



Public Service Commission

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-M-E-M-O-R-A-N-D-U-M **RECEIVED**

SEP 14 2000

DATE: SEPTEMBER 14, 2000

FPSC - Records/Reporting

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

FROM: DIVISION OF REGULATORY OVERSIGHT (REHWINKEL, REDEMANN)
DIVISION OF LEGAL SERVICES (CHRISTENSEN)

RE: DOCKET NO. 991494-SU - APPLICATION FOR AUTHORITY TO TRANSFER THE SEWER FACILITIES OF FOREST PARK CERTIFICATE NO. 175-S IN LEE COUNTY, FLORIDA TO NORTH FT. MYERS CERTIFICATE NO. 247-S; CANCELLATION OF CERTIFICATE NO. 175-S AND AMENDMENT OF CERTIFICATE NO. 247-S

COUNTY: LEE

AGENDA: 09/26/00 - REGULAR AGENDA - PROPOSED AGENCY ACTION FOR ISSUES 3, 4 AND 5 - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\WAW\WP\991494SU.RCM

CASE BACKGROUND

Forest Park is a mobile home subdivision in Lee County which has been in existence since the early 1970's. The subdivision receives water service from Lee County. Vista Villages, Inc. provided wastewater service to the Forest Park subdivision from its inception until 1990. Vista Villages, Inc. was granted Certificate No. 175-S pursuant to Order No. 7010, issued November 19, 1975, in Docket No. 750592-S. In 1990, Forest Park Property Owners Association (Forest Park) obtained ownership of the utility. Certificate No. 175-S was transferred from Vista Villages, Inc. to Forest Park by Order No. PSC-92-0193-FOF-SU, issued April 13, 1992, in Docket No. 910467-SU.

DOCUMENT NO.
11498-00
9-14-00

By Order No. PSC-92-0588-FOF-SU, issued June 30, 1992, in Docket No. 920273-SU, an amendment of territory application, and Docket No. 920379-SU, a limited proceeding application, the Commission granted temporary authority to North Fort Myers Utility, Inc. (NFMU) to charge its rates and charges to the Forest Park customers. While this Order amended NFMU's wastewater certificate to include the additional territory of Forest Park and suspended the rates and charges for Forest Park, the Order did not cancel Forest Park's certificate. The Order states that, after numerous violations, Forest Park entered into a consent order with the Department of Environmental Protection (DEP) to interconnect with NFMU. The interconnection was completed in June 1992 and the wastewater treatment plant was dismantled.

By Order No. PSC-92-1357-FOF-SU, issued November 23, 1992, in the same dockets above, Docket No. 920273-SU and Docket No. 920379-SU, the Commission approved NFMU's application for a limited proceeding and granted the request to charge the approved rates and charges for NFMU to the Forest Park customers. The Order also denied NFMU's request to cancel Certificate 175-S issued to Forest Park. According to the order, Forest Park retained ownership and maintenance responsibilities of the collection lines.

On October 4, 1999, Forest Park filed an application for authority to transfer its wastewater facilities (collection lines) and Certificate No. 175-S to NFMU. Forest Park closed on the transfer of its facilities to NFMU on August 31, 1999, prior to obtaining Commission approval.

This recommendation addresses approval of the transfer of wastewater facilities and Certificate No. 175-S from Forest Park to NFMU. The apparent violation of Section 367.071, Florida Statutes, by Forest Park for failure to obtain Commission approval prior to transfer or make the transfer contingent upon Commission approval in the sales contract is addressed in Issue 1.

Forest Park's 1999 annual report lists annual revenues of \$8,854. The annual report also includes annual operating expenses of \$11,375 resulting in a net operating loss of \$2,521.

DISCUSSION OF ISSUES

ISSUE 1: Should Forest Park be ordered to show cause, in writing within 21 days, why it should not be fined for transferring its facilities to NFMU prior to obtaining Commission approval in apparent violation of Section 367.071, Florida Statutes?

RECOMMENDATION: No. A show cause proceeding should not be initiated. (CHRISTENSEN)

STAFF ANALYSIS: As stated in the case background, Forest Park transferred its facilities to NFMU, on August 31, 1999, prior to obtaining Commission approval and without making the transfer contingent upon Commission approval. Section 367.071(1), Florida Statutes, states that:

No utility shall sell, assign, or transfer its certificate of authorization, facilities or any portion thereof, or majority organizational control without determination and approval of the commission that the proposed sale, assignment, or transfer is in the public interest... However, a sale, assignment, or transfer of its certificate of authorization, facilities or any portion thereof, or majority organizational control may occur prior to commission approval if the contract for sale, assignment, or transfer is made contingent upon commission approval.

