

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-98-0153-FOF-WS
ISSUED: January 27, 1998

The following Commissioners participated in the disposition of this matter:

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

ORDER FINDING UTILITY TO BE EXEMPT, DISMISSING PETITION OF
HOMEOWNERS ASSOCIATION, AND CLOSING DOCKET

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. The utility had been considered exempt from our regulation pursuant to Section 367.022(7), Florida Statutes.

We 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, dated June 7, 1971. Also, in Docket No. 910604-SU, by Order No. 24921, issued August 16, 1991, we acknowledged that Bonita Springs' wastewater system was exempt. However, both the above orders indicated that service would be provided 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 stated that the exemption from our regulation was based on the

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assumption that Bonita Springs was a non-profit cooperative providing service solely to members who own and control such cooperatives. Southern Pines alleged that Bonita Springs provided water and wastewater service to many individually metered and billed customers who were denied membership in the Corporation. Southern Pines has also alleged that Bonita Springs is collecting water and wastewater revenues in excess of the corporation expenses and that 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 requested 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."

After receiving 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, we issued Order No. PSC-97-0841-FOF-WS on July 14, 1997. That Order gave Bonita Springs 60 days 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.

By letter dated September 5, 1997, the attorney for Bonita Springs advised our staff that on September 2, 1997, the Board of Directors of Bonita Springs approved amending the company's by-laws. Also, the letter advised that the Board had directed its staff to provide a draft bylaw amendment for review and approval, and to advise the Commission of its intentions in this matter. However, by that same letter, Bonita Springs requested an additional sixty days in which to work out the mechanics of the by-law amendment. This request was granted by Order No. PSC-97-1348-PCO-WS, issued on October 27, 1997. By that Order, Bonita Springs was given until November 11, 1997, to either revise its bylaws to comply with the requirements of Section 367.022(7), Florida Statutes, or apply for an original certificate.

Subsequently, by letter dated October 23, 1997, the attorney for Bonita Springs advised our staff that the company's Board of Directors had voted, on October 21, 1997, to amend Article V of the Bylaws to comply with Section 367.022(7), Florida Statutes. A copy of the amended Article V was provided and is attached to this Order as Attachment 1.

This Order addresses whether Bonita Springs, with the amendment of Article V, has complied with Order No. PSC-97-0841-FOF-WS and what action should we take on the Petition of Southern Pines requesting we rescind the exemption granted Bonita Springs.

EXEMPT STATUS OF BONITA SPRINGS

As stated in the Background above, Bonita Springs was ordered by Order No. PSC-97-0841-FOF-WS (the Order) to either revise its bylaws to comply with the requirements of Section 367.022(7), Florida Statutes, or apply for an original certificate. The Board of Directors chose to amend the bylaws as shown in Attachment 1.

Section 1 of the amended Article V provides in pertinent part:

It is the intent of the Corporation to provide service solely to its members. The holders of membership certificates of, or accounts with, this Corporation are its members. . . . Service is first provided to a parcel of land based on proper application by the owner and admission to membership in the Corporation. Thereafter, persons not holding a direct ownership interest in the property including, but not limited to, tenants, lessees, sublessees, . . . and others who receive service as a result of the owner's membership status cannot also be considered members unless the person occupies an individually metered premises, and accepts responsibility for service and payment obligations, in which case they shall be substituted as a member for the period of occupancy. 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 or account.

Section 3 of Article V allows each member a vote at any meeting of the Corporation on items submitted to a vote, provided that the member (to include account holder) is in good standing for all accounts or certificates. Also, Section 4 of the amended Article V provides in pertinent part:

Termination of such membership shall result in a disconnection of water and sewer service to the member. Termination shall not result in forfeiture of a member's entitlement to any patronage refund resulting from status as a member pursuant to Article XII of these By-Laws.

By three letters dated November 19, 1997, two to staff counsel and one to the Division of Consumer Affairs, Jay Arend, President of Southern Pines, questions whether the amendments to Article V actually bring Bonita Springs into compliance. In the letter to the Division of Consumer Affairs, Mr. Arend raised various concerns and asked several questions. These concerns and some of the questions were reiterated in his letters to the staff counsel.

We believe the bylaws, as amended, do correct the problems previously noted, and do qualify Bonita Springs for exemption pursuant to Section 367.022(7), Florida Statutes. Further, by notice dated November 11, 1997, to its utility customers, Bonita Springs states that as of October 21, 1997, the "Board of Directors voted to revise the Utility's by-laws to expand membership . . . to include customers who do not own their property but who 'occupy an individually metered premise and accept responsibility for service and payment obligations.' As of the November 1997 billing, any rental tenants who meet this criteria will be welcomed as members." We find that the bylaws as amended and this notice demonstrate that Bonita Springs is now in compliance with Section 367.022(7), Florida Statutes.

Also, if Bonita Springs fails to follow its own bylaws and the pronouncements of this notice, then the people who believe they have wrongly been denied membership status may then file their petition or complaint. However, at this time, we believe that the concerns expressed by Mr. Arend are premature, and we should first see if a problem develops before we take any further action. If Bonita Springs does not confer membership status, then Mr. Arend or the affected customers could either contact the Office of the Public Counsel, or again file a formal petition or complaint, and we could then take whatever action is necessary.

