

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for transfer
of Certificate No. 281-S in Lee
County from Bonita Country Club
Utilities, Inc. to RealNor
Hallandale, Inc.

DOCKET NO. 990975-SU
ORDER NO. PSC-99-2107-PCO-SU
ISSUED: October 25, 1999

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
SUSAN F. CLARK
E. LEON JACOBS, JR.

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO
EXPEDITE OR IN THE ALTERNATIVE TO TAKE OTHER SPECIFIED ACTION
FOR THE BENEFIT OF CUSTOMERS

BY THE COMMISSION:

BACKGROUND

Bonita County Club Utilities, Inc. (BCCU) is a Class B utility which provides wastewater service in Lee County to 859 customers. According to BCCU's 1997 annual report, its operating revenues were \$209,946 with a net operating loss of \$50,184.

On July 28, 1999, RealNor Hallandale, Inc. (RealNor or utility) filed an application on behalf of BCCU for the transfer of Certificate No. 281-S to RealNor. RealNor, the transferee, obtained rights to the transferor's utility by an Assignment of Interest in the Certificate of Title from Northern Trust Bank of Florida N.A. (Bank), following its mortgage foreclosure. RealNor is currently operating the utility as required by Section 367.071(6), Florida Statutes. On September 7, 1999, Michael J. Miceli, as president of BCCU, filed a letter objecting to the application for transfer. Mr. Miceli's objection letter states that RealNor is not entitled to the entire utility as requested in RealNor's application. Accordingly, this matter is currently set for an administrative hearing. Moreover, it has come to our attention that a hearing pertaining to the Certificate of Title has been set for October 25, 1999, in the Twentieth Judicial Circuit In

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and For Lee County, Florida (Circuit Court Case No. 98-6169-CA-WCM). The parties filed a joint stipulation in the Circuit Court to escrow certain revenues for the months of July and August, 1999, which the Court approved.

On September 17, 1999, RealNor filed a Motion to Expedite Application for Transfer or in the Alternate to Take Other Specified Action for the Benefit of Customers. BCCU filed no response to the motion and the time for filing such has expired. In August 1999, our staff attempted to address many of the matters contained in RealNor's Motion, but staff was informed by RealNor's counsel that RealNor would not attend a meeting between the parties at that time. Therefore, staff did not conduct a meeting.

We have been informed that BCCU is collecting monthly revenues from the customers. The purpose of this Order is to protect the customers and the revenues, until such time as we can review the utility's books and records to estimate the operating expenses which the utility will need to collect on a monthly basis during the pendency of this matter. Our staff met on October 12, 1999, with BCCU and RealNor to discuss each party's monthly operating and maintenance expenses. Once we have reviewed the utility's expenses, we will take into account the utility's current level of operating expenses during the pendency of this matter.

MOTION TO EXPEDITE OR IN THE ALTERNATIVE TO
TAKE OTHER SPECIFIED ACTION FOR THE BENEFIT OF CUSTOMERS

In its motion, RealNor makes three alternative requests, each of which is discussed below.

RealNor's First Request

RealNor's first request is for the Commission to immediately approve the transfer application as a Proposed Agency Action (PAA). We find that this request is inconsistent with Section 367.071(4), Florida Statutes, which provides that transfer applications shall be disposed of as provided for in Section 367.045, Florida Statutes. The statutory notice provisions for transfer applications require that notice of an application be given prior to Commission approval and that affected parties be given a 30 day objection period from the last notice. Section 367.045, Florida Statutes. If a written objection is filed during the objection period requesting a proceeding pursuant to Sections 120.569 and 120.57, Florida Statutes, the Commission must conduct such a

proceeding. Section 367.045(4), Florida Statutes. To approve the application as PAA, as requested, would be inconsistent with the statutory provision. Therefore, RealNor's first request is denied.

RealNor's Second Request

RealNor's second request states that "[i]f the Commission refuses to grant the transfer application in a PAA order, then the Commission, pursuant to Section 367.071(6), F. S., must relieve RealNor Hallandale, Inc. of its burden to provide service (without compensation) and place the burden on BCCU."

Section 367.071(6), Florida Statutes states that

Any person, company, or organization that obtains ownership or control over any system, or part thereof, through foreclosure of a mortgage or other encumbrance, shall continue service without interruption and may not remove or dismantle any portion of the system previously dedicated to the public use which would impair the ability to provide service, without the express approval of the Commission.

Section 367.071(6), Florida Statutes, plainly states that the foreclosing party must provide uninterrupted service. Therefore, to shift this burden back to BCCU would clearly be contrary to the statute. Also, we find that it is not in the customers' best interests to shift the burden back to BCCU because BCCU has no treatment facilities.

Furthermore, it is important to note that Section 367.071(6), Florida Statutes, fails to address compensation for the continued service without interruption. This is significant because Section 367.071(1), Florida Statutes, states that a utility may not assign, sell, or transfer its Certificate of Authorization without the Commission's approval. Without a Certificate of Authorization, RealNor cannot bill customers for service provided because the only authorized party to bill in the service area is BCCU. RealNor (the foreclosing party) must provide continued service without interruption, with or without compensation, until a Certificate of Authorization can be obtained. However, we recognize that to provide service without compensation would be unfair. This is why we believe it is important to protect the revenues so that compensation for services provided will be available upon resolution of this matter.

