

ORIGINAL

M E M O R A N D U M

September 9, 1999

TO: DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (BRUBAKER) *JSB*

RE: DOCKET NO. 981781-SU - APPLICATION FOR AMENDMENT OF CERTIFICATE NO. 247-S TO EXTEND SERVICE AREA BY THE TRANSFER OF BUCCANEER ESTATES IN LEE COUNTY TO NORTH FORT MYERS UTILITY, INC.

The attached Motion to Strike Settlement Agreement was received by the Division of Legal Services on September 8, 1999. Please place the document in the docket file.

JSB/lw

Attachment

cc: Division of Water and Wastewater (Messer, Redemann)

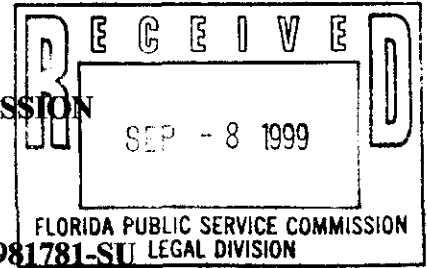
i:\memo-buc.jsb

- AFA \_\_\_\_\_
- APP \_\_\_\_\_
- CAF \_\_\_\_\_
- CMU \_\_\_\_\_
- CTR \_\_\_\_\_
- EAG \_\_\_\_\_
- LEG \_\_\_\_\_
- MAS \_\_\_\_\_
- OPC \_\_\_\_\_
- PAI \_\_\_\_\_
- SEC \_\_\_\_\_
- WAW \_\_\_\_\_
- OTH \_\_\_\_\_

DOCUMENT NUMBER-DATE  
 10883 SEP-99  
 FPSC-RECORDS/REPORTING

594

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION



IN RE: Application for Certificate No 247-S to )  
extend Wastewater service area by transfer of )  
Buccaneer Estates in Lee Co., Florida, to North )  
Fort Myers Utility, Inc., )

PSC docket 981781-SU

**MOTION TO STRIKE SETTLEMENT AGREEMENT**

For the following reasons Donald Gill a party in the above captioned matter moves the Public Service Commission (PSC) strike the PSC Staff's recommendation that states the stipulation should be approved as modified in the Staff's Memorandum dated September 3, 1999:

(1) The last paragraph on page #7 of the Staff's Memorandum states:

Paragraph 5 of the settlement agreement would allow the utility to begin billing the Buccaneer residents for service beginning on September 1, 1999. Staff believes that the utility should be allowed to collect rates subject to refund pending the final disposition of this case. The reasons for this are that the utility and OPC, who represent the Buccaneer Homeowners' Association, have stipulated to begin billing the Buccaneer residents, ... (underlining added)

(2) The Buccaneer Homeowners' Association has private counsel, Mr. Robert Burandt, Esq., representing the Association in the Circuit Court in some of the same issues that are before this Commission. However, Mr. Burandt has not, in the name of the Buccaneer Homeowners' Association, made an appearance in the above captioned matter.

(3) With the exclusion of Devine, Luddington and Gill, the interests of the majority of the Buccaneer Homeowner's Association have not and are not represented in this matter.

(4) The majority of the residents of Buccaneer Estates have proceeded in this matter given the mistaken belief that the Office of Public Counsel is representing them in a capacity as counsel for the Buccaneer Homeowners' Association.

(5) It is not within the Public Counsel's jurisdiction, or its delegated duties to represent state-chartered organizations. The Buccaneer Homeowners' Association is a state-chartered not for profit corporation or association.

