State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: AUGUST 17, 2000

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

FROM: DIVISION OF REGULATORY OVERSIGHT (JOHNSON, REDEMANN)
DIVISION OF LEGAL SERVICES (VAN LEUVEN)

RE: DOCKET NO. 000277-WS - APPLICATION FOR TRANSFER OF FACILITIES AND CERTIFICATES NOS. 353-W AND 309-S IN LEE COUNTY FROM MHC SYSTEMS, INC. D/B/A FFEC-SIX TO NORTH FORT MYERS UTILITY, INC., HOLDER OF CERTIFICATE NO. 247-S; AMENDMENT OF CERTIFICATE NO. 247-S; AND CANCELLATION OF CERTIFICATE NO. 309-S.
COUNTY: LEE

AGENDA: 08/29/2000 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\RGO\WP\000277.RCM

CASE BACKGROUND

MHC Systems, Inc. (MHC or utility) is a Class B utility which provides water and wastewater services in Lee County to 1,847 water and 1,839 wastewater customers. MHC's service area is a water-use caution area as designated by the South Florida Water Management District. The annual report for 1999 shows that the operating revenue was $408,638 and $460,317 and the net operating income was $70,384 and $81,391, for the water and wastewater systems respectively. The utility's facilities consist of four systems: one water treatment plant, one water transmission and distribution system, one wastewater collection system and one wastewater treatment plant. Rate base was established for this utility in Docket No. 950193-WS, by Order No. PSC-95-1444-FOF-WS, issued

November 28, 1995 as $1,018,482 for water and $1,903,971 for wastewater.

On March 2, 2000, North Fort Myers Utility, Inc. (NFMU) filed an application for approval of the transfer of the facilities and Certificates Nos. 353-W and 309-S currently held by MHC Systems, Inc. d/b/a FFEC-Six to NFMU.

On March 2 and 7, 2000, MHC noticed its utility customers of its intention to transfer to NFMU. The 30 day protest period ended April 6, 2000 with no protests being filed with the Commission's Division of Records and Reporting. However, on March 31, 2000, Mr. Alexander William Varga (Mr. Varga), a customer, e-mailed the Commission's Division of Consumer Affairs stating that he objected to NFMU's transfer application. The Commission's Division of Legal Services received a copy of Mr. Varga's e-mail on April 4, 2000, and attempted to contact Mr. Varga concerning the acceptable and proper filing methods. On April 6, 2000, staff was able to contact Mr. Varga and explain that an e-mailed objection does not constitute a proper filing and that he must file his objection by mail with the Director of Records and Reporting. On May 16, 2000, staff explained again to Mr. Varga that the proper procedure for filing an objection or any other information is to send it to the Commission's Division of Records and Reporting. On May 18, 2000, Mr. Varga properly filed his objection to MHC's transfer application on the grounds that he believes that "[t]he sale [of MHC to NFMU] will more than likely place these communities in both financial and physical jeopardy."

Once Mr. Varga's objection was filed, staff informed NFMU's attorney, Mr. Martin Friedman, that the Commission had received an objection to the transfer application.

On May 22, 2000, the Commission received an objection from Pine Lakes Homeowners Association (Pine Lakes) addressed to Chairman Garcia. In response to Pine Lakes' objection, the Commission's legal staff informed Pine Lakes by letter that a copy of the staff's recommendation addressing their objection would be mailed to them once filed, along with a letter notifying them of the date of the agenda conference.

Pending the outcome of this recommendation, both Mr. Varga and Pine Lakes have been identified in this docket as interested persons.

The purpose of this recommendation is to address NFMU's Motion to Dismiss Mr. Varga's objection and Pine Lakes' objection.

DISCUSSION OF ISSUES

ISSUE 1: Should North Fort Myer Utility, Inc.'s Motion to Dismiss Mr. Varga's objection be granted?

RECOMMENDATION: No. Staff recommends that North Fort Myers Utility, Inc.'s Motion to Dismiss Mr. Varga's objection should be denied, and that therefore, this matter should proceed to hearing. (VAN LEUVEN)

STAFF ANALYSIS: As stated in the case background, on March 31, 2000, Mr. Varga e-mailed the Commission's Division of Consumer Affairs objecting to NFMU's transfer application. On April 6, 2000, the Commission's Division of Legal Services contacted Mr. Varga and explained the proper filing methods. On May 16, 2000, staff explained to Mr. Varga that his prior e-mail did not constitute a filing and that if he wanted his March 31, 2000 e-mail to be filed it had to be mailed to the Division of Records and Reporting. Mr. Varga agreed to send another copy of his March 31, 2000 e-mail which was received and filed on May 18, 2000. Mr. Varga has always contended that he mailed a copy of his March 31, 2000 e-mail to the Commission within the objection period. However, Mr. Varga's objection was filed 42 days past the timely filing date.

