



Public Service Commission

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RECORDS AND REPORTING

DATE: JANUARY 20, 2000

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

FROM: DIVISION OF LEGAL SERVICES (BRUBAKER, CIBULA) *SMC*
DIVISION OF WATER AND WASTEWATER (MESSER, REDEMANN) *RS*

RE: DOCKET NO. 981781-SU - 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. *SMC*

AGENDA: 02/01/2000 - REGULAR AGENDA - RECOMMENDATION ON MOTIONS
FOR RECONSIDERATION OF POST-HEARING DECISION - FOR ISSUES
2-4, PARTICIPATION IS DEPENDENT UPON THE COMMISSION'S VOTE
ON ISSUE 1

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: ORAL ARGUMENT HAS BEEN REQUESTED

FILE NAME AND LOCATION: S:\PSC\LEG\WP\981781.RCM

CASE BACKGROUND

On December 1, 1998, North Fort Myers Utility, Inc. (NFMU or utility) filed an Application for Amendment to Certificate of Authorization to include the wastewater service area of Buccaneer Utility (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 our staff's 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 a notice to the Buccaneer customers which stated that utility service had been assigned to NFMU, that connection fees would be collected, and that effective

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December 1, 1998, the utility would begin billing for monthly service and the lot rent would decrease by a specific amount.

On December 18, 1998, the Commission received numerous customer 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 protest letters were filed on December 18, 1998, December 21, 1998, and December 21, 1998, respectively. On January 14, 1999, several customers filed letters requesting that the Office of Public Counsel (OPC) represent the Buccaneer residents in this matter. However, the Commission's records indicate that neither Messrs. Gill, Devine nor Ludington agreed to be represented by OPC or other counsel, nor did they file requests to be considered qualified representatives pursuant to Rule 28-106.106, Florida Administrative Code. Therefore, these three individuals were considered pro se litigants.

On December 21, 1998, 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, this matter was set for an administrative hearing on September 14 and 15, 1999.

A hearing was held on October 13, 1999, in North Fort Myers, Florida, and continued to November 16, 1999, in Tallahassee, Florida. By Order No. PSC-99-2444-AS-SU, issued December 14, 1999, the Commission accepted a proposed settlement offered by OPC and NFMU, approved the transfer of Buccaneer to NFMU, and amended NFMU's certificate of authorization to include Buccaneer Estates.

On December 22, 1999, Mr. Gill and Mr. Devine timely filed a joint Motion to Reconsider and Rehear Order No. PSC-99-2444-AS-SU. On December 27, 1999, Mr. Ludington's Motion For Reconsideration of Order No. PSC-99-2444-AS-SU was timely filed. Both of these motions also included requests for oral argument. Additionally, the Commission received several letters from customers, who are not parties to this proceeding, requesting that the Commission reconsider its decision.

On December 28, 1999, NFMU timely filed its responses to Mr. Gill and Mr. Devine's motion and Mr. Ludington's motion. On December 29, 1999, OPC timely filed its responses to these motions.

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This recommendation addresses whether the Commission should allow Messrs. Gill, Devine and Ludington to present oral arguments and whether the Commission should grant Mr. Gill and Mr. Devine's joint Motion to Reconsider and Rehear and Mr. Ludington's Motion For Reconsideration.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant the requests made by Mr. Ludington and Messrs. Gill and Devine for oral argument on their respective Motions for Reconsideration?

RECOMMENDATION: No. The requests for oral argument on the respective motions for reconsideration should be denied.
(BRUBAKER, CIBULA)

STAFF ANALYSIS: As stated in the case background, Mr. Ludington's Motion for Reconsideration was filed on December 27, 1999. In his motion, Mr. Ludington stated that he "also advises the PSC that he would like to make oral arguments, if possible, at the next conference held to discuss this matter." Similarly, in the motion for reconsideration filed by Messrs. Gill and Devine on December 22, 1999, the movants make a request that the Commission "hear oral arguments on the merits of this matter at a date the Commission may deem proper."

Rule 25-22.058, Florida Administrative Code, permits the Commission to grant oral argument, provided, among other things, that the request state "with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it." Messrs Gill, Devine and Ludington fail to give any explanation as to why oral argument would assist the Commission in evaluating the issues addressed in their respective motions. Furthermore, staff believes that the motions contain sufficient argument for the Commission to render a fair and complete evaluation of the merits without oral argument.

