BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Complaint and Petition of Cynwyd Investments Against TAMIAMI VILLAGE UTILITY, INC. Regarding Termination of Water and Wastewater Services in Lee County.	DOCKET NO. 920649-WS
In Re: Complaint Against TAMIAMI VILLAGE UTILITY, INC. by CYNWYD INVESTMENTS, and Request for Emergency Order Requiring the Utility to Reestablish Water and Wastewater Service to Cynwyd's Friendship Hall in Lee County.	DOCKET NO. 930642-WS ORDER NO. PSC-94-0210-FOF-WS ISSUED: 02/21/94

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK
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Appearances:

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On behalf of the Commission Staff

ORDER DENYING COMPLAINT AND PETITION
AND GRANTING RELIEF TO UTILITY

BY THE COMMISSION:

Tamiami Village Utility, Inc., (TVU or utility) is a Florida Corporation that operates its water and wastewater utility in Lee County, Florida. Cynwyd Investments (Cynwyd) is a Pennsylvania General Partnership that owns a recreational vehicle (RV) park and other parcels of property, including the Friendship Hall recreation center, either adjoining or within the Tamiami Village Mobile Home community in Lee County, Florida. Cynwyd's RV park is a bulk customer of TVU, while its other parcels are on separate meters.

TVU'S last rate case culminated in Order No. PCO-92-0807-FOF-WS issued August 11, 1992. In that Order the Commission determined that certain repair expenses which the utility incurred in repairing lines within the RV park could not be charged to the general ratepayers. In making this decision the Commission found that Cynwyd, as a bulk service customer, had the responsibility of repairs to the lines within the RV park from the point of delivery. The Order also disallowed expenses for treating the excess infiltration caused by the lines within the RV park. Subsequently, the utility attempted to have the RV park make repairs to the remaining lines within the RV park which were causing excessive infiltration. When it was unsuccessful in these efforts, the utility took steps to terminate service to the RV park purportedly in accordance with the terms of its tariff.

On June 24, 1992, Cynwyd filed a complaint which was followed by a request for emergency relief filed on July 6, 1992. Cynwyd alleged that TVU threatened to terminate service to the RV park because of excessive infiltration into TVU's wastewater system from faulty lines which TVU argued were Cynwyd's responsibility to maintain. Subsequently, this Commission issued proposed agency action Order No. PSC-93-0810-FOF-WS, on May 25, 1993. Cynwyd timely objected to that Order and the matter was set for formal hearing.

Subsequently, Cynwyd filed a second request for emergency relief, on July 1, 1993, as a result of TVU's alleged threat to disconnect service to the Friendship Hall recreation center. The disagreement in this complaint was over the purported unauthorized use of an open drain around the pool which caused excessive infiltration into TVU's wastewater system. Cynwyd complied with TVU's request and disconnected the open drain. Subsequently, it was billed $800 by the utility for prior unauthorized use. Cynwyd has refused to pay this disputed amount. On July 26, 1993, by Order No. PSC-93-1086-PCO-WS, this Commission consolidated complaint Dockets Nos. 920649-WS and 930642-WS because both dockets

involve essentially the same facts, the same parties, and some of the same witnesses.

The prehearing conference was held on September 27, 1993 in Tallahassee, Florida. The hearing was held on October 14, 1993 in Fort Myers, Florida. Both parties filed briefs on November 19, 1993.

FINDINGS OF FACT, LAW, AND POLICY

Having heard the evidence presented at the hearing in this proceeding and having reviewed the recommendation of the Commission Staff (Staff), as well as the briefs of the parties, we now enter our findings and conclusions.

STIPULATIONS

At the hearing, the Commission approved the oral stipulation made by the parties and staff that after repairs are completed, Staff engineers would examine the lines to determine the adequacy of the repairs and the level of reduction of infiltration. In so doing, the parties agreed that this was the most cost efficient method to verify the adequacy of repairs because hiring an outside engineer would be prohibitively expensive.

MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

TVU made an oral Motion to Dismiss at the hearing. The Commission heard oral argument on the Motion. TVU's grounds for the Motion to Dismiss are that this entire action, petition and complaint, is merely a means for Cynwyd to seek injunctive relief and that the Commission has no power to grant injunctions. In addition, TVU asserts that the rate case Order No. PSC-92-0807-FOF-WS was binding on all customers; and, because Cynwyd's Motion to Intervene was denied as untimely in that cause of action, it was barred from bringing this complaint by the doctrine of res judicata. TVU claims that we are relitigating the issues of who is responsible for maintaining the facilities within the RV park and where the "point of delivery" is; such relitigation, TVU asserts, is contrary to the doctrine of res judicata.

