

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Request for exemption) DOCKET NO. 940812-SU
from Florida Public Service) ORDER NO. PSC-94-1246-FOF-SU
Commission regulation for) ISSUED: October 11, 1994
provision of wastewater service)
in Lee County by BONITA SPRINGS)
INVESTMENTS, INC.)
_____)

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
SUSAN F. CLARK
JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

ORDER TO SHOW CAUSE

AND

NOTICE OF PROPOSED AGENCY ACTION
ORDER DENYING REQUEST FOR DETERMINATION
OF NONJURISDICTIONAL STATUS

BY THE COMMISSION:

NOTICE IS HEREBY GIVEN by the Florida Public Service Commission that our actions to deny the request for determination of nonjurisdictional status and to require an application for an original certificate are preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

On January 29, 1993, this Commission's Division of Consumer Affairs received a complaint from a Mr. Jason Kessel that a developer named Norman Hedrich was operating a wastewater utility that provided service to the Pelican Ridge subdivision, under the name Hickory Homes, Inc. (Hickory Homes). According to Mr. Kessel, each customer had received a letter stating that he was going to be hooked-up to Bonita Springs Utilities, Inc. (BSU) and that the estimated cost per customer would be \$900. Upon request of the Staff of this Commission (Staff), Mr. Kessel provided a copy of the letter. Based upon this information, it appeared that Mr. Hedrich was indeed operating a wastewater utility in Lee County, a county

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subject to our jurisdiction, and that the utility had not been found exempt from our regulation.

By letter dated February 9, 1993, Staff requested that Mr. Hedrich complete a jurisdictional information form and address additional questions regarding the utility's operations by February 24, 1993. By letter dated February 18, 1993, Mr. Hedrich stated that he was charging a "one-time contribution" in order to turn the entire system over to BSU. On March 23, 1993, Staff sent a second letter to Mr. Hedrich advising him that, without a certificate of authorization, he had no authority to collect any rates or charges for wastewater service. Enclosed with the letter was an application for a certificate to operate a wastewater utility which was already in existence and charging for service. Staff requested that Mr. Hedrich return the completed application by May 24, 1993.

On March 30, 1993, Mr. Kessel forwarded copies of a letter dated March 25, 1993, from Grady, Minor & Associates, P.A., which Hickory Homes had hired to represent it in the design, drawings, permitting, and other matters concerning the wastewater system. This letter outlined the customers' options regarding the connection to BSU. During April, 1993, we also received a number of written and telephonic complaints from Hickory Homes' customers.

By letter dated April 28, 1993, Robert Medvecky, an attorney hired to represent Mr. Norman Hedrich and Hickory Homes, stated that Hickory Homes had entered into an agreement with BSU to donate its system to BSU's regional system, and that the turnover had been completed on April 23, 1993. Therefore, Mr. Medvecky argued that an application for a certificate would not be appropriate.

On June 25, 1993, Staff sent a letter to BSU in order to verify that both Pelican Ridge and Polynesian Villas were connected to BSU's wastewater system. Mr. Fred Partin, BSU's General Manager verified that Hickory Homes, "the owner/operator of the wastewater system providing service to the subdivisions, connected the lift station effluent line to the Bonita Springs Utilities wastewater system" on April 23, 1993. "Since the lift station and gravity systems were not built to BSU specifications, BSU (would) not own, operate or maintain the lines and lift stations".

On November 16, 1993, Mr. Hedrich sent a letter and questionnaire to each customer regarding the need to improve the system in order to complete the turnover to BSU. He estimated that the improvements would cost \$700 per unit. On March 25, 1994, Hickory Homes sent another letter to the residents advising them that the cost was now \$1,356.89 per unit based upon a total projected cost of \$71,950 plus \$6,750 for the collection lines.

The cost was based on a March 18, 1994, estimate by Grady, Minor & Associates. Mr. Kessel forwarded a copy of this letter to Staff on April 8, 1994.

On April 21, 1994, Staff contacted Mr. Hedrich in writing, stating that a customer complaint had once again brought Hickory Homes to the attention of the Commission. Staff informed Mr. Hedrich that it appeared as if Hickory Homes continued to operate as a utility and that, before it could collect any charge for wastewater service, it was required to obtain a certificate of authorization or an order granting it an exemption. Staff outlined two options that could be pursued if Hickory Homes did not wish to operate as a utility: 1) it could make all necessary upgrades to the system, bearing all costs associated with these upgrades, or; 2) it could have the homeowners form an exempt association to bear the costs of the system improvements. In either case, Hickory Homes was informed that it must refund all monies already collected from the homeowners, with interest. Staff requested that Hickory Homes respond by May 20, 1994.

On April 29, 1994, Mr. Medvecky, representing Mr. Norman Hedrich and Hickory Homes, responded to Staff's letter. Mr. Medvecky stated that the Florida Public Service Commission does not have jurisdiction over Hickory Homes and that we do not have the authority to order it to do anything. Mr. Medvecky was of the opinion that Hickory Homes was not a utility as defined by Section 367.022(6), Florida Statutes, which applies to small systems.

During the month of May, 1994, Staff continued to receive complaints from customers regarding the actions of Hickory Homes. On May 20, 1994, Hickory Homes sent delinquency notices to customers who refused to pay a "one-year maintenance fee".

