LAW OFFICES
ROSE, SUNDSTROM & BENTLEY, LLP
2548 BLAIRSTONE PINES DRIVE
TALLAHASSEE, FLORIDA 32301

(904) 877-6555

CHRIS H. BENTLEY, PA
JENNIFER S. BRUBAKER
F. MARSHALL DETERDING
BRIAN L. DOSTER
MARTIN S. FRIEDMAN, PA
JOHN R. JENKINS, PA
STEVEN T. MINDLIN, PA
ROBERT M. C. ROSE
DAREN L. SHIPPY
WILLIAM E. SUNDSTROM, PA
DIANE D. TREMOR, PA
JOHN L. WHARTON

MAILING ADDRESS
POST OFFICE BOX 1567
TALLAHASSEE, FLORIDA 32302-1567

TELECOPIER (904) 656-4029

ORIGINAL
FILE COPY

March 17, 1997

VIA HAND DELIVERY

Ms. Blanca Bayo, Clerk
Division of Records & Reporting
Florida Public Service Commission
2540 Shumard Oaks Boulevard
Tallahassee, Florida 32399-0850

Re: DECCA Utilities; Amendment of Certificate No. 347-W to add territory in Marion County by Marion Utilities, Inc.
Docket No. 961531-WU
Our File No. 20982.10

Dear Ms. Bayo:

Enclosed for filing please find the original and fifteen copies of Decca Utilities' Response To Motion To Dismiss Objection To Certificate Amendment in the above-referenced docket.

Should you have any questions or concerns regarding the above, please let me know.

Sincerely,

ROSE, SUNDSTROM & BENTLEY, LLP

John L. Wharton, Esq.
For The Firm

JLW/lm
Encl.

ACK
AFA
APP
CAF
CMU
CTR
EAG
LEG
LIN
OPC
RCH
SEC
WAS
OTH

DOCUMENT NUMBER-DATE
02769 MAR 17 97
FPSC-RECORDS/REPORTING

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

DECCA UTILITIES' RESPONSE TO MOTION TO DISMISS OBJECTION TO CERTIFICATE AMENDMENT

DECCA UTILITIES, ("Decca"), pursuant to Commission Rule 25-22.037(2), Fla. Admin. Code, hereby files this Response to Motion to Dismiss Objection to Certificate Amendment and in support thereof would state and allege as follows:

1. Marion Utilities, Inc. ("MUI") has moved this Commission to dismiss the objection of DECCA Utilities on the basis that the objection was not timely made as required by the notice and by Commission Rule 25-30.031, Fla. Admin. Code.

2. MUI asserts that the due date for the objection was Tuesday, January 21, 1997, and that the Commission received DECCA's objection on January 22, 1997.

3. For both the equitable and substantive reasons set forth below, the objection of DECCA Utilities should either be acknowledged by the Commission as timely filed or MUI should be required to renotice its application.

4. Two threshold facts are important. The first is that all allegations and assertions in DECCA's petition must be accepted as fact for the purpose of adjudicating the motion. See, e.g., *Kay v. Via Verde Home Homeowners Association*, 667 So.2d 337, 338 (4th DCA

DOCUMENT NUMBER-DATE
02709 MAR 17 97
FPSC-RECORDS/REPORTING

1986). Thus, it must be accepted as true that the protest was mailed on January 15, 1997, as dated.[1] The second fact which the Commission should consider is that MUI will not deny that it received a copy of the Petition several days before January 21, 1997.

I.

The Notice of publication of MUI is fatally flawed or, in the alternative, is so flawed that equitable tolling should be applied such to extend the protest date for a single day.

