



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

RECEIVED

DATE: JUNE 4, 1998

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TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

11:30
FPSC - Records/Reporting

FROM: DIVISION OF WATER AND WASTEWATER (CLARK, CHASE)
DIVISION OF ADMINISTRATION (LAKE, SEWELL)
DIVISION OF LEGAL SERVICES (FERGUSON)

RE: DOCKET NO. 980258SU - ACKNOWLEDGMENT OF EXEMPT STATUS OF
IMPERIAL BONITA ASSOCIATES D/B/A IMPERIAL BONITA ESTATES
AND CANCELLATION OF CERTIFICATE NO. 237-S IN LEE COUNTY.

AGENDA: 06/16/98 - REGULAR AGENDA - - INTERESTED
PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\WAW\WP\980258SU.RCM

CASE BACKGROUND

Imperial Bonita Associates d/b/a Imperial Bonita Estates (IBE or utility) is a Class C utility serving approximately 694 general service wastewater customers in Lee County. The utility's 1992 annual report on file with the Commission lists annual revenues of \$10,419 and net operating earnings of \$1,479.

Imperial Bonita Estates is the name of the utility as well as the name of the mobile home park it serves. The mobile home park has four distinct divisions: 1) RV park; 2) mobile home rentals; 3) homeowners; and 4) a unit owned by the park for residential use by the manager.

Imperial Bonita Estates (utility and mobile home park) was sold to Imperial Bonita Associates d/b/a Imperial Bonita Estates on October 31, 1983. The application to transfer Certificate No. 237-S was not filed with this Commission until December 9, 1991.

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FPSC-RECORDS/REPORTING

Included in Order No. PSC-92-0809-FOF-SU approving the transfer was reference to a pre-sale agreement between IBE and Bonita Springs Utilities, Inc. (BSU). This agreement gave an anticipated interconnection date with BSU of late 1993.

On January 20, 1998, BSU provided a letter verifying that IBE had interconnected with BSU on September 7, 1993. On May 16, 1994, the property the wastewater collection and treatment system had been located on was deeded to the Imperial Bonita Homeowners Association, Inc. This recommendation addresses the interconnection of the utility system to BSU, the qualification of the utility operations of the Homeowners Association as an exempt entity, the cancellation of Certificate No. 237-S, and the requirement to file an annual report and remit delinquent regulatory assessment fees.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission acknowledge the exempt status of Imperial Bonita Estates as of September 7, 1993, and cancel Wastewater Certificate No. 237-S

RECOMMENDATION: Yes, the Commission should acknowledge the exempt status of Imperial Bonita Estates as of September 7, 1993, and cancel Wastewater Certificate No. 237-S. (CLAPP)

STAFF ANALYSIS: IBE (the utility) provided service to Imperial Bonita Estates, a mobile home cooperative, which had the following sections: a seasonal recreational vehicle site with a 318 vehicle capacity; a 130 lot subdivision where residents own their units and lots; a 245 unit mobile home rental area; and one unit owned by the park which is usually used to house the park manager.

In the course of gathering information for potential show cause actions with respect to delinquent annual reports and regulatory assessment fees, Commission Staff has been corresponding with Mr. Tim Newby, a director of the former utility, the current manager of the utility, and BSU. As a result of these exchanges, Staff has received various correspondence to document the series of events since the last official action recorded for this utility,

which was the sale to the partnership operating as Imperial Bonita Associates.

On January 20, 1998, BSU filed a letter with this Commission stating that the Imperial Bonita Estates Wastewater Treatment Plant had been taken out of service on September 7, 1993, and that all customers of the utility had been interconnected to the BSU system to receive wastewater service. BSU is an exempt non-profit corporation, as acknowledged in Order No. PSC-98-0153-FOF-WS, issued January 27, 1998.

In a letter dated April 6, 1998, Mr. Tim Newby stated that on May 16, 1994, the property the wastewater collection and treatment system had been located on was deeded to the Imperial Bonita Homeowners Association, Inc. Further, he affirmed that residents had not been billed for wastewater service during the time the plant was interconnected (September 7, 1993) and the conclusion of the sale (May 16, 1994). Based on the representations made by the utility, Staff believes that IBE would have qualified as a non-profit association at that point pursuant to Section 367.022(7), Florida Statutes.

A letter received on January 26, 1998, from Imperial Bonita Estates, Inc., verified that BSU was now providing wastewater services; however, the existing on-site collection system remained the responsibility of IBE. This maintenance responsibility of IBE could have the potential of making the park jurisdictional. Therefore, the Staff collected additional information about the IBE's internal organization and billing methodology with respect to wastewater services. The collection lines for the 694 sites are maintained as part of the Association's common area elements by IBE through nonspecific maintenance fees charged the owners and through rental fees.