By letter dated May 26, 1994, Staff informed Mr. Medvecky that, while some utilities may be exempt from the Commission's regulation, only the Commission is authorized to determine whether a utility is exempt. As for Mr. Medvecky's claim regarding Section 367.022(6), Florida Statutes, Staff noted that exemptions were granted to "[s]ystems with the capacity or proposed capacity to serve 100 or fewer persons", not 100 or fewer homes. In conclusion, Staff again asked Hickory Homes to file for a certificate or for an exemption by June 15, 1994.

On June 12, 1994, Mr. Medvecky again stated that his client is not a utility and "does not provide wastewater service to anyone". He also stated that he had not received any of the forms; therefore on June 16, 1994, Staff forwarded copies of the exemption forms.

On July 25, 1994, Bonita Springs Investments, Inc. (BSI) applied for an exemption from this Commission's jurisdiction pursuant to Section 367.021(12), Florida Statutes. BSI appears to be a new corporation formed to replace Hickory Homes, Inc. Under Section 367.021(12), Florida Statutes,

"Utility" means a water or wastewater utility and, except as provided in s. 367.022, includes every person, lessee, trustee, or receiver owning, operating, managing, or controlling a system, or proposing construction of a system, who is providing, or proposes to provide water or wastewater service to the public for compensation.

In order to be found nonjurisdictional, a utility may not collect any compensation whatsoever associated with the provision of water or wastewater service, and all costs associated with providing service must be treated or recovered as operational expenses. Upon review of its application and other information provided by its customers, it appears that BSI has been unlawfully operating as a utility and collecting compensation for the provision of service. For example, in 1990, its customers were billed \$14.00 per month or \$42.00 per quarter for wastewater service. In 1991, customers received notice that, due to increased requirements by the Florida Department of Environmental Regulation, it was necessary to increase the rate from \$14.00 per month to \$16.50 per month, effective April 1, 1991. It also appears that the utility continues to collect a yearly "maintenance fee". Further, in addition to imposing rates without authorization, BSI has attempted to collect a "one-time charge" for the connection to BSU.

As noted above, BSI, as well as its predecessor in interest, Hickory Homes, have been informed on several occasions that they did not have the authority to impose rates or charges until they obtained a certificate of authorization from this Commission pursuant to Section 367.031, Florida Statutes. They were also warned that, regardless of whether they received a certificate or an exemption, they faced the possibility of having to refund all monies already collected from the homeowners, with interest. Despite such warnings, the utility continues to impose charges as it sees fit.

Based upon the discussion above, we find it appropriate to deny BSI's request for a determination that it is not subject to our jurisdiction. BSI shall file, within sixty days of the date of this Order, an application for an original certificate. We also find it appropriate to require BSI and/or Hickory Homes to show cause why it should not be fined for operating a utility and

implementing rates and charges without a certificate of authorization.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the request by Bonita Springs Investments, Inc., for determination that it is not subject to the jurisdiction of this Commission is denied. It is further

ORDERED that Bonita Springs Investments, Inc., shall file an application for an original certificate no later than sixty (60) days from the date of this Order. It is further

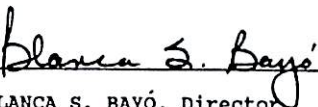
ORDERED that our actions to deny the request for determination of nonjurisdictional status and to require an application for an original certificate are preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding in the form and by the date specified in the Notice of Further Proceedings or Judicial Review. It is further

ORDERED that Bonita Springs Investments, Inc. and/or Hickory Homes, Inc., shall show cause why they should not be fined for operating a utility and implementing rates and charges without a certificate of authorization. It is further

ORDERED that any response to the show cause provisions of this Order must be in writing, must contain specific allegations of fact and law, and must be received by the Director of the Division of Records and Reporting within twenty (20) days from the date of this Order. It is further

ORDERED that failure to file a response to the show cause portions of this Order in the time and the manner specified shall constitute an admission of the facts alleged herein and a waiver of any right to a hearing, pursuant to Rule 25-22.037(3), Florida Administrative Code, and a default pursuant to Rule 25-22.037(4), Florida Administrative Code.

By ORDER of the Florida Public Service Commission, this 11th
day of October, 1994.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

RJP

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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.

As identified in the body of this order, our actions to deny the request for determination of nonjurisdictional status and to require an application for an original certificate are preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting at 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on November 1, 1994. In the absence of such a petition, this order shall become effective on the date subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If the relevant portion of this order becomes final and effective on the date described above, any party adversely affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

Any person whose substantial interests are affected by the show cause provisions of this order may file a petition for a formal proceeding, as provided by Rule 25-22.037(1), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on October 31, 1994.

Failure to respond within the time set forth above shall constitute an admission of all facts and a waiver of the right to a hearing pursuant to Rule 25-22.037(3), Florida Administrative Code, and a default pursuant to Rule 25-22.037(4), Florida Administrative Code. Such default shall be effective on the day subsequent to the above date.

If an adversely affected person fails to respond to this order within the time prescribed above, that party may request judicial review by the Florida Supreme Court in the case of any electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure.