

FLORIDA PUBLIC SERVICE COMMISSION
Capital Circle Office Center • 2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

M E M O R A N D U M

MARCH 6, 1997

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

FROM: DIVISION OF WATER & WASTEWATER (BRADY) *pb bca gault*
DIVISION OF LEGAL SERVICES (CROSBY) *MS*

RE: DOCKET NO. 960734-WS - REQUEST FOR EXEMPTION FROM FLORIDA
PUBLIC SERVICE COMMISSION REGULATION FOR PROVISION OF
WATER AND WASTEWATER SERVICE BY HIAWATHA & HART POINT
TREATMENT FACILITY, INC.
COUNTY: PUTNAM

AGENDA: MARCH 18, 1997 - REGULAR AGENDA - INTERESTED PERSONS MAY
PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\WAW\WP\960734WS.RCM

CASE BACKGROUND

Hiawatha Management, Inc., (condominium) was formed in 1981 to provide water and wastewater services from on-site plants to fifty-eight condominium units in East Palatka, Florida. Order No. 25283, issued October 31, 1991, in Docket No. 910526-WS, granted the condominium a nonprofit exemption from regulation. Pursuant to Section 367.022(7), Florida Statutes, in order for an entity to qualify for a nonprofit exemption, it must provide service solely to its members. Order No. 25283 also required the condominium to notify the Commission within 30 days of any change in circumstances so that its exempt status could be reevaluated.

Subsequent to Order No. 25283 being issued, the condominium began providing wastewater service to a nearby motel in apparent violation of the order. The condominium was in the process of establishing similar service to a nearby restaurant when contacted by staff. In order to continue its exempt status, the condominium formed a master non-profit association called Hiawatha & Hart Point Treatment Facility, Inc., (Hiawatha or master association) consisting of three corporate members: the condominium, the motel, and the restaurant. On June 14, 1996, an application for nonprofit

DOCUMENT NUMBER-DATE

02426 MAR-97

FPSC-RECORDS/REPORTING

DOCKET NO. 960734-WS
MARCH 6, 1997

exemption from regulation was filed on behalf of Hiawatha pursuant to Section 367.022(7), Florida Statutes.

In addition to the apparent violation of Order No. 25283, Rule 25-30.060(3)(g), Florida Administrative Code, in existence at the time of the filing, requires that voting rights for nonprofit exemptions be one vote per unit of ownership "or other voting rights if the Commission finds they are fair and nondiscriminatory so that members have equitable control of the corporation." Since the three corporations share the facilities based on the amount of capacity reserved for each members' use, the voting rights in Hiawatha's Articles of Incorporation and bylaws are based on each member's relative amount of reserved capacity.

Section 2.08(C)(14) of the Administrative Procedures Manual grants staff the administrative authority to approve requests for determination of exempt status that are clear-cut and without controversy. Order No. 25283 found the condominium exempt from Commission regulation because of the circumstances that existed at the time the order was issued. At that time the only member of the association was the condominium. The application filed in this docket seeks exemption for Hiawatha and Hart Point Treatment Facility, Inc., a completely separate entity whose members consist of the condominium, a motel and a restaurant. Staff is bringing this recommendation to the Commission for consideration of the apparent violation of Order No. 25283 by the condominium as well as for consideration of Hiawatha and Hart Point Treatment Facility, Inc.'s voting rights which uses a methodology not yet considered by the Commission.

DOCKET NO. 960734-WS
MARCH 6, 1997

ISSUE 1: Should Hiawatha Management, Inc., be ordered to show cause in writing within 20 days why it should not be fined for violation of Order No. 25283 and Section 367.022(7), Florida Statutes?

RECOMMENDATION: No, show cause proceedings should not be initiated. (CROSBY)

STAFF ANALYSIS: As stated in the case background Hiawatha Management, Inc. (condominium) is in apparent violation of Order No. 25283 and Section 367.022(7), Florida Statutes. That Order required the condominium to notify the Commission within 30 days of any change in circumstances affecting its exempt status. Section 367.022(7), Florida Statutes, states that nonprofit corporations, associations, or cooperatives are exempt from Commission regulation if they provide service solely to members who own and control such nonprofit corporations, associations, or cooperatives. The condominium has been providing water and wastewater service to entities that are not members of the association since 1993, without notifying the Commission of the change in circumstances. Such action is "willful" in the sense intended by Section 367.161, Florida Statutes. Section 367.161, Florida Statutes, authorizes the Commission to assess a penalty of not more than \$5,000 for each offense, if a utility is found to have knowingly refused to comply with, or to have willfully violated any provision of Chapter 367, Florida Statutes. In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, titled In Re: Investigation Into The Proper Application of Rule 25-14.003, F.A.C., Relating To Tax Savings Refund For 1988 and 1989 For GTE Florida, Inc., the Commission, having found that the company had not intended to violate the rule, nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "[i]n our view, 'willful' implies an intent to do an act, and this is distinct from an intent to violate a statute or rule." Id. at 6.

Failure of the condominium to notify this Commission of the change in circumstances appears to be due to its belief that, although additional connections had been made, it was still exempt from Commission regulation because of its agreement with Crestone Service Corporation (Crestone). Crestone is the original developer of the condominium and utility facilities and a member of the association. At the time of the condominium's original incorporation, Crestone reserved a perpetual easement to connect to the wastewater plant. The easement was conveyed by Crestone to a group of investors constructing a motel and restaurant. Due to the condominium's understanding of Crestone's right to connect to the system because of the easement, and because Crestone was a member

DOCKET NO. 960734-WS
MARCH 6, 1997

of the association, the condominium did not believe that serving the motel and restaurant constituted a change in circumstances requiring Commission notification. However, when Crestone conveyed its easement to the developers, it did not convey its membership in the association.

Although the condominium failed to notify the Commission of the change in circumstances, staff does not believe that the violation of Section 367.022(7), Florida Statutes, rises in these circumstances to the level of warranting initiation of show cause proceedings. Upon becoming aware of the violation, the condominium reincorporated as Hiawatha and Hart Point Treatment Facility, Inc., making all entities served members of that association. Hiawatha and Hart Point Treatment Facility, Inc., then filed an application for exemption. Therefore, staff recommends that the Commission not order the condominium to show cause for failure to notify the Commission of the change in circumstances, as required by Order No. 25283.

DOCKET NO. 960734-WS
MARCH 6, 1997

ISSUE 2: Should the Commission grant Hiawatha & Hart Point Treatment Facility, Inc., an exemption from Florida Public Service regulation for provision of water and wastewater service pursuant to Section 367.022(7), Florida Statutes?

RECOMMENDATION: Yes. Hiawatha & Hart Point Treatment Facility, Inc., should be granted an exemption from Commission regulation for provision of water and wastewater service pursuant to Section 367.022(7), Florida Statutes. The Commission should require Hiawatha & Hart Point Treatment Facility, Inc., or any successors in interest, to notify the Commission within 30 days of any change in fact or circumstance which causes it to no longer qualify for an exemption pursuant to Section 367.022, Florida Statute. (BRADY, CROSBY)

STAFF ANALYSIS: On June 14, 1996, an application for a nonprofit exemption from regulation by the Florida Public Service Commission was filed on behalf of Hiawatha pursuant to Section 367.022(7), Florida Statutes. The application was signed by Mr. Ben Bates as President of the master association. The primary contact person is Mr. Edward E. Hedstrom, P.O. Box 1354, Palatka, Florida 32178. The physical location, mailing address and service territory for Hiawatha is 116 Hiawatha Court, East Palatka, Florida 32131. This location is in Putnam County.

Except as discussed herein, the application was filed in accordance with Statute 367.022(7), Florida Statutes, and Rules 25-30.060(2) and (3)(g), Florida Administrative Code, in effect at the time of the filing. Mr. Bates filed a statement that Hiawatha is a nonprofit corporation intending to provide service solely to members who own and control it. The application contained a copy of Hiawatha's Articles of Incorporation as filed with the Secretary of State and by-laws. A description of the voting rights was provided and will be more fully discussed below.

Turnover of developer control does not apply in this case since the condominium association already owned and controlled the facilities and the land upon which the facilities are located. According to the application, the condominium has turned over all records to the new corporation and the new corporation has control of the facility. Finally, by signing the application, Mr. Bates has acknowledged that he is aware of the penalty pursuant to Section 837.06, Florida Statutes, for knowingly making false statements in writing with the intent to mislead.

Hiawatha is a newly established nonprofit association formed from three separate corporate entities: Hiawatha Management, Inc.,

DOCKET NO. 960734-WS
MARCH 6, 1997

the original condominium association, Hart Point Properties, Inc., (motel) and Lemon Street Restaurant, Inc., (restaurant). As originally formed, voting rights were based on condominium units. However, since only one member of the master association is a condominium, such units of ownership no longer apply. Instead, in the master association, voting rights are based on each members' allotted share of wastewater capacity. Of the total committed capacity, the condominium is assigned 50% and appoints three members to the Board of Directors. The motel is assigned 30% and appoints one member to the Board. The restaurant is assigned 20% and also appoints one member to the Board. Copies of the agreements for use of the wastewater facilities were provided as proof of these assignments.

The reason it was decided that the condominium should appoint three members is to ensure that the Board has an odd number of members. In the event that the remaining uncommitted capacity is assigned to a fourth member, Hiawatha's Articles of Incorporation entitle that entity to appoint one member to the board and requires that number of board members appointed by the condominium be reduced to two. Since membership in Hiawatha is based on each members' allotted share of wastewater capacity, staff believes that voting rights established on the same basis are fair and non-discriminatory. The voting rights, then, are in proportion to each member's share of the cost which, in turn, are proportionate to each member's allocated use of the facilities.

Staff, therefore, recommends that the Commission grant Hiawatha & Hart Point Treatment Facility, Inc., an exemption from Commission regulation for provision of water and wastewater service pursuant to Section 367.022(7), Florida Statutes. Staff also recommends that the Commission require Hiawatha, or any successors in interest, to notify the Commission within 30 days of any change in fact or circumstance which causes it to no longer qualify for an exemption pursuant to Section 367.022, Florida Statutes.

DOCKET NO. 960734-WS
MARCH 6, 1997

ISSUE 3: Should this docket be closed?

RECOMMENDATION: Yes, the docket should be closed. (CROSBY)

STAFF ANALYSIS: If the Commission approves staff's recommendations in Issues 1 and 2, then no further action is necessary and the docket should be closed.