

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Request for) DOCKET NO. 940725-SU
Acknowledgement of Sale of) ORDER NO. PSC-96-1472-FOF-WS
Bonita Center Treatment Plant,) ISSUED: December 3, 1996
Inc., to Bonita Springs)
Utilities, Inc. and Cancellation)
of Certificate No. 458-S in Lee)
County)
_____)

The following Commissioners participated in the disposition of this matter:

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

ORDER APPROVING TRANSFER

BY THE COMMISSION:

BACKGROUND

Bonita Center Treatment Plant, Inc. (Bonita Center or utility) was a utility providing wastewater service in Lee County under Florida Public Service Commission Certificate No. 458-S, Order No. 22301, issued December 12, 1989. It was originally certificated in order to provide wastewater service to a shopping center called The Center at Bonita (the Center).

The utility consists of a wastewater treatment plant and two lift stations. The land on which the wastewater plant is located is owned by Southern Management I, Inc. and was conveyed to the utility through a long term lease. Southern Management owns the shopping center and collection lines.

Bonita Center discontinued the operation of its wastewater treatment plant on February 24, 1993 when it interconnected with BSU. Bonita Center no longer exists as a corporate entity and the former customers now receive wastewater service from BSU. Water service has always been provided by BSU.

The 1991 annual report was the most recent submitted to the Commission and stated that the utility provided service to 57 connections in the Center, with a total operating revenue of

DOCUMENT NUMBER-DATE

12868 DEC-3%

FISCAL YEAR-END REPORT

\$65,150 and a net loss of \$63,111. Bonita Center has not filed an annual report or remitted regulatory assessment fees since 1991.

On March 7, 1994, we received a response to a request designed to update our directory, which stated that the utility was no longer providing wastewater service. This response was signed by Mr. Christopher Austin, Vice-President of Southern Management, and according to the 1991 annual report, also a Vice-President of Bonita Center.

Bonita Center discontinued operation of the wastewater treatment plant in order to prepare for interconnection. On February 28, 1993, BSU interconnected wastewater service for the shopping center at the two lift stations and the utility transferred the lift stations and customers to BSU. Southern Management retained ownership of the collection lines within the shopping center.

On January 27, 1995, Bonita Center filed an application for a transfer of Bonita Center Treatment Plant, Inc. to Bonita Springs Utilities, Inc. pursuant to Chapter 367.071(4)(b), Florida Statutes, and Rule 25-30.037, Florida Administrative Code.

We note that Bonita Center has not paid its 1992-1994 regulatory assessment fees nor the application fee for this docket. Pursuant to Section 367.071(2), Florida Statutes, the transferor remains liable for outstanding regulatory assessment fees, fines, or refunds of the utility. These matters will be handled in a separate docket.

APPLICATION

Bonita Center did not notify us prior to interconnecting with BSU. We believe that the utility also did not notify the individual tenants of the shopping center, who were the ultimate customers of the service provider. However, no protests or complaints from any source have been received by us subsequent to the transfer. Bonita Center claims that it was unaware that it was required to notify us prior to any interconnection.

Section 367.071(1), F.S. provides that:

no utility shall sell, assign, or transfer its certificate of authorization, facilities or any portion thereof, or majority organizational control 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.

As a result of our initial understanding that the utility was being transferred to a governmental entity, Bonita Center originally filed a transfer to governmental entity application on June 29, 1994. After lengthy investigation and questioning, we determined that the utility was not being transferred to a governmental entity.

Bonita Center subsequently filed an application for transfer on January 27, 1995. However, Bonita Center's transfer application did not fulfill statutory and rule requirements. The application reported the names of Bonita Center as the seller and BSU as the buyer along with a copy of a consent order from the Department of Environmental Protection, upon which Bonita Center had been operating the wastewater treatment system prior to interconnection with BSU. Bonita Center did not submit any vital information, nor a filing fee within the application.

The method in which the transfer was executed between the two entities complicated the situation. There was no transfer of cash for assets, no contract for sale, nor any books and records. The only transfer of assets were two lift stations and customers. We attempted to obtain additional information on several occasions and ultimately sent a letter to Bonita Center outlining possible show cause actions. Mr. Chris Austin of Southern Management, on behalf of Bonita Center, responded informally by stating that it had expended a great deal of time and effort in trying to meet Commission requirements and that it could not continue further efforts.

BSU has been serving the customers of the shopping center for approximately three years with no complaints. It appears BSU has the technical and financial ability to serve the customers within the shopping center. Based upon the consent order, it also appears that the interconnection is in the public interest.

Based upon the above, we approve the transfer of Bonita Center treatment Plant, Inc. to Bonita Springs Utilities, Inc. Accordingly, Wastewater Certificate No. 458-S is cancelled.

SHOW CAUSE

As mentioned previously, the transfer of Bonita Center's service area to BSU occurred in February 1993. Section 367.161 (1), Florida Statutes, authorizes us 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 Center appears to have violated Section 367.071 (1), Florida Statutes, by failing to obtain the approval of the Commission before selling Bonita Center's facilities to BSU wastewater users. While we have no reason to believe that the utilities intended to violate this statute, its act was "willful" in the sense intended by Section 367.161, 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., we 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, "in 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.

Utilities are charged with the knowledge of our 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 utilities' failure to obtain antecedent Commission approval to sell their facilities, would meet the standard for a "willful violation."

A show cause proceeding against Bonita Center is unlikely to result in any constructive outcome. As mentioned in the case background, Bonita Center no longer exists as a corporate entity. We have contacted a former officer, Mr. Austin, several times over the past few years with reference to this transfer. Mr. Austin has repeatedly informed us that neither books nor records of the former corporation exist.

As stated earlier, we find that the transfer is in the public interest and BSU has the technical and financial ability to provide wastewater service to the certificated area. BSU has fulfilled the commitments, obligations, and representations of Bonita Center. Furthermore, after notification by us, Mr. Austin filed an application for transfer with the Commission. We find that pursuing a show cause action against Bonita Center would accomplish little and waste Commission time and resources.

We have not received any complaints since the transfer of the service area to BSU. Furthermore, the quality of service has been considered adequate. Had BSU not provided service to the certificated area when it did, the customers would most likely have been left without wastewater service.

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We are not suggesting that the Bonita Center's apparent violations should be taken lightly. Although Bonita Center is charged with knowledge of Chapter 367, Florida Statutes, we do not find that its apparent violations of Section 367.071(1), Florida Statutes, rise to the level of warranting that a show cause order be issued. Neither do we find that a show cause proceeding is necessary to correct this situation at this time. Therefore, we find that Bonita Center should not be ordered to show cause in writing within twenty days why it should not be fined, for violating Section 367.071(1), Florida Statutes.

Based on the foregoing, it is

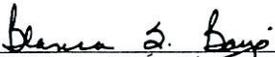
ORDERED by the Florida Public Service Commission that the transfer of facilities in Lee County from Bonita Center Treatment Plant, Inc., to Bonita Springs Utilities, Inc., is hereby approved. It is further

ORDERED that Certificate No. 458-S is hereby cancelled. It is further

ORDERED that each of the findings made in the body of this Order is hereby approved in every respect. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission, this 3rd day of December, 1996.



BLANCA S. BAYO, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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.