

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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RECORDS AND REPORTING

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DATE: OCTOBER 11, 1999

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

FROM: DIVISION OF LEGAL SERVICES (VAN LEUVEN) *RL*
DIVISION OF WATER AND WASTEWATER (JOHNSON, REDEMANN) *CT, RPR, JPPW, JWS*

RE: DOCKET NO. 990975-SU - APPLICATION FOR TRANSFER OF CERTIFICATE NO. 281-S IN LEE COUNTY FROM BONITA COUNTRY CLUB UTILITIES, INC. TO REALNOR HALLANDALE, INC.
COUNTY: LEE

AGENDA: OCTOBER 19, 1999 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\990975SU.RCM

CASE BACKGROUND

Bonita County Club Utilities, Inc. (BCCU) is a Class B utility which provides wastewater service in Lee County to 859 customers. According to BCCU's 1997 annual report, its operating revenues were \$209,946 with a net operating loss of \$50,184.

On July 29, 1999, Realnor Hallandale, Inc. (Realnor or utility) filed an application on behalf of BCCU for the transfer of Certificate No. 281-S to Realnor. Realnor, the transferee, obtained rights to the transferor's utility by an Assignment of Interest in the Certificate of Title from Northern Trust Bank of Florida N.A. (Bank), following its mortgage foreclosure. Realnor is currently operating the utility as required by Section 367.071(6), Florida Statutes. On September 7, 1999, Michael J. Miceli, as president of BCCU, filed a letter objecting to the application for transfer. Mr. Miceli's objection letter states that Realnor is not entitled to the entire utility as requested in

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FPSC-RECORDS/REPORTING

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Realnor's application. Accordingly, this matter is currently set for an administrative hearing. Moreover, it has been made known to staff that a hearing pertaining to the Certificate of Title has been set for October 25, 1999, in the Twentieth Judicial Circuit In and For Lee County, Florida (Circuit Court Case No. 98-6169-CA-WCM). The parties filed a joint stipulation in the Circuit Court to escrow certain revenues for the months of July and August, 1999, which the Court approved.

On September 17, 1999, Realnor filed a Motion to Expedite Application for Transfer or in the Alternate to Take Other Specified Action for the Benefit of Customers. BCCU filed no response to the motion and the time for filing such expired on September 29, 1999. In August 1999, Staff attempted to resolve many of the problems addressed in Realnor's Motion, but Staff was informed by Realnor's counsel that Realnor would not attend a meeting between the parties at that time. Therefore, Staff did not hold a meeting.

Staff is informed that BCCU is collecting the monthly revenues from the customers. Staff files this recommendation in an attempt to protect the customers and the revenues, until such time as we can review the utility's books and records to estimate the operating expenses which the utility will need to collect on a monthly basis during the pendency of this matter. Staff has scheduled a meeting for October 12, 1999, between Staff, BCCU, and Realnor to discuss each party's monthly operating and maintenance expenses. Once staff has reviewed the utility's expenses, staff plans to bring a recommendation as soon as possible to take into account the utility's current level of operating expenses during the pendency of this matter.

A copy of the Motion to Expedite Application for Transfer or in the Alternate to Take Other Specified Action for the Benefit of Customers is attached as Attachment A and a copy of the Joint Stipulation is attached as Attachment B.

DISCUSSION OF ISSUES

ISSUE 1: Should Realnor Hallandale's Motion to Expedite the Transfer Application or in the Alternative to Take Other Specified Action for the Benefit of Customers be approved?

RECOMMENDATION: Realnor's first and second requests should be denied and its third request should be approved, as modified in the staff's analysis. Realnor and BCCU should be put on notice that failure to comply with these requirements will result in the initiation of a show cause proceeding. (VAN LEUVEN, JOHNSON)

STAFF ANALYSIS:

A. Realnor's First Request

Realnor's first request to immediately approve the transfer application pursuant to Proposed Agency Action (PAA) is inconsistent with the statute. According to Section 367.071(4), Florida Statutes, an application shall be disposed of as provided for in Section 367.045, Florida Statutes. The statutory notice provisions for transfer applications require that notice of an application be given prior to approval and that affected parties be given a 30 day objection period from the last notice. Section 367.045, Florida Statutes. If a written objection is filed during the objection period requesting a proceeding pursuant to Sections 120.569 and 120.57, Florida Statutes, then the Commission must order a proceeding to take place. Section 367.045(4), Florida Statutes. To approve the application as PAA, as requested, would be inconsistent with the statutory provision. Therefore, staff recommends that Realnor's first request be denied.

