

MEMORANDUM

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October 12, 1998

RECORDS AND  
REPORTING

TO: DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (FLEMING) *RSR*

RE: DOCKET NO. 980953-SU - ACKNOWLEDGMENT OF TRANSFER OF  
WASTEWATER SERVICE IN LEE COUNTY FROM BONITA 75  
CORPORATION, HOLDER OF CERTIFICATE NO. 485-S, TO BONITA  
SPRINGS UTILITIES, INC., AN EXEMPT UTILITY, AND  
CANCELLATION OF CERTIFICATE NO. 485-S.

98-1377-FDF-SU

Attached is an ORDER ACKNOWLEDGING TRANSFER, CANCELING  
CERTIFICATE, DECLINING TO INITIATE A SHOW CAUSE PROCEEDING,  
REFERRING REGULATORY ASSESSMENT FEES TO THE COMPTROLLER'S OFFICE,  
AND CLOSING THE DOCKET, to be issued in the above-referenced  
docket.

(Number of pages in order - 9)

*See 1 + 7*

SRF/lw/dr

Attachment

cc: Division of Water and Wastewater (Clapp) *1/2*

I:980953OR.SRF

*Clapp*

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Acknowledgment of transfer of wastewater service in Lee County from Bonita 75 Corporation, holder of Certificate No. 485-S, to Bonita Springs Utilities, an exempt utility, and cancellation of Certificate No. 485-S.

DOCKET NO. 980953-SU  
ORDER NO. PSC-98-1377-FOF-SU  
ISSUED: October 12, 1998

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman  
J. TERRY DEASON  
SUSAN F. CLARK  
JOE GARCIA  
E. LEON JACOBS, JR.

ORDER ACKNOWLEDGING TRANSFER, CANCELING CERTIFICATE,  
DECLINING TO INITIATE A SHOW CAUSE PROCEEDING,  
REFERRING REGULATORY ASSESSMENT FEES TO THE COMPTROLLER'S  
OFFICE, AND CLOSING THE DOCKET

BY THE COMMISSION:

BACKGROUND

Bonita 75 Corporation (Bonita 75 or utility) is a Class C utility serving three general service wastewater customers in Lee County. The utility's last annual report on file with the Commission in 1993 lists annual revenues of \$14,164 and net operating earnings/loss of \$0.00.

We were notified on June 20, 1995 that Bonita Springs Utilities (BSU), had extended its sewer lines and was now providing wastewater service to the Bonita 75 customers. BSU is a nonprofit exempt utility, pursuant to Section 367.022(7), Florida Statutes. According to BSU, Bonita 75, which returned its Certificate No. 485-S, interconnected to BSU on April 24, 1995.

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

By letter dated June 21, 1995, we sent Bonita 75 an application for transfer. The utility never completed or responded to the application. A subsequent letter was sent on July 3, 1997.

After further conversations with BSU, we became aware that the utility corporation had been dissolved. On July 20, 1998, a letter was received from BSU verifying that the three general service customers of Bonita 75 were individually billed for water and wastewater service by BSU, and were also members of BSU.

### SHOW CAUSE PROCEEDING

#### Interconnection Without Commission Approval

As discussed previously, BSU had extended its sewer lines and is now providing wastewater service to the Bonita 75 customers. This occurred prior to Commission approval of the transfer. Section 367.071(1), Florida Statutes, states the following:

No utility shall sell, assign, or transfer its certificate of authorization, facilities, or any portion thereof . . . , without determination and approval of the Commission that the proposed sale, assignment, or transfer is in the public interest and that the buyer, assignee, or transferee will fulfill the commitments, obligations, and representations of the utility.

#### 1995 Annual Report

Bonita 75 has not filed its annual report for 1995. Pursuant to Rule 25-30.110, Florida Administrative Code, utilities subject to the Commission's jurisdiction as of December 31 of each year are required to file an annual report on or before March 31 of the following year. Requests for extension of time must be in writing and must be filed before March 31. One extension of 30 days is automatically granted. A further extension may be granted upon a showing of good cause. Incomplete or incorrect reports are considered

delinquent, with a 30-day grace period in which to supply the missing information.

Pursuant to Rule 25-30.110(6)(c), Florida Administrative Code, any utility that fails to file a timely, complete annual report is subject to penalties, absent demonstration of good cause for noncompliance. The penalty set out in Rule 25-30.110(7)(b), Florida Administrative Code, for Class C utilities is \$3.00 per day. The Commission may impose lesser or greater penalties, pursuant to Rule 25-30.110(6)(c), Florida Administrative Code.

