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November 6, 2000

Ms. Blanca S. Bayó, Director  
Division of Records and Reporting  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0870

RE: Docket No. 000277-WS

Dear Ms. Bayó:

Enclosed are an original and fifteen copies of Amicus Response to North Fort Myers Utility, Inc.'s Motion for Summary Final Order for filing in the above-referenced docket.

Also enclosed is a 3.5 inch diskette containing the Amicus Response to North Fort Myers Utility, Inc.'s Motion for Summary Final Order in WordPerfect for Windows 6.1. Please indicate receipt of filing by date-stamping the attached copy of this letter and returning it to this office. Thank you for your assistance in this matter.

Sincerely,

Stephen C. Reilly  
Associate Public Counsel

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RECORDS AND  
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for Authority )  
to Transfer the Facilities of )  
MHC SYSTEMS, INC. and )  
Certificate Nos. 353-W and 309-S )  
in Lee County, Florida to )  
NORTH FORT MYERS UTILITY, INC. )  
\_\_\_\_\_ )

DOCKET NO. 000277-WS  
FILED: November 6, 2000

AMICUS RESPONSE TO NORTH FORT MYERS  
UTILITY, INC.'S MOTION FOR SUMMARY FINAL ORDER

The Citizens of the State of Florida ("Citizens"), by and through their undersigned attorney, file this Response to North Fort Myers Utility, Inc.'s ("NFMU's"), Motion for Summary Final Order, and state:

1. The Citizens are offering this Response to NFMU's Motion for Summary Final Order as a nonparty amicus curiae. The Citizens have communicated with counsel for both NFMU and MHC Systems, Inc. ("MHC"), and can represent that neither the proposed transferor or transferee object to the Citizens filing this Amicus Response.

2. As provided by Section 367.045 and Section 367.071, Florida Statutes, and Commission Rule 25-30.030, Florida Administrative Code, NFMU provided notice to MHC's FFEC-Six customers of NFMU's application to transfer the water and wastewater facilities and certificates of MHC d/b/a FFEC-Six to NFMU.

3. As reflected in Order No. PSC-00-1649-PCO-WS, issued September 15, 2000, the Commission determined that Mr. Varga reasonably and in good faith filed his objection. By this same order the Commission memorialized its granting of the objection and its decision to set the matter for a Section 120.57 (1), Florida Statutes, hearing. Once the objection is granted by the Commission,

it is required by Section 367.045, Florida Statutes, to order a Section 120.57 (1), Florida Statutes, hearing on the objection “in or near the area for which the application is made, if feasible.”

4. As required by Section 367.071, Florida Statutes, there are always at least two broad issues to be resolved in every transfer docket. First, is the proposed transferee willing and able to fulfill the commitments, obligations, and representations of the transferor utility? Stated differently, does the utility have the financial and technical ability to provide quality service to the customers, and is the transferee utility committed to provide that service? Second, is the proposed transfer in the public interest? Within these two very broad issues lie many specific sub-issues. These sub-issues differ in each transfer docket depending upon the unique facts of each specific case.

5. Pursuant to the CASR in this docket, the initial meeting to try to establish the specific issues in this case was not held until October 24, 2000. At this meeting Staff offered seven preliminary issues. At the conclusion of the meeting Mr. Varga committed to provide to Staff by October 30, 2000, the wording for several additional preliminary issues. Also after the meeting NFMU and MHC offered one additional issue. There is pending before the Commission two requests for intervention by the Presidents of the two Homeowners’ Associations for the Pine Lakes Community. Neither request has been acted upon. While each intervenor takes the case as he or she finds it, it would be helpful to act on both requests and hear from these intervenors before finalizing the issues in this case.

6. While the issues have not yet been finalized, the preliminary issues offered to date by Staff, NFMU, MHC and Mr. Varga are as follows:

1. Does North Fort Myers Utility, Inc. have the financial ability to provide water and wastewater services to the customers of MCH Systems, Inc. d/b/a FFEC-Six?

2. Does North Fort Myers Utility, Inc. have the technical ability to operate and maintain MHC Systems, Inc. d/b/a FFEC-Six's water and wastewater facilities?
3. What is the rate base of MHC Systems, Inc. d/b/a FFEC-Six at the time of transfer?
4. Should a acquisition adjustment be approved?
5. Should North Fort Myers Utility, Inc. adopt and use the rates and charges approved for MHC Systems, Inc. d/b/a FFEC-Six, pursuant to Rule 25-9.044, Florida Administrative Code?
6. Is it in the public interest to approve the transfer of MHC Systems, Inc. d/b/a FFEC-Six to North Fort Myers Utility, Inc.?
7. Should the transfer of MHC Systems, Inc. d/b/a FFEC-Six's facilities and Certificates Nos. 353-W and 309-S to North Fort Myers Utility, Inc. be approved?
8. Did Mr. Varga file his objection for an improper purpose such that he is liable for NFMU's and MHC's reasonable costs and attorneys' fees pursuant to Section 120.595, Florida Statutes?
9. Will the proposed transfer adversely affect the Pine Lakes Community, including but not limited to the Golf Course and home values in the Country Club?
10. Would the public interest be better served if Lee County owned and operated the FFEC-Six water and wastewater systems?
11. Is it the policy of the Public Service Commission to allow Utility's to intimidate customers to discourage them from exercising their statutory right to protest proposed transfers?

7. NFMU's Motion for Summary Final Order is at best an extreme rush to judgment. The issues in this docket have not yet even been finalized. As stated in NFMU's motion, Rule 28-106.204 (4), Florida Administrative Code, provides in part that "... any party may move for summary final order whenever there is no genuine issue as to any material fact." (Emphasis supplied). The Citizens

concur with NFMU, that the holding of the Green v. CSX Transportation, Inc., 626 So.2d 974 (Fla. 1st DCA 1993) Case is the standard that must be met to prevail on a motion for summary judgment. This case held that a Party moving for summary judgment is required to conclusively demonstrate the non-existence of any issue of material fact, and the Court must draw every possible inference in favor of the party against whom summary judgment is sought. It will be very difficult if not impossible for NFMU to meet this extreme standard concerning the issues of financial and technical ability to serve. Clearly, it is impossible for NFMU to meet the burden of this extreme standard as it relates to the statutorily required broad issue of whether it is in the public interest to approve the proposed transfer. For this reason, NFMU never even mentions this statutorily required issue in its motion. This issue could not be mentioned because it necessarily involves competing disputable material facts that must be weighed by the Commission before it can determine which approach best serves the public interest.

8. Mr. Varga challenges NFMU's financial ability to operate the water and wastewater systems of Pine Lakes and Lake Fairways mobile home communities. NFMU asserts that while its net income is negative, "from a cash flow standpoint NFMU is doing fairly well." While NFMU, may be able to meet its burden and demonstrate that it will have adequate financial ability to operate the MHC-FFEC-Six water and wastewater systems, there are many disputable material facts involved with the resolution of this issue. As Mr. Varga correctly notes, NFMU has been in a loss position since at least 1995. Its net income was negative \$1.2 million in 1995, negative \$.96 million in 1996, negative \$.60 million in 1997, negative \$.91 million in 1998 and negative \$73,000 in 1999. Clearly it is unusual for a utility to operate in a negative earnings position for such an extended period of time. Furthermore, NFMU doesn't even suggest that it has ample cash flow, it merely states that it is doing "fairly well." The Citizens examined NFMU's cash flow and found it to be negative in 1995, and

positive, in each of the years 1996 through 1999. The primary reason for NFMU's positive cash flow stems from large contributions in aid of construction (CIAC). These amounts were \$.46 million in 1995, \$2.0 million in 1996, \$1.2 million in 1997, \$.75 million in 1998, and \$.27 million in 1999. As can be seen from this trend, NFMU's CIAC has generally been declining. Furthermore, unless NFMU is able to acquire more systems and provide service from its wastewater system, these amounts of CIAC will continue to decline in the future. In the past, NFMU was collecting not only CIAC, but the tax gross-up on this CIAC, much of which it retained. This made a positive contribution to its cash flow. However, because of the Small Business Job Protection Act changed the tax treatment of CIAC after June 12, 1996, this additional cash flow was no longer available to NFMU, except under certain installment contracts. In summary, the Citizens believe that resolution of the financial ability issue involves many disputable material facts.

