

FLORIDA PUBLIC SERVICE COMMISSION
Capital Circle Office Center • 2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

MEMORANDUM

MAY 29, 1997

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO) *MS*

FROM: DIVISION OF LEGAL SERVICES (VACCARO) *MS*
DIVISION OF WATER & WASTEWATER (REDEMAN) *3/24/97 in RPK: '00/1/01*

RE: DOCKET NO. ~~961531WU~~ - MARION UTILITIES, INC. -
APPLICATION FOR AMENDMENT OF CERTIFICATE NO. 347-W TO ADD
TERRITORY
COUNTY: MARION

AGENDA: JUNE 10, 1997 - REGULAR AGENDA - INTERESTED PERSONS MAY
PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\LEG\WP\961531WU.RCM

CASE BACKGROUND

Marion Utilities, Inc. (MUI or utility) provides water and wastewater service to approximately 3,925 water customers and 118 wastewater customers in Marion County. The utility's 1995 annual report shows an annual operating revenue of \$861,746 and a net operating income of \$75,756. The utility is a Class A utility under Commission jurisdiction. On December 19, 1996 pursuant to Rule 25-30.030, Florida Administrative Code, the utility gave legal notice of its application for an amendment to Water Certificate No. 347-W, under pursuant Section 367.045(2), Florida Statutes, and Rule 25-30.036(3), Florida Administrative Code.

On January 22, 1997, Decca Utilities (Decca) filed an objection to MUI's application. On March 4, 1997, MUI filed a Motion to Dismiss Decca's objection. Decca responded to MUI's motion to dismiss on March 17, 1997. This recommendation deals with MUI's Motion to Dismiss.

DOCUMENT NUMBER-DATE

0004 | MAY 29 5

FPSO-RECORDS/REPORTING

DOCKET NO. 961531-WU
DATE: MAY 29, 1997

DISCUSSION OF ISSUES

ISSUE 1: Should Marion Utilities, Inc.'s Motion to Dismiss Decca Utilities' Objection to Certificate Amendment be granted?

RECOMMENDATION: No. Marion Utilities, Inc.'s Motion to Dismiss should be denied. (VACCARO)

STAFF ANALYSIS: As stated in the case background, on January 22, 1997, Decca filed an objection to MUI's application to amend its water certificate. On March 4, 1997, MUI filed a Motion to Dismiss Decca's objection. In its motion, MUI states that on December 19, 1996, pursuant to Section 367.045, Florida Statutes, the utility gave legal notice of its application for amendment to required persons. On the same date, MUI published its legal notice in the Ocala Star-Banner, a daily newspaper published in Marion County.

MUI states that the notice, as published, provided in part the following:

An objection to said application must be made in writing within thirty (30) days from this date to the Director, Division of Records and Reporting, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida, 32399-0850.

MUI states that pursuant to Section 367.045(3), Florida Statutes, Rule 25-30.031, Florida Administrative Code, and the provisions of the notice, any objection to MUI's application was due on January 21, 1997. Therefore, Decca's objection, which was not filed until January 22, 1997, should be dismissed as untimely.

On March 17, 1997, Decca timely responded to MUI's Motion to Dismiss. In its response, Decca argues that the Commission should either acknowledge Decca's objection as timely filed or require MUI to renotice its application.

In support of its argument, Decca states the following:

1. MUI's notice is fatally flawed. Rule 25-30.030(4)(d), Florida Administrative Code, provides in part:

(4) The notice shall include the following . . .

(d) a statement that any objections to the application must be filed with the Director, Division of Records and Reporting, . . . no later than 30 days after the notice was mailed or published
(Emphasis added be Decca.)

Use of the word "shall" in an Administrative Code Rule denotes that the application of the rule is mandatory. Bystrom v. Florida Rock Industries, 502 So. 2d 35, 36 (Fla. 3rd DCA 1987). Therefore, MUI's notice violates Rule 25-30.030(4)(d), Florida Administrative Code, because it does not include the required words, "must be filed."

2. In the alternative, MUI's notice is so flawed that equitable tolling should be applied to extend the protest period by one day. Decca's objection was filed by a non-attorney representative of Decca. For a non-attorney, the words "must be made in writing" leave ambiguity as to whether the protest had to be received by the Commission in the time specified.
3. Based upon equitable considerations, MUI should not insist that the Commission strictly interpret one rule regarding Decca's deadline for filing an objection, yet, as to another rule, adopt a forgiving interpretation so that MUI's notice be deemed proper.
4. Finally, Decca notes that, despite the fact that Decca's objection was filed on January 22, 1997, the utility mailed its objection on January 15, 1997.

The standard to be applied in disposing of a motion to dismiss is whether, with all allegations in the petition assumed to be true, the petition states a cause of action for which relief may be granted. Varnes v. Dawkins, 624 So. 2d 349 (Fla. 1st DCA 1993).

DOCKET NO. 961531-WU
DATE: MAY 29, 1997

In this instance, MUI does not challenge the facial sufficiency of Decca's objection, but still raises a valid argument that Decca's objection was untimely filed pursuant to Section 367.045(3), Florida Statutes and Rule 25-30.031, Florida Administrative Code.

Section 367.045(3), Florida Statutes, provides, in part, that:

If, within 30 days after the last day that notice was mailed or published by the applicant, whichever is later, the commission does not receive written objection to the notice, the commission may dispose of the application without hearing.

Rule 25-30.031(1), Florida Administrative Code, provides:

A written objection to a Notice of Application is timely if it is filed within 30 days after the last date that the Notice is mailed or published by the applicant, whichever is later.

Therefore, it does appear that Decca's objection should have been filed by January 21, 1997.

However, Section 367.045(3), Florida Statutes, provides that the Commission "may dispose of the application without hearing," when an objection is not received in 30 days. (Emphasis added.) The statute does not specifically require it. Therefore, whether to accept an untimely objection appears to be within the Commission's discretion.

Staff believes that the facts in this docket provide support for denial of MUI's motion to dismiss. Decca alleged that it mailed its objection on January 15, 1997. Staff cannot verify the postmark date, because the docket file does not include the envelope in which the objection arrived. However, the date is corroborated by a telephone conversation between staff and MUI in which the utility acknowledged that its copy of Decca's objection was postmarked January 15, 1997. Under the circumstances, staff believes that it is reasonable to assume that Decca mailed its objection to the Division of Records and Reporting on the same date. The objection was filed one day late.

DOCKET NO. 961531-WU
DATE: MAY 29, 1997

Under the circumstances, staff believes that Decca did act in good faith and should not be barred from this proceeding. To dismiss an objection under this set of facts because it was filed one day late appears to be a drastic remedy. Florida Case law provides that dismissal is a "drastic remedy" that should only be used in "extreme situations". Carr v. Dean Steel Buildings, Inc., 619 So. 2d 392 (Fla. 1st DCA 1993). Therefore, based upon the foregoing, staff recommends that the Commission deny MUI's Motion to Dismiss. If the Commission approves this recommendation, staff will confirm a hearing date with the Chairman's office.

DOCKET NO. 961531-WU
DATE: MAY 29, 1997

ISSUE 2: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open pending the resolution of the hearing process. (VACCARO)

STAFF ANALYSIS: If the Commission approves Issue 1, this docket will need to remain open in order to dispose of the formal hearing. If the Commission denies Issue 1, this docket will still need to remain open in order for the Commission to make a determination of whether to grant MUI's amendment application.