



Public Service Commission

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RECORDS/REPORTING

-M-E-M-O-R-A-N-D-U-M-

DATE: JUNE 29, 2000

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

FROM: DIVISION OF LEGAL SERVICES (VAN LEUVEN) *ry*
DIVISION OF REGULATORY OVERSIGHT (JOHNSON, REDEMANN) *RRR*

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. *IQ*

AGENDA: 07/11/00 - REGULAR AGENDA - INTERESTED PERSONS MAY
PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

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

CASE BACKGROUND

Bonita County Club Utilities, Inc. (BCCU) was a Class B utility which provided wastewater service in Lee County to 859 customers. According to the BCCU's 1997 annual report, its operating revenues were \$209,946, with a net operating loss of \$50,184. BCCU's facilities consisted of two systems: one wastewater collection system and one wastewater treatment plant. However, on February 29, 2000, RealNor Hallandale, Inc.'s (RealNor or utility) application on behalf of BCCU for the transfer of Certificate No. 281-S to RealNor was granted by Order No. PSC-00-0579-PAA-SU, issued March 22, 2000, in this docket. BCCU did not protest the Commission's order which was consummated by Order No. PSC-00-0755-CO-SU, issued April 17, 2000.

By Order No. PSC-00-0579-PAA-SU, the Commission ordered Mr. Michael Miceli, as president of BCCU, to show cause as to why he should not be fined for failure to file a 1998 annual report on behalf of BCCU. On April 28, 2000, the Division of Legal Services

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sent Mr. Miceli a letter stating that BCCU had failed to show cause for its failure to file a 1998 annual report and instructed him to remit the fine and delinquent report by May 15, 2000. Additionally, on April 28, 2000, staff sent a Memorandum to Ms. Blanca Bayo, Director, Division of Records and Reporting, which was copied to Mr. Miceli, advising that Colonial Bank should be directed to disburse monies held in escrow in accordance with Order No. PSC-00-0579-PAA-SU. However, on May 9, 2000, Mr. Miceli filed a letter stating that he had sent a letter on April 3, 2000 indicating that he wanted to "appeal the Order and request a review of the issues, as I feel your ruling was unfairly done." Attached letter filed on May 9, 2000, was a copy of a letter dated April 3, 2000, protesting Order No. PSC-00-0579-PAA-SU. Staff contacted Mr. Miceli and asked him if his correspondence meant that he wanted a hearing on the proposed agency action (PAA) issues. Mr. Miceli replied that he wanted a hearing on the matter and that his original letter must have been lost in the mail.

Next, staff contacted Mr. David Erwin, attorney for RealNor, to inform him of the May 9, 2000 filing of a letter by Mr. Miceli with an attached copy of a letter dated April 3, 2000, protesting Order No. PSC-00-0579-PAA-SU. Additionally, on May 30, 2000, staff sent RealNor a letter asking what, if any, reliance RealNor has placed upon the Commission's Final Order. On June 8, 2000, the Commission received RealNor's reply.

The purpose of this recommendation is to address Mr. Miceli's correspondence filed May 9, 2000, and whether it should be considered a valid protest to Order No. PSC-00-0579-PAA-SU, even though it was filed 27 days past the expiration of the protest period.

ISSUE 1: Should Mr. Miceli's protest letter be considered timely and this matter set for hearing?

RECOMMENDATION: No. Staff recommends that the protest filed by Mr. Miceli on May 9, 2000, is untimely and should be dismissed as such. (VAN LEUVEN)

STAFF ANALYSIS: As stated in the case background, on February 29, 2000, RealNor's application on behalf of BCCU for the transfer of Certificate No. 281-S to RealNor was granted by Order No. PSC-00-0579-PAA-SU, issued March 22, 2000, in this docket. As of April 17, 2000, when Consummating Order No. PSC-00-0755-CO-SU was issued, no protest had been filed with the Commission. However, on May 9, 2000, the Commission received a letter from Mr. Miceli providing a copy of a letter allegedly mailed on April 3, 2000, protesting PAA Order No. PSC-00-0579-PAA-SU.

Section 120.569(2)(c), Florida Statutes, provides in relevant part: "A petition shall be dismissed if . . . it has been untimely filed." Rule 25-22.029(3), Florida Administrative Code, states that "One whose substantial interests may or will be affected by the Commission's proposed action may file a petition for a . . . hearing in the form provided by Rule 28-106.201, F.A.C. Any such petition shall be filed within the time stated in the notice" In addition, the uniform rules address a point of entry into proceedings in Rule 28-106.111, Florida Administrative Code, which provides in part:

(2) Unless otherwise provided by law, persons seeking a hearing on an agency decision which does or may determine their substantial interests shall file a petition for hearing with the agency within 21 days of receipt of a written notice of the decision.

(4) Any person who receives written notice of an agency decision and who fails to file a written request for a hearing within 21 days waives the right to request a hearing on such matters.

Order No. PSC-00-0579-PAA-SU, which was delivered to Mr. Miceli via certified mail on March 29, 2000, states in the Notice of Further Proceedings or Judicial Review section that:

Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must

be received by the Director, Division of Records and Reporting, at 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on April 12, 2000. . . . In the absence of such a petition, this order shall become effective and final upon the issuance of a Consummating Order.

In addition, Mr. Miceli called staff after receiving a copy of the Order to ask questions about the Commission's decision. At that time, staff informed Mr. Miceli that if he believed the Commission had made the wrong decision pertaining to the escrowed monies he could file a protest to the PAA order. Furthermore, staff directed Mr. Miceli's attention to the Notice of Further Proceedings and Judicial Review portion of the Order and emphasized the importance of filing by April 12, 2000. At the conclusion of the telephone conversation, Mr. Miceli indicated that he would be protesting the Commission's decision.