Therefore, staff recommends that the Commission deny the requests made by Mr. Ludington and Messrs. Gill and Devine for oral argument on their respective motions for reconsideration.

ISSUE 2: Should the Commission grant Mr. Ludington's Motion for Reconsideration?

RECOMMENDATION: Mr. Ludington's Motion for Reconsideration of Order No. PSC-99-2444-AS-SU should be granted in part and denied in part. The Motion should be granted in part, and Order No. PSC-99-2444-AS-SU should be amended to clarify that the Motion for Dismissal of Settlement Agreement filed by Mr. Ludington was denied by virtue of the fact that the Commission approved the NFMU/OPC Agreement. The Commission found by Order No. PSC-99-2444-AS-SU that the NFMU/OPC Agreement provided a fair and reasonable resolution of the matter and was persuaded by the fact that the utility and the representatives of the citizens jointly endorsed the proposed offer of settlement. Mr. Ludington's Motion for Reconsideration should otherwise be denied. (BRUBAKER, CIBULA)

STAFF ANALYSIS: As stated in the case background, Mr. Ludington's Motion for Reconsideration of Order No. PSC-99-2444-AS-SU was timely filed on December 27, 1999. On December 28, 1999, NFMU timely filed its response to Mr. Ludington's motion for reconsideration. On December 29, 1999, OPC timely filed its response to the motion. Mr. Ludington's motion for reconsideration and the responses are discussed in greater detail below.

Mr. Ludington's Motion for Reconsideration

In support of his motion for reconsideration, Mr. Ludington alleges that no response was ever filed with respect to his September 7, 1999 motion for dismissal of the OPC/NFMU settlement agreement, and that the motion was never ruled upon. Mr. Ludington argues that the settlement agreement was therefore dismissed as the motion to strike in effect went unopposed. Mr. Ludington also alleges that staff has incorrectly represented the level of support by the Buccaneer residents for the NFMU/OPC settlement agreement, and that a great many of the homeowners supported Mr. Ludington's proposed settlement agreement instead. Mr. Ludington states that staff refers to Mr. Ludington several times (presumably in Order No. PSC-99-2444-AS-SU) as "customer Ludington," which is offensive in that Mr. Ludington does not consider himself a customer of NFMU. Mr. Ludington also argues that the signatures of Messrs. Gill, Devine and Ludington were required to make the OPC/NFMU settlement agreement a "completed settlement," and that as these signatures were not obtained, the OPC/NFMU proposal therefore fails. Mr. Ludington also alleges that the NFMU/OPC proposal never properly obtained the approval of a majority of the homeowners, and thus the agreement was never bonafide. Mr. Ludington also states that

"staff still insists that this settlement agreement was modified by staff recommendations made on September 7th, but the final order clearly shows that it was the earlier version, as filed on September 2, 1999 which was ordered approved." Finally, Mr. Ludington also states that he understands Order No. PSC-99-2444-AS-SU to allow NFMU to come back to the Commission in the future and ask the PSC for a change in rates to cover a "CIAC shortfall."

Attached to Mr. Ludington's Motion for Reconsideration are three exhibits marked L-1, L-2 and L-3. The exhibits consist of various letters and a signature page of the executed agreement. Staff notes that the various letters, Exhibits L-1 and L-2, are not a part of the record to this proceeding. However, Exhibit L-3, the signature page of the executed agreement, is contained in the record within Exhibit No. 3.

OPC's Response to Mr. Ludington's Motion for Reconsideration

In response to Mr. Ludington's Motion for Reconsideration, OPC states that Prehearing Order No. PSC-99-1786-PHO-SU, issued September 13, 1999, clearly deferred a ruling on the Motion to Dismiss Settlement Agreement to the evidentiary hearing which was ultimately scheduled on October 13, 1999. At that hearing, the Commission again deferred ruling on the motion to dismiss, finding instead that evidence should be presented on both proposed settlement agreements. After considering the evidence, the parties' closing arguments and staff's recommendation, the Commission rendered its approval of the NFMU/OPC proposal, thereby effectively rejecting the motion to dismiss.