In Mr. Varga's March 31, 2000, e-mail he states that "this sale [MHC to NFMU] will more than likely place these two communities [Pine Lakes Country Club and Fairway Lakes Country Club] in both financial and physical jeopardy." Mr. Varga cites to various parts of a March 29, 2000 article in the Lee County Examiner. In his March 31, 2000 e-mail, Mr. Varga states the following:

> (Note: The residents of Pine Lakes Country Club were notified of this transfer of ownership by NFMU with an undated letter attached to a NOTICE OF APPLICATION, etc., dated March 7, 2000. I hereby, file an objection to the said application (within the 30 days required) to the Director, Division of Records and Reporting, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850. It is hoped that E-mail will serve as legal notice. In any event, a copy of this E-mail will be forwarded by U.S. Mail to the PSC and the applicants attorneys).

NFMU's Motion to Dismiss Objection

Pursuant to Rule 28-106.204, Florida Administrative Code, NFMU timely filed a Motion to Dismiss Mr. Varga's Objection letter on May 31, 2000 (motion). In its motion, NFMU states that pursuant to Rule 25-30.030, Florida Administrative Code, on March 4, 2000, notice was published in the Fort Myers News-Press and on March 7, 2000, notice was sent to each of the customers of the system being transferred. Accordingly, NFMU states that pursuant to Rule 25-30.031, Florida Administrative Code, any objection to its notice must have been filed no later than April 6, 2000.

NFMU argues that Mr. Varga's March 31, 2000 e-mail purporting to object to this transfer does not constitute an objection because the Commission does not have any rules which permit filing documents by e-mail. Additionally, NFMU argues that since Mr. Varga's e-mail was not received by the Commission until May 18, 2000, it should be dismissed as untimely.

In addition, NFMU argues that this is not a case where the doctrine of equitable tolling would apply. In support of its argument, NFMU cites to In re: Application for Amendment of Certificate No. 347-W to add territory in Martin County by Marion Utilities, Inc., Order No. PSC-97-0781-FOF-WU, issued July 1, 1997, in Docket No. 961531-WU. In In re: Application for Amendment of Certificate No. 347-W to add territory in Martin County by Marion Utilities, Inc., the Commission allowed an objection filed one day late because the wording of the notice was misleading. However, NFMU argues that this is not the case here because the notice given by NFMU was in accordance with the noticing rules and is not misleading. Furthermore, NFMU argues that "Unless a Rule so provides, the placing of an objection in the mail does not constitute a valid objection absent receipt within the required time period. Cf. Enriquillo Expert & Import. v. M.B.R. Industries, Inc., 733 So. 2d 1124, 1126-27 (Fla. 4th DCA 1999)."

NFMU's final argument is that Mr. Varga's objection is based solely upon an article in the Lee County Examiner which is not a legitimate newspaper and the dismissal of Mr. Varga's objection would not result in any legitimate issue being overlooked because financial ability is a threshold issue in proceedings such as this.

Mr. Varga's Response

On June 5, 2000, in response to NFMU's Motion to Dismiss Objection, Mr. Varga timely filed a copy of his June 1, 2000 e-mail

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to staff titled Response to NFMU's Motion to Dismiss My Complaint. In response, Mr. Varga first makes mention of an article from The News-Press concerning NFMU and utility concerns in Lee County.

As to NFMU's motion to dismiss, Mr. Varga responds by stating that "my complaint [objection] was received in a timely manner. Whether 'served' or 'filed', I have proof that my E-mail was received on March 31, 2000 and acknowledged by an internal E-mail . . . on May 9, 2000. The efficiency of the PSC mail room or the U.S. Mail cannot be a valid issue here!"

Staff Analysis

Section 367.045(3), Florida Statutes, provides that "If, within 30 days after the last day that notice was published or mailed 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." Additionally, Rule 25-30.031(1), Florida Administrative Code, provides that "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."

The Commission does not accept electronic filings as stated in its 1999 Statement of Agency Organization and Operations.[1] Rule 25-22.028(1), Florida Administrative Code, states that "Filing shall be accomplished by submitting the original document and the appropriate number of copies, as provided by rule, to the Division of Records and Reporting (Division). Filing may be made by U.S. Mail, hand delivery, or courier service." While staff agrees with NFMU's argument that Mr. Varga's objection was untimely filed, it is within the Commission's discretion to determine whether to grant or deny an untimely objection. See In re: Application for amendment of Certificate No. 347-W to add territory in Martin County by Marion Utilities, Inc., Order No. PSC-97-0781-FOF-WU, issued July 1, 1997, in Docket No. 961531-WU.