B. Realnor's Second Request

Realnor's second request states that "If the Commission refuses to grant the transfer application in a PAA order, then the Commission, pursuant to Section 367.071(6), F. S., must relieve Realnor Hallandale, Inc. of its burden to provide service (without compensation) and place the burden on BCCU." Section 367.071(6), Florida Statutes states that

Any person, company, or organization that obtains ownership or control over any system, or part thereof, through foreclosure of a mortgage or other encumbrance, shall continue service without interruption and may not remove or dismantle any portion of the system previously

dedicated to the public use which would impair the ability to provide service, without the express approval of the Commission.

Section 367.071(6), Florida Statutes, plainly states that the foreclosing party must provide uninterrupted service. Therefore, to shift this burden back to BCCU would clearly be contrary to the statute. Also, it is not in the customers' best interests to shift the burden back to BCCU because BCCU has no treatment facilities.

Furthermore, it is important to note that Section 367.071(6), Florida Statutes, fails to address compensation for the continued service without interruption. This is significant because Section 367.071(1), Florida Statutes, states that a utility may not assign, sell, or transfer its Certificate of Authorization without the Commission's approval. Without a Certificate of Authorization Realnor cannot bill customers for service provided because the only authorized party to bill in the service area is BCCU. Realnor (the foreclosing party) must provide continued service without interruption, with or without compensation, until a Certificate of Authorization can be obtained. However, staff recognizes that to provide service without compensation would be unfair. This is why we believe it is important to protect the revenues so that compensation for services provided will be available upon resolution of this matter.

Based on the foregoing, staff recommends that Realnor's second request be denied on the grounds that it is inconsistent with statutory provisions and it is not in the best interests of the customers.

C. Realnor's Third Request

The third request of Realnor states that if the Commission grants the application pursuant to a PAA and BCCU makes a lawful protest, then for the benefit of the customers and the protection of Realnor's property, the Commission should authorize the creation of an escrow account for all of the revenues derived from service to customers. Furthermore, the request states that the Commission could establish conditions for withdrawal for necessary and legitimate operations and needed repairs. Staff recommends that this request be approved as modified below.

The pending dispute over ownership of this utility is unresolved, and a Court hearing on the matter is scheduled to take place on October 25, 1999. However, staff understands the urgency of this matter since it may be appropriate for both entities to

receive some level of compensation for the operation of the utility during the pendency of this case. Clearly, monies paid by the customers of the utility should be protected and service should continue pending resolution of this case.

As previously mentioned, the parties entered into, and the Circuit Court approved, a joint stipulation for July and August, 1999, under which BCCU was provided certain billing expenses and the remaining revenues were escrowed. Staff recommends that the parties should continue operating under the terms of this joint stipulation, with the major distinction that the Commission be a party to the escrow agreement and a signatory to the escrow account, as is standard Commission practice for Commission-approved escrow agreements. Also, at the time of the joint stipulation, the Bank was a party. However, the Bank assigned its rights to Realnor. Therefore, Realnor should be identified as a party to the escrow agreement, as set forth below.

Overall, the joint stipulation allowed for the escrow of all monies received by BCCU, with the exception of certain, specific expenses. Staff recommends that an escrow agreement, based on the Court-approved joint stipulation, should be entered into by both parties with the following provisions:

1. The Commission should be a party to the written escrow agreement and a signatory to the escrow account.
2. The written escrow agreement should state that:
 - a. The account is established at the direction of this Commission for the purpose set forth above;
 - b. No withdrawals of funds shall occur without the prior approval of the Commission through the Director of the Division of Records and Reporting;
 - c. Information concerning that escrow account shall be available from the institution to the Commission or its representative at all times;
 - d. The amount of revenue received shall be deposited in the escrow account within seven days of receipt; and
 - e. Pursuant to Cosentino v. Elson, 263 So. 2d 253 (Fla 3d. DCA 1972), escrow accounts are not subject to garnishments.
3. BCCU shall send out wastewater treatment bills until otherwise ordered by this Commission, with a letter executed by Realnor and counsel.

