

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Southern  
Pines Homeowners of Bonita  
Springs, Inc. to rescind  
exemption granted to Bonita  
Springs Utilities in Lee County.

DOCKET NO. 961343-WS  
ORDER NO. PSC-97-0841-FOF-WS  
ISSUED: July 14, 1997

The following Commissioners participated in the disposition of this matter:

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

ORDER DECLINING TO INITIATE SHOW CAUSE PROCEEDINGS AT THIS TIME,  
BUT REQUIRING BONITA SPRINGS TO AMEND ITS BY-LAWS TO COMPLY  
WITH EXEMPTION STATUTE OR APPLY FOR A CERTIFICATE

BY THE COMMISSION:

BACKGROUND

Bonita Springs Utilities, Inc. (Bonita Springs or utility) is a non-profit association which provides water and wastewater service in Lee County to approximately 19,542 water and 12,213 wastewater customers. The financial statement of Bonita Springs for 1994 shows that the annual operating revenue from water and wastewater is \$5,320,144.

This Commission acknowledged Bonita Springs' exemption from regulation of its water system in Dockets Nos. 690404-W, 70337-W, 70145-W and 8188-W by Order No. 5223, issued June 7, 1971. Bonita Springs was granted an exemption for its wastewater system in Docket No. 910604-SU, by Order No. 24921, issued August 16, 1991. These orders indicated that service would be provided by Bonita Springs only to members of the corporation.

On November 12, 1996, the Southern Pines Homeowners of Bonita Springs, Inc. (Southern Pines or homeowners) filed a petition to rescind the exemption granted to Bonita Springs. The petition

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states that the exemption from the Florida Public Service Commission regulation was based on the assumption that Bonita Springs was a non-profit cooperative providing service solely to members who own and control such cooperatives. Southern Pines alleges that Bonita Springs provides water and wastewater service to many individually metered and billed customers who are denied membership in the corporation. Southern Pines states that Bonita Springs collects water and wastewater revenues in excess of the corporation expenses and these excess revenues are dispensed in the form of capital credits to the corporate members, but that Southern Pines' members do not receive any share of these capital credits. The homeowners also request that we review Bonita Springs' operations, audit its books, and "reassign the already distributed capital credits to every customer on a fair and equitable basis."

We received information from the homeowners, including the utility's bylaws, its corporate structure, financial statements, newspaper articles, and documents relating to Bonita Springs' rate proceeding before Lee County. Our staff also sent inquiries to the utility and homeowners. This Order reviews the information provided and addresses whether we should require Bonita Springs to apply for a certificate of authority to operate as a regulated utility or whether and under what conditions it may continue to operate as an exempt entity.

#### EXEMPT STATUS OF BONITA SPRINGS

Bonita Springs was granted an exemption for its water system in Dockets Nos. 690404-W, 70337-W, 70145-W and 8188-W by Order No. 5223. The order stated:

Chapter 71-278, Laws of Florida became effective on September 1, 1971. Paragraph (b) of Subsection 367.021(2) provides: Not subject to regulation by the commission as a utility are non-profit corporation, associations or cooperatives providing service solely to members who own and control such non-profit corporation, associations or cooperatives.

Bonita Springs was granted an exemption for its wastewater system in Docket No. 910604-SU, by Order No. 24921, pursuant to Section 367.022(7), Florida Statutes. That order affirmed Bonita Springs' water system exemption and required the utility to file a copy of the amendment to its by-laws, so that only members would be

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served. The order required Bonita Springs to inform the Commission of any change in circumstances or method of operation so that its exempt status could be reviewed.

Bonita Springs serves the residents of the Southern Pines Subdivision, whose residents own their homes, but not the lots of their subdivision. Bonita Springs directly bills the homeowners, and responds to their inquiries regarding billing or service quality. According to the petition, the subdivision developer transferred the billing account to each homeowner, but the homeowner was denied membership in the corporation because he or she did not own the land upon which their homes were situated. Southern Pines alleges that even though Bonita Springs provides water and wastewater service to many individually metered and billed customers, those customers are denied membership in the Corporation. Bonita Springs asserts that the owner of the lot or subdivision has membership in Bonita Springs, but not the individual homeowners.

