

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Request for Exemption) DOCKET NO. 960734-WS
from Florida Public Service) ORDER NO. PSC-97-0370-FOF-WS
Commission Regulation for) ISSUED: April 2, 1997
Provision of Water and)
Wastewater Service in Putnam)
County by Hiawatha & Hart Point)
Treatment Facility, Inc.)

The following Commissioners participated in the disposition of this matter:

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

ORDER INDICATING THE EXEMPT STATUS OF HIAWATHA & HART
POINT TREATMENT FACILITY, INC. AND CLOSING DOCKET

BY THE COMMISSION:

Background

On June 14, 1996, Hiawatha & Hart Point Treatment Facility, Inc. (H&H) filed an application seeking recognition of its exempt status pursuant to Section 367.022(7), Florida Statutes. H&H is a master non-profit association formed by Hiawatha Management, Inc. (Hiawatha), Lemon Street Restaurant (restaurant), and Hart Point Properties, Inc. (Best Western or motel).

Hiawatha was previously exempted from Commission regulation, pursuant to Section 367.022(7), Florida Statutes, by Order No. 25283, issued on October 31, 1991, in Docket No. 910526-WS. In 1993, Hiawatha began serving a nearby motel that was not a member of the non-profit association. Hiawatha was in the process of establishing similar service to a nearby restaurant when the Commission became aware that Hiawatha was serving non-members. We contacted the association regarding this matter.

Order No. 25283 instructed Hiawatha to advise the Commission within 30 days of any change in circumstances which caused it to no longer qualify for exemption. By serving the motel since 1993 without notifying the Commission, Hiawatha is in apparent violation of Order No. 25283.

DOCUMENT NUMBER-DATE

03340 APR-25

FPSC-RECORDS/REPORTING

The master non-profit association, H&H, was formed so that the utility would continue to be exempt from Commission regulation. As stated above, H&H filed its request for exemption on June 14, 1996.

Show Cause

As discussed previously, Hiawatha is in apparent violation of Order No. 25283 and Section 367.022(7), Florida Statutes. That Order required Hiawatha 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 providing service solely to members who own and control such nonprofit corporations, associations, or cooperatives.

Hiawatha has been providing water and wastewater service to the motel, which is not a member 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 Hiawatha 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 Hiawatha'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 Hiawatha's understanding of Crestone's right to connect to the system because of the easement, and because Crestone was a member of the Association, Hiawatha 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 Hiawatha failed to notify the Commission of the change in circumstances, we do not find that the violation of Section 367.022(7), Florida Statutes, rises in these circumstances to the level of warranting an initiation of a show cause proceeding. Upon becoming aware of the violation, Hiawatha reincorporated as H&H, making all entities served, members of the Association. H&H then filed an application for exemption. Therefore, a show cause proceeding will not be initiated against Hiawatha for failure to notify the Commission of the change in circumstances, as required by Order No. 25283.

Application

As stated previously, on June 14, 1996, H&H filed an application for exemption from Commission regulation pursuant to Section 367.022(7), Florida Statutes. H&H is located at 116 Hiawatha Court, East Palatka, Florida. Mr. Ben Bates, President, filed the application on behalf of H&H. The primary contact person is Edward E. Hedstrom, Esquire, Post Office Box 1354, Palatka, Florida 32178.

Upon request and sufficient proof, the Commission will issue an order indicating the nonjurisdictional or exempt status of water or wastewater systems if they qualify under the appropriate provision of Chapter 367, Florida Statutes. The application was filed in accordance with Section 367.022(7), Florida Statutes.

Section 367.022(7), Florida Statutes, states that nonprofit corporations, associations, or cooperatives providing service solely to members who own and control such nonprofit entities are exempt from Commission regulation. Before an exemption of this nature may be granted, the applicant requesting the exemption must file with the Commission a statement specifying the following: that the corporation is nonprofit; providing service solely to the members who own and control it; and whether it provides water service, wastewater service, or both. Additionally, the applicant must submit its Articles of Incorporation as filed with the Secretary of State and its Bylaws. These documents must show clearly the requirements of membership, the members' voting rights, and the circumstances under which control passes to the nondeveloper members.

In its application, H&H stated that it is a nonprofit corporation organized pursuant to Chapter 617, Florida Statutes; that it will provide service solely to its members who own and

control it; and that it will provide water and wastewater service. H&H provided copies of its Articles of Incorporation and By-Laws.

Rule 25-30.060, Florida Administrative Code, in effect at the time the application was filed, states, in part, "[t]he voting rights shall be one vote per unit of ownership or other voting rights if the Commission finds they fair and nondiscriminatory so that members have equitable control of the corporation." According to the application, the voting rights are based on each member's allotted share of wastewater capacity. Hiawatha is assigned 50 percent of the capacity and has three votes. The motel is assigned 30 percent of the capacity and has one vote. The restaurant is assigned 20 percent of the capacity and has one vote. In the event a fourth entity becomes a member, it will be assigned a share of the capacity and will have one vote. At that time, Hiawatha's voting rights will be reduced to two votes. The voting rights are in proportion to each member's share of the cost which, in turn, is in proportion to each member's allotted use of the facilities. Therefore, we find H&H's voting rights, which are based on each member's allotted share of capacity, to be fair and nondiscriminatory.

Pursuant to Section 837.06, Florida Statutes, and Rule 25-30.060(2)(f), Florida Administrative Code, anyone knowingly making a false statement in writing with the intent to mislead is guilty of a misdemeanor. By signing the application, Mr. Bates acknowledged that he is aware of Section 837.06, Florida Statutes, and the penalties for making false statements in the application.

Based on the facts as represented, we find that H&H is exempt from our regulation pursuant to Section 367.022(7), Florida Statutes. However, the owner of H&H or any successors in interest are put on notice that if there is any change in circumstance or method of operation which causes it to no longer qualify for exemption pursuant to Section 367.022, Florida Statutes, it should inform the Commission within 30 days of such change so that its status may be reevaluated.

It is, therefore,

ORDERED by the Florida Public Service Commission that, based upon the facts as represented, Hiawatha & Hart Point Treatment Facility, Inc., 116 Hiawatha Court, East Palatka, Florida 32131, is hereby exempt from Commission regulation pursuant to the provisions of Section 367.022(7), Florida Statutes. It is further

ORDERED that this Docket is hereby closed.

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By ORDER of the Florida Public Service Commission, this 2nd
day of April, 1997.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

by: Kay Flynn
Chief, Bureau of Records

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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.

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, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, 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.