LAW OFFICES
RICHARD M. SEPLER

TELEPHONE: 444-6101
AREA CODE 305
TELECOPIER NO: 441-2159

2997 DAY AVENUE
MIAMI, FLORIDA 33133

CERTIFIED MAIL/RETURN RECEIPT
REQUEST NO. 7007 3020 0003 2262 2093

April 18, 2011

100453-SU

Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

RE: Strap 25-47-25-B3-0060C.0000 – 26611-26621 Robin Way
Strap 25-47-25-B3-0060B.0000– 26601 Robin Way
Strap 25-47-25-B3-0060D.0000 – 11891 Red Hibiscus Dr.
Strap 25-47-25-B3-0060E.0000 – 11901-11911 Red Hibiscus Dr.

Dear Sir/Madam:

In connection with a due diligence on my part representing a client purchasing property at:

26611-26621 Robin Way
26601 Robin Way
11891 Red Hibiscus Dr.
11901-11911 Red Hibiscus Dr.
Bonita Springs, FL 34135

COM
APA
ECR
GCL
RAD
SSC
ADM
OPC
CLK

I requested and had a meeting with J. Fritz Holzberg as his name had appeared in a number of documents in connection with sewage collection system related to the above referenced property.

Mr. Holzberg presented me with a document which I have included in this letter containing Florida Statute 877.09 titled "Tampering with or damaging sewer systems".

He next presented me with a bill which is also included herewith to "Properties owned by Fifth Third Bank" (the Seller of the property) in the amount of $254,512.00.

He then presented me with a small map included herein, showing sewer lines which are related to the subject property. The map showed that two of the 6 inch lines are shown to be capped and in fact one of them is capped. Capped in this instance means that someone pulled up the manhole cover and poured concrete so as to seal the exit from the manhole and which of course stops sewage from reaching its destination where it would be otherwise cleansed.

I have been provided with copy of an Order Acknowledging Notice of Withdrawal of Application and Closing Docket, Docket number 020640-SU, Order No. PSC-07-0297-FOF-SU and Issued: April 9, 2007, together with Final Judgments in case numbers 02-CA-11718 and 04-CA-001695, which are relevant.

It is my understanding from Mr. Holzberg, in the absence of payment to him of $254,512.00, that he intends to pour concrete into the manholes stopping the flow of sewage and creating a health hazard to the people in the community.

I request that the Public Service Commission take the necessary steps to protect the public from Mr. Holzberg's proposed violation of your Rules and Regulations and State Statutes by tampering with and blocking sewage and creating a hazard to the county.

Please advise the action that the Public Service Commission will take in this regard.

Yours cordially,

RICHARD M. SEPLER
RMS:ab
Enclosures
cc: Sheriff Mike Scott, MBA
Sheriff of Lee County FL

Select Year: 2006 Go

The 2006 Florida Statutes

Title XLVI CRIMES | Chapter 877 MISCELLANEOUS CRIMES | View Entire Chapter

877.09 Tampering with or damaging sewer systems.--

(1) Whoever willfully or fraudulently, without the consent of any person, firm, or corporation or lessee, trustee, or receiver owning, leasing, operating, or managing any sewer system, shall tap, make or cause to be made any connection with, injure or knowingly to suffer to be injured, tamper or meddle with, plug or in any way hinder, use without authorization, or interfere with any lines, mains, pipes, laterals, collectors, connections, interceptors, manholes, appliances, or appurtenances used for or in connection with any sewer system and belonging to such person, firm, or corporation or lessee, trustee, or receiver, shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(2) The existence of any tap, connection to, unauthorized use of, or interference with any line, main, pipe, lateral, collector, connection, interceptor, or other appliance or appurtenance used for or in connection with any sewer system and belonging to any person, firm, or corporation or lessee, trustee, or receiver owning, leasing, operating, or managing any sewer system shall be prima facie evidence of intent to violate this law by the person receiving the direct benefit from such tap, connection, or interference.

History.--ss. 1, 2, ch. 65-232; s. 1154, ch. 71-136.

NAME OF COMPANY _____

WASTEWATER TARIFF

(Continued from Sheet No. 9.0)

17.0 DELINQUENT BILLS - When it has been determined that a Customer is delinquent in paying any bill, wastewater service may be discontinued after the Company has mailed or presented a written notice to the Customer in accordance with Rule 25-30.320, Florida Administrative Code.

18.0 TERMINATION OF SERVICE - When a Customer wishes to terminate service on any premises where wastewater service is supplied by the Company, the Company may require reasonable notice to the Company in accordance with Rule 25-30.325, Florida Administrative Code.

19.0 UNAUTHORIZED CONNECTIONS - WASTEWATER - Any unauthorized connections to the Customer's wastewater service shall be subject to immediate discontinuance without notice, in accordance with Rule 25-30.320, Florida Administrative Code.

20

GISTRO INC.
A FLORIDA CORPORATION

POBOX 366 762
BONITA SPRIMGS
FLORIDA 34136
TEL'239 495 8089
FAX 239 495 8089
HLZBRG@ EMBARQMAIL ,COM

Properties owned by Fifth Third Bank.

Unauthorised rebuilding of existing sewer system in the Forest Mere Townhouse Community on 33 building lots. Located on Red Hibiscus Rd. .and Robin Way is by, LOTS B , C, D , and lot D.

FLORIDA STATUTES CHAPTER 877 MISSELLANEOUS CRIMES
877.09 TAMPERING WITH OR DAMAGING SEWER SYSTEMS.

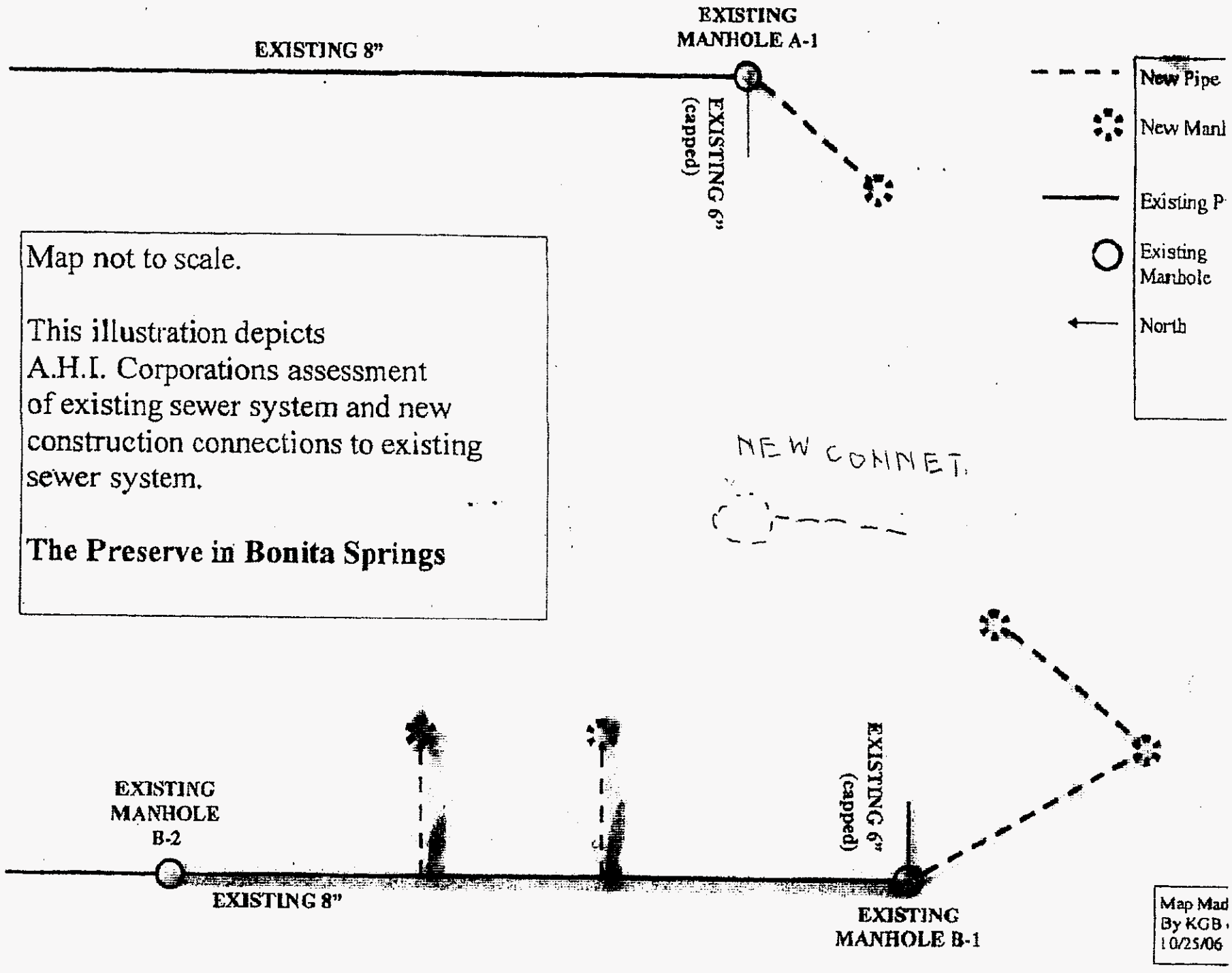
Connecting 33 lots to the system belonging to Gistro Inc without the consent of the owner Gistro Inc.	$ 165.000
Other damages incurred during illegal work, and after	20.000.
	$ 185.000