Section 367.022(7), Florida Statutes, provides, in pertinent part, as follows:

The following are not subject to regulation by the commission as a utility nor are they subject to the provisions of this chapter, except as expressly provided:

\* \* \*

(7) Non-profit corporations, associations or cooperatives providing service solely to members who own and control such non-profit corporations, associations or cooperatives ...

On February 3, 1997, our staff sent an inquiry letter to Bonita Springs regarding its billing and provision of service to the non-members, its policies regarding membership in the corporation, and its articles of incorporation. Bonita Springs responded on March 12, 1997, and submitted further information on April 18, 1997. Our staff also sent an inquiry to Southern Pines, which provided documentation on February 28, 1997, April 24, 1997, and May 8, 1997.

Bonita Springs states that it has been exempted from Commission regulation, and that its operation has not materially

changed since the exemption order was issued in 1991. Bonita Springs indicated that land ownership was a prerequisite to membership in the corporation, and that because the homeowners did not own the parcel of land, they were not granted membership. In its March 12, 1997 response to staff's inquiry regarding the definition of membership, Bonita Springs indicated that Article V of its by-laws states that "[s]ervice is provided to a parcel of land based on proper application by the owner and admission to membership in the Corporation."

The wastewater exemption was initially considered in Docket No. 910604-SU. The first set of by-laws filed with the Commission in that docket indicated that service was available to non-members if excess capacity was available. In Order No. 24921, this Commission stated that Bonita Springs had agreed to amend its by-laws to reflect that it would provide service only to its members. According to the docket file, Bonita Springs amended Article V of the by-laws to indicate that requirement. That version of Article V read, in pertinent part:

Section 1: The holders of membership certificates of this corporation are its members. Any person having reasonable access to the sources of and who is in need of water, sewer, or other services operated by the Corporation and who receives the approval of the Board of Directors may be admitted to membership upon subscribing for or otherwise acquiring a membership certificate and by signing such agreements for service as may be provided and required by the Corporation; provided that no person shall be entitled to service who is not a member, and no person otherwise eligible shall be permitted to subscribe for or acquire a membership certificate of the Corporation if the capacity of the Corporation's water and/or sewer system is exhausted by the needs of its existing members. (Emphasis added)

Section 2 of Article V further stated that each connection for services "shall entitle the subscriber for such connection to one membership certificate."

Noting that it appeared that Bonita Springs was now serving non-members, our staff sent a follow-up letter requesting an updated copy of the by-laws. On May 14, 1997, Bonita Springs submitted a copy of its current by-laws. According to the cover page of the by-laws, they were last amended in October of 1995. Article V now states:

The holders of membership certificates of this Corporation are its members. Any person having reasonable access to the sources of and who is in need of water, sewer, or other services operated by the Corporation and who receives the approval of the Board of Directors may be admitted to membership upon subscribing for or otherwise acquiring a membership certificate and by signing such agreements for service as may be provided and acquired by the Corporation; provided that no person shall be entitled to service who is not a member, and no person otherwise eligible shall be permitted to subscribe for or acquire a membership certificate of the Corporation if the capacity of the Corporation's water and/or sewer system is exhausted by the needs of its existing members. Service is provided to a parcel of land based on proper application by the owner and admission to membership in the Corporation. Persons not holding a direct ownership interest in the property, including, but not limited to, tenants, lessees, sublessees, stockholders, members, parent or subsidiary companies, limited partners, future interests not yet possessory, and others who receive service as a result of the owner's membership status, cannot also be considered members. There shall be no membership fee as such, provided that the Corporation may charge initial connection and other fees upon the issuance or acquisition of each membership certificate. (Emphasis added)

Bonita Springs states in its March 12, 1997, letter that the "operation of the Company, as it relates to the exemption, has not changed in any material way since the issuance" of the exemption orders. However, as noted above, the by-laws have been amended



since our granting of the exemption. Moreover, a group of customers assert that they receive service from Bonita Springs, but are not members of the non-profit corporation. This situation raises the concern that Bonita Springs' exempt status may have been affected by the revision of its articles of incorporation, by-laws and the billing, membership and operational policies of the utility.

