. Gill, Devine and Ludington should be stricken as parties because OPC and the utility have entered into a Settlement Agreement which resolves all issues of the case; Messrs. Gill, Ludington, and Devine failed to file any prehearing testimony or exhibits and a prehearing statement as required by Order Establishing Procedure No. PSC-99-0420-PCO-SU; that the hearing will only consist of evidence which supports the Settlement Agreement, thus requiring a hearing will be "futile, time consuming and expensive"; and that Messrs. Gill, Ludington and Devine have "done nothing to represent themselves in this proceeding" and as a consequence must accept the settlement that OPC has negotiated.

A prehearing conference was held on August 30, 1999. OPC and the utility stated during the prehearing conference that an executed Settlement Agreement would be filed on August 31, 1999. Based on this information, the prehearing conference was continued until September 8, 1999, to allow staff to file a recommendation on the Settlement Agreement.

On September 2, 1999, OPC and the utility filed the executed Settlement Agreement. Messrs. Devine, Gill and Ludington opposed

the Settlement Agreement and did not sign it. Staff prepared a recommendation on the Settlement Agreement, which was considered at the September 7, 1999 Agenda Conference. At the Agenda Conference, the Commission deferred ruling on the Settlement Agreement, instructing that this matter proceed to hearing as scheduled on September 14, 1999, and that the Settlement Agreement could be presented for the Commission's consideration at that time.

The prehearing conference was continued on September 8, 1999. This matter is scheduled for an administrative hearing on September 14 and 15, 1999.

III. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

A. Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending a formal ruling on such request by the Commission, or upon the return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been used in the proceeding, it shall be returned expeditiously to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of the proceeding, it shall be returned to the person providing the information within the time periods set forth in Section 367.156, Florida Statutes.

B. It is the policy of the Florida Public Service Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 367.156, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding.

In the event it becomes necessary to use confidential information during the hearing, the following procedures will be observed:

- 1) Any party wishing to use any proprietary confidential business information, as that term is defined in Section 367.156, Florida Statutes, shall notify the Prehearing Officer and all parties of record by the time of the Prehearing Conference, or if not known at that time, no later than seven (7)

days prior to the beginning of the hearing. The notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute.

- 2) Failure of any party to comply with 1) above shall be grounds to deny the party the opportunity to present evidence which is proprietary confidential business information.
- 3) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the Court Reporter, in envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.
- 4) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information. Therefore, confidential information should be presented by written exhibit when reasonably possible to do so.
- 5) At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Division of Records and Reporting's confidential files.

IV. POST-HEARING PROCEDURES

The parties are hereby put on notice that the Commission may render a final decision in this case at the September 14, 1999 hearing. If the Commission defers making a final decision at the hearing, the following procedures shall apply:

Each party shall file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. If a party fails to file a post-hearing statement, that party shall have waived all issues and may be dismissed from the proceeding.

A party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 40 pages, and shall be filed at the same time.

V. PREFILED TESTIMONY AND EXHIBITS; WITNESSES

All testimony which has been prefiled in this case will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and associated exhibits. All testimony remains subject to appropriate objections. Each witness will have the opportunity to orally summarize his or her testimony at the time he or she takes the stand. Upon insertion of a witness' testimony, exhibits appended thereto may be marked for identification. After all parties and Staff have had the opportunity to object and cross-examine, the exhibit may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

Witnesses are reminded that, on cross-examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer.

The Commission frequently administers the testimonial oath to more than one witness at a time. Therefore, when a witness takes the stand to testify, the attorney calling the witness is directed to ask the witness to affirm whether he or she has been sworn.

Staff notes that testimony and exhibits of all witnesses to be sponsored by OPC, the utility, and Staff has been prefiled. Messrs. Gill, Luddington and Devine have not prefiled testimony or exhibits. Furthermore, these pro se litigants have not filed prehearing statements. Therefore, they have not identified issues or positions in this matter.

VI. ORDER OF WITNESSES

<u>Witness</u>	<u>Proffered By</u>	<u>Issues #</u>
<u>Direct</u>		
A.A. Reeves, III	NFMU	1, 2, 3, 4, 5, 6

VII. BASIC POSITIONS

UTILITY: It is in the public interest for NFMU to provide wastewater service directly to the residents of Buccaneer Estates, in accordance with the Settlement Agreement.

OPC: The Commission should resolve the issues presented in this docket by issuing a Final Order consistent with the Settlement Agreement between North Fort Myers Utility and OPC.

DEVINE: I object to the Settlement Agreement on the grounds that it directs the payment for the sewer charges to the wrong people. I further object to the Settlement Agreement because it lacks all of the necessary parties, namely, the Manufactured Homes Community, who is part of this whole matter. And being an indispensable party, I cannot see how we can proceed without being able to involve them in the settlement.

GILL: I object to the Settlement Agreement because it lacks all of the necessary parties, namely, the Manufactured Homes Community, who is part of this whole matter. And being an indispensable party, I cannot see how we can proceed without being able to involve them in the settlement.

LUDDINGTON: I object to the Settlement Agreement on the grounds that it directs the payment for the sewer charges to the wrong people.

STAFF: Staff's positions are preliminary and based on materials filed by the parties and on discovery. The preliminary positions are offered to assist the parties in preparing for the hearing. Staff's final positions will be based upon all the evidence in the record and may differ from the preliminary positions. The information gathered through the prehearing process and prefiled testimony indicates that NFMU has the financial ability, technical ability and capacity to serve the customers of Buccaneer Estates.

It also appears, at this point, that the transfer of the wastewater utility operations of Buccaneer Estates to NFMU would be in the public interest. The appropriate monthly service rates should be as set forth in the proposed Settlement Agreement; however, the rates should not be charged until staff has approved the security for any potential refund pending the final disposition of this case in the event a bench ruling is not made, and the customers have received notice.