Staff believes that the operations of IBE, since September 7, 1993, meet the necessary qualifications for exemption from regulation as a non-profit association pursuant to Section 367.022(7), Florida Statutes. Therefore, Staff recommends the Commission acknowledge the system as exempt, and cancel Certificate No. 237-S.

ISSUE 2: Should IBE be ordered to show cause in writing, within 20 days, why it should not remit RAF's in the amount of \$312.57 as well as a statutory penalty in the amount of \$78.14 and interest in the amount of \$162.54, for violation of Sections 350.113 and 367.145, Florida Statutes, and Rule 25-30.120, Florida Administrative Code, for failure to pay regulatory assessment fees from January 1, 1993 to September 7, 1993?

RECOMMENDATION: No. A show cause proceeding against IBE should not be initiated. Staff further recommends that the Commission refer IBE's unpaid regulatory assessment fees and associated penalties and interest to the State of Florida Comptroller's Office for permission to write off the account as uncollectible. (FERGUSON, SEWELL, LAKE, CHASE)

STAFF ANALYSIS: 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(5)(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(5)(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.

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 pay regulatory assessment fees, 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.

IBE has not paid regulatory assessment fees (RAFs) since 1992. As stated in issue 1, IBE was under Commission jurisdiction prior to the interconnection with BSU. Therefore, IBE owes regulatory assessment fees for the period January 1, 1993 to September 7, 1993, the date of the interconnection. Based upon the utility's 1992 annual report, IBE owes \$312.57 for RAFs for this period of time. In addition, through June 30, 1998, IBE owes \$78.14 in penalties and \$162.54 in interest, for a total of \$240.68.

When questioned about delinquent RAFs, Mr. Newby advised Staff that the utility was informed by Commission Staff in March 1994, that IBE was listed as inactive on Commission records, and therefore, no regulatory assessment fees were due. However, our records indicate that one notice of delinquency was sent on May 3, 1994, regarding 1993 regulatory assessment fees. Apparently, there has been some confusion on the part of Commission Staff and the utility's management team as to whether IBE owes any regulatory assessment fees and, if so, for what period of time. Since the utility was interconnected with BSU, it apparently believed that it was no longer subject to Commission regulation. Also, the Commission Staff until recently was unclear as to the utility's jurisdictional status. However, it is now clear that the utility was jurisdictional in 1993 until it interconnected with BSU on September 7. Therefore, IBE should be held responsible for outstanding RAFs. Since the penalties and interest associated with the outstanding RAFs is determined by statute, these cannot be waived by the Commission. However, due to the circumstances in this case, we do not believe a show cause proceeding is warranted.

The utility corporation was dissolved in September 1993. 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, Staff does not believe that IBE's directors and shareholders can be held responsible for IBE's 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, Staff does not know when distributions were made. Therefore, it is unclear when 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 September 1996.

Therefore, in consideration of the facts stated above, Staff does not believe further collection efforts would be cost effective. Staff further recommends that the Commission refer IBE'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 recommendation is consistent with Order No. PSC-98-0663-FOF-WS, issued May 14, 1998, in Docket No. 980342.

ISSUE 3: Should IBE be ordered to show cause, in writing, within 20 days, why it should not remit a penalty for failing to comply with Rule 25-30.110, Florida Administrative Code, in that it did not file its annual report for 1993?

RECOMMENDATION: No. A show cause proceeding against IBE should not be initiated. (FERGUSON, CHASE)

STAFF ANALYSIS: Rule 25-30.110, Florida Administrative Code, requires utilities subject to the Commission's jurisdiction as of December 31 of each year 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 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), 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.

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, 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. In this instance, Staff recommends that a show cause proceeding not be initiated. Our rationale is set forth below.

As discussed previously, IBE has not filed an annual report since 1992. In Issue 1, staff is recommending that the utility has

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been exempt since its interconnection with BSU, which occurred on September 7, 1993. Therefore, the utility is only responsible for filing the 1993 annual report.

Pursuant to Rule 25-30.110(3)(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(3)(a), Florida Administrative Code, Staff believes that there would be no purpose in requiring IBE to submit an annual report for 1993.

In consideration of the foregoing, Staff recommends that IBE not be ordered to show cause in writing, within 20 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 1993.

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ISSUE 4: Should this docket be closed?

RECOMMENDATION: Yes. If the Commission approves Staff's recommendation, upon referral to the Comptroller's Office, no further action will be required, and this docket should be closed. (FERGUSON)

STAFF ANALYSIS: If the Commission approves Staff's recommendation, upon referral to the Comptroller's Office of IBE's unpaid regulatory assessment fees and associated penalty and interest, no further action will be required, and this docket should be closed.