Commission's Authority To Review Exemptions

Although Bonita Springs has previously been found to be exempt from Commission regulation, it is appropriate for us to review the exemption if it appears that the basis for the exemption has changed. Order No. 24921, which granted Bonita Springs' exemption, required the utility to notify the Commission within 30 days of any change of circumstance or operation, so that the Commission could review and determine whether the exemption was still appropriate.

Even if the order had not set forth that obligation upon the utility, we have jurisdiction pursuant to Section 367.011, Florida Statutes, to interpret and enforce the provisions of Chapter 367. Section 367.031, Florida Statutes, was amended in 1996 so that exempt entities no longer had to file an application for an exemption. Instead, an entity is considered exempt if it meets the statutory standards. Notwithstanding this revision, if an entity is apparently operating so as to not fit within the exemptions in the statutes, this Commission can and will examine that entity's operations to determine if it should be certified as a utility.

We have conducted such reviews in the past. For example in Docket No. 920923-SU, we instituted an inquiry into the exempt status of Landmark Utilities, after customers complained that utility charges were not included in the rent, as required to maintain a landlord-tenant exemption under Section 367.022(5), Florida Statutes. After investigation, we determined that the utility no longer qualified for an exemption (Order No. PSC-93-0914-FOF-SU, issued June 16, 1993). In Docket No. 930072-SU, we determined that Pine Lake Mobile Home Estates no longer qualified for a small system exemption under Section 367.022(6) because its capacity and number of customers had increased. Following customer and legislative inquiries, the Commission ordered the utility to file for an original certificate (Order No. PSC-93-1026-FOF-SU).

Bonita Springs asserts that its operations have not changed, and that it therefore remains exempt from Commission inquiry and

regulation. Moreover, Bonita Springs states that it has relied upon the exemption in development matters and long-range planning. It is not our intention to intervene in the operations of an exempt entity, nor disrupt water and wastewater service to the petitioning homeowners. However, the factors noted above indicate that we must reexamine the exempt status of Bonita Springs.

#### Legal Analysis Of Membership Status

The issue before us is whether Bonita Springs' current by-laws indicate that Bonita Springs should be certified as a regulated utility or is an exempt entity under Section 367.022(7), Florida Statutes? The linchpin of the non-profit exemption under Section 367.022(7) is the concept that service must be provided solely to members who own and control the corporation. Members have a voice in the operations of the utility, and the opportunity to vote on utility matters. Each exemption requires an examination of whether non-members receive service.

We have recognized an exemption for systems when the non-members receive service without compensation. The matter was first considered in a petition for declaratory statement filed by Central Lakes Utilities Corporation (Central Lakes) in Docket No. 900516-WU. Central Lakes was a non-profit corporation which provided wastewater service to its members. However, it wished to provide wastewater service to an adjacent non-member business without compensation, but questioned whether doing so would jeopardize its exemption. This Commission examined both the exemption statute and the definition of "utility" under Section 367.021(12), Florida Statutes. While the exemption statute only permitted service to be provided to members, Section 367.021(12) defined a utility for the purpose of regulation as an entity that "offer(s) water and wastewater service to the public for compensation" (Emphasis in original). Therefore, this Commission concluded that, giving effect to each part of the statute, a non-profit corporation could retain its exempt status, provided that if it provided service to non-members, it did so without compensation.

Recognizing the declaratory statement in Central Lakes, we granted an exemption to the Montpelier Village Club, Inc., because although the association provided irrigation water to a non-member, it provided it without compensation (Order No. PSC-95-1436-FOR-WU, issued November 27, 1995, in Docket No. 951154-WU). We reached a similar decision regarding Golf Lakes Residents Association, Inc.,

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in Docket No. 951235-WS, by Order No. PSC-97-0111-FOF-WS, issued January 28, 1997.