VIII. ISSUES AND POSITIONS

ISSUE 1: Should the stipulation between the Office of Public Counsel and North Fort Myers Utility be approved?

POSITIONS

UTILITY: Yes. (Reeves)

OPC: Yes.

DEVINE: No.

GILL: No, I do not think the stipulation should be approved.

LUDINGTON:No.

STAFF: Yes, with the modification that the portion of Paragraph 2 of the stipulation which would require Messrs. Devine, Gill and Ludington to voluntarily dismiss their objections should be stricken, and that Paragraph 3 of the stipulation should be modified to reflect that the monthly rates should not be charged until staff has approved the security for any potential refund pending the final disposition of this case in the event a bench ruling is not made, and the customers have received notice.

ISSUE 2: Does NFMU have the financial ability to provide wastewater service to Buccaneer Estates?

POSITIONS

UTILITY: Yes. (Reeves)

OPC: Yes.

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DEVINE: No.

GILL: No position at this time.

LUDINGTON: No position at this time.

STAFF: Yes.

ISSUE 3: Does NFMU have the technical ability and capacity to provide wastewater service to Buccaneer Estates?

POSITIONS

UTILITY: Yes. (Reeves)

OPC: Yes.

DEVINE: No.

GILL: No position at this time.

LUDINGTON: No position at this time.

STAFF: Yes. NFMU is presently serving the customers of Buccaneer Estates and still has excess plant capacity.

ISSUE 4: What is the net book value of the assets proposed to be transferred to NFMU?

POSITIONS

UTILITY: \$146,119.68 (Reeves)

OPC: No position at this time.

DEVINE: No position at this time.

GILL: No position at this time.

LUDINGTON: No position at this time.

STAFF: No position pending further development of the record.

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ISSUE 5: Is the transfer of the wastewater operations of Buccaneer Estates to NFMU in the public interest?

POSITIONS

UTILITY: Yes. It is in the public interest for NFMU to provide wastewater service directly to the residents of Buccaneer Estates in accordance with the Settlement Agreement. (Reeves)

OPC: Yes. Pursuant to the Settlement Agreement, the transfer is in the public interest.

DEVINE: No.

GILL: In this matter, the term "public interest" has been used in a very broad and generic way. While the term "public interest" has been used over and over, the term has never been specifically defined as to what the public interest is that is being served.

LUDINGTON:No.

STAFF: Yes, the transfer is in the public interest.

ISSUE 6: Should NFMU be fined for violation of Section 367.071, Florida Statutes?

POSITIONS

UTILITY: No. (Reeves)

OPC: No. North Fort Myers Utility's forfeiture of any compensation for providing wastewater service to Buccaneer Estates from December 1, 1998, through August 31, 1999, is sufficient punishment for North Fort Myers Utility's premature and improper interconnection with Buccaneer Estates Manufactured Home Community.

DEVINE: Yes.

GILL: Yes. The fine should be levied pursuant to law and should not be substituted with other means.

LUDINGTON:Yes.

STAFF: Agree with OPC.

IX. EXHIBIT LIST

<u>Witness</u>	<u>Proffered</u>	<u>I.D. No.</u>	<u>Description</u>
<u>Direct</u>	<u>by</u>		
A.A. Reeves	NFMU	AAR-1	Resume of Mr. Reeves
		AAR-2	Application and amendments
		AAR-3	Settlement Agreement

The parties and Staff reserve the right to identify additional exhibits for the purpose of cross-examination.

X. PROPOSED STIPULATIONS

On September 2, 1999, a Settlement Agreement was filed with the Commission's Division of Records and Reporting. The Settlement Agreement is a stipulation for settlement of the case between NFMU and OPC. Messrs. Gill, Luddington and Devine have declined to sign the stipulation.

XI. PENDING MOTIONS

On September 7, 1999, a Motion for Dismissal of Settlement Agreement by Mr. Ludington was filed with the Commission. On September 9, 1999, a Motion to Strike Settlement Agreement by Mr. Gill was filed with the Commission. At the September 8, 1999 continuation of the Prehearing Conference, a ruling on these motions was deferred to the September 14, 1999 hearing.

XII. RULINGS

At the August 30, 1999, Prehearing Conference, Messrs. Devine, Gill and Ludington made separate oral motions for a continuation of and extension of time for the prehearing and hearing in this matter. All three motions were denied, upon a finding that adequate notice of the procedures and prehearing and hearing dates were given and that there would be no benefit to delaying the prehearing and hearing.

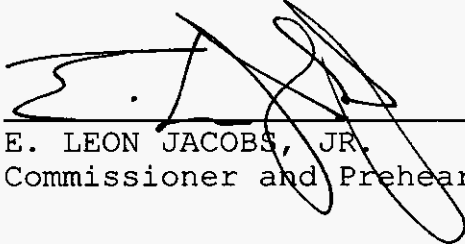
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Also at the prehearing conference, NFMU's Motion to Strike Parties, filed on August 30, 1999, was addressed. The motion to strike Messrs. Gill, Devine and Ludington as parties was denied. However, it was further ruled that Messrs. Devine, Gill and Ludington may not offer witnesses or exhibits at the hearing, and that their participation at the hearing shall be limited to a concise statement of their objection and to cross-examining witnesses presented by the other parties because they failed to prefile testimony and prehearing statements as required by Order No. PSC-99-0420-PCO-SU.

It is therefore,

ORDERED by Commissioner E. Leon Jacobs, Jr. as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

By ORDER of Commissioner E. Leon Jacobs, Jr. as Prehearing Officer, this 13th Day of September, 1999.



E. LEON JACOBS, JR.
Commissioner and Prehearing Officer

(S E A L)

JSB

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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 this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), 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.