[1] The Commission established an e-filings task force several months ago. The e-filings task force is preparing an implementation plan and schedule for an electronic filing system. Once completed, this plan will be brought to the Commissioners at an Internal Affairs meeting.

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In prior cases, the Commission has accepted late-filed objections when good cause is demonstrated as to why the petition is untimely. See In re: Application by Florida Cities Water Company for extension of water service, etc, Order No. PSC-98-0513-FOF-WS, issued April 15, 1999, in Docket No. 970696-WS.

An example of the Commission allowing an untimely objection is In Re: Initiation of show cause proceedings against VOCAL MOTION, INC. for violation of Rule 25-24.510, F.A.C., Certificate of Public Convenience and Necessity Required, and Commission Order 24101, Order No. PSC-95-0630-FOF-TC, issued May 23, 1995, in Docket No. 940719-TC. In this case, Vocal Motion, Inc. (Vocal Motion) attempted to file a petition for a formal proceeding via facsimile transmission on the due date. Vocal Motion, after learning that Commission Rules do not allow for such filings, sent its pleading to the Commission via overnight mail. In allowing the protest, the Commission stated that it was fair and appropriate to exercise its discretion in granting Vocal Motion's Petition for a Formal Proceeding. See also In Re: Application for Transfer of Certificates Nos. 374-W and 323-S in Volusia County from Terra Mar Village (River Park) to Terra Mar Village Utilities, Inc., Order No. PSC-95-1386-FOF-WS, issued November 8, 1995, in Docket No. 950695-WS (the Commission denied the utility's motion to dismiss untimely filed objection to transfer application when the objection was filed five days late); In re: Application for Staff assisted rate case in Highlands County by Sebring Ridge Utilities, Inc., Order No. PSC-96-1184-FOF-WS, issued September 20, 1996, in Docket No. 950966-WS (the Commission granted an untimely petition for formal proceeding which was two days late).

As to the doctrine of equitable tolling, these circumstances do appear to warrant the application of the doctrine of equitable tolling because Mr. Varga was ignorant of the Commission's filing rule and the utility has not indicated any prejudice. In Machules v. Department of Administration, 523 So. 2d 1132, 1134 (Fla. 1988), the Florida Supreme Court adopted the doctrine of equitable tolling in proceedings pursuant to the Florida Administrative Procedures Act. The doctrine of equitable tolling "is used in the interests of justice to accommodate . . . a plaintiff's right to assert a meritorious claim when equitable circumstances have prevented a timely filing." Id. Additionally, "Equitable tolling is a type of equitable modification which 'focuses on the plaintiff's excusable ignorance of the limitations period and on [the] lack of prejudice to the defendant.'" Id. (citations omitted).

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For the foregoing reasons, staff recommends that the Commission should exercise its discretion to accept Mr. Varga's untimely objection because Mr. Varga's intent to object was made known before the expiration of the objection period. In Mr. Varga's March 31, 2000 e-mail, he stated that a copy of his e-mail would be forwarded by mail to the Commission and the applicant's attorney. Although, the Commission never received his original mailing, Mr. Varga contends that he mailed the original copy in time for it to be received by the Commission by the expiration of the objection period. Neither the Commission nor NFMU's attorney have received the original mailed copy, but the Commission did receive a second copy on May 18, 2000. Staff believes that Mr. Varga reasonably and in good faith thought that his e-mail would serve as an objection, and once he was informed that the mailed copy was never received he mailed another copy to the Commission.

Therefore, staff recommends that the Commission deny NFMU'S Motion to Dismiss Objection and that this matter should proceed to hearing. To dismiss an objection under this set of facts, because Mr. Varga thought e-mail was an acceptable filing method, appears to be a drastic remedy. Dismissal is a "drastic remedy" that should only be used in "extreme circumstances." Carr v. Dean Steel Buildings, Inc., 619 So. 2d 392 (Fla. 1st DCA 1993). Staff recommends that the Commission should exercise its discretion to allow Mr. Varga's objection to stand because there is good cause to believe that Mr. Varga reasonably and in good faith thought that his e-mail would serve as an objection. In addition, the utility has failed to allege any prejudice.

ISSUE 2: Should the Pine Lakes Estates Homeowner's Association's (Pine Lakes) objection be dismissed as untimely?