We have consistently denied exempt status for non-profit corporations that provide service to non-members for compensation. In Docket No. 900814-WU, this Commission denied an exemption to Zellwood Water Users, which provided service to two non-members: a school and a small water system. We held that "Water Users does not meet the statutory criteria for an exemption because it does not provide service solely to members of the non-profit corporation." (Order No. 24044, issued January 29, 1991) In Docket No. 941044-WS, we denied an exemption to the Burnt Store RO Association on similar grounds. In addition to the fact that the association provided service to a commercial business that was not a member of the corporation, we noted that the association provided service to tenants renting lots who were not members of the corporation (Order No. PSC-95-0648-FOF-WS, issued May 25, 1995).

Counsel for the utility submitted a U.S. District Court Opinion which addressed the definition of membership in the context of federal income tax laws: Modern Electric Water Co. v United States, 1988 U.S. Dist. LEXIS 16679; 88-2 U.S. Tax Cas. (CCH)P9523. In that case, the Internal Revenue Service (IRS) contended that because a portion of the electric company's customers were tenants and paid their electric bill directly, less than the necessary 85 percent of the utility's income was derived from its members. The court overruled the IRS determination and instead accepted Modern Electric's definition of a member as "all owners and occupiers of the land." The court's decision was based in part upon the need to serve the spirit of congressional intent regarding the tax status of non-profit organizations.

We agree with the utility that "hypertechnical" applications of the law should not defeat the legislative purpose of exempting non-profit corporations from taxation. However, we believe that the case provided by Bonita Springs can be distinguished. In the Modern Electric case, the utility asserted that the tenants should be considered members for the purposes of determining the utility's tax exempt status. In Bonita Springs' case, the utility is asserting, and the current by-laws require, that the tenants not be considered members.

Given that Bonita Springs' by-laws and operating practices indicate that the homeowners and other tenants and lessees are not members, the next relevant question is who is it that is receiving



service? Bonita Springs contends that it is the landowner, and not the tenant or lessee.

Bonita Springs explains its position more fully in its June 5, 1997 letter. The utility describes the billing and deposit procedures employed when a homeowner who rents the lot from the subdivision owner receives service. Bonita Springs asserts that by directly addressing the tenant's complaints and service problems, and billing the tenants, Bonita Springs is providing a service to its member, the subdivision owner.

Bonita Springs stated in correspondence to the homeowners that it was industry practice to assign the responsibility and rights to receive utility service to the owner of the property. We do not agree with this assertion. It is common utility industry practice to have the account in the tenant's name, with the tenant being liable for deposits and unpaid bill. While the utility may hold a customer liable for an unpaid bill, the liability commonly attaches to the customer, not the property. A utility cannot hold a subsequent occupant or owner of a property liable for the delinquent bill of the prior occupant or owner. See, Williams v. City of Mt. Dora, 452 So. 2d 1143 (Fla. 5th DCA, 1984). Also, Talquin Electric Cooperative, which operates in the North Florida area pursuant to Chapter 425, grants membership to its customers regardless of whether they own or rent their property.

Bonita Springs asserts that the utility "must look to the property owner as the party ultimately responsible for service, and membership in the cooperative". If the customers are truly not receiving service from the utility, but instead receive it through the subdivision owner who owns the land, then a question may be raised as to whether the subdivision is operating as a utility under Chapter 367. Although the subdivision owner is considered to be a member having one share in the non-profit corporation, it is important to note that the subdivision does not appear to receive service at a master meter. Instead, the lots are individually metered for service directly from Bonita Springs. There is no indication that the subdivision owner performs any utility service to the lot-owners, or resells the service to the lessees. The fact that the utility, and not the subdivision owner, bills the customers and answers billing and service complaints indicates that the homeowners receive service directly from Bonita Springs, and not through the subdivision/member of the cooperative.