Cynwyd maintains that the Commission has full authority under Chapter 367, Florida Statutes, to require a utility to provide service and also to protect a customer from having service terminated unlawfully. Cynwyd cites to the utility's tariff which

specifically states that if there is a dispute under the tariff, it is the Commission that will resolve it. It is Cynwyd's position that, without the Commission's authority to enter an order for relief, the Commission would have no authority to protect any customer from discriminatory treatment. Further, Cynwyd maintains that the doctrine of res judicata as a determinative of finality in administrative proceedings requires an identity of issues and an identity of parties. Cynwyd went on to explain that it did not intervene earlier in the rate case proceeding because no issue was identified that related to the responsibility to maintain the sewer mains beyond the point of delivery until after the prehearing conference. Counsel conceded that it is the customer that is responsible for maintaining the lines beyond the point of delivery; however, at the time, there was no indication by the Commission that either on a "going-forward basis or on a retroactive basis" it was going to adjudicate whose duty it was to maintain the pipes or what constituted the point of delivery. Rather, Cynwyd believed that the Commission was merely going to determine whether the utility had proven the items in its test year for the purposes of setting rates on a prospective basis. Moreover, Cynwyd claims there is currently a circuit court action with several claims and counter-claims regarding the maintenance of these same facilities, which was initiated prior to the utility's rate case, therefore there is no finality. After hearing oral argument, the Commission denied the Motion to Dismiss because res judicata and collateral estoppel are not applicable where the same parties have not fully litigated the issues.

PETITION FOR RECONSIDERATION MOOT

On October 18, 1993, TVU filed a Petition for Reconsideration of Order No. PSC-93-1469-PLO-WS compelling Production of Documents. Service of the Petition was executed by mail and the Petition was received four days after the October 14, 1993 hearing. TVU produced some of the discovery demanded by Order No. PSC-93-1469-PLO-WS at the hearing and agreed to file the balance as late-filed exhibits. The late-filed exhibits were subsequently received, therefore we find the Petition for Reconsideration is moot.

DISPOSITION OF POST-HEARING ISSUES

In its post-hearing brief, TVU claims it was denied a fair hearing because the Prehearing and Presiding Officer exhibited personal bias and prejudicial conduct and because TVU was required inappropriately to bear the burden of proof.

Rule 25-22.056 (3) (a), Florida Administrative Code, outlines the procedure by which a new issue may be raised in a post-hearing

statement. Although TVU did not fully comply with the Rule, it has raised two new issues, prejudicial conduct and burden of proof, as grounds for its allegation that it did not receive a fair hearing. Despite the procedural inadequacies, in the interest of fairness, we will address TVU's new legal issues.

Prejudicial Conduct by Prehearing Officer

Section 120.71 (1), Florida Statutes, establishes the means for disqualifying, for bias or prejudice, a person who serves alone or with others as an agency head from serving in an agency proceeding. Section 120.71(1) allows disqualification "...for bias, prejudice, or interest when any party to an agency proceeding shows just cause by suggestion filed within a reasonable period of time prior to the agency proceeding. "An "Agency Head" is "the person or collegial body in a department or governmental unit statutorily responsible for final agency action." Section 120.52 (3), Florida Statutes. In the context of Chapter 367, the "agency head" also functions in a judicial role. Judicial prejudice may generally be defined as the mental attitude or condition of mind which sways judgment and renders a judge unable to exercise his functions impartially. See Black's Law Dictionary 1061, (5th ed 1979).

The utility has predicated its claim of judicial prejudice mainly on the fact that several uncomplimentary comments about the work product of the utility's attorney were included in the official record of a prior rate proceeding involving the same utility and the same prehearing officer. Since the attorney criticized is the participating counsel in this docket, the utility believes that the prehearing officer denied his fourteen motions for reconsideration (his count) without consideration of their legal grounds. In support of this conclusion of prejudice, he points to the six prehearing motions (his count) granted to opposing counsel, but he does not demonstrate any substantive grounds to support error in the prehearing officer's adverse rulings on his motions. Adverse rulings alone do not establish prejudice on the part of the trial court. Post-Newsweek Stations, Florida, Inc. v. Kaye, 585 So.2d 430 (Fla. 3d DCA 1991). A careful review of the motions denied reflect that often the filings requested reconsideration for issues that had been disposed of previously, which is contrary to Rule 25-22.060, Florida Administrative Code, or issues that had been found moot. Therefore, we find that the record of this proceeding does not demonstrate that the prehearing officer's adverse rulings were inappropriate.