As stated previously, Forest Park entered into a Wastewater Agreement with NFMU on March 3, 1992, whereby NFMU was to provide wastewater service to Forest Park. On August 31, 1999, Forest Park and NFMU entered into an Amendment to the Wastewater Agreement (Amendment) which transferred Forest Park's wastewater facilities and certificate to NFMU. However, the Amendment does not make the transfer contingent upon Commission approval.

In the Amendment, the parties ratified and confirmed the provisions of the Wastewater Agreement which did not require change to effectuate the transfer. The Wastewater Agreement had a provision which made it effective upon approval from the necessary governmental authorities. However, this provision would have required a change that indicated it applied to the transfer as well as to the original Wastewater Agreement. Staff believes that in order to comply with Section 367.071(1), Florida Statutes, the Amendment should have contained a provision that stated that the transfer is contingent upon Commission approval. Therefore, staff

believes that the transfer was made prior to Commission approval and in apparent violation of the statute.

Section 367.161(1), Florida Statutes, authorizes the Commission to assess a penalty of not more than \$5,000 for each offense, if a utility is found to have knowingly refused to comply with, or to have willfully violated any provision of Chapter 367, Florida Statutes. In closing on the transfer of its facilities prior to Commission approval and without making the transfer contingent upon Commission approval, the utility's act was "willful" in the meaning and intent of Section 367.161, Florida Statutes. In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, titled In Re: Investigation Into The Proper Application of Rule 25-14.003, Florida Administrative Code, Relating To Tax Savings Refund For 1988 and 1989 For GTE Florida, Inc., the Commission having found that the company had not intended to violate the rule, nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "[i]n our view, 'willful' implies an intent to do an act, and this is distinct from an intent to violate a statute or rule." Id. at 6. Additionally, "[i]t is a common maxim, familiar to all minds that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833).

Forest Park's transfer of its facilities to NFMU prior to Commission approval and without making the transfer contingent upon Commission approval is an apparent violation of Section 367.071(1), Florida Statutes. However, there are mitigating circumstances in the instant case. The Wastewater Agreement contained a provision which made the transfer effective upon approval from the necessary governmental authority. Forest Park's attorney stated that the parties believed at the time the Amendment was executed that it contained an "unwind" provision. However, Forest Park's attorney acknowledges that upon further review the Amendment did not contain an "unwind" provision. In a letter dated September 5, 2000, the parties indicated that the transfer was not intended to and will not be consummated without specific Commission approval.

Therefore, staff does not believe that the apparent violation of Section 367.071, Florida Statutes, rises in these circumstances to the level which warrants the initiation of a show cause proceeding. Therefore, staff recommends that the Commission not order Forest Park to show cause within 21 days why it should not be fined for its failure to obtain Commission approval prior to transferring its facilities or making the transfer contingent upon Commission approval.

ISSUE 2: Should the transfer of wastewater facilities of Forest Park to NFMU be approved and Certificate 175-S canceled?

RECOMMENDATION: Yes, the transfer of wastewater facilities of Forest Park to NFMU should be approved and Certificate 175-S held by Forest Park should be canceled. (REHWINKEL, REDEMANN)

STAFF ANALYSIS: As stated in the case background, after numerous violations, Forest Park entered into a consent agreement with DEP to interconnect with NFMU. Pursuant to Order No. PSC 92-0588-FOF-SU, issued June 30, 1992, while the wastewater treatment plant was dismantled and NFMU began charging Forest Park's customers its rates and charges, Forest Park retained ownership and maintenance responsibilities of the collection lines. It is through the immediate proceeding that Forest Park and NFMU are proposing to transfer the collection lines and cancel Forest Park's certificate.

Forest Park applied for a transfer of its wastewater facilities in Lee County to NFMU and cancellation of Wastewater Certificate No. 175-S on October 4, 1999. As discussed in Issue 1, the parties closed on the transfer on August 31, 1999. Except as discussed in Issue 1, the application is in compliance with Section 367.071, Florida Statutes, and other pertinent statutes and administrative rules concerning an application for transfer. The application contains a check in the amount of \$750, which is the correct filing fee pursuant to Rule 25-30.020, Florida Administrative Code.

