

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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.

DOCKET NO. 000277-WS
ORDER NO. PSC-00-1649-PCO-WS
ISSUED: September 15, 2000

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
E. LEON JACOBS, JR.
LILA A. JABER

ORDER DENYING NORTH FORT MYERS UTILITIES, INC.'S MOTION TO DISMISS MR. WILLIAM ALEXANDER VARGA'S LATE-FILED OBJECTION AND DISMISSING PINE LAKES ESTATES HOMEOWNERS ASSOCIATION'S LATE-FILED OBJECTION

BY THE COMMISSION:

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 by Order No. PSC-95-1444-FOF-WS, issued November 28, 1995, in Docket No. 950193-WS, as \$1,018,482 for water and \$1,903,971 for wastewater.

DOCUMENT NUMBER-DATE

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FPSC-REPORTING

ORDER NO. PSC-00-1649-PCO-WS
DOCKET NO. 000277-WS
PAGE 2

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

On March 2 and 7, 2000, MHC noticed its utility customers of its intention to transfer its facilities to NFMU. The 30 day protest period ended April 6, 2000, with no protests being filed with the Division of Records and Reporting. However, on March 31, 2000, Mr. Alexander William Varga, a customer, e-mailed the Division of Consumer Affairs stating that he objected to the transfer application. The 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 proper filing methods. On April 6, 2000, staff counsel contacted Mr. Varga and explained that an e-mailed objection does not constitute a proper filing and that he needed to file his objection by mail with the Division of Records and Reporting. As of May 16, 2000, the Commission had not received an objection from Mr. Varga and staff counsel again explained to Mr. Varga that the proper procedure for filing an objection or any other information is to send it 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).

Once Mr. Varga's objection was filed, staff counsel notified counsel for NFMU that the Commission had received an objection to the transfer application.

On May 22, 2000, Pine Lakes Homeowners Association (Pine Lakes) filed and objection to the transfer application. In response to Pine Lakes' objection, we informed Pine Lakes by letter that a copy of the staff's recommendation addressing the objection would be mailed to them once filed, along with a letter notifying them of the date of the agenda conference.

MOTION TO DISMISS OBJECTION

Pursuant to Rule 28-106.204, Florida Administrative Code, NFMU timely filed a Motion to Dismiss Mr. Varga's Objection (Motion) on May 31, 2000. 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 this 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 filed 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 that case, 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 Export & 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.

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 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.

Mr. Varga further states 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!"

We note that 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."

This Commission does not accept electronic filings as stated in our 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

¹ We 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 before us at an Internal Affairs meeting.

of Records and Reporting (Division). Filing may be made by U.S. Mail, hand delivery, or courier service." While we agree with NFMU's argument that Mr. Varga's objection was untimely filed, it is within our 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.

In prior cases, we have accepted late-filed objections when good cause has been 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. For example, in 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, Vocal Motion, Inc. (Vocal Motion) attempted to file a petition for a formal proceeding via facsimile transmission on the due date. After learning that Commission Rules do not allow for such filings, Vocal Motion sent its pleading to the Commission via overnight mail. In allowing the protest, this 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 (denying the utility's motion to dismiss untimely filed objection to transfer application when the objection was filed five days late); and 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 (granting an untimely petition for formal proceeding which was two days late).

As to the doctrine of equitable tolling, we find that these circumstances 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).

For the foregoing reasons, we shall exercise our discretion to allow Mr. Varga's untimely objection to stand 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 to the applicant's attorney. Although we did not receive his original mailing, Mr. Varga contends that he mailed the original copy in time for it to be received before the expiration of the objection period. Neither we nor NFMU's attorney have received the original mailed copy, but we did receive a copy on May 18, 2000. We find 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.

For the forgoing reasons, NFMU'S Motion to Dismiss Objection is denied and this matter shall proceed to hearing.

PINE LAKES' LATE-FILED OBJECTION

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. Pine Lakes' objection to the transfer application was filed on May 22, 2000, 46 days past the proper filing date.

In its objection, 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 concerning NFMU made by the Buccaneer, Lake Arrowhead, Tamiami Village, and Six-Lakes communities at an interpark council meeting held on April 28, 2000. Pine Lakes' objection included 12 newspaper articles addressing the apparent utility problems in Lee County.

We find that Pine Lakes' untimely objection is distinguishable from Mr. Varga's objection because Pine Lakes made no attempt to voice an objection to the application prior to its late filing. Albeit improperly, Mr. Varga did make an attempt to file an objection within the 30 day objection period. Pine Lakes, on the other hand, provided no explanation as to why its objection was untimely filed. Absent an explanation or demonstration of good cause as to why its objection was filed 46 days late, we find it appropriate to dismiss Pine Lakes' objection. Pine Lakes did not attempt to contact the Commission. Further, Pine Lakes mailed its objection by regular U.S. mail, not by overnight mail, even though the 30 days to file an objection had passed. These facts show no attempt by Pine lakes to file an objection as soon as possible, even though the 30 days to file an objection had passed.

We note that this matter will proceed to hearing and Pine Lakes will have the opportunity to petition for intervention in this matter.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that North Fort Myers Utilities, Inc.'s Motion to Dismiss Objection is denied for the reasons set forth in the body of this Order and this matter shall proceed to hearing. It is further

ORDERED that Pine Lakes Estates Homeowners Association's Objection is dismissed for the reasons set forth in the body of this Order. It is further

ORDERED that this docket shall remain open. It is further

ORDER NO. PSC-00-1649-PCO-WS
DOCKET NO. 000277-WS
PAGE 8

By ORDER of the Florida Public Service Commission this 15th
day of September, 2000.



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

ORDER NO. PSC-00-1649-PCO-WS
DOCKET NO. 000277-WS
PAGE 9

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.