Counsel alleges further that the prehearing officer unfairly exercised her discretionary power when she did not permit a telephone prehearing conference. In support of this conclusion of prejudice, he points to the practice of the Twentieth Judicial Circuit in allowing telephone conferences on motions. It is well known that different judicial circuits establish their own rules regarding telephone conferences on motions. While this Commission operates in an administrative forum, not a circuit court forum, motion hearings have been allowed by telephone. However, in the instant case we are dealing with a prehearing conference, not with a motion hearing. On rare occasions, when viable, the Commission permits telephone prehearing conferences. In the instant situation, the prehearing officer, in her discretion, determined that due to the conflicts arising at a previous telephone preliminary prehearing conference involving the same individuals, it would not be in the best interests of the parties to permit a telephone prehearing conference.

It is also noteworthy that at no time during the period from the filing of TVU's objection to proposed agency action Order No. PSC-93-0810-FOF-WS, issued May 25, 1993, and the formal hearing held October 14, 1993, did the utility's counsel request that the prehearing officer recuse herself for prejudice, although this was the period within which most of the rulings on motions occurred. The first time the issue of "judicial prejudice" was raised was in the post-hearing statement.

Prejudicial Conduct by Presiding Officer

The utility's attorney alleges that the Presiding Officer's conduct at the formal hearing had "numerous instances of disparate and conflicting treatment based on bias and prejudice." In partial support of this conclusion, counsel alleges that the presiding officer did "not allow him to assist the ... witness (an elderly gentleman) in finding the proper places in documents and in the tariff." It is apparent that the utility's counsel sees his witness' age as an impediment to competency. The record does not support this conclusion; the competency of the utility's witness was never questioned. The witness testified that he is the Chief Executive Officer and a member of the Board of Directors of the utility, holds a B.S. degree in engineering, and has been designated by the Board of Directors of the utility as its spokesperson. Further, it is inappropriate for an attorney to lead his witness to answers to cross-examination questions of other attorneys.

TVU has also argued that bias was demonstrated by the presiding officer's failure to permit TVU's witness to make a short concluding statement. This argument is not supported by the record. The presiding officer did not allow the witness to make a statement at the end of his direct testimony on the basis that he would get the opportunity when his attorney questioned him on redirect examination. Although the witness' counsel chose not to conduct redirect examination, the presiding officer allowed the witness to make a short statement at that time. We find that the record does not reflect any prejudicial conduct or personal bias on the part of the presiding officer, but to the contrary, an effort on the part of the presiding officer to give broad latitude to counsel.

Burden of Proof

TVU asserts that it is "axiomatic in Anglo-American law that the party filing or making a complaint has the burden of establishing the merits of his complaint before the party defending against the complaint is required to proceed." TVU maintains that the prehearing officer committed error by requiring the utility, the party charged, to defend himself first. TVU stated that the prehearing officer followed "Star Chamber proceedings" and "proceedings from totalitarian cultures" without citing to any authority for its proposition that the prehearing officer committed error.

In Order No. PSC-93-1386-PCO-WS, issued September 22, 1993, the Prehearing Officer determined that TVU had the burden of proof to establish that it had complied with its tariff and the Commission's statutes, rules and orders. This Order cited Order No. PSC-93-0043-PCO-WS, issued January 11, 1993, involving Placid Lakes Utilities, Inc. in a matter wherein the Commission required the utility to establish that it had not violated the terms of its Commission-approved service availability provisions.

Order No. PSC-93-1386-PCO-WS did not disregard the fact that Cynwyd, as the Complainant, had the burden of going forward to establish that TVU had violated, in its case, the provisions of TVU's tariff. In that sense, Cynwyd was asserting the affirmative of that issue and had the burden of going forward on that issue. It is a well established administrative law principle that the burden of proof is on the party asserting the affirmative of an issue. However, as a regulated utility, TVU has the burden of proof that its actions in twice attempting to terminate service to Cynwyd were in compliance with its tariff.

TVU has incorrectly interpreted the requirement that it file its testimony first as placing the entire burden of proof on the utility. It is important to recognize that the standard involved in determining the issues in an administrative proceeding is the preponderance of the evidence presented.

Therefore, based on the foregoing we find that TVU was granted a fair hearing.

PROPOSED FINDINGS OF FACT

TVU filed 30 proposed findings of fact with its proposed conclusions of law which, other than being sequentially numbered, do not comport with the requirements stated in Rule 25-22.056 (2)(b), Florida Administrative Code. The Rule requires that proposed findings of fact be presented separately from other post-hearing filings and that each proposed finding be separately stated and numbered. The rule states further that

> (e)ach proposed finding of fact shall cite to the record, identifying the page and line of the transcript or exhibit that supports the particular finding. All proposed findings of fact which relate to a particular issue shall be grouped together and shall identify the issue number to which they relate.