4. All monies taken in by BCCU, whether they are for wastewater service payments, impact fees, or otherwise, shall be deposited by BCCU in an escrow account, except as noted in paragraph 5 below, in order to maintain the status quo of the billing of the BCCU accounts.
5. BCCU will be compensated for its billing services which may be deducted from the monies received from the billings in the following manner:
 - A. \$350.00 a week for the salary of Pamela Pass;
 - B. \$120.00 a week for the salary of Kathy Johnson;
 - C. \$500.00 a month for office rental;
 - D. \$1,141.49 for the rental payments to Platinum Coast Financial Corporation for the percolation ponds. (inclusive of Tax)
6. BCCU employee, Pamela Pass, shall be the only one allowed to make any disbursements. Before any disbursements are made, including those referenced in paragraph 5, Ms. Pass shall send a statement or some other indication of what the disbursement is to the designated representative of Realnor and to the Commission for authorization to disburse.

Staff recognizes that continuation of this escrow account may not be the long-term solution if indeed BCCU is incurring more expenses than what is allowed under these terms. Also, Realnor is operating the treatment facilities and incurring expenses which it has not received any compensation for at this point in time. The staff is meeting with both parties the week of October 11th to review the operating expenses of the utility as incurred by both BCCU and Realnor. Further, staff plans to return to the November 16th Agenda Conference with a recommendation proposing more specific compensation from the escrow account for both parties.

Therefore, staff recommends that the parties enter into an escrow agreement modeled after the previous joint stipulation, but as specified in the staff analysis. Realnor and BCCU should be put on notice that failure to comply with these requirements will result in the initiation of a show cause proceeding.

DOCKET NO. 990975-SU
DATE: OCTOBER 11, 1999

ISSUE 2: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open to resolve the protest filed in opposition to the transfer application and to dispose of the transfer application after hearing. (VAN LEUVEN)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for Transfer of Certificate)	
No. 281-S in Lee County from Bonita)	Docket No. 990975-SU
Country Club Utilities, Inc. to RealNor)	
Hallandale, Inc.)	Filed:

MOTION TO EXPEDITE APPLICATION
FOR TRANSFER OR IN THE ALTERNATIVE TO
TAKE OTHER SPECIFIED ACTION FOR THE BENEFIT OF CUSTOMERS

RealNor Hallandale, Inc., the Applicant in the above captioned docket, moves to expedite the application for transfer of Certificate No. 281-S and if the primary motion is denied to take other action as specified herein. In support of its motion, RealNor Hallandale, Inc. states as follows:

1. RealNor Hallandale, Inc. has the lawful authority to make this motion for the benefit of the customers who have in the past received sewer service from Bonita Country Club Utilities, Inc. (hereinafter BCCU). RealNor Hallandale, Inc. has been assigned the Certificate of Title to the BCCU sewage treatment system by Northern Trust Bank of Florida, N. A. The bank was issued the Certificate of Title by a court of competent jurisdiction, the Circuit Court for the Twentieth Judicial Circuit in and for Lee County, Florida, following the successful prosecution of a foreclosure action against BCCU. It is clear that the Certificate of Title conveyed, “(H) all permits, licenses, franchises, certificates, and other rights and privileges . . .”). (Emphasis supplied.) RealNor Hallandale, Inc. is the owner of Certificate 281-S. The Certificate was assigned to RealNor Hallandale, Inc., by Northern Trust Bank of Florida, N. A. The Amended Summary Final Judgment of Foreclosure, the Certificate of Title and the Assignment are attached as Exhibits C-1, C-2 and C-3 to the Application for Transfer of RealNor Hallandale, Inc. They are attached to this motion as Appendix A. Having received Certificate No. 281-S as the result of a foreclosure, RealNor Hallandale, Inc. now has a legal obligation to continue to provide “service without interruption,” as required by Section 367.071(6), Florida Statutes, which states as follows:

(6) Any person, company, or organization that obtains ownership or control over any system, or part thereof, through foreclosure of a mortgage or other

encumbrance, shall continue service without interruption and may not remove or dismantle any portion of the system previously dedicated to public use which would impair the ability to provide service, without the express approval of the commission. This provision may be enforced by an injunction issued by a court of competent jurisdiction.