With respect to Mr. Ludington's allegations that staff incorrectly represented the homeowners' support for the NFMU/OPC proposal, OPC notes that no evidence supporting such an allegation has ever been furnished to the Commission or subjected to critical review or cross-examination. Further, OPC states that since it executed the settlement agreement, OPC would have supported the proposal even if the homeowners' association had taken a contrary view, because OPC continues to believe that the proposal offers the best legally permissible resolution of the matter. OPC further notes that when the three customer intervenors refused to sign the agreement, it became a proposal -- an offer of settlement -- endorsed by OPC and NFMU, and that the intervenors' signatures were not necessary to present the proposal for the Commission's consideration. OPC also clarifies that the only "modification" made to the NFMU/OPC proposal was to remove references and signature blanks of the three intervenors, since they refused to execute the agreement.

Finally, OPC states that the allegation that Order No. PSC-99-2444-AS-SU permits NFMU to later request a change in rates to cover a "CIAC shortfall" is an example of Mr. Ludington misunderstanding what he reads. What the Order actually sets forth is that the Commission reserves the right to impute any uncollected CIAC in a future rate proceeding, which OPC states would be to the utility's detriment, and not that of the customers.

NFMU's Response to Mr. Ludington's Motion for Reconsideration

In its response, NFMU notes that the purpose of a motion for reconsideration is to bring to the Commission's attention some point of fact or law which it overlooked or failed to consider when it rendered its decision, and not to merely reargue a case because the losing party disagrees with the decision. Diamond Cab Co. of Miami v. King, 146 So. 2d 889 (Fla. 1962). Furthermore, a motion for reconsideration should be based upon specific factual matters set forth in the record. Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974).

NFMU argues that there is no requirement that a response be filed to a motion, and that Mr. Ludington's motion to dismiss is not automatically granted merely because no response was filed to it. Further, NFMU states that the motion was effectively denied when the Commission adopted the NFMU/OPC proposal.

With respect to the proposal, and whether it had the approval of the homeowners' association, and whether such approval was properly obtained, NFMU argues that such arguments are irrelevant, because no legal basis has been stated which would allow a withdrawal from the settlement agreement. Crown Ice Machine Company v. Senter Farms, Inc., 174 So. 2d 614 (Fla. 2d DCA 1965).

NFMU states that it was patently clear that the NFMU/OPC proposal was not legally binding upon the intervenors who did not sign it. The proposal became effective only upon its approval by the Commission pursuant to Order No. PSC-99-2444-AS-SU. Also, the only modification made to the agreement was one made orally at the prehearing to eliminate references to the customer intervenors, who did not wish to be signatories to the proposal.

Further, NFMU states that there is nothing in the record which indicates that the homeowners were intimidated or coerced into approving the OPC/NFMU approval. The homeowners' association president and board members testified at the final hearing and Mr. Ludington failed to provide any examination or evidence that such improper conduct took place. NFMU notes that certain quotes

contained in Mr. Ludington's Motion for Reconsideration, purportedly from a prior homeowners' association meeting, are not in the record and cannot properly be considered. NFMU also notes that statements made by Mr. Ludington that approval of the homeowners, or the executory signature of OPC, was never properly obtained with regard to the NFMU/OPC proposal is merely argument, and has no basis in testimony or any other evidence.

Staff's Analysis

Rule 25-22.060(1)(a), 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. NFMU correctly notes that the standard for determining whether reconsideration is appropriate is set forth in Diamond Cab Co. of Miami v. King, 146 So. 2d 889, 891 (Fla. 1962), which states that the purpose of a petition for reconsideration is to bring to an agency's attention a point of law or fact which it overlooked or failed to consider when it rendered its order. In Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974), the Court found that the granting of a petition for reconsideration should be based upon specific factual matters set forth in the record and susceptible to review. Staff has applied this rationale in its review of Mr. Ludington's motion, and believes that the authority cited by NFMU is controlling and dispositive.

There appears to be merit to Mr. Ludington's argument that his motion to dismiss the NFMU/OPC settlement agreement was never explicitly ruled upon by the Commission. OPC and NFMU correctly note in their respective responses that a ruling on the motion was deferred at the Prehearing Conference, and again deferred at the October 13th hearing in order to allow the parties to present evidence and conduct cross-examinations on the agreements proposed by both Mr. Ludington and by OPC and NFMU. Staff agrees that the motion was effectively denied when the Commission approved the NFMU/OPC proposal. However, staff agrees that no explicit ruling was made on the motion. If the lack of an explicit ruling constitutes error, staff believes the error to be harmless, in that, under the circumstances, no party appears to have been legally prejudiced by not having had an explicit ruling on the motion.