The Court Reporter noted that TVU's counsel did not request a copy of the official transcript. Although it may be argued that ordering a transcript is rightfully a decision of a party, to not do so, and instead expect the Commission Staff to examine each fact, identify which issue to which it refers, and to locate in the record where it is purportedly proven, would place Staff in the untenable posture of preparing TVU's litigation in place of TVU's attorney of record. It also raises the possible specter of Cynwyd alleging that by our Staff's assistance to TVU in preparation of TVU's Proposed Findings of Fact, the Commission had acted in a manner prejudicial to Cynwyd. Therefore, based on the foregoing, we deny TVU's proposed findings of fact in total for not being in compliance with the above cited Rule.

EXCESSIVE INFILTRATION

Infiltration is groundwater leakage into the wastewater collection system through the wastewater lines. Inflow is rainwater leakage into the collection system through manholes. All collection systems experience some infiltration since most wastewater lines are laid below the groundwater level.

On July 7, 1992, the utility measured the infiltration entering through lines D, E, K, T, and U. This test also indicated that these lines were allowing excessive infiltration to enter the collection system. Lines D, E, K, T, and U were the only lines which the utility tested at that time.

During November 1992, Cynwyd measured the infiltration entering the through all of the lines in the RV park. This test indicated that lines B, D, E, K, T, and U were allowing excess infiltration.

Based on the foregoing, we find that lines B, D, E, K, T, and U in the RV park are allowing excessive infiltration to enter the wastewater collection system.

REPAIRS TO LINES

Res Judicata and Collateral Estoppel

TVU maintains that the obligation of Cynwyd to repair the lines in the RV Park was decided in rate case Order No. PSC-92-0807-FOF-WS. Therefore, finality has occurred and the doctrines of res judicata and collateral estoppel apply. In its brief, TVU argues that in the rate case "[t]he interest of Cynwyd and ... every other customer of the utility was fully and adequately represented by the Commission itself." Consequently, Cynwyd can not relitigate the rates. The quoted statement is a mischaracterization of the Commission's role in a rate case and its regulatory authority. The Office of the Public Counsel is the entity created by the Legislature to intervene in Commission proceedings in behalf of the customers. In addition, any substantially affected person may intervene in a rate case. The Commission is charged with the duty to fix rates which are just, reasonable, compensatory, and not unfairly discriminatory and which allow the utility an opportunity to earn a fair rate of return on its investment. In exercising its responsibility the Commission does not represent either the utility or the customer, but makes its decision in the public interest.

The utility's argument is founded also on a mistaken premise that the issue at hand is one about rates or rate structure. This is not the case. The primary question presented is who is responsible for the maintenance and repairs of the wastewater lines within the RV Park. In order to make this determination, it is necessary to find the point of delivery. This Commission, in Order No. PSC-92-0807-FOF-WS, did make a determination, for rate setting purposes, that the repairs within the RV park were the bulk

customer's responsibility and the general body of ratepayers should not bear the burden of these expenses. However, Cynwyd, the bulk customer and owner of the RV Park, was not a party in the rate case.

As previously discussed, at the hearing, TVU presented an oral Motion to Dismiss, based in part upon the doctrines of res judicata and collateral estoppel, which was denied by the Commission after hearing arguments from the parties. In its brief, TVU cited several cases in support of its position: Jet Air Freight v. Jet Air Freight Delivery, 264 So.2d 35 (Fla. App. 1972) (case actually support the Commission's position as to requirements for res judicata); Metropolitan Dade County v. Rockmatt Corp., 231 So.2d 41 (Fla.App. 1971) Card City Utility v. Miami Gardens, 165 So.2d 199 (Fla.App. 1964). Since TVU has raised the argument of error in its pleading, we believe that our discussion should begin with a brief explanation of each doctrine.

Res judicata bars relitigation of causes of action between the same parties or their privies, if there is a final judgment on the merits. Several conditions must occur together: 1) identity of the thing sued for; 2) identity of the cause of action; 3) identity of the parties; 4) identity of the quality in the person for or against whom the claim is made. Albrecht v. State, 444 So.2d 8 (Fla. 1984). The general principle shaping the doctrine of res judicata is that a final judgment by a court of competent jurisdiction is absolute and puts to rest every justiciable, as well as every actually litigated, issue. Albrecht at 11. Thus, where the second suit is upon the same cause of action and between the same parties as the first, res judicata applies.

