

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for transfer
of Certificate No. 281-S in Lee
County from Bonita Country Club
Utilities, Inc. to Realnor
Hallandale, Inc.

DOCKET NO. 990975-SU
ORDER NO. PSC-00-0341-PCO-SU
ISSUED: February 18, 2000

The following Commissioners participated in the disposition of
this matter:

J. TERRY DEASON
E. LEON JACOBS, JR.

ORDER GRANTING IN PART REALNOR HALLANDALE, INC.'S
MOTION FOR SUMMARY FINAL ORDER

BY THE COMMISSION:

BACKGROUND

On July 28, 1999, Realnor Hallandale, Inc. (Realnor or utility) filed an application on behalf of Bonita Country Club Utilities, Inc. (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 Realnor's application. Accordingly, this matter is currently set for an administrative hearing.

On October 25, 1999, the Twentieth Judicial Circuit in and for Lee County, Florida (Circuit Court) held a hearing to clarify the Certificate of Title, but issued a continuance until November 23, 1999. However, on November 23, 1999, the Circuit Court issued an Order of Clarification and Replevin which gave Realnor the right to possession of the entire wastewater system conveyed in the Certificate of Title. BCCU did not appeal the Order of

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Clarification and Replevin and the time for filing such expired on December 23, 1999.

On December 28, 1999, Realnor filed a Motion for Summary Final Order, and on January 10, 2000, BCCU filed its timely response in opposition to Realnor's Motion for Summary Final Order.

This order addresses Realnor's Motion for Summary Final Order. It does not address the merits of Realnor's application for the transfer of Certificate No. 281-S from BCCU to Realnor. A separate order will be issued at a later date on the disposition of Realnor's transfer application.

MOTION FOR SUMMARY FINAL ORDER

Realnor's Motion for Summary Final Order

Realnor moves for the issuance of a summary final order pursuant to Rule 28-106.204, Florida Administrative Code. Realnor argues that the factual basis for BCCU's objection to its transfer application has been resolved in the Circuit Court (Circuit Court Case No. 98-6169-CA-WCM). Thus, Realnor reasons that since no factual matter remains to be resolved in an administrative hearing, the Commission should issue a summary final order.

In support of its claim that there is no genuine issue as to any material fact, Realnor attached a certified copy of the Order of Clarification and Replevin, issued by the Circuit Court on November 23, 1999. Realnor cites to portions of the Order of Clarification and Replevin which state that the assets listed in the Certificate of Title include the collection system and that Realnor has the right to possession of the entire wastewater treatment system conveyed in the Certificate of Title. Therefore, Realnor requests that the transfer of Certificate No. 281-S from BCCU to Realnor be approved.

BCCU's Response

BCCU filed a timely response to Realnor's motion on January 10, 2000. In its response, BCCU argues that the factual basis for the objection has not been resolved because "the land and all of the plant and equipment that was built and put into public service, was no longer owned by anyone, except the people in its service area being served by the equipment." BCCU argues that the Circuit Court's Order of Clarification and Replevin only gave Northern

Trust the right to property belonging to BCCU and not property which BCCU had dedicated to public service. BCCU reasons that once property is dedicated to serving the public it is owned by the persons being served.

In its response, BCCU also argues that it is not in the public interest for Realnor's transfer application to be approved because it is currently under Orders by the Florida Department of Environmental Protection (FDEP) for numerous violations. In support of its public interest argument, BCCU attached a letter addressed to Realnor from FDEP. Additionally, BCCU argues that the transfer is not in the public interest because Realnor wants to sell the Certificate of Authorization once it owns it.

Therefore, BCCU's response is based upon the idea that since BCCU's assets had been dedicated to public service, they could no longer be owned by anybody except the public being served by such assets.

Summary Disposition

Realnor has moved for the issuance of a Summary Final Order pursuant to Rule 28-106.204(4), Florida Administrative Code. Rule 28-106.204(4), Florida Administrative Code, states that "Any party may move for summary final order whenever there is no genuine issue as to any material fact. The Motion may be accompanied by supporting affidavits. All other parties may, within seven days of service, file a response in opposition, with or without supporting affidavits." A summary final order shall be rendered if it is determined from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final summary order. Section 120.57(1)(h), Florida Statutes (1999).

Under Florida Law "the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact, and . . . every possible inference must be drawn in favor of the party against who a summary judgment is sought." Green v. CSX Transportation, Inc., 626 So. 2d 974 (Fla. 1st DCA 1993) (citing Wills v. Sears, Roebuck & Co., 351 So. 2d 29 (Fla. 1977)). Furthermore, "A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law." Moore v. Morris, 475 So. 2d 666 (Fla. 1985).

On September 7, 1999, Mr. Michael Miceli, as president of BCCU, filed a timely letter objecting to the application for transfer. Mr. Miceli's objection letter states that Realnor is not entitled to the entire utility. In particular, Mr. Miceli claims that BCCU is the owner of the collection system because "[t]he mortgage did not encompass the sewer lines, lift stations, lift pumps, office equipment, etc." Therefore, the material fact in dispute pertains to the ownership of the utility and its assets.

In order to determine whether any genuine issue of material fact exists with regards to Realnor's ownership of the entire system, we have reviewed the certified copy of the Order of Clarification and Replevin, issued on November 23, 1999, by the Circuit Court and the docket file. After reviewing these documents we find that no genuine issue of material fact exists as to the ownership issue because the Circuit Court has clearly stated that the Certificate of Title conveyed Title in Realnor to all of BCCU's assets which include the following:

All sewer lines, lift stations, and lift pumps owned or previously titled in BCCU transmitting effluent to the property because all such equipment is 'Personal Property' within the purview of the Mortgage and Security Agreement foreclosed in this action because such equipment benefits and serves the real property where the wastewater treatment plant is located.

Order of Clarification and Replevin, para. 3-4.

We find that the Circuit Court has resolved any and all questions pertaining to the ownership of BCCU and its assets.

Next, it is necessary to address BCCU's argument that property dedicated to public service is not owned by the utility but rather is owned by the persons being served by it. BCCU has not provided any legal precedent in support of this argument and we are unaware of any. Moreover, if BCCU's public dedication argument were to be considered valid, it would have a serious impact upon a utility's property rights. The impact would be to divest utilities which provide service to the public of their ownership rights in utility property without due process of law. Therefore, we find BCCU's argument flawed.

We will address BCCU's public interest argument in a subsequent order on the merits of Realnor's application for

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transfer. In particular, we will fully explore any FDEP violations that may exist as part of our public interest analysis.

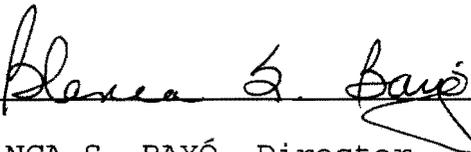
Conclusion

Realnor's Motion for Summary Final Order is granted to the extent that BCCU's objection shall be dismissed since the underlying basis of the objection, the disputed ownership of the assets, has been resolved by the Circuit Court. Therefore, there is no need to conduct an administrative hearing. Additionally, a separate order will be issued at a later date on the disposition of Realnor's transfer application.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Realnor Hallandale, Inc.'s Motion for Summary Final Order is granted to the extent that Bonita Country Club Utilities, Inc.'s objection is dismissed.

By ORDER of the Florida Public Service Commission this 18th day of February, 2000.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

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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.