In consideration of the above, we find that the utility has complied with the requirements of Order No. PSC-97-0841-FOF-WS and is now exempt from our regulation pursuant to Section 367.022(7), Florida Statutes.

PETITION OF SOUTHERN PINES .

In response to the Petition of Southern Pines, we issued Orders Nos. PSC-97-0841-FOF-WS and PSC-97-1348-PCO-WS. Those Orders gave Bonita Springs until November 11, 1997, to either revise its bylaws to comply with the requirements of Section 367.022(7), Florida Statutes, or apply for an original certificate.

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Bonita Springs has now complied with those Orders and the requirements of Section 367.022(7), Florida Statutes. Accordingly, the Petition of Southern Pines is dismissed.

CLOSING OF DOCKET

There are no further actions to be taken in this docket, and the docket shall be closed.

Based on the foregoing, it is


ORDERED by the Florida Public Service Commission that the bylaws, as amended, exempt Bonita Springs Utilities, Inc., from this Commission's regulation pursuant to the provisions of Section 367.022(7), Florida Statutes. It is further

ORDERED that the Petition of Southern Pines Homeowners of Bonita Springs, Inc., shall be dismissed. It is further

ORDERED that Attachment 1 to this Order is incorporated herein and made a part of this Order. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 27th day of January, 1998.



BLANCA S. BAYÓ, 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 120.569(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.

BONITA SPRINGS UTILITIES, INC.
AMENDMENT TO BY-LAWS

ARTICLE V

MEMBERSHIP

SECTION 1: It is the intent of the Corporation to provide service solely to its members. The holders of membership certificates of, or accounts with, this Corporation are its members. Any person, as defined by Florida law, 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, or account, and by signing such agreements for service as may be provided or required by the Corporation; provided that no person otherwise eligible shall be permitted to subscribe for or acquire a membership certificate of, or account with, 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 first provided to a parcel of land based on proper application by the owner and admission to membership in the Corporation. Thereafter, persons not holding a direct ownership interest in the property including, but not limited to, tenants, lessees, sublessees, stockholders, members, parent or subsidiaries 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 unless the person occupies an individually metered premises, and accepts responsibility for service and payment obligations, in which case they shall be substituted as a member for the period of occupancy. 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 or account.

SECTION 3: At any meeting of the members of the Corporation, each member shall be entitled to only one vote upon each matter submitted to a vote, regardless of the number of certificates of membership held, or accounts in the name of the member, provided the member is in good standing for all accounts or certificates held.

SECTION 4: In case of the death of a member, or if a member ceases to be eligible for membership, or a member willfully fails to comply with the By-Laws, or Rules and Regulations of the Corporation, the Board of Directors may terminate his membership by resolution of the Board. A transfer by a member of all certificates held by, or accounts in the name of, such member shall terminate such member's membership. Any member whose membership is terminated for cause, other than ceasing to be eligible, may appeal the action of the Board of Directors to the members at their next regular or special meeting. Thereafter such member shall be reinstated by the issuance of a new membership certificate, or

reactivation of an member account, only upon such conditions as the Board of Directors may deem necessary or appropriate. Termination of such membership shall result in a disconnection of water and sewer service to the member. Termination shall not result in forfeiture of a member's entitlement to any patronage refund resulting from status as a member pursuant to Article XII of these By-Laws. However, any such refund shall have deducted from it any debt or obligation owed the Corporation by the member.

ARTICLE XI

BENEFITS AND DUTIES OF MEMBERS

SECTION 1: The Corporation will install, maintain and operate a main distribution pipe line or lines from the source of water supply and service lines from the main distribution pipe line or lines to the property line of each member qualifying for water service from the Corporation for each membership certificate held by such member, ~~or account in the name of such member,~~ at which points, designated as delivery points, meters to be purchased, installed, owned and maintained by the Corporation shall be placed. ~~The Corporation will further install, maintain and operate a wastewater transmission system and appurtenant facilities to its treatment plant from the property line of each member qualifying for wastewater service, from the Corporation for each membership certificate held by such member, or account in the name of such member.~~ The cost of the service lines to ~~or from its main distribution, or transmission,~~ line or lines, shall be paid by the Corporation. The Corporation will also purchase and install a cut-off valve to be owned and maintained by the Corporation and to be installed on some portion of the service line owned by the Corporation. The Corporation shall have the sole and exclusive right to use such cut-off valve to turn it on and off.

SECTION 2: Each member shall be entitled to purchase from the Corporation pursuant to such agreements as may from time to time be provided and required by the Corporation, such water for domestic, commercial, agricultural, industrial or other purposes as a member may desire, subject, however, to the provisions of the By-Laws, ~~the Corporation's tariffs,~~ and to such rules and regulations as may be prescribed by the Board of Directors. Each member shall be entitled to have delivered to him through a single service line for each membership certificate, ~~or account in the name of the member,~~ only such water as may be necessary to supply the needs of such member, including his family, business, agricultural, or industrial requirements. The water delivered through each service line shall be metered and the charges for such water shall be determined separately, irrespective of the number of service lines owned ~~or used by a member.~~