#### 1995 Regulatory Assessment Fees

Bonita 75 has not paid regulatory assessment fees since 1994. As stated previously, Bonita 75 was under Commission jurisdiction prior to the interconnection with BSU. Therefore, Bonita 75 owes regulatory assessment fees for the period January 1, 1995 to April 24, 1995, the date of the interconnection. Based upon the utility's 1994 annual report, Bonita 75 owes \$212.46 for regulatory assessment fees for this period of time. In addition, through September 22, 1998, Bonita 75 owes \$53.12 in penalties and \$65.86 in interest, for a total of \$331.44. Section 367.145, Florida Statutes, requires water and wastewater utilities to remit regulatory assessment fees to this Commission. Pursuant to Section 350.113(4), Florida Statutes, and Rule 25-30.120(7)(a), Florida Administrative Code, a statutory penalty plus interest shall be assessed against any utility that fails to timely pay its regulatory assessment fees, in the following manner:

1. 5 percent of the fee if the failure is for not more than 30 days, with an additional 5 percent for each additional 30 days or fraction thereof during the time in which failure continues, not to exceed a total penalty of 25 percent.
2. The amount of interest to be charged is 1% for each 30 days or fraction thereof, not to exceed a total of 12% annum.

In addition, pursuant to Sections 367.145(1)(b) and 367.161, Florida Statutes, and Rule 25-30.120(7)(b), Florida Administrative Code, the Commission may impose an additional penalty upon a utility for failure to pay regulatory assessment fees in a timely manner. Regulatory assessment fees are intended to cover the costs incurred in Public Service Commission regulation of utilities.

#### Summary and Disposition of Findings

Section 367.161(1), 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 have willfully violated, any provision of Chapter 367, Florida Statutes. Utilities are charged with the knowledge of the Commission's rules and statutes. Additionally, "[i]t is a common maxim, familiar to all minds that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404. 411 (1833). Thus, any intentional act, such as the utility's failure to timely file its annual report, failing to remit regulatory assessment fees, and failing to obtain Commission approval prior to a transfer, would meet the standard for a "willful violation." 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 "'willful' implies an intent to do an act, and this is distinct from an intent to violate a statute or rule." Id. at 6. Our rationale is set forth below.

Bonita 75 appears to have violated Section 367.071(1), Florida Statutes, by failing to obtain our approval before transferring to BSU. While we have no reason to believe that the utility intended to violate this statute, its act was "willful" in the sense intended by Section 367.161, Florida Statutes. However, we decline to initiate a show cause proceeding against Bonita 75 for its apparent violation of Section 367.071(1), Florida Statutes. When Bonita 75 was issued its grandfather certificate by Order No. PSC-93-0715-FOF-SU, issued May 11, 1993, we noted that Bonita 75 was unable to provide sufficient evidence that it was financially viable.



However, since there was no other utility able to serve the three general service customers at that time, the Commission granted the utility a certificate in order to allow service to continue. The continuity of quality of service to the three customers is the most important consideration at this point. Therefore, since we are assured that the three customers are receiving sufficient service, we do not find that the violation of Section 367.071(1), Florida Statutes, rises to the level of warranting the initiation of a show cause proceeding.

With regard to the 1995 annual report, pursuant to Rule 25-30.110(5)(a), Florida Administrative Code, the Commission requires annual reports to be filed to: determine the earnings level of the utility; determine whether a utility is in substantial compliance with the Uniform System of Accounts as well as applicable rules and orders of the Commission; whether financial statements and related schedules fairly present the financial condition and results of operations for the period presented; and whether other information presented as to the business affairs of the utility are correct for the period they represent.

Since this utility is exempt, the Commission does not need the information regarding the utility's operations on a going-forward basis to meet the requirements of Rule 25-30.110(5)(a), Florida Administrative Code. There is purpose in requiring Bonita 75 to submit an annual report for 1995. In consideration of the foregoing, we decline to order the utility to show cause in writing, within 21 days, why it should not remit a penalty for violation of Rule 25-30.110, Florida Administrative Code, by failing to file its annual report for 1995.