2. The service provided to the customers is in grave danger of interruption. In order to provide uninterrupted, quality service to customers, RealNor Hallandale, Inc. hired Severn Trent Environmental Services, Inc. to operate and manage the utility system. A copy of the contract, executed on July 11, 1999, is attached as Exhibit B-1 to the Application for Transfer of RealNor Hallandale, Inc. The contract provides for comprehensive service to be provided for the annual amount of \$93,727.00, payable monthly in installments of \$7,810.58. The contract is attached to this motion as Appendix B.

The Area Manager for Severn Trent Environmental Services, Inc. is Michael Angel. Mr. Angel has made a detailed personal inspection of the former BCCU facilities, and he has concluded that due to a lack of maintenance, especially at the lift stations, there is a potentially immediate health hazard. Among many other problems, there is no operating emergency generator and it is obvious that serious problems would arise in the event of loss of electric power, as is common during hurricanes. Mr. Angel has estimated that repairs in the amount of approximately \$144,950 are required, and many repairs are needed immediately. Mr. Angel's affidavit is attached hereto as Appendix C.

3. RealNor Hallandale, Inc. is the only entity today that has the obligation and the ability to provide "service without interruption." The stock of BCCU has been unlawfully transferred to Platinum Coast Financial Corporation, Inc. (hereinafter PCFC), without prior approval of the Commission. Therefore, BCCU is no longer in possession of a valid Certificate of Authorization. Whereas RealNor Hallandale, Inc. has a statutory obligation to provide "service without interruption," PCFC has no lawful right to provide any service. Whereas RealNor Hallandale, Inc. has the resources to provide service, BCCU has not made needed repairs and is financially incapable of making repairs or providing service, even if BCCU had a treatment facility that would permit it to do so. In fact, BCCU has not even had enough money to prepare and file its 1998 Annual Report, in compliance with Commission Rule 25-30.110, F. A. C. Mr. Michael Miceli, the previous owner of all of the BCCU stock is in the midst of personal bankruptcy and remains subject to the jurisdiction of the bankruptcy court in the case styled: In Re: Michael J. Miceli, debtor, United States Bankruptcy Court, Middle District of Florida, Tampa Division, Case No. 96-05177-9P1. The financial situation for BCCU is bleak. Unless the Commission acts quickly, the

customers are in jeopardy. The above facts have been extracted from documents and transcripts in the bankruptcy and foreclosure proceedings, and pertinent portions are attached. The documents are attached hereto as Appendix D.

4. RealNor Hallandale, Inc. is not presently receiving any revenue and is shouldering the burden of operating and maintaining the sewer system for customers without any compensation. BCCU is currently receiving all revenue, but that money is not being used for the benefit of customers. There have been no repairs, but at least \$50,000 has recently been paid by BCCU to Bonita Springs Golf Club, another Michael J. Miceli company. See pages 34 and 39 of the deposition of Pam Pass, the transcript of which is attached hereto as part of Appendix D.


The Commission should not expect RealNor Hallandale, Inc. to assume the burden of paying for the operation and maintenance of the sewer system while someone else pockets all the revenue, and the Commission has the authority and ability to immediately rectify the situation.

5. RealNor Hallandale, Inc. respectfully submits that the Commission should do the following:
 - a) The Commission should immediately grant the transfer application, which would give RealNor Hallandale, Inc. the right to collect the revenue from customers to compensate RealNor Hallandale, Inc. for complying with its statutory obligation to provide "service without interruption." The Commission could grant the transfer application pursuant to a proposed Agency Action Order (PAA).
 - b) If the Commission refuses to grant the transfer application in a PAA order, then the Commission, pursuant to Section 367.071(6), F. S., must relieve RealNor Hallandale, Inc. of its burden to provide service (without compensation) and place the burden on BCCU. The fact that BCCU has no facilities to treat sewage produced by customers suggests that this is not a good solution, but RealNor Hallandale, Inc. can not be required to provide free service without creating an unlawful taking of the property of RealNor Hallandale, Inc.
 - c) If the Commission grants the transfer pursuant to a PAA, and BCCU makes a lawful and valid protest of the PAA, then the Commission should, for the benefit of customers, and to prevent an unlawful taking of the property of RealNor Hallandale, Inc., authorize the creation of an escrow account into which would be placed all revenues received from sewer service customers or developers. Monies could be released from this escrow account for necessary and legitimate operations and needed repairs.

The Commission could establish conditions for withdrawal from the escrow account. Any money remaining in the escrow account after conclusion of the proceedings in the docket could be directed to the appropriate recipient.

WHEREFORE and in consideration of the above, RealNor Hallandale, Inc. moves that the Commission act in the manner set forth above for the reasons expressed.

RESPECTFULLY SUBMITTED this 17th day of September, 1999.



David B. Erwin, of Counsel
Young, van Assenderp, Varnadoe & Anderson

127 Riversink Road
Crawfordville, Florida 32327
Tel. (850) 926-9331

CERTIFICATE OF SERVICE
DOCKET NO. 990975-SU

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this 17th day of September, 1999 to the following:

Michael J. Miceli
10200 Maddox Lane
Bonita Springs, FL 34135

Wayde P. Seidensticker, Jr.
Seidensticker & San Filippo, LLP
1100 Fifth Avenue South, Suite 405
Naples, FL 34102

Tyler Van Leuven
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850



David B. Erwin

GRANT, FRIDKIN

ID:941-514-0377

SEP 22 '99 15:16 No.002 P.06

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA
CIVIL ACTION

NORTHERN TRUST BANK OF FLORIDA, N.A.
a National Banking Association

Plaintiff,

v.

CASE NO.98-6169-CA-WCM

BONITA COUNTRY CLUB UTILITIES, INC.
a Florida Corporation, THOMAS HEIDKAMP,
CHAPTER 7, TRUSTEE, and all persons having
or claiming by, through, under, or against any of
the above parties and all parties having any right,
title or interest in the subject property.

Defendants.

FILED LEE CO. FLORIDA
CLERK OF COURTS
1999 SEP 16 PM 4:28
BY _____ D.C.

JOINT STIPULATION

Northern Trust Bank of Florida, N.A., for the benefit of Realnor Hallandale, Inc. ("Realnor Hallandale"), and Bonita Country Club Utilities ("BCCU"), jointly stipulate to the entry of an Order stating the following:

1. That BCCU shall send out sewer treatment bills for July and August with a letter executed by Northern Trust and counsel.
2. That all monies taken in by BCCU, whether they are for wastewater service payments, impact fees, or otherwise, shall be deposited by BCCU, except as noted in paragraph 3 below, in order to maintain the status quo of the billing of the BCCU accounts. At the end of this two month period, the parties may agree as to how those monies are disbursed, or failing an agreement, may make application to the Court for such a decision.

GRANT, FRIDKIN

ID:941-514-0377

SEP 22 '99 15:16 No.002 P.07

3. That BCCU shall be compensated for this service which may be deducted from monies received from the July and August billings in the following manner:
- a. \$350.00 a week for the salary of Pamela Pass for the months of July and August;
 - b. \$120.00 a week for the salary of Kathy Johnson for the months of July and August;
 - c. \$500.00 a month for office rental payments for the months of July and August; and,
 - d. \$ 1,141.49 for the rental payments to Platinum Coast Financial Corporation for the percolation ponds. (inclusive of Tax)
4. That BCCU employee, Pamela Pass, shall be the only one allowed to make any disbursements. Before any disbursements are made, including those referenced in paragraph 3, Pass shall send a statement or some other indication of what the disbursement is to attorney D. Keith Wickenden, via facsimile at (941) 514-0377. Wickenden will have 48 hours to review and authorize the proposed disbursement.

GRANT, FRIDKIN & PEARSON, P.A.

SEIDENSTICKER & SAN FILIPPO, LLP

BY:



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