In its June 5, 1997, correspondence, the utility notes that we have no rules on the subject of exemptions. We recently repealed Rule 25-30.060, Florida Administrative Code, as a result of the amendment of Section 367.022, Florida Statutes, to no longer require utilities to seek exemptions from the Commission. However, we may still require an entity to file an application for certification when it provides service inconsistent with the exemption criteria. We believe that the orders cited above, and the language of the statute itself is controlling in this situation. If Bonita Springs provides service to non-members, then it does not meet the statutory criteria and is no longer exempt.

Article V of Bonita Springs' current by-laws indicates that non-member lessees and tenants may receive service as a result of the owner's status, but are not members. Also, the by-laws indicate that the homeowners receive service without membership status. Bonita Springs' March 12, 1997, letter makes the distinction between customers as members and non-members. We therefore conclude that the utility's by-laws and operating practices indicate that Bonita Springs has provided service to non-members, and, therefore, it does not qualify as an exempt utility under Section 367.022(7), Florida Statutes.

Request To Audit Bonita Springs And Order Redistribution Of Capital Credits

The homeowners also requested in their petition that we review Bonita Springs' operations, audit its books, and "reassign the already distributed capital credits to every customer on a fair and equitable basis." In support of that request, the homeowners supplied documentation related to Bonita Springs' financial structure, its distribution of credits, and its rate proceeding before the Lee County Commission.

As stated above, our legal authority in this matter extends to the review of Bonita Springs exemption, and the determination as to whether Bonita Springs remains an exempt entity. If Bonita Springs amends its by-laws to retain its exempt status, we lack authority to audit Bonita Springs' books for the purpose of reassigning capital credits. However, if Bonita Springs files for an original certificate, then we could review the utility's books and records at that time.

Action On Bonita Springs' Exempt Status

While the by-laws, as currently adopted, indicate that Bonita Springs provides service to non-members, we recognize the Florida Legislature's intent, through Section 367.022(7), Florida Statutes, to exempt non-profit corporations from the Commission's regulation. Therefore, the utility shall be given the opportunity to rectify the situation, and create a situation where all the customers who receive service are members of the non-profit corporation. As stated above, we do not wish to interfere with the delivery of service to the public, or with the operations of Bonita Springs, provided the utility can amend its by-laws and policies to conform with Section 367.022(7), Florida Statutes.

As noted earlier, Order No. 24921 required Bonita Springs to notify the Commission of any change of circumstance or operating method so that its exempt status could be reviewed. A show cause proceeding will not be initiated at this time for Bonita Springs' failure to notify us of the change. Instead, Bonita Springs shall be put on notice that if it fails to comply with this Order to amend its by-laws or file for certification, then an initiation of a show cause proceeding will be considered.

Based on all the above, Bonita Springs' current policies and 1995 amendment of its by-laws indicate that the utility is providing service to customers who are not members of the non-profit corporation. Therefore, Bonita Springs shall be given 60 days from the date of the order to either revise its by-laws to comply with the requirement of Section 367.022(7), Florida Statutes, that it only provide service to its members, or apply for an original certificate with the Commission.

CLOSING OF DOCKET

The docket shall remain open in order to allow further action on Bonita Springs' exempt status.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Bonita Springs Utilities, Inc., shall be given 60 days from the date of this Order to either revise its by-laws to comply with the requirement of Section 367.022(7), Florida Statutes, that it only provide service to its members, or apply for an original certificate with the Commission. It is further


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ORDERED that, while we will not initiate show cause proceedings at this time, a show cause action shall be considered if Bonita Springs Utilities, Inc., fails to attain compliance with the statute, or fails to apply for an original certificate within the allotted 60 days. It is further

ORDERED that this docket remain open.

By ORDER of the Florida Public Service Commission, this 14th day of July, 1997.

BLANCA S. BAYÓ, Director  
Division of Records and Reporting

  
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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.