RECOMMENDATION: Yes, Staff recommends that Pine Lakes' objection should be dismissed as untimely. However, if the Commission agrees with staff in Issue 1 of this recommendation, this matter will proceed to hearing and Pine lakes may petition for intervention. (VAN LEUVEN)

STAFF ANALYSIS: 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." In addition, Rule 25-30.031, Florida Administrative Code, states that "A written objection to a Notice of Application is timely if it is filed within 30 days after the last day the Notice is mailed or published by the applicant, whichever is later."

As stated in the case background, pursuant to Rule 25-30.030, Florida Administrative Code, on March 4, 2000, notice was published in the Fort Myers News-Press and on March 7, 2000, notice was sent to each of the customers of the system being transferred. Accordingly, pursuant to Rule 25-30.031, Florida Administrative Code, any objection to NFMU's notice must have been filed no later than April 6, 2000. However, on May 22, 2000, the Commission received an objection from Pine Lakes. Thus, Pine Lakes' objection was filed 46 days past the proper filing date.

In its objection to NFMU's transfer application, Pine Lakes states that the Board of Directors of Pine Lakes stands behind Mr. Varga's objection to NFMU's transfer application and that the transfer is not in the best interests of the community. Pine Lakes states that its objection "is based on the negative publicity concerning NFMU, Inc., including its potential bankruptcy, and the fact that its purchase has been put on indefinite hold . . . ." Additionally, Pine Lakes bases its objection upon statements from the Buccaneer, Lake Arrowhead, Tamiami Village, and Six-Lakes communities concerning NFMU made at an interpark council meeting held on April 28, 2000. Lastly, Pine Lakes' objection included twelve newspaper articles addressing the apparent utility problems in Lee County.

Staff believes that Pine Lakes' untimely objection is distinguishable from Mr. Varga's objection because Pine Lakes never attempted to voice an objection to the application prior to its

late filing. Mr. Varga, albeit improperly, did make an attempt to file an objection within the 30 day objection period.

Whether to grant or deny an untimely objection is within the Commission's discretion. In re: Application for amendment of Certificate No. 347-W to add territory in Martin County by Marion Utilities, Inc., Order No. PSC-97-0781-FOF-WU, issued July 1, 1997, in Docket No. 961531-WU. In prior cases, the Commission has accepted late-filed objections when good cause is demonstrated as to why the petition is untimely. In re: Application by Florida Cities Water Company for extension of water service, etc, Order No. PSC-98-0513-FOF-WS, issued April 15, 1999, in Docket No. 970696-WS.

However, Pine Lakes provided no explanation as to why its objection was untimely filed. Absent a explanation or demonstration of good cause as to why its Objection was filed 46 days late, staff believes that Pine Lakes' objection should be dismissed.

Staff notes that, as discussed in Issue 1 of this recommendation, untimely filings have been allowed by both the Commission, and the Courts. However, the circumstances surrounding Pine Lakes' objection are distinguishable. For example, Order No. PSC-95-0630-FOF-TC, issued May 23, 1995, (Docket No. 940719-TC, Initiation of Show Cause Proceedings Against Vocal Motion, Inc. for Violation of Rule 25-24.510, Florida Administrative Code, Certificate of Public Convenience and Necessity Required, and Commission Order 24101) the Commission granted Vocal Motion, Inc.'s (Vocal Motion) Petition for a Formal Proceeding, although Vocal Motion filed its Petition two days after the filing date expired. The Commission used its discretion in granting Vocal Motion's Petition based on the specific facts in that case. In Docket No. 940719-TC, Vocal Motion sent its Petition by facsimile to the Division of Legal Services on the date it was due to be filed. A staff attorney informed Vocal Motion that Commission rules do not allow for filing by facsimile. Vocal Motion filed its Petition and a Motion for Extension of Time by next day express mail. In this case, Pine Lakes did not call staff, nor file a Motion for an Extension of Time to file its objection. Further, Pine Lakes mailed its objection by regular U.S. mail, not by overnight mail, even though the thirty days to file an objection had passed. This showed no attempt by Pine lakes to file the Objection as soon as possible, even though the thirty days to file an objection had passed.

In conclusion, Pine Lakes did not attempt to state a good cause as to why it did not timely respond to NFMU's Notice of

Application and it did not inform staff of any possible delay. Therefore, staff recommends that the Pine Lakes' objection should be dismissed as untimely. It should be noted that if the Commission agrees with staff on Issue 1 of this recommendation and denies NFMU's Motion to Dismiss Objection, this matter will proceed to hearing and Pine Lakes will have the opportunity to petition for intervention in this matter.

ISSUE 3: Should the docket be closed?

RECOMMENDATION: No, this docket should remain open to process the utility's transfer application. (VAN LEUVEN)

STAFF ANALYSIS: This docket should remain open to process the utility's transfer application.