

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

DATE: MARCH 7, 2002

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK &
ADMINISTRATIVE SERVICES (BAYÓ)

FROM: DIVISION OF ECONOMIC REGULATION (WALDEN) *Walden*
OFFICE OF THE GENERAL COUNSEL (BRUBAKER) *Brubaker* *JDJ 1/9/02*

RE: DOCKET NO. 011006-SU - APPLICATION FOR AMENDMENT OF
CERTIFICATE NO. 247-S TO EXTEND SERVICE AREA IN LEE
COUNTY, BY NORTH FORT MYERS UTILITY, INC.
COUNTY: LEE

AGENDA: MARCH 19, 2002 - REGULAR AGENDA - INTERESTED PERSONS MAY
PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\ECR\WP\011006.RCM

CASE BACKGROUND

North Ft. Myers Utility, Inc. (NFMU or utility), a Class A utility, applied for additional territory to be included in its wastewater certificate on August 2, 2001. NFMU has a water system at Pine Lakes and two wastewater systems: the Pine Lakes and the Old Bridge Park systems. This application involves only the Old Bridge Park wastewater system. The Old Bridge Park wastewater system serves 8117 equivalent residential connections (ERCs), with annual revenues of \$2,574,334 and net income of \$46,591 according to the 2000 annual report on file with the Commission. The utility had 7194 residential, 225 general service, and 75 multifamily connections. Total company revenues were \$3,284,811, with an overall net income of \$755,846 per the 2000 annual report.

DOCUMENT NUMBER-DATE
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FPSC-COMMISSION CLERK

DATE: MARCH 7, 2002

Several objections were received from residents in the area affected by this application. Staff counsel contacted each protestant, by letter asking whether the customers wished to pursue their objections to hearing. As discussed in Issue 1, only one customer affirmatively requested a hearing. Staff has the administrative authority to approve certificate amendments when no protests have been filed. However, because protests were received, staff is bringing this matter to the Commission for consideration. The Commission has jurisdiction to consider this matter pursuant to Section 367.045, Florida Statutes.

This item was deferred from the March 5, 2002 agenda to modify language in the second paragraph of the Case Background addressing the protests received, and to restate the Staff Analysis in Issue 3.

DISCUSSION OF ISSUES

ISSUE 1: Should NFMU's Motion to Dismiss Objection of Mr. Hale be granted?

RECOMMENDATION: Yes. (BRUBAKER)

STAFF ANALYSIS: Pursuant to Rule 25-30.030, Florida Administrative Code, on August 1, 2001, NFMU mailed written notice to relevant utilities and government officials, and all known property owners of record in the proposed service area. NFMU also published a legal notice of its amendment application in a local newspaper, in this case the Fort Myers News-Press, in Lee County on August 4, 2001. Pursuant to Rule 25-30.030, Florida Administrative Code, all notices distributed by NFMU stated that any objections to the application must be filed in writing with the Commission no later than thirty days after the last date that the notice was mailed or published, whichever is later.

Several letters were timely received by the Commission regarding NFMU's application, three in support of the application and ten in opposition. With respect to each objection, counsel inquired by letter as to whether the objecting customer intended to pursue the matter to formal hearing. Only one customer, Mr. Norman Hale, affirmatively requested a hearing by letter dated September 15, 2001.

On October 24, 2001, the utility filed an amendment to its application (Amendment), and a Motion to Dismiss Objection of Mr. Hale (Motion). In its Motion, NFMU states that the Amendment is designed to eliminate Mr. Hale's property from the requested territory in its application. Therefore, Mr. Hale would no longer be substantially affected pursuant to Sections 367.045(5), 120.569, and 120.057, Florida Statutes, and pursuant to Agrico Chemical Co. v. Dept. of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981).

On October 26, 2001, staff counsel spoke with Mr. Hale regarding NFMU's Motion, asking whether, under the circumstances, Mr. Hale would consider withdrawing his objection and request for hearing. Mr. Hale requested copies of the Motion and Amendment, and stated that he would consider the matter after reviewing the documents. The documents were provided under cover of a letter dated October 31, 2001, in which staff requested that any

DATE: MARCH 7, 2002

withdrawal of Mr. Hale's objection be made in writing and filed with the Commission. To date, no response has been received.