**(6) The Public Counsel cannot serve two masters. The Public Counsel's delegated duty is to represent the interest of the general public and not to exclusively represent the interest of the residents of Buccaneer Estates. The residents of Buccaneer Estates may be considered part of the "general public" in most other matters, but in this matter they are a group of people with a common special interest that cannot be characterized as a public interest. The Buccaneer Homeowners' Association cannot be characterized as part of the general public.**

**Fs. 350.061 Public Counsel; appointment; oath; restrictions on Public Counsel and his or her employees.— The Joint Legislative Auditing Committee shall appoint a Public Counsel by majority vote of the members of the committee to represent the general public of Florida before the Florida Public Service Commission ...” (underlining added).**

**(7) As of this date a “Lease Agreement (contract)” between the individual homeowners and Manufactured Home Communities, Inc., (Park Owners) remains in full force and effect. This contract provides that the Park Owners (MHC) provide the residents with “sewage” in exchange for payment of the lot rental amount. The contract only specifies that MHC will provide “sewage” service. The contract does not specify the methods or means that MHC will employ to provide sewer service, only that MHC provides the service. Because MHC unilaterally decided not to use its own facility, but to hook-up to NFMU, to provide this service does not relieve MHC of its contractual obligation to provide wastewater service to the Homeowners.**

**(8) In light of a lack of a “governmental” mandate, the Homeowners’ lease agreement and PSC having yet to approve NFMU’s application to extend its service area, the PSC cannot at this time hold the homeowners financially responsible for MHC’s desire to change the method in which MHC provides the homeowners wastewater service.**

**(9) The individual homeowner’s lease agreement will become legally null and void only if and when the individual homeowner willingly consents to release MHC of its contractual obligation. Without an actual governmental mandate that may be deemed in the public’s interest, the PSC has no legal authority to do any act that will nullify the resident’s federal and state Constitutional rights of contract.**

- (10) As of this date the individual homeowners have not stipulated to any agreement with MHC that would release MHC from its contractual (lease) obligations.
- (11) The issue of wastewater rates that is now before the Commission is not rightfully an issue between the homeowners and NFMU. In the absence of a statutory governmental mandate this matter remains an issue solely between MHC and NFMU. Unfortunately, MHC, an indispensable party, has not been made a party to this action and remains beyond the PSC's subject matter jurisdiction at this time.
- (12) Even if the majority of all the members of the Buccaneer Homeowners' Association were to capitulate to the Staff's recommendations and assent to the Public Counsel and Staff's "agreement," the terms of the lease agreement between MHC and the dissenting Homeowners would remain in full force and effect.

### CONCLUSION

In the absence of a "governmental mandate" MHC and the Homeowners remain bound by a lease agreement (contract) whose provisions provide for MHC to furnish the Homeowners with "sewage" disposal at no additional cost. Therefore, this is not a legitimate rate-matter between the homeowners of Buccaneer Estates and NFMU. It is legitimately a rate-matter between NFMU and MHC.

Until such time as MHC can be joined as a party to this matter, and in the name of the Constitution and justice, the Commission must strike any and all of the Staff's recommendations and any and all NFMU's claims that would allow NFMU to unconstitutionally impose a temporary wastewater rate on the dissenting homeowners of Buccaneer Estates.

The Public Service Commission must also strike the settlement agreement because the Staff and the Public Counsel did not take into consideration MHC's role, responsibilities and obligations in this matter. MHC is an indispensable party in this matter without whom the PSC cannot fulfill its duty and act in the public's interest.

The Homeowners have been led to believe that Public Counsel is representing them, as an association, in this matter. If the Homeowners had previously understood

that Public Counsel only represents the interest of the general public, they may have elected to retain private counsel to act solely in their best interest.

The Homeowners are now being wrongfully asked to take financial responsibility for NFMU and MHC's wrongful acts because of the PSC's mistaken acceptance of the original developer's agreement that allowed this matter to become the "unique situation" that it is.

**WHEREFORE:** For all the above reasons the Commission must strike the Staff's recommendations in regard to the Commission's approval of the "settlement agreement." The Commission must disallow the "settlement agreement" at this time.

Respectfully submitted,



Donald Gill

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the forgoing was forwarded via fax to Steve Reilly, Esq., Office of Public Counsel (Fax 850-488-4491), Martin S. Friedman, Esq., of Rose, Sundstrom & Bentley, (Fax 850-656-4029), Ronald Luddington and Joseph Devine and also by fax and first class US Mail (overnight delivery) to Jennifer Brubaker, Esq., Public Service Commission, 2540 Shumard Oak Blvd., Tallahassee FL 32399-0850, Fax 850-413-6250, on this 6<sup>th</sup> day of September, 1999.



Donald Gill