

MEMORANDUM

JUNE 30, 1997

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FPSC - Records/Reporting

TO: DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (VACCARO) *OV*

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

0701-FLF

Attached is an ORDER DENYING MOTION TO DISMISS to be issued in
the above referenced docket. (Number of pages in Order - 6)

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TV:mw

Attachment

cc: Division of Water & Wastewater (Redemann)

I: 961531OR.TV

boxed. 4/10

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for amendment
of Certificate No. 347-W to add
territory in Marion County by
Marion Utilities, Inc.

DOCKET NO. 961531-WU
ORDER NO. PSC-97-0781-FOF-WU
ISSUED: July 1, 1997

The following Commissioners participated in the disposition of
this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
DIANE K. KIESLING
JOE GARCIA

ORDER DENYING MOTION TO DISMISS

BY THE COMMISSION:

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. MUI is a Class A utility. 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, as provided under 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.

MOTION TO DISMISS

In its motion to dismiss Decca's objection, 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

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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 that 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 by Decca.)

Decca also states that the 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, according to Decca, MUI's notice violates Rule 25-30.030(4)(d), Florida Administrative Code, because it does not include the required words, "must be filed."

Alternatively, Decca argues that 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 this Commission in the time specified. Decca states that based upon equitable considerations, MUI should not insist that this 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. 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). 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 this 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, we find that whether to accept an untimely objection is within our discretion.

We believe that under the doctrine of equitable tolling, the facts in this docket support denial of MUI's motion to dismiss. 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." Machules v. Department of Administration, 523 So. 2d 1132, 1134 (Fla. 1988). The doctrine has been applied "when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum." Id.

As discussed earlier, MUI's notice provided that any objections to its application must be made in writing to the Director, Division of Records and Reporting, within thirty days of the notice. However, Rule 25-30.030 (4)(d), Florida Administrative Code, requires that the notice contain a statement that the objection "must be filed" within that period. Although we do not believe that MUI's notice is "fatally flawed" as suggested by Decca, we do believe that the wording of the notice was misleading, whether or not intended as such. Therefore, we find it reasonable to believe that Decca did not realize that its objection had to be received by the Division of Records and Reporting by no later than January 21, 1997, so long as the objection was mailed on or before that date. Accordingly, the doctrine of equitable tolling appears to be applicable.

We note Decca's allegation that it mailed its objection on January 15, 1997. Although we cannot verify the postmark date, MUI has acknowledged that its copy of Decca's objection was postmarked January 15, 1997. Under the circumstances, 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.

Under the circumstances, we find that Decca acted in good faith to provide its objection in what it perceived to be a timely manner 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, we find it appropriate to deny MUI's Motion to Dismiss Decca's objection. This docket shall remain open in order to conduct a formal hearing to make a determination of whether to grant MUI's amendment application.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Marion Utilities, Inc.'s Motion to Dismiss Decca Utilities' Objection to Certificate Amendment is hereby denied. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission, this 1st day of July, 1997.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

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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 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.