5. The Notice of MUI is fatally flawed. Rule 25-30.030(4)(d) states, in relevant 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, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399-0870, no later than 30 days after the last date that the notice was mailed or published, whichever is later. (emphasis added)

6. The language of MUI's publication and notice expressly violates Rule 25-30.030(4), Fla. Admin. Code. The mandatory content of the notice is set forth in the Rule which is prefaced "[t]he notice shall include the following ..." Use of the word shall in an Administrative Code Rule denotes that the application of the rule is mandatory. See, e.g., *Bystrom v. Florida Rock Industries*, 502 So.2d 35, 36 (3rd DCA 1987). The Rule provides that the Notice ***shall*** include a statement that any objections to

---

[1] Thus, the correspondence took eight (8) days to reach the Clerk of the Florida Public Service Commission, inclusive of the date of mailing and the date of receipt.

the application ***must be filed*** no later than 30 days after the last day the notice **is mailed** or **published**, whichever is later.

7. MUI's notice fails to include the mandatory language. Rather, MUI's notice and publication provided that,

> [A]n objection to said application ***must be made in writing*** within thirty (30) days from this date to the Director, Division of Records & Reporting ... (emphasis added)

Not only does the Rule require, without equivocation, that the Notice must state that the objection should be "filed" with the Director within thirty (30) days (not merely "made in writing within thirty (30) days") but the Commission routinely reminds applicants of the requirements and mandatory nature of this regulation. When an applicant requests a list of water and wastewater utilities and governmental/regulatory agencies who should receive notice for a given application, the Commission provides that list with a cover letter reminding the applicant of how important it is to follow the Administrative Code Rule.[2]

8. The protest of DECCA to the application of MUI was filed by a non-attorney representative of DECCA. The distinction between the Rules' requirement that Notice shall provide that objections "must be filed" within thirty (30) days, as opposed to MUI's Notice which merely provided that objection "must be made in writing within thirty (30) days" is in no way trivial or inconsequential,

---

[2] For example, a letter mailed to the offices of Rose, Sundstrom & Bentley on February 5, 1997, by John D. Williams, Chief, Bureau of Certification, referred to Rule 25-30.030 and provided that "noticing must be done in the proper format, consistent with the Rule. If your notice is not in the proper format, you will be required to renotice, and your application will be delayed."

particularly where laymen and members of the general public are attempting to understand the daunting rules and procedures which many agencies have necessarily implemented. In the case of *Environmental Resource Associates of Florida, Inc. v. Department of General Services*, 624 So.2d 330, the First DCA determined that the principles of equity should not enlarge the time for filing in that case and affirmed the Order of the agency. Judge Ervin, in a concurring opinion, found that the Notice in that case informed the appellant that any request for an administrative hearing "must be filed with this department within twenty-one (21) days of receipt of this letter" and noted

> [B]y using the term "filed" rather than "served", the notice unambiguously advised appellant that any request for hearing must be received by the Agency within the time specified following the appellant's receipt of the notice of the letter terminating appellant's contract. The term "filed" when used to denote a limitation period, is a legal term generally understand to mean that the Agency must receive the matter required no later than the date stated.

9. The Commission's rule wisely requires that the Notice applicants are required to give of their application ***shall*** state without ambiguity that "any objections to the application must be ***filed*** with the" Commission. It is unknown whether MUI's failure to follow the clear dictates of the Rule was due to inadvertence or something more Machiavellian. Either way, the notice did not, as the Commission's own Rule requires, "unambiguously advise (potential protestors) that any request for hearing must be received by

ROSE SUNDSTROM & BENTLEY LLP
2548 BLAIRSTONE PINES DRIVE TALLAHASSEE FLORIDA 32301

the Agency within the time specified following" the date of notice. *Environmental* ***Resource Associates of Florida***, at 331.

10. For whatever reason, MUI chose not to follow the Rule which clearly requires that Notices shall provide that objections must be ***filed*** with the PSC within thirty (30) days after the last date that the notice was mailed or published, whichever is later. The Commission did not equivocate in drafting and implementing the Rule regarding the content of such notices. MUI should not be allowed to benefit (to Decca's detriment) by its unexplained deviation from the requirement of the Rule in the content of its notice.

II.

Even assuming, arguendo, that the Commission finds that the notice was not fatally flawed, the principles of equity should enlarge the time such that DECCA's filing, (which was one day late) should be accepted in this case.

11. Even if a statute provides that failure to request a hearing within a specified time constitutes a waiver of any right to a hearing, it does not necessarily follow that the same precludes all possibilities of an extension of time. *Legal and Environmental Assistance Foundation, Inc. v. DEP and Pinellas County*, 97 ER FALR 11 (Final Order, December 16, 1996). Even in the case of such a statute:

> The case law seems clear that the time for filing petitions for administrative proceedings is "not jurisdictional in the sense that failure to comply is an absolute bar to appeal but is more analogous to statute(s) of limitations which are subject to equitable consideration such as tolling . . . It follows logically that if the time to file petitions for administrative proceedings can be extended

> under the doctrine of equitable tolling (by the District Courts), an agency also has the inherent authority to grant a reasonable extension of time, even without a rule (expressly providing such authority)."
>
> * * *
>
> The doctrine (of equitable tolling) serves to ameliorate harsh results that sometimes flow from a strict, literalistic construction and application of administrative time limits contained in statutes and rules
>
> * * *
>
> (As to parties opposing the intended grant of an application) at least in terms of an Agency's authority to extend the filing deadline, the rights of those kinds of petitioners to administrative proceedings should not be treated as less worthy than the rights of a denied applicant or a respondent to an agency's administrative complaint.

Interestingly, that same order concluded that the motion in opposition to the petition could not be granted without a hearing to determine whether the doctrine of equitable tolling should be invoked under the facts of that case.

12. It will be undisputed by MUI that it received a copy of the Objection from DECCA before the filing deadline. Tolling the due date for petitions so as to include DECCA's petition (if determined to be one day late by this Commission despite the flaw in the notice) would not prejudice MUI in any way, shape or form. Rather, it would prevent MUI from effecting and benefiting from the harsh results that sometimes flow from a strict, literalistic construction and application of administrative time limits contained in statutes and rules. See, e.g., *Legal Environmental Assistance Foundation*. MUI can hardly be in the position of

insisting that the Commission strictly interpret one rule while at the same time requesting that as to another Rule, the PSC should adopt a "forgiving" interpretation such that MUI's notice, which unequivocally and incontrovertibly does not follow the required language of the Rule, should be deemed proper.

III.

Summary

13. The ambiguous and unclear nature of MUI's notice, the fact that the notice did not follow the clear dictates of the Rule, the fact that MUI received a copy of DECCA's protest within the protest period, and the fact that DECCA'S objection was only one day late all support DECCA's position that its objection should be abjudicated as timely filed and properly accepted by this Commission. DECCA has not herein made extended argument regarding the eight (8) days which occurred between mailing and Commission receipt of its notice because DECCA understands that the Commission cannot be held responsible for the United States Mail. However, the U. S. Post Office's inexplicable delay in conveying the objection of DECCA to the PSC is a further equitable reason that the filing date should be tolled.

WHEREFORE, in consideration of the above, DECCA respectfully requests that this Commission either declare that the notice of Marion Utilities, Inc. is fatally flawed and that, as such, the application must be renoticed or, in the alternative, that the Commission determine that under the principles of equity and the

facts and circumstances of this case the objection of DECCA should be accepted as though timely filed.

Respectfully submitted this
17th day of March, 1997, by:

ROSE, SUNDSTROM & BENTLEY, LLP
2548 Blairstone Pines Drive
Tallahassee, Florida 32301
(904) 877-6555

By: JOHN L. WHARTON
MARTIN S. FRIEDMAN

g:\atty\decca\objection.mot

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Motion to Dismiss Objection to Certificate Amendment was furnished via U.S. Mail to Pat Wiggins, Esquire, Wiggins & Villacora, P.A., P.O. Box 1657, Ste. B, Tallahassee, FL 32302 and Tim Vacarro, Esquire, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399-0850 this 17th day of March, 1997.

JOHN L. WHARTON