Where a prior judgment occurs between the same parties on a different cause of action, it is an estoppel as to those matters in issue or points controverted, on determination of which finding or verdict was rendered. E.I. duPont de Nemours & Co. v. Union Carbide., D.C. Ill., 250 F.Supp. 816, 819. The essential elements of collateral estoppel are: 1) that the parties and issues be identical; 2) that the particular matter be fully litigated and determined in a contest; 3) which results in a final decision; 4) in a court of competent jurisdiction. US Fidelity & Guaranty Co., 444 So.2d (Fla. 5th DCA 1984). Essentially, collateral estoppel would prevent a party from relitigating the same issues in a second different cause of action if those issues were fully adjudicated in the first case.

The two most essential characteristics of the doctrines of res judicata and collateral estoppel are that the parties and the thing sued for be identical. TVU's argument must fail for lack of

authority or merit since Cynwyd was not a party to the rate case and, consequently, did not have an opportunity to present its pleading or litigate the issues. The reasons surrounding the untimely filing of Cynwyd's Motion to Intervene in the rate case are irrelevant. The Commission's denial of Cynwyd's entrance into the rate case does not now preclude Cynwyd from litigating an issue which substantially affects its interests. Therefore, we find that error has not occurred because the doctrines of res judicata and collateral estoppel are not applicable in this situation because the same parties have not previously litigated the identical issue and had the Commission adjudicate the cause of action.

Obligation to Repair the Lines

The RV Park is a bulk customer with 243 lots available for rent. Witness Thomas testified that none of the lots in the RV park are customers of the utility; that the RV Park's water service is provided through a master meter; and wastewater from the lines in the RV Park enters the utility's collection system at two manholes. He further emphasized that although the RV park has 243 connections for rent, it pays the base facility charge for a 4 inch meter, which is equivalent to only 25 equivalent residential connections.

Cynwyd and TVU agree that the customer is responsible for maintaining the lines beyond the point of delivery. The question then becomes deciding the points of delivery of water and wastewater for the RV park. For the water system, both the utility and Cynwyd agree that the point of delivery is the master meter. Cynwyd is responsible for maintaining all of the water lines in the RV park beyond the master meter. The dispute arises over the definition of the point of delivery for the wastewater collection system when there is a master meter; and, whether the lines after the master meter are lateral lines or mains. Rules 25-30.210 (2) and (6), 25-30.225 (6), and 25-30.231, Florida Administrative Code, address these issues. Cynwyd and TVU interpret these rules and, consequently, their responsibilities differently.

Cynwyd Witness Kurtz testified that the point of delivery for the wastewater system is the point where the service laterals meet the sewer mains within the RV Park. Witness Kurtz further testified that for ten years, as the previous utility owner, Cynwyd maintained the lines within the RV Park. He believes that TVU is obliged to continue this practice. In support of this position, Cynwyd, in its brief, references Order No. 21421, approving the transfer of the utility from Cynwyd to TVU. Cynwyd claims that the utility is obliged to adopt and use the rates, classification, and regulations of the former operating company. Therefore, since

Cynwyd had maintained the RV Park lines, TVU is required now to continue to maintain the lines.

Cynwyd argues also that the tariff requires the utility to maintain the lines. Witness Kurtz testified that the warranty deed indicates that TVU owns the wastewater mains within the RV park. Further, the utility's tariff defines the point of delivery as "[t]he point where the Company's pipes are connected with the pipes of the Consumer's, namely at the main line connection in easements, or property line on the street side." Since the utility owns the mains, Cynwyd argues, its tariff requires that it maintain those mains.

Utility Witness Thomas testified that the point of delivery is the RV Park's property line. He further testified that the lines within the RV park are not mains; they are just laterals which tie into the utility's collection system through two manholes. He stated that the utility does not own the lines within the RV Park and the tariff does not require the utility to maintain the lines. TVU believes that Cynwyd is a bulk customer and the only sensible interpretation of the rules and tariff is to find that Cynwyd is responsible for maintaining the lines within the RV Park.

Witness Thomas claims that the utility is bound by its filed tariffs and the rules of the Commission. He believes that the former utility owner's policy is meaningless and inapplicable to the extent that it conflicts with the terms of the filed tariffs.

Upon consideration, we find that the utility's interpretation of the point of delivery is a logical and reasonable application of the rules and tariff. The RV park is a bulk customer of the utility and should maintain the lines. Cynwyd admits responsibility for maintaining the water lines. But, Cynwyd then denies any responsibility for maintaining the wastewater lines based on the premise that as the utility's previous owners it had maintained the lines and on its claim that TVU owns the lines. We agree with TVU that the policy of the previous owners is meaningless to the extent that it violates the present tariff. The utility disputes Cynwyd's claim that it owns the lines. Consequently, because ownership of the lines is in dispute and this Commission does not have the authority to decide the ownership, the utility's tariff as it relates to ownership does not resolve the problem.