Before one can be considered to have a substantial interest in the outcome of a proceeding, he or she must show (1) that he or she will suffer injury in fact which is of sufficient immediacy to entitle him or her to a Section 120.57 hearing, and (2) that his or her substantial injury is of a type or nature which the proceeding is designed to protect. Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981). NFMU asserts in its motion that, with the filing of the Amendment, Mr. Hale fails to meet either prong of this test for substantial interest.

The basis of Mr. Hale's objection is that he resides in a rural area and that he believes wastewater service is not needed. With the deletion of his property from NFMU's request, Mr. Hale will no longer be impacted by NFMU's certificate amendment. He will not suffer injury in fact of sufficient immediacy to entitle him to a hearing pursuant to Section 120.57, Florida Statutes, nor a substantial injury of a type or nature a hearing in this proceeding would be designed to protect. Staff therefore recommends that NFMU's Motion to Dismiss Objection of Mr. Hale should be granted.

DATE: MARCH 7, 2002

ISSUE 2: Should the utility's request to amend its certificated territory be approved?

RECOMMENDATION: Yes. The utility's request to amend its certificated territory should be approved. The recommended territory is described in Attachment A. (WALDEN)

STAFF ANALYSIS: The utility filed this application on August 2, 2001, pursuant to Section 367.045(2), Florida Statutes, and Rule 25-30.036, Florida Administrative Code. Included with the application was a filing fee of \$2,250, which is the correct amount pursuant to Rule 25-30.020, Florida Administrative Code. A copy of a warranty deed was provided showing ownership of the land where the wastewater facilities are located, as required by Rule 25-30.036(3)(d), Florida Administrative Code. The utility states that it has the plant capacity to serve the additional connections expected to be added. Plant expansions will be made as required by increased demand. The plant has a current capacity of 2.0 mgd, with average daily flows of 1.68 mgd, according to the annual report.

The utility has experienced steady growth since first being certificated by the Commission in 1977, and is now the primary wastewater utility provider in unincorporated northern Lee County. NFMU asserts it has the financial and technical ability to render adequate and efficient service. The utility has industrial development revenue bond financing in the amount of \$13,670,000 and has made timely payments on these bonds. In addition, the utility's parent corporation, Old Bridge Corporation, will provide for any additional capital needs which may arise as the result of the expanded service area.

Technical ability has been demonstrated in the past. The utility has no outstanding Notices of Violation or Consent Orders from the Department of Environmental Protection. A full time manager is employed, and the utility retains consultants for general accounting, regulatory accounting, and legal advice.

The territory requested includes both residential and general service development, and is expected to serve more than 4,000 ERCs. The proposed additions are areas adjacent to the current certificated territory. Water service is provided by either private wells or Lee County Utilities.

DATE: MARCH 7, 2002

An affidavit was submitted stating that notice of application, including newspaper publication, was given in accordance with Section 367.045(1)(a), Florida Statutes, and Rule 25-30.030, Florida Administrative Code. In addition, notice was provided to each property owner in the proposed territory. A second affidavit was submitted stating that the utility has a current tariff and annual report on file with the Commission.

Construction of the collection system is to be financed by service availability charges collected from new development, which is consistent with the utility's tariff. NFMU's parent corporation, Old Bridge Corporation, will provide for any additional capital needs that may arise due to the increased service area.

A protest and request for hearing was filed by a resident in the affected territory as discussed in Issue 1. As part of the resolution of that protest, the utility amended its request for territory to exclude some of the originally requested territory. This exclusion is reflected in the staff recommended territory description.

Pursuant to the Commission's memorandum of understanding with the Department of Community Affairs (DCA), the DCA provided comments to the Commission regarding the application and its consistency with the county's comprehensive plan. Attached to those comments was a letter from Lee County's Director of Planning, dated October 23, 2001, written to the DCA. The county has some concerns about the western portion of the requested territory, as discussed below. Lee County did not object to the notice given by NFMU.