Subsequent to filing the application, Forest Park provided a perpetual easement as required by Rule 25-30.037(2)(q), Florida Administrative Code. Since Forest Park retained ownership of only the collection system, staff's concern is that NFMU has "continued use of the land," specifically, the land associated with the collection system, as provided by Rule 25-30.037(2)(q), Florida Administrative Code. The perpetual easement meets the requirement and staff's concern.

In addition, the application contains proof of compliance with the noticing provisions set forth in Rule 25-30.030, Florida Administrative Code. No objections to the application were received, and the time for the filing of such objections has expired. A description of the territory served by the utility is appended to this memorandum as Attachment A. The service area has been verified as the service area granted to Forest Park initially by Order No. 7010, issued November 19, 1975, in Docket No. 750592-S.

With regard to the purchaser's technical ability, NFMU has indicated that it will maintain and operate the system in

compliance with the appropriate laws and rules. NFMU is already serving the Forest Park customers and has been serving these customers since the interconnection in June 1992. Further, NFMU was originally organized in 1977 to provide central sewer service to Old Bridge Park, a mobile home community. Since that time, the company has expanded its service area to include a large portion of the unincorporated area north of the Caloosahatchee River. Presently, NFMU serves approximately 6,682 wastewater customers.

In addition to over 20 years of experience in operating a wastewater utility, NFMU has the financial resources to ensure consistent compliance with environmental regulations. NFMU is a wholly-owned subsidiary of Old Bridge Park Corporation. Regarding the financial ability of NFMU, staff has reviewed the utility's 1999 Annual Report along with three prior annual reports on file with the Commission. While the utility reported operating revenues in 1999 of \$2,139,446 and operating expenses of \$2,265,992 resulting in an operating loss of \$126,546, for the years of 1996, 1997, and 1998, the utility experienced operating incomes of \$219,571, \$446,362, and \$326,436, respectively.

In addition to staff's analysis of the utility's annual reports, pursuant to Order No. PSC-99-2444-AS-SU, issued December 14, 1999, in Docket No. 981781-SU, the Commission found that the utility had the financial ability to provide wastewater service to Buccaneer Estates. According to that Order, "While some questions were raised with respect to NFMU's finances, we believe that nothing was identified which outweighed the evidence presented as to NFMU's overall financial ability to provide service." Order No. PSC-99-2444-SU at page 11. After reviewing the Commission's findings in that case, along with our analysis of the utility's prior annual reports, for purposes of this docket, staff believes that NFMU has the financial ability to maintain compliance with environmental regulations and to continue to provide service to the Forest Park subdivision.

The application contains a copy of the Amendment to Wastewater Agreement which includes the purchase price, terms of payment, a list of the assets purchased and liabilities assumed and not assumed. Based on the application, there are no guaranteed revenue contracts, developer agreements, customer deposits, customer advances, debt of the utility, or leases that must be disposed of in association with the transfer of the utility.

According to our records, Forest Park is current with payment of its regulatory assessment fees through December 1999 and has filed an annual report for 1999 and all prior years. Also, according to the application and conversations with the parties, Forest Park will remain liable for any outstanding regulatory assessment fees, fines, or refunds owed until the transfer is

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final. It is important to clarify that the transfer will become final upon the Commission vote.

Therefore, if the Commission approves staff's recommendation, Forest Park will be responsible for the regulatory assessment fees and the annual report information through September 30, 2000. Both utilities are current with regulatory assessment fees and annual reports for 1999.

Based on the above, staff recommends that the transfer of wastewater facilities of Forest Park to NFMU should be approved and Certificate 175-S held by Forest Park should be canceled. Certificate No. 247-S held by NFMU was amended to include Forest Park's service territory pursuant to Order No. PSC-92-0588-FOF-SU, issued June 30, 1992. Therefore, no amendment is necessary.

***North Fort Myers Utility, Inc.

Forest Park Property Owners Association / Vista Village, Inc.

Order No. 7010

In Section 36, Township 43 South, Range 24 East, in Lee County, Florida.