9. While the Commission in the past has concluded that NFMU possesses the technical expertise to operate a wastewater plant and collection system, it has never ruled upon the expertise of this wastewater only company to operate a water system. While NFMU may be able to establish this expertise by competent and substantial evidence, such a presentation of evidence will most likely involve disputed material facts.

10. There are many disputable material facts that must be put into evidence, and tested with cross-examination, before the Commission can finally conclude that the proposed transfer is in the public interest. The Protestant and Intervenors have a statutory right to present evidence as to why the proposed transfer is not in the public interest, and why other approaches are more in the public interest. The issue of public interest ultimately becomes a comparison of competing ideas about

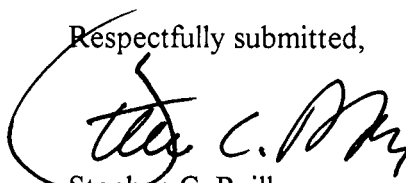
which approach best serves the interests of the public. The material facts relating to these competing approaches necessarily involve disputed material facts.

11. In Docket 900832-WS, Hudson Utilities, in Pasco County, (“Hudson”) filed an application seeking the Commission’s approval to transfer the Viva Villas wastewater system to Hudson. The deadline to protest the proposed transfer came and went without the county government expressing any objection to the proposed transfer. However, the customers protested, because they did not want Hudson to be their wastewater provider. From the time that the protest was made until the formal hearing, the customers persuaded Pasco County to agree to take over the Viva Villas system, if the Commission denied Hudson’s application. Notwithstanding the fact that Hudson was already operating the system as a receiver, and that Hudson had already physically interconnected its system with Viva Villas, the Commission denied the proposed transfer. At the hearing the Commission considered the evidence presented by the customers that it was more in the public interest to have Pasco County operate the system, rather than to have Hudson operate it. The expressed preference of the Viva Villas customers together with their arguments concerning what was in the best interest of the public, caused the Commission to deny the proposed transfer. The order denying the transfer required the County to reimburse Hudson for the money it expended to dismantle the package treatment plant and interconnect Viva Villas with its system.

12. Ultimately, the statutorily required public interest question can only be resolved by the Commission assessing competing disputed material facts. That process can not take place unless the customers are afforded the opportunity to present their evidence as to why the public interest will be better served if the proposed transfer is denied.

WHEREFORE, the Citizens respectfully request the Commission to deny NFMU's Motion for Summary Final Order. The Commission should reject NFMU's attempt to deny the customers their statutorily provided opportunity to object to the transfer and receive a Chapter 120.57 (1), Florida Statutes, hearing to determine if the proposed transfer is in the public interest and to resolve the other issues that will be identified and finalized during the normal progression of this case.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Stephen C. Reilly", is written over a circular stamp or mark.

Stephen C. Reilly  
Associate Public Counsel

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Attorney for the Citizens  
of the State of Florida



**CERTIFICATE OF SERVICE**  
**DOCKET NO. 000277-WS**

I HEREBY CERTIFY that a true and correct copy of the foregoing Amicus Response to North Fort Myers Utility, Inc.'s Motion for Summary Final Order was furnished by hand-delivery\* or U.S. Mail this 6th day of November, 2000 to:

Tyler Van Leuven, Esquire\*  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

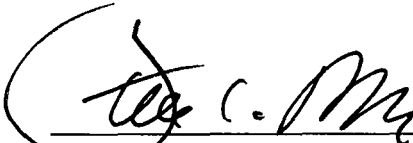
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Stephen C. Reilly