

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Request for exemption) DOCKET NO. 940812-SU
from Florida Public Service) ORDER NO. PSC-95-0407-FOF-SU
Commission regulation for) ISSUED: March 23, 1995
provision of wastewater service)
in Lee County by Bonita Springs)
Investments, Inc.)
_____)

The following Commissioners participated in the disposition of this matter:

JOE GARCIA
JULIA L. JOHNSON

ORDER DENYING MOTION TO DISMISS
AND APPROVING PROPOSED SETTLEMENT

BY THE COMMISSION:

BACKGROUND

On January 29, 1993, this Commission's Division of Consumer Affairs received a complaint that a developer, Mr. Norman Hedrich, was operating a wastewater utility that provided service to a subdivision named Pelican Ridge and a condominium complex known as Polynesian Villas, under the name Hickory Homes, Inc. (Hickory Homes). According to the complaint, Hickory Homes had sent a letter to each customer stating that the wastewater system was going to be interconnected with Bonita Springs Utilities, Inc. (BSU) and that the estimated cost per customer would be \$900. Based upon this information, it appeared that Mr. Hedrich was operating a wastewater utility in Lee County, and that the utility had not been found exempt from our regulation.

By letter dated February 9, 1993, the Staff of this Commission (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

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existence and charging for service. Staff requested that Mr. Hedrich return the completed application by May 24, 1993.

On March 30, 1993, Staff received a copy 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 interconnection to BSU. This letter outlined the customers' options regarding the connection to BSU. During April, 1993, Staff also received a number of written and telephonic complaints from Hickory Homes' customers.

By letter dated April 28, 1993, Robert Medvecky, an attorney representing Mr. 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. However, he also stated that "[s]ince 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.

On April 21, 1994, Staff contacted Mr. Hedrich in writing, stating that a customer complaint had once again brought Hickory Homes to its attention. Staff informed Mr. Hedrich that it appeared that Hickory Homes continued to operate as a utility and that, before it could collect any charges for wastewater service, it must 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 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.

By letter dated April 29, 1994, Mr. Medvecky argued that Hickory Homes does not meet the definition of "utility" set forth in Section 367.011(12), Florida Statutes, because it is a "small system" as defined under Section 367.022(6), Florida Statutes. Mr. Medvecky argued that this Commission does not have jurisdiction over Hickory Homes and cannot, therefore, require it to apply for a certificate.

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 its one-year maintenance fee of \$55.60.

By letter dated May 26, 1994, Staff informed Mr. Medvecky that only the Commission is authorized to determine whether a utility is exempt. As for the suggestion that Hickory Homes is a "small system," Staff noted that that exemption applies to "[s]ystems with the capacity or proposed capacity to serve 100 or fewer persons", not 100 or fewer homes. Staff, therefore, requested that Hickory Homes file for a certificate or for an exemption by June 15, 1994.

By letter dated 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 Hickory Homes had not received any of the certification forms. On June 16, 1994, Staff forwarded copies of the forms. On July 25, 1994, Bonita Springs Investments, Inc. (BSI), an affiliate of Hickory Homes, applied for an exemption from this Commission's jurisdiction pursuant to Section 367.021(12), Florida Statutes.

Upon review of its application and other information, this Commission found that BSI/Hickory Homes was operating a utility without a certificate and had collected and increased utility rates and charges without our approval. Therefore, by Order No. PSC-94-1246-FOF-SU, issued October 11, 1994, we denied BSI/Hickory Homes' request for a determination of non-jurisdictional status and ordered it to apply for a certificate of authorization. We also ordered BSI/Hickory Homes to show cause why it should not be fined for operating a utility and collecting rates and charges without Commission approval.

On October 24, 1994, BSI filed a protest to Order No. PSC-94-1246-FOF-SU. Accordingly, this case was set for an administrative hearing on February 16, 1995.

On December 21, 1994, BSI filed a "Notice of Withdrawal and Motion to Dismiss." Pending the Commission's disposition of this matter, the hearing was postponed until July 14, 1995.