Beginning at the Northwest corner of said Section 36; run thence South 89 degrees 46 minutes 50 seconds East, along the North line of said Section 36 and the center line of a roadway easement 50 feet wide, 25 feet either side of said centerline as declared by C.C.M. Book 5 at page 661 of the public records of Lee County, Florida, for 1650.00 feet to the Northeast corner of Lot 120, Block C of Forest Park Mobile Home Subdivision; thence South 0 degrees 19 minutes 40 seconds East, 132.00 feet; thence South 89 degrees 46 minutes 50 seconds East, 330.00 feet; thence North 0 degrees 19 minutes 40 seconds West, 132.00 feet to the Northwest corner of Lot 19, Block A, Sherwood Forest Mobile Home Subdivision; thence South 89 degrees 46 minutes 48 seconds East, 592.67 feet to the Northeast corner of the said Sherwood Forest Mobile Home Subdivision, said point also being on the West boundary of Hart Road; thence South 2 degrees 43 minutes 18 seconds East, 660 feet more or less along said West boundary of Hart Road to the intersection with the centerline of Forest Park Drive; thence North 89 degrees 46 minutes 48 seconds West, 294 feet more or less along the said centerline of Forest Park Drive to the intersection with the Northerly extension of the East boundary of Block B, Sherwood Forest Mobile Home Subdivision; thence South 0 degrees 19 minutes 36 seconds, 660 feet more or less along said East boundary of Block B to the Southeast corner of said Block B; thence North 89 degrees 47 minutes 24 seconds West, 2310 feet to the Southwest corner of Block D, Forest Mobile Home Subdivision, said point also being on the West boundary of said Section 36; thence North 0 degrees 19 minutes 36 seconds, 1319.72 feet along said West boundary to the POINT OF BEGINNING.

*** The composite North Fort Myers Utility, Inc. certificated area currently reflects the area described above, pursuant to Order No. PSC-92-0588-FOF-SU, issued June 30, 1992.

ISSUE 3: What is the rate base of Forest Park at the time of transfer?

RECOMMENDATION: The rate base of Forest Park, which for transfer purposes reflects the net book value, is \$4,973 as of December 31, 1999. (REHWINKEL)

STAFF ANALYSIS: According to the application, and based on our records, rate base was last established by this Commission in Docket No. 910467-SU, a transfer application. According to Order No. PSC-92-0193-FOF-SU, issued on April 13, 1992 in that docket, rate base was \$23,168 as of November 7, 1990.

Staff conducted an audit of the utility's books and records to determine rate base at the time of transfer. The audit reveals that the utility correctly recorded plant and contributions-in-aid-of-construction (CIAC) based on the above-referenced Order. However, in 1992, the company wrote off the wastewater treatment plant when it interconnected with NFMU.

According to the audit, Forest Park "wrote off all but \$29,663 of plant" and all of the CIAC. Based on prior audit workpapers supporting the above-referenced Order establishing rate base, the original cost of the collection system should be \$147,862. Therefore, staff is recommending an adjustment in the amount of \$118,229 to reflect the appropriate amount of utility plant-in-service associated with the collection system. Also, staff has calculated the appropriate associated accumulated depreciation in the amount of \$94,365. The utility recorded accumulated depreciation in the amount of \$15,366. Therefore, staff has adjusted this amount by \$78,999.

As stated earlier, the utility recorded a \$0 balance for CIAC. The audit revealed that a breakdown could not be found in prior audit workpapers for the original CIAC balance of \$199,552 which was established by Order No. 8275, issued April 19, 1978, in Docket No. 770688-S. The audit states that the original CIAC balance of \$199,552 was recorded before many customers were hooked up. The audit further states that no tap in fees were included in the utility's tariff. Therefore, the auditor concluded that most of the CIAC balance related to contributed plant. The auditor calculated the CIAC balance which would be related to the collection system and the associated accumulated amortization of CIAC. The CIAC balance calculated per the audit is \$134,116 and the associated accumulated amortization is \$85,592. Staff agrees with this calculation and has adjusted the utility's balance

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accordingly. Staff is recommending a CIAC balance of \$134,116 and accumulated amortization of CIAC balance of \$85,592.

Staff's calculation of rate base is shown on Schedule No. 1. Staff recommends that rate base for Forest Park be established as \$4,973. This rate base calculation is used solely to establish the net book value of the property being purchased and does not include the normal ratemaking adjustments of working capital calculations and used and useful adjustments.

FOREST PARK PROPERTY OWNER'S ASSOCIATION INC.

SCHEDULE OF WASTEWATER RATE BASE

As of December 31, 1999

<u>DESCRIPTION</u>	<u>BALANCE PER UTILITY</u>	<u>STAFF ADJUSTMENTS</u>	<u>BALANCE PER STAFF</u>
Utility Plant in Service	\$ 29,633	\$ 118,229	\$ 147,862
Accumulated Depreciation	\$ (15,366)	(78,999)	\$ (94,365)
Contributions-in-aid-of-Construction	\$ 0	(134,116)	\$ (134,116)
CIAC Amortization	\$ <u>0</u>	<u>85,592</u>	<u>\$ 85,592</u>
TOTAL	\$ 14,267	\$ (9,294)	\$ 4,973

ISSUE 4: Should an acquisition adjustment be approved?

RECOMMENDATION: No. An acquisition adjustment should not be included in the calculation of rate base for transfer purposes. (REHWINKEL)

STAFF ANALYSIS: An acquisition adjustment results when the purchase price differs from the original cost calculation adjusted to the time of the acquisition. The acquisition adjustment resulting from the transfer of Forest Park would be calculated as follows:

Purchase Price:	\$ 10.00
Staff Calculated Rate Base:	\$ 4,973.47
Negative Acquisition Adjustment:	\$ 4,963.47

In the absence of extraordinary circumstances, it has been Commission practice that a subsequent purchase of a utility system at a premium or discount should not affect the rate base calculation. See Order No. PSC-00-0682-FOF-WU, issued April 12, 2000, in Docket No. 990253-WU; Order No. PSC-00-0264-FOF-WS, issued February 8, 2000, in Docket No. 971220-WS; and Order No. PSC-99-1818-PAA-WS, issued September 20, 1999, in Docket No. 981403-WS. The circumstances in this exchange do not appear to be extraordinary; therefore, a negative acquisition adjustment should not be included in the calculation of rate base. Also, an acquisition adjustment was not requested by the applicant.

ISSUE 5: What are the appropriate rates and charges for the utility?

RECOMMENDATION: NFMU should continue charging the customers of Forest Park the rates approved pursuant to Order No. PSC-92-1357-FOF-SU, issued November 23, 1992, in Docket Nos. 920273-SU and 920379-SU. However, the monthly lines maintenance charge of \$1.70 per customer charged by Forest Park, as established pursuant to Order No. PSC-92-1357-FOF-SU, issued November 23, 1992, should be discontinued. The tariff should be effective for services rendered or connections made on or after the stamped approval date, in accordance with Rule 25-30.475, Florida Administrative Code, provided the customers have received notice. (REHWINKEL)

STAFF ANALYSIS: As mentioned earlier, Order No. PSC 92-0588-FOF-SU, issued June 30, 1992 in Docket Nos. 920273-SU and 920379-SU, granted NFMU temporary authority to charge its rates and charges within the Forest Park subdivision. That Order addressed the prior mandate by DEP for Forest Park to interconnect with NFMU after numerous violations. Subsequently, Order No. PSC-92-1357-FOF-SU, issued November 23, 1992 in the same two dockets, approved NFMU's application for a limited proceeding and granted its request to charge its approved rates and charges to Forest Park Mobile Home Subdivision.

In that proceeding, NFMU was granted its request to charge its rates and charges to the Forest Park subdivision. However, since Forest Park retained ownership and responsibility of maintenance of the collection system, the utility was required by the above-referenced Order to establish a monthly lines maintenance charge. A monthly lines maintenance charge was approved and is currently in Forest Park's tariff as \$1.70 per customer. If the Commission approves the transfer, staff recommends that the monthly lines maintenance charge of \$1.70 per customer should be discontinued. If the transfer is approved, Forest Park will no longer own or maintain the collection lines.

Based on the above, staff recommends that NFMU should continue charging the customers of Forest Park the rates approved pursuant to Order No. PSC-92-1357-FOF-SU, issued November 23, 1992, in Docket Nos. 920273-SU and 920379-SU. However, the monthly lines maintenance charge of \$1.70 per customer charged by Forest Park, as established pursuant to Order No. PSC-92-1357-FOF-SU, issued November 23, 1992, should be discontinued. The tariff should be effective for services rendered or connections made on or after the

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stamped approval date, in accordance with Rule 25-30.475, Florida Administrative Code, provided the customers have received notice.

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ISSUE 6: Should this docket be closed?

RECOMMENDATION: Yes. If no timely protest is received to the proposed agency action issues upon the expiration of the protest period, the order should become final and effective upon the issuance of a Consummating Order, and the docket should be closed.
(CHRISTENSEN)

STAFF ANALYSIS: If no timely protest is received to the proposed agency action issues upon the expiration of the protest period, the order should become final and effective upon the issuance of a Consummating Order, and the docket should be closed.