However, as of April 17, 2000, the Commission had not received a protest from any substantially affected persons. Accordingly, Order No. PSC-00-0579-SU was consummated by Order No. PSC-00-0755-CO-SU, issued April 17, 2000, in this docket. Next, staff proceeded to address the closing of the escrow account in accordance with the above-referenced Order. On April 28, 2000, staff sent Mr. Miceli a letter stating that BCCU had failed to show cause for his failure to file a 1998 annual report and instructed him to remit the \$4,117.50 fine and delinquent report by May 15, 2000. Apparently, upon receipt, Mr. Miceli contacted staff to ask if the Commission had received his letter dated April 3, 2000. After further investigation, staff informed Mr. Miceli that the Commission had not received his letter. As previously noted, on May 9, 2000, Mr. Miceli filed a letter along with a copy of the April 3, 2000 protest letter. Consequently, Mr. Miceli's April 3, 2000 letter of protest was filed 27 days late. Mr. Miceli's only explanation as to why the Commission did not timely receive his letter is that it must have been lost in the mail.

Staff believes that the doctrine of equitable tolling does not apply in this matter. 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." 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). The doctrine has been applied "when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum." Id.

Although the plain meaning of the pertinent statutes and rules mandate that timely petitions for hearing should not be considered, the courts and this Commission have in some instances allowed equitable tolling to excuse an untimely petition. See Avante, Inc. v. Agency for Health Care Admin., 722 So. 2d 965 (Fla. 1st DCA 1998) (the court reversed the agency's final order dismissing a petition for hearing on the basis that it was untimely); In re: Application for a 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 (the Commission allowed a protest which was untimely by two days because the customer reasonably interpreted the utility's notice of rates and charges as being a valid point of entry).

However, in Environmental Resource Associates of Florida, Inc. v. State, Dept. of General Services, 624 So. 2d 330 (Fla. 1st DCA 1993), the court affirmed the agency's denial of a petition for hearing on the grounds that extraordinary circumstances were not present which would warrant equitable tolling of the 21 day period. In this decision, the appellant contended that its preparation and mailing of a petition for hearing within the 21-day period evidenced its intent not to waive its right to hearing, and that equitable tolling should delay the filing period so that its petition would be considered timely filed. The appellant's petition was received four days late. However, the court stated that "the principles of equity should not enlarge the time for filing in this case" and that "there is nothing extraordinary in the failure to timely file in this case." Id.

Moreover, in In re: Application for a staff assisted rate case in Volusia County by Terra mar Village (River Park), Order No. PSC-98-0266-FOF-WS, issued February 9, 1998, in Docket No. 941084-WS, the Commission dismissed as untimely a protest and request for hearing which was more than 20 months late. In doing so, the Commission stated that in order to be considered timely, any protest would have had to be received by the end of the 21 day protest period.

In this instance, staff believes that, unlike the petition at issue in Avante, Mr. Miceli's petition for hearing is not facially

sufficient to provide an equitable basis to excuse his untimely filing. Staff does not believe that the doctrine of equitable tolling should apply. Mr. Miceli has not been misled or lulled into inaction, or in some extraordinary way been prevented from asserting his rights. Nor should excusable ignorance excuse Mr. Miceli from filing his protest in a timely fashion. To the contrary, staff emphasized the importance of filing a protest by the date specified in the order.

On June 8, 2000, at staff's request, RealNor replied by letter advising the Commission of any reliance it had placed on the Commission's Final Order. In reliance, RealNor states that has placed into effect tariff sheets reflecting a change in ownership, sent notices to customers informing them of the change in ownership, remitted estimated regulatory assessment fees for 1999, started to prepare the 1999 annual report, and assumed all the commitments, obligations, and representations of the prior owner with respect to utility matters. In particular, RealNor states that it

has acted in reliance of obtaining monies from the escrow account since the day of its inception. Our Client [RealNor] has already invested more than \$162,000 in the utility, maintaining and repairing the system in accordance with Florida law and without reimbursement therefor, expecting that when the Application for Transfer was finally granted, RealNor would be reimbursed for some of these expenses through the escrow account monies.

Furthermore, RealNor states that "there does not appear to be any good faith reason or extraordinary circumstances to make an exception for Mr. Miceli." Lastly, RealNor raises the point that the expenses which Mr. Miceli wants reimbursement for occurred prior to the institution of the escrow account and are not covered under the escrow account."

Staff believes that for the reasons stated above, RealNor has put a significant amount of reliance upon the Commission's order being final and would be prejudiced if Mr. Miceli's untimely petition for a hearing were granted.

In conclusion, staff recommends that the protest filed by Mr. Miceli on May 9, 2000, is untimely by 27 days and should be dismissed as such. The plain language of Section 120.569(2)(c), Florida Statutes, Rules 25-22.029(3) and 28-106.111, Florida Administrative Code, clearly provide that Mr. Miceli's untimely

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protest of Order No. PSC-00-0579-PAA-SU should be dismissed. The Notice of Further Proceedings or Judicial Review section of Order No. PSC-00-0579-PAA-SU provided a clear point of entry for Mr. Miceli to assert his rights. Moreover, the doctrine of equitable tolling should not apply under these circumstances.

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: This docket should remain open for BCCU to remit penalties and interest for its failure to timely pay its 1998 regulatory assessment fees and to allow for the resolution of the show cause proceeding pertaining to BCCU's 1998 annual report.
(VAN LEUVEN)

STAFF ANALYSIS: This docket should remain open for BCCU to remit penalties and interest for its failure to timely pay its 1998 regulatory assessment fees and to allow for the resolution of the show cause proceeding pertaining to BCCU's 1998 annual report.