The input from the DCA noted that a portion of Sections 4, 5, 6, and 7 in Township 43 South, Range 24 East, would not be developed, specifically Section 7 and the west half of Section 6. Section 7 and the west half of Section 6 are contained in the Charlotte Harbor Flatwoods CARL Project Boundary which are relatively undisturbed forested pine flatwoods with agricultural zoning. Further, the DCA letter states that the expansion in this area has the potential to promote urban sprawl. The DCA letter refers to the comments from the county, in which the county stated that while the Lee County comprehensive plan does not expressly prohibit the extension of the utility's service area into non-urban

areas, it is the county's policy that sewer service not be provided within these areas of the county.

In response to the concern expressed by the county and the DCA, on February 13, 2002, the utility filed a second amendment to its application to remove all of Sections 6 and 7 and the west half of Section 5 from its application. NFMU is in the process of preparing a developer agreement with the St. Therese Mission Church in the southeast quarter of Section 5. The area north of this church along the west side of U. S. 41 in the east half of Section 5 is expected to be developed similarly to the area on the east side of U. S. 41.

Staff recommends approval of the utility's request to serve the small area in Section 4 and the east half of Section 5, west of U. S. Highway 41. This land area fronts on the west side of U. S. 41 where commercial development is expected.

In the eastern service area, abutting I-75, the utility requested an area generally northerly and east of I-75. The application also includes an area in Section 21 west of I-75 and north of Bayshore Road, which is essentially an interchange location alongside the interstate. As discussed previously, the utility amended its request to remove the property owned by Mr. Hale. The remainder of the requested territory along I-75 is expected to include both residential and commercial development.

In summary, staff recommends the Commission grant the utility's twice amended request for the territory west of U. S. Highway 41, and, the area adjacent to I-75 in the eastern portion of the service area. The amended proposed territory is described in Attachment A. NFMU's current rates and charges contained in the utility's tariff should be applied to service in the additional territory.

ISSUE 3: Should the docket be closed?

RECOMMENDATION: Yes, if staff's recommendations in Issues 1 and 2 are approved, no further action is required and the docket should be closed. (BRUBAKER)

STAFF ANALYSIS: If staff's recommendations in Issues 1 and 2 are approved, no further action is required and the docket should be closed.

ATTACHMENT A

NORTH FT. MYERS UTILITY, INC.

That part of Lee County, Florida, lying in Township 43 South, Range 25 East, north of the Caloosahatchee River and northeasterly of I-75, more particularly described as follows:

In Township 43 South, Range 25 East, Lee County:

From an intersection with the north line of Section 18 and I-75, run east along the north line of Sections 18, 17, 16, and 15, to the north quarter section corner of said Section 15; thence run south along the north-south quarter section line of said Section 15 and continuing south along the north-south quarter section line of Section 22, to an intersection with the line that is 500 feet north of (as measured on a perpendicular) and parallel with Bayshore Road; thence run easterly and northeasterly along said line that is 500 feet north of (as measured on a perpendicular) and parallel with Bayshore Road, to the east line of Township 43 South, Range 25 East; thence run southwesterly along the Caloosahatchee River to I-75; thence run northwesterly along I-75 to the north line of said Section 18, to the point of beginning.

AND

That part of Lee County, Florida, lying in Section 21, Township 43 South, Range 25 East, west of I-75 and north of Bayshore Road and designated as general interchange at Bayshore Road and I-75 on the Lee County Land Use Map.

LESS AND EXCEPT the South 500 feet of the Northwest quarter of the Southeast quarter, and the South 500 feet of the West quarter of the Northeast quarter of the Southeast quarter, all in Section 23, Township 43 South, Range 25 East.

That part of Lee County, Florida, lying in Township 43 South, Range 24 East, west of U. S. Highway 41, more particularly described as follows:

DOCKET NO. 011006-SU

DATE: MARCH 7, 2002

In Township 43 South, Range 24 East, Lee County:

That part of Section 4 lying south and west of U. S. Highway 41 as it is now established; the East half of Section 5, lying south and west of U. S. Highway 41 as it is now established.