Based on the foregoing, RealNor's second request is denied on the grounds that it is inconsistent with statutory provisions and that it is not in the best interests of the customers.

RealNor's Third Request

The third request of RealNor states that if we grant the application as a PAA and BCCU makes a lawful protest, then for the benefit of the customers and the protection of RealNor's property, we should authorize the creation of an escrow account for all of the revenues derived from service to customers. Furthermore, the request suggests that we could establish conditions for withdrawal for necessary and legitimate operations and needed repairs.

The pending dispute over ownership of this utility is unresolved, and a Court hearing on the matter is scheduled to take place on October 25, 1999. However, we understand the urgency of this matter since it may be appropriate for both entities to receive some level of compensation for the operation of the utility during the pendency of this case. Clearly, monies paid by the customers of the utility should be protected and service should continue pending resolution of this case. Therefore, RealNor's third request is granted as modified below.

As previously noted, the parties entered into, and the Circuit Court approved, a joint stipulation for July and August, 1999, under which BCCU was provided certain billing expenses and the remaining revenues were escrowed. We find it appropriate to require the parties to continue operating under the terms of this joint stipulation, with the major distinction that the Commission be a party to the escrow agreement and a signatory to the escrow account, as is standard practice for Commission-approved escrow agreements. We note that at the time of the joint stipulation, the Bank was a party. However, the Bank subsequently assigned its rights to RealNor. Therefore, RealNor shall be identified as a party to the escrow agreement, as set forth below.

Overall, the joint stipulation allowed for the escrow of all monies received by BCCU, with the exception of certain, specific expenses. An escrow agreement, based on the Court-approved joint stipulation, shall be entered into by both parties with the following provisions:

1. The Commission shall be a party to the written escrow agreement and a signatory to the escrow account.

2. The written escrow agreement shall state that:
 - a. The account is established at the direction of this Commission for the purpose set forth above;
 - b. No withdrawals of funds shall occur without the prior approval of the Commission through the Director of the Division of Records and Reporting;
 - c. Information concerning that escrow account shall be available from the institution to the Commission or its representative at all times;
 - d. The amount of revenue received shall be deposited in the escrow account within seven days of receipt; and
 - e. Pursuant to Cosentino v. Elson, 263 So. 2d 253 (Fla. 3d DCA 1972), escrow accounts are not subject to garnishments.
3. BCCU shall send out wastewater treatment bills until otherwise ordered by this Commission, with a letter executed by RealNor and counsel.
4. All monies taken in by BCCU, whether they are for wastewater service payments, impact fees, or otherwise, shall be deposited by BCCU in an escrow account, except as noted in paragraph 5 below, in order to maintain the status quo of the billing of the BCCU accounts.
5. BCCU will be compensated for its billing services which may be deducted from the monies received from the billings in the following manner:
 - a. \$350.00 a week for the salary of Ms. Pamela Pass;
 - b. \$120.00 a week for the salary of Ms. Kathy Johnson;
 - c. \$500.00 a month for office rental; and
 - d. \$1,141.49 for the rental payments to Platinum Coast Financial Corporation for the percolation ponds (inclusive of tax).

6. BCCU employee, Ms. Pamela Pass, shall be the only one allowed to make any disbursements. Before any disbursements are made, including those referenced in paragraph 5, Ms. Pass shall send a statement or some other indication of what the disbursement is to the designated representative of RealNor and to the Commission for authorization to disburse.

We recognize that continuation of this escrow account may not be the long-term solution if indeed BCCU is incurring more expenses than what is allowed under these terms. Also, RealNor is operating the treatment facilities and incurring expenses which it has not received any compensation for at this point in time. As previously mentioned, upon our review of each party's books and records, and we shall specifically address each party's entitlement to escrowed funds for expenses during the pendency of this matter.

Conclusion

Based on all the above, the first and second requests of RealNor's motion are denied because they are inconsistent with the statutes and are not in the best interests of the customers. Additionally, RealNor's third request is granted as modified herein. RealNor and BCCU are hereby put on notice that failure to comply with these requirements will result in the initiation of a show cause proceeding.

This docket shall remain open to resolve the protest filed in opposition to the transfer application and to dispose of the transfer application after hearing.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the first and second requests of RealNor Hallandale, Inc.'s Motion to Expedite or in the Alternative to Take Other Specified Action for the Benefit of Customers is denied. It is further

ORDERED that the third request of RealNor Hallandale, Inc.'s Motion to Expedite or in the Alternative to Take Other Specified Action for the Benefit of Customers is granted to the extent set forth in the body of this Order. It is further

ORDERED that an escrow account shall be entered into by both parties, as set forth in the body of this Order. It is further

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ORDERED that the failure of either party to comply with the requirements of this Order shall result in the initiation of a show cause proceeding. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission this 25th day of October, 1999.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida

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Administrative Code, if issued by the Commission; or (3) 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 wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.