

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for Transfer) DOCKET NO. 950695-WS
of Certificates Nos. 374-W and) ORDER NO. PSC-95-1386-FOF-WS
323-S in Volusia County from) ISSUED: November 8, 1995
Terra Mar Village (River Park))
to Terra Mar Village Utilities,)
Inc.)
_____)

The following Commissioners participated in the disposition of this matter:

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

ORDER DENYING UTILITY'S MOTION TO DISMISS

BY THE COMMISSION:

BACKGROUND

Terra Mar Village (Terra Mar or utility) is a Class C water and wastewater utility located in Volusia County, Florida. The utility's service area is located on the intracoastal waterway between Edgewater and Oak Hill approximately seven miles south of New Smyrna Beach along the east boundary of US Hwy. 1 in Volusia County. Presently, there are 237 water customers and 247 wastewater customers receiving service from the utility.

On July 7, 1981, Terra Mar filed an application for certificates to operate water and wastewater utilities in Volusia County. By Order No. 11267, issued October 26, 1982, we granted Water Certificate No. 374-W, and Wastewater Certificate No. 323-S, and set compensatory rates.

On June 20, 1986, the utility filed an application requesting a transfer of water and wastewater certificates to Terra Mar Associates from Terra Mar Village. On November 6, 1986, we issued Order No. 16815, granting the utility's request to transfer its certificates.

DOCUMENT NO. 95-1386-FOF-WS

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FILED FOR REPORTING

On September 10, 1993, as a result of foreclosure proceedings, Mr. Bernard Covington, President of Terra Mar Associates, was removed from any involvement with Terra Mar Village by Circuit Court Judge William Johnson. At the same hearing, Judge Johnson named Mr. Gerald Potts of Contemporary Property Management, Inc., as the receiver.

On July 15, 1994, Judge Johnson relieved Mr. Potts as the receiver, and appointed Mr. Frank Uddo, the original owner and developer of Terra Mar Village, as successor Receiver. On October 11, 1994, Mr. Uddo filed, on behalf of the utility, a staff-assisted rate case. By Order No. PSC-95-0722-FOF-WS, issued June 19, 1995, we set new rates and charges for the utility.

On June 21, 1995, Terra Mar filed an Application for Transfer of Certificates Nos. 364-W and 323-S from Terra Mar Village (River Park) to Terra Mar Utilities, Inc. (application). On July 26, 1995, Terra Mar/River Park Homeowners Association (Association) filed a Notice of Objection to the transfer (objection). Subsequently, on August 25, 1995, Terra Mar filed Terra Mar Village/Terra Mar Village Utilities, Inc.'s Motion to Dismiss Terra Mar/River Park Homeowners Association, Inc.'s Opposition to the Transfer of Certificate Nos. 364-W and 323-S (Motion to Dismiss), alleging that the Association's objection was untimely pursuant to Section 367.045(3), Florida Statutes. On September 8, 1995, the Association filed Association's Motion to Strike Utilities' Motion to Dismiss (Motion to Strike), and Association's Memorandum in Opposition to Utilities' Motion to Dismiss (memorandum).

MOTION TO DISMISS

Pursuant to Rule 25-30.030, Florida Administrative Code, Terra Mar published a legal notice of its application for transfer of water and wastewater certificates in a local newspaper, the New Smyrna Beach Observer, in Volusia County, on June 21, 1995. The notice properly stated that any objection to the application should be made in writing within thirty (30) days from its date, i.e., July 21, 1995, to the Director of the Commission's Division of Records and Reporting. Further, in its application, Terra Mar stated that on June 21, 1995, it mailed a copy of the legal notice to all of the affected customers, including the members of the Association. As just noted, on July 26, 1995, 35 days after the publication and mailing of Terra Mar's notice, the Association filed an objection to the transfer. On August 25, 1995, the utility filed its motion to dismiss the Association's objection.

The Association's Motion to Strike Terra Mar's Motion to Dismiss was untimely filed on September 8, 1995. We find it to be within our discretion to consider the Association's Motion to Strike, despite its being untimely filed. Pursuant to Rule 25-22.037, Florida Administrative Code, any parties wishing to respond to a motion shall be given seven days after service of the motion to do so. If the motion is mailed, the responding party has an additional five days to file a response. Terra Mar sent a copy of its Motion to Dismiss to the Association on August 23, 1995. The Association claims that it did not receive Terra Mar's Motion to Dismiss until September 5, 1995. The Association then mailed its Motion to Strike on September 6, 1995, and it was filed with the Commission on September 8, 1995, three days after it was due. Terra Mar did not file a motion to strike the Association's motion.

In its Motion to Dismiss, Terra Mar stated that the Association's objection was untimely, pursuant to Section 367.045(3), Florida Statutes. Additionally, Terra Mar attached an affidavit to its Motion to Dismiss, stating that, by first class mail, a copy of the legal notice was sent to the customers of the system being transferred. Further, Terra Mar stated that the board members of the Association were served legal notice by certified mail, and attached copies of the return receipts to its motion.

