



Public Service Commission

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DATE: SEPTEMBER 10, 1998

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

FROM: DIVISION OF WATER AND WASTEWATER (CLAPP, CHASE)
DIVISION OF ADMINISTRATION (KNIGHT, SEWELL)
DIVISION OF LEGAL SERVICES (FERGUSON, FLEMING)

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.
COUNTY: LEE

AGENDA: 09/22/98 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\WAW\WP\980953SU.RCM

CASE 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.

The utility was issued Certificate No. 485-S pursuant to Order No. PSC-93-0715-FOF-SU issued on May 11, 1993. The Order noted that the utility was in foreclosure action, but that there were no other utilities able to serve the customers, so the certificate was issued to allow continuity of service.

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FPSC-RECORDS/REPORTING

A letter was received by the Commission on June 20, 1995, from Clifford Hale, President of Bonita 75 Corporation, stating that Bonita Springs Utilities, Inc., had extended its sewer lines and was now providing wastewater service to the Bonita 75 customers. Bonita Springs Utilities, Inc. (BSU), is a nonprofit exempt utility, pursuant to Section 367.022(7), Florida Statutes. Mr. Hale returned Certificate No. 485-S with his letter. According to BSU, Bonita 75 interconnected to BSU on April 24, 1995.

By letter dated June 21, 1995, this Commission sent Bonita 75 an application for transfer. The utility never completed or responded to the application. A letter was subsequently sent from the Commission on July 3, 1997 to Mr. Hale, informing him that the issue of transferring the utility system was still considered unresolved since no formal application had been received and approved by the Commission.

After further conversations with BSU, the staff became aware that the utility corporation had been dissolved, and requested further information on the interconnection from BSU. 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. Further, the three customers were also members of BSU.

This recommendation addresses the transfer of customers of Bonita 75 to BSU, the cancellation of Certificate No. 485-S, and the requirement to file an annual report and remit delinquent regulatory assessment fees for the period of January 1, 1995 to April 24, 1995.

DISCUSSION OF ISSUES

ISSUE 1: Should Bonita 75 be ordered to show cause, in writing within 21 days, why it should not be fined for violation of Section 367.071(1), Florida Statutes?

RECOMMENDATION: No, a show cause proceeding should not be initiated. (FLEMING)

STAFF ANALYSIS: As stated in the case background, 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.

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.

Bonita 75 appears to have violated Section 367.071(1), Florida Statutes, by failing to obtain the approval of the Commission before transferring to BSU. While staff does not have 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. See 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. 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).

A letter was received by the Commission on June 20, 1995, from Clifford Hale, President of Bonita 75 Corporation, stating that BSU had extended its sewer lines and was now providing wastewater service to the Bonita 75 customers. BSU is an exempt utility, pursuant to Section 367.022(7), Florida Statutes.

For reasons discussed below, staff does not recommend that the Commission initiate a show cause proceeding for Bonita 75's apparent violation of Section 367.071(1), Florida Statutes. First, staff believes that the continuity of quality of service to the three customers is the most important consideration at this point. Second, when Bonita 75 was issued its grandfather certificate by Order No. PSC-93-0715-FOF-SU, issued May 11, 1993, it was 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.

Third, as of August 25, 1995, Bonita 75 Corporation is dissolved. Under certain conditions, the directors and shareholders of a dissolved corporation could be held responsible. However, the statute of limitations for pursuing such has expired. See Sections 607.0830 and 607.1406(13), Florida Statutes.

Based upon the foregoing, staff does not believe that the violation of 367.071(1), Florida Statutes, rises to the level of warranting the initiation of a show cause proceeding. Staff recommends that the Commission not order Bonita 75 to show cause for violation of Section 367.071, Florida Statutes, for failing to obtain approval of the Commission prior to the transfer.

ISSUE 2: Should the Commission acknowledge the transfer of Bonita 75 Corporation to Bonita Springs Utilities, Inc., as of April 24, 1995, and cancel Wastewater Certificate No. 485-S?

RECOMMENDATION: Yes, the Commission should acknowledge the transfer of Bonita 75 Corporation to Bonita Springs Utilities, Inc., as of April 24, 1995, and cancel Wastewater Certificate No. 485-S. (CLAPP)

STAFF ANALYSIS: Bonita 75 provided wastewater service to three general service customers since November 1985. Water service was provided by Bonita Springs Utilities, Inc. (BSU). On April 24, 1995, Bonita 75 interconnected with BSU and the three customers individually switched to BSU for wastewater service.

On June 20, 1995, Mr. Clifford Hale, President of Bonita 75 Corporation, filed a letter with this Commission stating that BSU had extended its wastewater collection lines to the area serviced by Bonita 75. As a result, the three customers of Bonita 75 had now become customers of BSU. Mr. Hale returned original wastewater Certificate No. 485-S since Bonita 75 had no other customers.

In the course of gathering information for potential show cause actions with respect to delinquent annual reports and regulatory assessment fees as well as non response to letters asking for submittal of an application for transfer, Commission Staff has been corresponding with former corporate officers and former customers of the utility and with officials of Bonita Springs Utilities, Inc. 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, Staff recommends that the transfer of customers from Bonita 75 to BSU be recognized, and that Certificate No. 485-S be cancelled.

ISSUE 3: Should Bonita 75 be ordered to show cause in writing, within 21 days, why it should not remit regulatory assessment fees in the amount of \$212.46 as well as a statutory penalty in the amount of \$53.12 and interest in the amount of \$65.86, 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, 1995 to April 24, 1995?

RECOMMENDATION: No. A show cause proceeding against Bonita 75 should not be initiated. Staff further recommends that the Commission refer Bonita 75'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, KNIGHT, 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(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.

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.

Bonita 75 has not paid regulatory assessment fees (RAFs) 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 RAFs 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.

Staff has attempted to collect the past due RAFs plus penalty and interest by letters dated August 11, 1997 and May 22, 1998. Staff learned from Clifford Hale that the corporation was dissolved in 1995. Although the utility was interconnected with BSU in April of 1995, Bonita 75 owes RAFs for the period January 1, 1995 to the date of the interconnection and remains responsible for payment. 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 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, Staff does not believe that 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, Staff does not believe further collection efforts would be cost effective. Staff further recommends that the Commission 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 recommendation 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.)

DOCKET NO. 980953-0
DATE: SEPTEMBER 10, 1998

ISSUE 4: Should Bonita 75 be ordered to show cause, in writing, within 21 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 1995?

RECOMMENDATION: No. A show cause proceeding against Bonita 75 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)(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.

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, Bonita 75 has not filed an annual report since 1994. The utility has been exempt since its

DOCKET NO. 980953
DATE: SEPTEMBER 10, 1998

interconnection with BSU, which occurred on April 24, 1995. Therefore, the utility is only responsible for filing 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. Therefore, staff believes that there would be no purpose in requiring Bonita 75 to submit an annual report for 1995.

In consideration of the foregoing, Staff recommends that Bonita 75 not be ordered 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.

DOCKET NO. 980953-~~0~~
DATE: SEPTEMBER 10, 1998

ISSUE 5: 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.
(FLEMING)

STAFF ANALYSIS: If the Commission approves Staff's recommendation, upon referral to the Comptroller's Office of Bonita 75's unpaid regulatory assessment fees and associated penalty and interest, no further action will be required, and this docket should be closed.