Staff recommends that Mr. Ludington's Motion for Reconsideration be granted in part, for the limited purpose of clarifying that the Motion to Dismiss Settlement Agreement filed by Mr. Ludington was denied by virtue of the fact that the Commission approved the NFMU/OPC Agreement. The Commission approved the

NFMU/OPC Agreement because it found that the NFMU/OPC Agreement provided a fair and reasonable resolution of the matter and was persuaded by the fact that the utility and representative of the citizens jointly endorsed the proposed offer of settlement. Mr. Ludington's proposed settlement agreement was premised on the idea of a bulk wastewater agreement between NFMU and the park owner, and there is no such agreement in the record which could be used by the Commission to base its decision in the matter.

With respect to the remainder of Mr. Ludington's Motion for Reconsideration, staff is persuaded by the arguments set forth in NFMU and OPC's responses (those arguments are not repeated here, as they are set forth above). Staff notes that the references to Mr. Ludington as "customer Ludington" are not intended to be offensive or prejudicial, nor were they intended to confer status as an NFMU customer. Clearly, Mr. Ludington is a customer -- of Buccaneer Estates -- and the designation as "customer Ludington" simply refers to that status.

Under the Administrative Procedures Act, it simply is not permitted for an agency to reconsider an Order based on extra-record material. Additionally, Section 120.57(1)(b), Florida Statutes, mandates that all parties have an "opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination, and submit rebuttal evidence." Exhibits L-1 and L-2 of Mr. Ludington's Motion, as well as a substantive portion of the allegations contained in the motion itself, are extra-record, that is, outside of the record of this case. These documents and arguments, in this context, would deny the other parties to this proceeding these rights. To the extent Mr. Ludington raises matters which are not outside of the record, staff believes that they largely consist of reargument, and thus are not an appropriate basis upon which relief can be granted. Finally, Mr. Ludington's motion fails to set forth any point of fact or law which the Commission overlooked or failed to consider in making its decision. Thus, staff recommends that the Commission deny Mr. Ludington's Motion for Reconsideration, except for the limited purpose of clarifying Order No. PSC-99-2444-AS-SU, as discussed above.

ISSUE 3: Should the Commission grant Mr. Gill and Mr. Devine's joint Motion to Reconsider and Rehear?

RECOMMENDATION: No. The Commission should deny Mr. Gill and Mr. Devine's joint Motion to Reconsider and Rehear. (CIBULA, BRUBAKER)

STAFF ANALYSIS: As stated in the case background, Mr. Gill and Mr. Devine timely filed their joint Motion to Reconsider and Rehear Order No. PSC-99-2444-AS-SU on December 22, 1999. On December 28, 1999, NFMU timely filed its response to Mr. Gill and Mr. Devine's joint motion for reconsideration. Also, on December 29, 1999, OPC timely filed its response to this motion. Mr. Gill and Mr. Devine's Motion for Reconsideration and the responses are discussed in greater detail below.

Mr. Gill and Mr. Devine's Motion to Reconsider and Rehear

In support of their Motion for Reconsideration, Mr. Gill and Mr. Devine allege that the attorney who authored the Settlement Agreement entered into by OPC and NFMU had a pecuniary interest in the outcome of this matter because he was representing the Buccaneer Estates Homeowners' Association in circuit court. Further, they state that the special meeting of the Buccaneer Estates residents was improperly called by the Board of the Homeowners' Association, and citing to excerpts of a transcript to a Homeowners' Association meeting, they contend that the Settlement Agreement was not properly ratified by the Buccaneer Estates residents. Also, they assert that the Board of the Homeowners' Association, OPC, Commission staff, and NFMU mislead the Commission as to the will of the Buccaneer Estates residents when they stated that the residents were in favor of the Settlement Agreement entered into by OPC and NFMU. Moreover, they state that because they did not stipulate to the Settlement Agreement, it should be considered null and void. Finally, they assert that they were "completely surprised" when OPC changed its position at the November 16, 1999, hearing in favor of the Settlement Agreement and that the whole administrative process has been "laced with fraud, deception and surprise."

NFMU's Response to Mr. Gill and Mr. Devine's Motion

In its response to Mr. Gill and Mr. Devine's motion, NFMU cites to In Re: Investigation of Rates of Gulf Utility Company, Order No. PSC-97-1544-FOF-WS, issued December 9, 1997, in Dockets Nos. 960234-WS and 960329-WS, and Diamond Cab Company of Miami v. King, 146 So. 2d 889 (Fla. 1962), for the proposition that 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. Further, NFMU cites to Stewart Bonded Warehouse v. Bevis, 294 So. 2d 315 (Fla. 1974), which held that a motion for reconsideration should be based upon specific factual matters set forth in the record, and NFMU states that there is no evidence in the record to support the statements made by Mr. Gill and Mr. Devine in their motion with regard to: who prepared the Settlement Agreement; that the Settlement Agreement was not properly ratified; what the "will of the residents" was, other than the President of the Association testifying that over 300 people voted to accept the Settlement Agreement; or any references to excerpts of Buccaneer Estates' Homeowners' Association meetings. Moreover, NFMU contends that OPC never withdrew its support for the Settlement Agreement and that there is no legal basis for OPC to withdraw from the Settlement Agreement pursuant to Crown Ice Machine Leasing Company v. Senter Farms, Inc., 174 So. 2d 614 (Fla. 2d DCA 1965); therefore, all of Mr. Gill and Mr. Devine's allegations that they were surprised or prejudiced by OPC's change in position in support of the Settlement Agreement are unfounded.

OPC's Response to Mr. Gill and Mr. Devine's Motion

OPC also timely filed a response to Mr. Gill and Mr. Devine's motion, in which it states that its response is "to correct many of the inaccurate statements" made by Mr. Gill and Mr. Devine in their motion. OPC asserts that Mr. Gill and Mr. Devine's motion incorrectly alleges that Mr. Burandt, attorney for the Homeowners' Association, authored the Settlement Agreement, and OPC further states that it knows of no pecuniary interest Mr. Burandt would have in the outcome of this matter before the Commission. OPC also states that, as for the meeting of the Buccaneer Estates' residents in which a vote was taken to determine the support of the residents for the Settlement Agreement, it was "only one of many factors which prompted OPC to execute the Settlement Agreement" and that the primary reason that OPC entered into the agreement was that "it offered the best legally permissible result for the customers." Moreover, OPC contends that it never made any representations that the Settlement Agreement was the will of the residents, although the only official vote taken by the residents concerning the agreement indicated overwhelming support for the agreement. Also, in regard to Mr. Gill and Mr. Devine's allegation that OPC failed to timely notify them of OPC's change in position with respect to support for the Settlement Agreement, OPC states that it never

withdrew its support of the agreement despite the fact that the Board of the Homeowner's Association requested that OPC withdraw its support of the agreement.

Staff's Analysis

Staff agrees with the standard for reconsideration set forth in the utility's response.

Mr. Gill and Mr. Devine's allegation that the attorney who they contend authored the Settlement Agreement had a pecuniary interest in the outcome of the proceeding is not appropriate for a motion for reconsideration pursuant to Bevis because there is nothing in the record pertaining to this allegation. Likewise, their reliance on excerpts from a Buccaneer Homeowner's Association meeting in support of their allegation that the Settlement Agreement was not properly ratified is also improper under Bevis because the transcript to the Homeowner's Association meeting was not a part of the record in this case. Further, their statement that the Settlement Agreement is null and void because they did not agree to it is a reargument of their case, which is inappropriate for a motion for reconsideration pursuant to Diamond Cab.

As for Mr. Gill and Mr. Devine's assertion that they were prejudiced by OPC's alleged change in position, there is only evidence in the record showing that OPC supported the Settlement Agreement, even after the Board of the Homeowner's Association asked OPC to withdraw its support of the agreement. Therefore, there are no facts in the record to support this allegation, so it is inappropriate for a motion for reconsideration.

Finally, in regard to Mr. Gill and Mr. Devine's statement that OPC, NFMU, and Commission staff mislead the Commission about the will of the residents, this argument was one of the primary contentions in their case. Thus, it is a reargument of their case, which is not the purpose of a motion for reconsideration.

Staff believes that Mr. Gill and Mr. Devine's motion fails to bring to the Commission's attention a point of fact or law, set forth in the record, which was overlooked by the Commission or which the Commission failed to consider when it rendered its order. Thus, staff recommends that the Commission deny Mr. Gill and Mr. Devine's Motion to Reconsider and Rehear.

DOCKET NOS. 981781-SU
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ISSUE 4: Should this docket be closed?

RECOMMENDATION: Yes. If the Commission approves staff's recommendation in Issues 2 and 3, this docket should be closed.
(BRUBAKER, CIBULA)

STAFF ANALYSIS: If the Commission approves staff's recommendation, no further action will be necessary, and the docket should be closed.