MOTION TO DISMISS

In its notice of withdrawal and motion to dismiss, BSI purports to withdraw its request for exemption which, BSI notes, it only filed "at the urging and insistence of the Commission staff." BSI argues that it has disposed of all remaining utility property by bill of sale to Bonita Springs Utilities and has no remaining connection with the provision of wastewater service. According to BSI, "[t]here are no other persons or issues properly before the Commission in this proceeding. Therefore, this proceeding should be dismissed."

In order to sustain a motion to dismiss, the moving party must demonstrate that, assuming all allegations sought to be dismissed as facially true, these allegations fail to state a cause of action for which relief may be had. BSI's motion fails to address the allegations, contained in the show cause provisions of Order No. PSC-94-1246-FOF-SU and Staff's direct testimony and exhibits, filed December 23, 1994, that BSI has operated as a utility and collected rates and charges, without a certificate, for a number of years. BSI also failed to address the fact that Order No. PSC-94-1246-FOF-SU required it to apply for a certificate of authorization.

Since BSI has not addressed all matters at issue in this proceeding, it has not demonstrated that "there are no other . . . issues properly before the Commission. . . ." Its motion to dismiss is, therefore, denied.

PROPOSED SETTLEMENT

Along with its Notice of Withdrawal and Motion to Dismiss, BSI submitted a bill of sale which effectuates a complete turnover of all utility assets to BSU. Staff has verified the turnover with counsel for BSU. Although BSI/Hickory Homes is now out of the utility business, as noted in the background section of this memorandum, it has collected yearly maintenance fees of \$55.20 per home since the original interconnection date, \$100 per home to cover the costs of a force main, maintenance of lift station equipment, and engineering and permitting related to "Phase I" of the interconnection, and various amounts for "Phase II" of the

interconnection. Staff has discussed this matter with counsel for BSI/Hickory Homes and, by letter dated January 26, 1995, BSI/Hickory Homes agreed to refund these monies with interest.

Upon consideration, we find it appropriate to approve the proposed settlement. BSI/Hickory Homes shall refund all monies collected related to "Phase I" and/or "Phase II" of the interconnection with BSU, including the yearly maintenance fee of \$55.20, with interest, calculated in accordance with Rule 25-30.360, Florida Administrative Code. BSI/Hickory Homes shall complete the refund within ninety days of the date of this order. BSI/Hickory Homes shall keep an accurate accounting of the refund, and should submit all documentation of the refund, including copies of canceled checks, to Staff for the purpose of verifying that the refund has been properly completed.

Although BSI/Hickory Homes has operated a utility and collected rates for wastewater service without Commission approval, we do not intend, at this juncture, to require BSI/Hickory Homes to refund all monies collected without our approval. The customers did receive value for their money and the rates charged do not appear to have been excessive. We also do not intend to pursue administrative penalties, pending a complete and satisfactory refund.

It is, therefore,

ORDERED by the Florida Public Service Commission that Bonita Springs Investments, Inc./Hickory Homes, Inc.'s motion to dismiss is denied. It is further

ORDERED that Bonita Springs Investments, Inc./Hickory Homes, Inc. shall refund all monies collected related to "Phase I" and/or "Phase II" of the interconnection with BSU, including the yearly maintenance fee of \$55.20 collected since the interconnection with Bonita Springs Utilities, Inc., with interest calculated in accordance with Rule 25-30.360, Florida Administrative Code. It is further

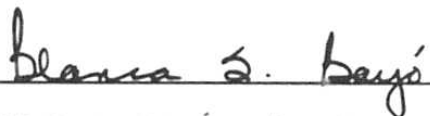
ORDERED that Bonita Springs Investments, Inc./Hickory Homes, Inc. shall complete the refund within ninety (90) days of the date of this order. It is further

ORDERED that Bonita Springs Investments, Inc./Hickory Homes, Inc. shall keep an accurate accounting of the refund, and shall submit all documentation of the refund, including copies of canceled checks, to Staff for the purpose of verifying that the refund has been properly completed. It is further

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ORDERED that this docket shall be closed upon Staff's verification that the refund has been properly completed.

By ORDER of the Florida Public Service Commission, this 23rd day of March, 1995.



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 120.59(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.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) 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 and/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 after the issuance 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.