Cynwyd believes that it is arbitrary and discriminatory to require them to pay for repairing the RV Park's lines as well as paying for line repairs in the rest of the utility's territory which are included in the rates. We do not find that being

responsible for repairs to the RV park's lines is discriminatory to Cynwyd. The utility's residential customers are also responsible for the wastewater line up to the main or property line. Just like Cynwyd, they pay in their rates for the maintenance of their lines up to the point of delivery as well as repairs to the utility's mains which are included in the rates.

Based on the foregoing, we find that TVU is not responsible for the repair and maintenance of the lines in the RV Park. However, TVU is responsible for the two wastewater lines which serve both the RV Park. Cynwyd is responsible for the repair and maintenance of the lines in its RV park.

Because of the length of time it took to resolve this dispute and the circuit court injunction requiring the utility to truck effluent, Cynwyd shall submit its repair plan to the Commission for approval within 30 days from the date of this Order. The repairs are to be completed within three months from the date of this Order. If repairs are not completed, the utility may exercise its right to discontinue water and wastewater service subject to our prior approval. Once completed, the adequacy of the repairs will be verified by our staff engineers as stipulated by the parties.

Cost of Repair

Cynwyd's Witness Kurtz testified that he did not know how much it would cost to repair the lines within the RV park and that the cost depends on how many mains actually need repair. Witness Kurtz testified that Cynwyd has spent approximately $5,000 to repair line K and partially repair line E. The Utility's Witness Thomas testified that the utility has spent $11,000 for line repairs in the RV Park. No other testimony addressed this issue.

We have found that excess infiltration is a consequence of faulty lines in the RV Park and have determined that Cynwyd is responsible for making the repairs. Therefore, the issue of cost of repair has no bearing on the utility and its ratepayers.

UNAUTHORIZED CONNECTION

Cynwyd Witness Kurtz testified that the Friendship Hall swimming pool had a drain connected to the utility's sewer system. He admits that rainwater entered the wastewater system through this connection. However, Witness Kurtz stated that Cynwyd had no prior knowledge of this connection although he believes that the drain was in place at the time of purchase of the system by TVU.

Section 21 of the tariff defines an unauthorized connection as one which was not made by employees of the utility. Cynwyd believes that since there is no competent evidence in the record to establish whether the connection was made by anyone other than the utility's employees, the connection was not unauthorized. Witness Kurtz also testified that the connection was not unauthorized since the utility purchased the system "where is, as is" and should have known of its existence.

Utility Witness Thomas testified that this connection was not authorized and violated the utility's tariff. He stated that the system prints did not show this connection and the utility only became aware of the connection after conducting a smoke test of the lines.

Upon consideration, we agree that there was an unauthorized connection at Friendship Hall and the utility treated wastewater from this connection. Section 25 of the tariff states that no person shall discharge or cause to be discharged any storm water, surface water, ground water, et cetera, to any mains. Section 21 of the tariff states that a connection is unauthorized if it was not made by employees of the utility. The record is not clear as to when this connection was made or who made the connection. Both the past and present owners of the utility deny any prior knowledge of the connection. Therefore, we must presume that it was not made by a utility employee. We disagree with Cynwyd's presumption that because the system was purchased "where is, as is" excuses a violation of the tariff, even if such violation was unknown by Cynwyd.

Responsibility for Charges

Cynwyd Witness Kurtz declared the usage at the drain was not a deliberate use or an overt use, but was something that was discovered. He believes that Cynwyd probably did not know that they were not charging themselves when Cynwyd owned the system. Cynwyd admits that it has not explicitly paid for service at this connection since the current owners purchased the utility. However, he states that the tariffed charges to Cynwyd for Friendship Hall included all the wastewater entering the drain because the drain connection was not unauthorized. Witness Kurtz testified that Cynwyd acted promptly to disconnect the drain upon notification by the utility. Although he states that, philosophically, customers should pay for wastewater service that they receive, he believes that based on the foregoing Cynwyd should not have to pay for any wastewater which entered through the drain.

Cynwyd states that even if it is responsible for some payment due to the rainwater entering the drain, the bill must comply with Rule 25-30.350, Florida Administrative Code, on backbilling and go back for only 12 months. This Rule requires that a utility may not backbill for any period greater than 12 months for any undercharge which is the result of the utility's mistake. Cynwyd believes that the undercharge is the result of the utility's own mistakes.