We have attempted to collect the past due regulatory assessment fees plus penalty and interest by letters dated August 11, 1997 and May 22, 1998. Our staff learned from Clifford Hale that the corporation was dissolved in 1995. Since the penalties and interest associated with the outstanding regulatory assessment fees is determined by statute, these cannot be waived by the Commission.

The utility corporation was dissolved on August 25, 1995. Under certain conditions, the directors and shareholders of a dissolved corporation could be held responsible for a distribution of funds prior to the payment of regulatory

assessment fees. However, as discussed below, Bonita 75's directors and shareholders can be held responsible for its delinquent regulatory assessment fees.

Section 607.06401(3), Florida Statutes, provides in pertinent part:

No distribution may be made, if after giving it effect: (a) The corporation would not be able to pay its debts as they become due in the usual course of business . . . .

Section 607.0834(1), Florida Statutes provides in pertinent part:

A director who votes for or assents to a distribution made in violation of s. 607.06401 . . . is personally liable to the corporation for the amount of the distribution that exceeds what could have been distributed without violating s. 607.06401 . . . if it is established that he did not perform his duties in compliance with s. 607.0830.

To hold a director liable under Section 607.0830, Florida Statutes, it must essentially be shown that the director made the unlawful distribution in bad faith. Furthermore, for a director to be held liable for an unlawful distribution, a proceeding must be "commenced within 2 years after the date on which the effect of the distribution was measured . . . ." Section 607.0834(3), Florida Statutes. In this case, distributions were made in 1995; therefore, the time began to run for holding the directors liable. Further, Section 607.1406(13), Florida Statutes, provides that a shareholder of a dissolved corporation is not liable for any claim against the corporation which is brought after three years of the effective date of dissolution. A proceeding against the shareholders would have required commencement by August 25, 1998.

Therefore, in consideration of the facts stated above, we find that further collection efforts would not be cost effective and we find that a show cause proceeding is unwarranted. Consequently, we hereby refer Bonita 75's unpaid regulatory assessment fees and associated penalty and interest to the Comptroller's Office for permission to write off the

account as uncollectible. This Order is consistent with decisions made in prior dockets. (See Order No. PSC-98-0663-FOF-WS, issued May 14, 1998, in Docket No. 980342-WS and Order No. PSC-98-0906-FOF-SU, issued July 7, 1998, in Docket No. 980258-SU.)

TRANSFER AND CLOSURE OF DOCKET

Bonita 75 has provided wastewater service to three general service customers since November 1985. Water service was provided by BSU. On April 24, 1995, Bonita 75 interconnected with BSU and the three customers individually switched to BSU for wastewater service.

A letter from BSU dated July 14, 1998, verified that the three customers receive water and wastewater service from BSU and that the three are members of the utility. BSU is an exempt non-profit corporation, as acknowledged in Order No. PSC-98-00153-FOF-WS, issued January 27, 1998.

The customers of Bonita 75 have been transferred via their interconnection to BSU, and are each considered members of the BSU cooperative. Therefore, we find it appropriate to acknowledge the transfer of Bonita 75 Corporation to Bonita Springs Utilities, Inc. and cancel Certificate No. 485-S. Upon referral to the Comptroller's Office of Bonita 75's unpaid regulatory assessment fees and associated penalty and interest, no further action is required, and this docket shall be closed.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the transfer from Bonita 75 Corporation, 28090 Quails Nest Lane, Bonita Springs, Florida, 33923, to Bonita Springs Utilities, P.O. Box 2368, Bonita Springs, Florida, 34133, is hereby acknowledged. It is further

ORDERED that Certificate No. 485-S is hereby canceled effective April 24, 1995. It is further

ORDERED that show cause proceedings shall not be initiated as set forth herein. It is further

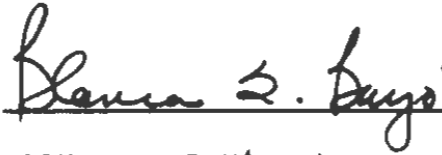
ORDERED that upon referral to the Comptroller's Office of Bonita 75 Corporation's unpaid regulatory assessment fees for the



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period of January 1, 1995 to April 24, 1995 and associated penalty, and interest, no further action is required, and this docket shall be closed.

By ORDER of the Florida Public Service Commission this 12th day of October, 1998.



BLANCA S. BAYÓ, Director  
Division of Records and Reporting

( S E A L )

SRF

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

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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.