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

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NORTH FORT MYERS UTILITY, INC.'S RESPONSE TO MOTION TO RECONSIDERATION

NORTH FORT MYERS UTILITY, INC., ("NFMU") by and through its undersigned attorneys and pursuant to Rule 25-22.060, Florida Administrative Code, files this Response to the Motion to Reconsideration filed by Intervenor Ronald Ludington.

The purpose of a motion for reconsideration is to bring to the Commission's attention a point of fact or law which was overlooked by the Commission, or which the Commission failed to consider when it rendered its order, and it is not intended as a procedure for rearguing a case merely because the losing party disagrees with the decision. *In re: Investigation of Rates of Gulf Utility Company*, 97 FPSC, 12:101 (Dec. 9, 1997)[1]; *Diamond Cab Company of Miami v. King*, 146 So.2d 889 (Fla. 1962).

[1]Order No. PSC-97-1544-FOF-WS.

Of particular applicability to the Motion of Mr. Ludington is the holding in *Stewart Bonded Warehouse v. Bevis*, 294 So.2d 315 (Fla. 1974) that the motion for reconsideration should be based upon specific factual matters set forth in the record. In *In re: Investigation of Rates of Gulf Utility Company, supra*, this Commission adopted that position when it reached the following conclusion which is applicable in this case:

> Furthermore, Gulf inappropriately relies [in its motion for reconsideration] on Mr. Moore's Affidavit and attachment. These items go beyond the scope of reconsideration because neither is a part of the record in this case. 97 FPSC 12:104.

Rule 25-22.060(2), Florida Administrative Code, requires that a motion for reconsideration "contain a concise statement of the grounds for reconsideration". The Motion filed by Mr. Ludington is anything but concise.

1. Ludington does not understand that merely because a response is not made to a Motion does not mean that the Motion is automatically granted. Ludington effectively abandoned his Motion when he did not address it at the final hearing. After addressing several motions, Commissioner Deason asked whether there were any other pending preliminary matters and Ludington responded that he

had none (Tr. 49).[2] Mr. Gill did not attend the final hearing and thus did not make any argument on his Motion.

It was unnecessary to directly rule upon those motions since they were effectively responses in opposition to the Settlement Agreement and were effectively denied upon the Commission adopting the Settlement Agreement. There was no legal or factual basis to support granting either motion.

Ludington has failed to identify the "long established legal proceedings" which support his assertion that if a response is not filed to a Motion it is effectively granted. In fact, written responses were not required in this case. The Motions were filed less than 12 days prior to the original hearing date of September 15, 1999 (including mailing, that is the length of time within which a response must be filed). Thus, the final hearing was scheduled to occur prior to the deadline for filing responses. At the prehearing conference, it was agreed those Motions would be heard as a preliminary matter at the final hearing. Since Ludington and Gill failed to argue those Motions, they were waived.

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[2]References are to the electronic version of the transcript. References to Mr. Reeves' prefiled testimony which is not included at the electronic version will be referenced as PFT followed by the appropriate page number of Mr. Reeves' prefiled testimony.

2. It is without question that the Association supported the Settlement Agreement and the President and members of the Utility Committee signed the Settlement Agreement with the following notation:

> We request the Public Counsel to execute the above Settlement Agreement on behalf of all of the members of the Buccaneer Homeowners Association (Ex. 3).

The Homeowners' Association has not stated any legal basis sufficient to allow it to withdraw from the Settlement Agreement and thus the Homeowners' Association is still bound by it. See, for example, *Crown Ice Machine Leasing Company v. Senter Farms, Inc.*, 174 So.2d 614 (Fla. 2d DCA 1965). Thus, any statements made at the November 16, 1999 agenda conference regarding the Association's support of the Settlement Agreement are irrelevant. Unless and until it is adjudicated that the Association can withdraw from the Settlement Agreement, it continues to be bound by it.

It makes no difference if every member of the Association wanted to withdraw support for the Settlement Agreement. One would logically surmise that every member of the Association would support Ludington's proposal if it could be legally supportable. However, Ludington's proposal was both legally and factually flawed

for those reasons previously set forth by NFMU in its Post Hearing Statement of Issues and Positions.

In fact, at the final hearing, it was unclear as to whether the Homeowners' Association really wanted to withdraw from the Settlement Agreement or whether it was just trying to get a better deal at the last minute while continuing to want the benefits of the Settlement Agreement if the Ludington proposal was not accepted. The Homeowners' Association's attorney testified:

> Obviously, we would all rather see you agree with us and go with Mr. Ludington's proposal instructing North Fort Myers Utility to bill MHC or its affiliates directly. That's obviously our first choice.
>
> If we can't have that, then we'll back up to our second choice, which was the agreement that the Public Service - that the Office of Public Counsel signed with North Fort Myers Utility (Tr. 80).

Since this Commission did not have a legal or factual basis to accept the Ludington proposed settlement agreement, the Homeowner's Association, in effect, continues to support the Settlement Agreement.

It is inappropriate to consider Exhibit L-1 to Ludington's Motion. It is no different from the Affidavit and attachments which this Commission refused to consider in *Gulf Utility Company, supra*. What Ludington fails to point out about this letter is that

it states that the Board of the Association "are not recognizing the proposal of Mr. Ludington, Mr. Devine and Mr. Gill before the Commission October 13, 1999". So even if the letter is not clear in its support of the Settlement Agreement, it is clear in its opposition to Ludington's proposal.

It is clear from the testimony at the final hearing why the Association sought to withdraw from the Settlement Agreement. It was obvious from the customer testimony that the Intervenors between the time of the originally scheduled hearing date of September 14, 1999 and the rescheduled hearing date of October 13, 1999 intimidated those residents who disagreed with their position, particularly the members of the Board of Directors of the Homeowners' Association. One Board member, Shirley Milligan, almost in tears, summed it up:

> You two gentlemen [referring to Devine and Ludington] - I'm sorry - you have called me names. You have accused me of things in the Blo Hard.[3](Tr. 66-67).

3. How Ludington can complain about being referred to as a customer when he has called the other parties frauds and cheats is beyond logic.

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[3]This is a "newsletter" written by Ludington, Devine and Gill and distributed within the park.

The Tariff provision referred to by Ludington applies to new developments, and is inapplicable where a utility is purchasing an existing collection system with customers connected thereto. This was a typical transaction and in spite of Ludington's protestations to the contrary, there was nothing illegal about it.

4. Everyone understood that the Settlement Agreement was not binding upon the Intervenors who did not sign it. Otherwise, there would have been no reason for a final hearing. However, Ludington's assertion that OPC could not sign the Settlement Agreement because the Intervenors who are residents of Buccaneer refused to sign it is without legal support. The Intervenors chose not to have OPC represent them and instead chose to represent themselves. They cannot have it both ways. Ludington apparently believes that he can represent himself and at the same time control how OPC handles the case.

There is nothing in the record to suggest that the homeowners were intimidated and coerced at the August 26, 1999 meeting and thus must be ignored by this Commission. In fact, the testimony at the final hearing points to the Intervenors as being the intimidators (Tr. 66-67).

The President and a number of Board Members testified at the final hearing and Ludington failed to pursue any questions

asserting the August 26, 1999 meeting was "rigged" or that residents were intimidated. Ludington is seeking to introduce this issue at this late date. He lost that opportunity and there is no basis for addressing that issue in a Motion for Reconsideration.

The purported quotes from the August 26, 1999 meeting are inappropriate during rehearing even if they were accurate, which we have no way of verifying in this proceeding. It would not be surprising if there were statements made at that meeting contrary to Ludington's position which he chose not to include in his Motion.

The timing of OPC signing the Settlement Agreement is irrelevant. OPC did not need the Association's approval. Ludington apparently believes that anything he disagrees with is illegal without any citations to statutes which make such actions illegal. Ludington also apparently sees a conspiracy in everything he does not like. How can there be collusion between NFMU and OPC with regard to NFMU's Motion to Strike Intervenors when OPC did not join in that motion, nor support it in any way?

5. It is interesting that Ludington argues that there is significance to the Association attempting to withdraw support for the Settlement Agreement. At the final hearing and before the Association sought to withdraw support for the Settlement Agree-

ment, Ludington argued that the Association did not have any authority to act on behalf of the residents with regard to this proceeding (Tr. 45-48). Now when it suits him, he embraces the position of the Association and its authority to act.

Ludington does not understand that merely because the Association sought to withdraw support for the Settlement Agreement, it does not mean that OPC was withdrawing its support. OPC has fully supported the Settlement Agreement during this entire proceeding. OPC has never attempted to withdraw from it. In fact, at the final hearing, Mr. Shreve stated:

> Commissioner, Mr. Friedman is correct. We signed the Settlement Agreement. Our name is still on there. We are not changing anything there. But I wanted to make you, Mr. Friedman and everyone also aware of the instructions or the change in instructions that I have had from that customer group. (Tr. 55).

Thus, the Association is only the signatory to the Settlement Agreement which attempted to withdraw. However, one cannot merely withdraw from a settlement agreement at its whim. The Association has never stated any legal basis for withdrawing from the Settlement Agreement; thus, the Settlement Agreement is still binding upon it. *Crown Ice Maching Leasing Company v. Senter Farms, Inc.*, 174 So.2d 614 (Fla. 2d DCA 1965).

Ludington believes that through his argument at the final hearing in opposition to the Settlement Agreement that he proved that OPC never obtained majority approval for the Settlement Agreement. Any statements Ludington made were argument and not testimony. Ludington was never a witness subject to cross examination by the other parties. His arguments are not evidence any more than an attorney's argument is evidence at a final hearing. *Sabina v. Dahlia Corporation*, 650 So.2d 96 (Fla. 2d DCA 1995).

6. Ludington, throughout this proceeding, has sought to create confusion by referencing different purported versions of the Settlement Agreement. There exists only one written version of the Settlement Agreement which was introduced into evidence at the final hearing (Ex. 3). Since the Intervenors complained because their names were on the Settlement Agreement although they did not agree to it, the parties have orally modified it to eliminate reference to the Intervenors. Since the only change which has been made to the Settlement Agreement is a technical one to eliminate as signatories those persons who did not agree to it, approval by the members of the Association was unnecessary.

7. Ludington's criticisms of the Staff Recommendation are unwarranted. Even if the errors alleged by Ludington are correct, they do not affect the substance of the recommendation.

a. There is only one written Settlement Agreement as discussed in paragraph 6 above, which was not dismissed or stricken despite Ludington's protestations to the contrary as discussed in paragraph 1 above. This is the "smoke screen" mentality which Ludington has exhibited throughout this proceeding instead of addressing substantive issues.

b. The record in this proceeding does not reflect the actual date that the connection was made to Buccaneer Estates and the statements made by Ludington are improper. Further, whether the connection was made on November 24, 1998 or September 30, 1998 has not bearing on the merits of this case.

c. This issue is addressed in NFMU's response to paragraph 1 above.

8. It is inappropriate for the Commission to consider the letter which Ludington attached to his Motion as Exhibit L-2 since it is not part of the record. See, *Gulf Utility Company, supra*. Further, whether OPC signed the Settlement Agreement before or after the homeowner's meeting is irrelevant. OPC did not have to

have the consent of the Association in order to enter into the Settlement Agreement.

9. (a) Since OPC entered into the Settlement Agreement, it has fully supported the Settlement Agreement. In fact, OPC's Post Hearing Statement starts out with the following sentence:

> Public Counsel fully supports the Settlement Agreement entered into with NFMU.

In addition, Mr. Shreve, at closing argument, reiterated OPC's full support of the Settlement Agreement. It is axiomatic that if OPC fully supported the Settlement Agreement that its position is that the Ludington proposal should be rejected since the Settlement Agreement and Ludington proposal are mutually exclusive options.

(b) Ludington has misunderstood the language in the Final Order as it relates to the imputation of the CIAC. The Final Order provides that the Commission does have the authority to impute CIAC for Buccaneer Estates for ratemaking purposes, which means that there would not be an increase in rates as a result of NFMU waiving the collection of the pass-through charges from the residents of Buccaneer Estates. Ludington simply does not understand this issue or he would not be complaining about it.

10. Ludington suggests that we discard the efforts of the last year and begin this process anew. Ludington was afforded his

rights to due process in the instant proceeding. He chose to represent himself and because he ignored procedural requirements which prohibited him from raising new issues, it is not sufficient reason to start this proceeding over. To do so would result in severe prejudice to NFMU which has been providing wastewater service to the residents of Buccaneer Estates for over a year without receiving any revenue from such service.

What is abundantly clear from the Motion for Reconsideration is that Mr. Ludington attempts to interject "facts" that are of questionable veracity as well as documents, that are not within the record. It is inappropriate for the Commission to consider such "facts" and documents. *Gulf Utility Company, supra.*

11. Mr. Ludington in his Motion has also requested oral argument. Pursuant to Rule 25-22.058(1), Florida Administrative Code, a request for oral argument shall be contained on a separate document and shall state with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it. The request for oral argument of Mr. Ludington fails both of these requirements.

WHEREFORE, NFMU requests the Motion for Reconsideration be denied, and that the request for oral argument be denied.

Respectfully submitted on this 28th day of December, 1999, by:

ROSE, SUNDSTROM & BENTLEY, LLP
2548 Blairstone Pines Drive
Tallahassee, Florida 32301
(850) 877 - 6555

MARTIN S. FRIEDMAN
For the Firm

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Motion for Reconsideration was forwarded via U.S. Mail to Steve Reilly, Esquire, Office Of Public Counsel, 111 West Madison Street, Suite 812, Tallahassee, FL 32301-1906, Jennifer Brubaker, Esquire, Florida Public Service Commission, Legal Division, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399-0850, Ronald Ludington, 509 Avanti Way, North Fort Myers, FL 33917, Donald Gill, 674 Brigantine Boulevard, North Fort Myers, FL 33917 and Joseph Devine, 688 Brigantine Boulevard, North Fort Myers, FL 33917 on this 28th day of December, 1999.

MARTIN S. FRIEDMAN

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