Although TVU's system prints did not reflect the connection, the utility did ultimately find the connection when it did a smoke test. Since Cynwyd was also unaware of the connection, it cannot be held responsible for the utility's mistake in failing to find the unauthorized connection earlier. There is no evidence to support the conclusion that Cynwyd knowingly or fraudulently received service from the unauthorized connection. However, regardless of whether the utility was aware of the connection or not, the customer has received service for which it has not paid.

We agree with Cynwyd that Rule 25-30.350, Florida Administrative Code, applies because no fraudulent use occurred and because the utility had ample time to discover the connection. Based on the foregoing, we find that Cynwyd is liable for the applicable charges for gallonage used during the calendar year 1992.

Calculation of Gallonage

The utility calculated the amount of rainwater which entered the wastewater system by multiplying the areas of the roof and pool deck by the amount of rainfall. This number was then converted into gallons of wastewater. Cynwyd Witness Kurtz agreed with this method of calculating the amount of wastewater entering the wastewater system, if the rainfall and the size of the roof and pool deck are accurate.

Utility Witness Thomas testified that the utility measured the pool deck and roof to calculate their areas. He testified that the rainfall between 1990 and 1992 was used to estimate the wastewater which entered the system. Rainfall data from the National Oceanic and Atmospheric Administration was the source documentation used to determine the rainfall in Fort Myers. The data indicates that the area experienced 49.09, 67.50, and 55.13 inches of rain during 1990, 1991, and 1992, respectively. The utility bill to Cynwyd, however, indicates that 236 inches of rain was used to calculate how much wastewater entered the system. However, because we have determined that Rule 25-30.350, Florida Administrative Code, applies for the purposes of backbilling, only the rainfall for the year 1992 is relevant.

Based on the rainfall data noted above, there was 55.13 inches of rain. Using the methodology used by TVU, we have calculated the amount of stormwater treated as 86,255 gallons.

Appropriate Charges

TVU billed Cynwyd for $801.07 for wastewater service to the Friendship Pool drain, repairs for a curb box and a leak at the corner of Sky Lane and Celestial Way. Utility Witness Thomas calculated the charge for wastewater service at the drain by multiplying the utility's estimated amount of rainfall from the pool drain, 369.23 thousand gallons, by a charge of $1.95 per one thousand gallons. The utility then deducted $61.43 for adjustment for shower water which is also collected by the drain, resulting in a charge of $658.57. Cynwyd Witness Kurtz agrees with the utility's method of calculation of the bill for wastewater service, but is not clear that the rate of rainfall was the average during the period.

Utility Witness Thomas explained that, in addition to the charges for treatment of excess drainwater, the bill to Cynwyd included repair bills of $77.50 for curb box repairs and $65.00 for repairs for a leak at Sky Lane and Celestial Way. Utility Witness Thomas states that, while the repairs are not related to the Friendship Hall drain problem, they should be paid for by Cynwyd.

The breakdown of the bill reflecting repairs in addition to charges for unauthorized wastewater service was first disclosed at the hearing. This did not provide the complainant, Cynwyd, the opportunity to fully address the repair bills. Therefore, the repair bills shall not be considered in this docket.

We find that based on the tariff rate of $1.95 per one thousand gallons, and our prior calculation of 86,255 gallons treated, the appropriate charge for wastewater treated from the Friendship Hall drain is $168.20. No adjustment shall be made for treatment of wastewater from the shower because the shower water was not included in the calculation of stormwater treated. Cynwyd shall make payment in the amount of $168.20 to TVU within 30 days of the issuance of this Order.

EMERGENCY ORDERS NOT EX PARTE INJUNCTIONS

The utility takes the position that the emergency orders issued by this Commission were in fact injunctions and that the Commission lacks subject matter jurisdiction to issue injunctions. This issue was addressed previously in Order No. PSC-93-1386-PCO-WS

and was also a foundation for the utility's Motion to Dismiss at the hearing.

The utility contends that the Commission use of the term "emergency relief" rather than the word "injunction" does not change the end result which is a restraining order. TVU asserts that the word "enjoin" was used within the text of the emergency relief Order No. PSC-92-0636-PCO-WS issued July 9, 1992, and therefore, the Commission issued an injunction. TVU cites several cases to support its position that the Commission is created by statute and has only those powers granted by the Legislature; that it has no inherent or common law powers; that it derives no power from the Constitution; and, that it has only those powers specifically granted to it by the Legislature. Florida Tel. Corp. v. Carter, 70 So.2d 508 (Fla. 1954). City of Cape Coral v. GAC Utility, 281 So.2d 493 (Fla. 1973), State v. Mayo, 354 So.2d 359 (Fla. 1977).

There is no argument that the purpose of the emergency relief order was to stay the utility from discontinuing service to the RV park and later to Friendship Hall pool, both entities owned by Cynwyd. While the right to issue injunctive relief is reserved to the circuit court, this Commission is granted broad police powers under Section 367.011(3), Florida Statutes. In the public interest, the Commission may exercise said police powers for the "protection of the public health, safety, and welfare." Section 367.111(2), Florida Statutes, requires utilities to provide safe, efficient and sufficient service. This Commission exercised said police power when it issued an emergency relief order stopping the utility from terminating service to a bulk customer, who in turn provided water and wastewater service to over two hundred recreational vehicle sites. We agree that this Commission does not have subject matter jurisdiction to issue injunctions or to resolve the contractual disputes presently being litigated in the circuit court between these parties. However, this Commission does have the power to enforce its own statutes, rules and regulations regarding settlement of disputes and termination of an essential public service affecting the public health, safety and welfare.

NO CONFISCATION OF PROPERTY

TVU argues that the utility's property has been confiscated in violation of its rights under the Constitution. TVU contends that by allowing the restraining order to remain in effect until the resolution of the dispute between the parties, the utility has had to expend over $23,000 to truck effluent to maintain a level in its ponds mandated by circuit court injunctions. Since the utility cannot bill retroactively, it has lost its stockholders' funds

forever. Consequently, it is TVU's belief that the orders of the Commission have confiscated the utility's property in violation of the rights granted the utility by the U.S. Constitution. TVU cites Smyth v. Ames, 169 US 466 (1898), as support for the assertion.

TVU's argument does not reflect the facts in the record. There is no evidence or testimony in the record that demonstrates that the expenditure for trucking effluent resulted only from the infiltration emanating from the RV park. The utility acknowledges that it has made $18,000 worth of repairs to its own pipes that have leaked and that at any given time a crack could develop and infiltration could occur somewhere in the lines. The record does indicate that excessive infiltration is emanating from certain lines in the RV park and that this is a major contributor to the recurring percolation pond problems. However, it cannot be determined from the record that these particular lines were the sole source of infiltration during the period of the $23,000 expenditure.

The findings of the case cited by TVU can be distinguished from this case. In Smyth v. Ames, the U.S. Supreme Court modified a prior decision which determined whether the rates and charges set by the Board of Transportation for the State of Nebraska would deprive the railroad of the compensation they were legally entitled to receive. Specifically, the Court said they were not going to analyze or review each specific rate and charge, but were going to allow the utility to earn its overall legally entitled compensation. Whether a particular repair expense is the responsibility of the utility or its customer must be determined before the regulatory agency can determine if the utility has the right to recover for that expense in its rates and charges. Section 367.081(3), Florida Statutes, states that "the Commission must determine the prudent cost of providing service ...." When the very basis for that issue is in dispute, the Commission cannot be said to have confiscated the property of the utility, but rather has given to the parties the due process granted by the U.S. and Florida Constitutions. Therefore, we find that the property of the utility was not confiscated.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that the complaint and petition of Cynwyd is hereby disposed of as set forth herein. It is further

ORDERED that all of the findings of fact and conclusions of law contained herein are approved in every respect. It is further

ORDERED that Tamiami Village Utility, Inc. shall not be responsible for the repairs and maintenance of the lines within the RV Park owned by Cynwyd Investments. It is further

ORDERED that Tamiami Village Utility, Inc. shall be responsible for the repair and maintenance of the two wastewater lines which serve both the RV Park and other utility customers. It is further

ORDERED that Cynwyd Investments is responsible for the repair and maintenance of the lines in its RV park. It is further

ORDERED that Cynwyd Investments shall submit its repair plan to the Commission for approval within 30 days from the date of this Order.

ORDERED that Cynwyd Investments shall complete the repairs to the lines within three months from the date of this Order. If the repairs are not completed, Tamiami Village Utility may exercise its right to discontinue water and wastewater service subject to this Commission's prior approval. It is further

ORDERED that Cynwyd Investments shall pay the sum of $168.20 for unauthorized wastewater service to Tamiami Village Utility within 30 days of the date of this Order. It is further

ORDERED that this docket shall remain open so that our staff engineers may monitor the adequacy of the repairs made by Cynwyd Investments. Once our staff engineers approve the repairs, this Docket shall be administratively closed.

By ORDER of the Florida Public Service Commission, this 21st day of February, 1994.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

SLE

by: Kay Flynn
Chief, Bureau of Records

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.