In its Motion to Strike, the Association stated that the utility's Motion to Dismiss is defective because Ms. Evelyn Schlak, the president of the Association, received a copy of the customer notice, but not the legal notice, by certified mail. The Association provided a copy of Ms. Schlak's return receipt, along with the customer notice and the envelope bearing the certified receipt number in which the customer notice is alleged to have been sent. However, the Association does not allege that the utility never mailed the legal notice, or that the legal notice was never received by the Association.

The Association's memorandum stated that on July 18, 1995, within the 30 day time period, it filed a written objection with the Commission by facsimile. Further, the Association's attorney stated that he was unable to mail the original version of the objection until he returned to his office, after conducting depositions in the Daytona Beach area. The Association stated that the objection was sent by regular U.S. mail on July 21, 1995. The Association, furthermore, stated that Section 367.045(3), Florida Statutes, does not require the Commission to dismiss an objection untimely filed. Rather, under Section 367.045(3), Florida Statutes, the Association offered, the Commission may, in its discretion, dispose of the application without hearing.

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). However, in this instance, Terra Mar does not challenge the facial sufficiency of the Association's objection, but raises as ground for dismissal that the Association's objection was untimely filed pursuant to Section 367.045(3), Florida Statutes. It is, therefore, on this ground that we dispose of Terra Mar's Motion to Dismiss.

Section 367.045(3), Florida Statutes, provides 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.

Terra Mar mailed and published the notice of transfer on June 21, 1995. Therefore, a written timely objection would have had to be received by the Commission by July 21, 1995.

Rule 25-22.036(9)(b), Florida Administrative Code, provides that the Commission may deny a petition for a formal proceeding if it is untimely. Thus, whether to grant or deny an untimely petition appears to us to be within our discretion. *Pan American World Airways, Inc. v. FPSC*, 427 So.2d 716 (Fla. 1983). We believe that such petitions may be granted in rare cases when good cause why the petition is untimely is shown.

We find that the Association has shown good cause why the objection was untimely filed. The Association conceded that, while it sent the objection by facsimile on July 18, 1995, it did not mail it until July 21, 1995, the date by which it should have been filed. We note that no copy of the objection transmitted by facsimile can be found in our files. However, the Association attached to its memorandum a copy of the facsimile transaction report, which confirms the transmittal of the objection to the Division of Records and Reporting on July 18, 1995.

Our rules do not provide for filings by facsimile. Rule 25-30.031, Florida Administrative Code, merely requires that an objection to a notice of application for a transfer of a certificate of authorization be written. However, the Association's attorney noted at Agenda Conference that electronic transmission of documents is permitted in circuit courts under

Section 28.30(5), Florida Statutes, enacted in 1994. He stated that he was accustomed to making electronic transmissions to the courts, while acknowledging that the statute is not applicable to the Commission. In the Association's memorandum, the attorney observed that he is a sole practitioner with limited secretarial support and that he was in the Daytona Beach area in the interests of another representation in the several days before July 21, 1995, when he returned to his Orlando office. We believe that the conduct of the Association's attorney was in good faith in the particular circumstances. We take notice that he was forthright in accepting fault for mistaking the requirements of our rules. We further believe that it is inappropriate to deny the Association its opportunity for a formal hearing in these circumstances. Accordingly, in the exercise of our discretion, Terra Mar's Motion to Dismiss is denied.

With regard to the Association's Motion to Strike, in which the Association alleged Terra Mar's Motion to Dismiss to be defective, we conclude that the apparent error in Paragraph 2 of the Motion to Dismiss, *i.e.*, legal notice was served by registered mail on the board members of the Association, is harmless. The Association did not allege that Ms. Schlak did not receive legal notice, only that she received the customer notice by certified mail. Terra Mar, in its Motion to Dismiss, attached an affidavit stating that all customers of the utility were served a copy of legal notice by first class mail. The Association provided no evidence to the contrary. Its Motion to Strike makes no other allegation. Therefore, we find it appropriate to deny the Association's Motion to Strike Terra Mar's Motion to Dismiss.

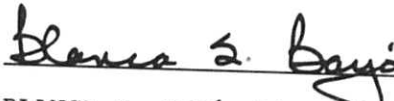
Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Terra Mar Village/Terra Mar Village Utilities, Inc.'s Motion to Dismiss Terra Mar/River Park Homeowners Association, Inc.'s Opposition to the Transfer of Certificate Nos. 364-W and 323-S is denied. It is further

ORDERED that the Association's Motion to Strike Utilities' Motion to Dismiss of Terra Mar Village Homeowners Association, Inc. is denied. It is further

ORDERED that this docket shall remain open pending the final resolution of the objection to the Application for Transfer of Certificates of Terra Mar Village.

By ORDER of the Florida Public Service Commission, this 8th day of November, 1995.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

CJP/MSN

DISSENTS:

Chairman Susan F. Clark dissents without opinion.

Commissioner Diane K. Kiesling dissents with opinion:

I respectfully dissent. The time for filing a petition should not be waived absent a showing of excusable neglect. The Homeowner's Association failed to meet the burden of showing excusable neglect; therefore, the petition should be dismissed as untimely.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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.

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 25-22.038(2), 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.