Rebuilding system to the original system as planned and buld.

Additional Properties owned by Fifth Third Bank. In the Forest Mere Townhouse Community

Robin Way 26511 and 26513 Illegal connection and creating damages	$ 69.512
	$ 254.512

J.F. Holzberg
\


EXISTING 8"
EXISTING MANHOLE A-1
EXISTING 6" (capped)
New Pipe
New Manl
Existing P
Existing Manhole
North
Map not to scale.
This illustration depicts A.H.I. Corporations assessment of existing sewer system and new construction connections to existing sewer system.
The Preserve in Bonita Springs
NEW CONNET.
EXISTING MANHOLE B-2
EXISTING 8"
EXISTING 6" (capped)
EXISTING MANHOLE B-1
Map Mad
By KGB
10/25/06

(6)

IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA

FIRST HOME BUILDERS OF FLORIDA,
Plaintiff,

vs.

Case No. 02-CA-11718

FOREST MERE JOINT VENTURE, INC.
and GISTRO, INC.,
Defendants / Third Party Plaintiff,

vs.

MILLS VENTURE GROUP, INC. and
DANIEL MILLS,
Third Party Defendants.
_____/

FINAL JUDGMENT

This matter was tried before the Court on Wednesday, March 5, 2008.

In count one, the third-party plaintiffs request a declaratory judgment on several issues relating to sewer lines, which are located within roadway and utility easements lying within a subdivision which the complaint refers to as the Forest Mere Subdivision. The evidence shows the platted subdivision as Spring Lakes, Phase I, II, and III, although the declaration of covenants recorded by the partnership does refer to Forest Mere Subdivision.

Specifically, the third-party plaintiffs are requesting the Court to determine and declare the third-party plaintiffs, or one of them, owns the sewer lines; that defendants and lot owners were not entitled to tie into the sewer lines without paying a fee. And in count two, third-party plaintiffs request the Court to find third-party defendants committed a trespass by connecting into the sewer lines.

The evidence that was presented to the Court was presented through the testimony of Mr. J. Fritz Holzberg on behalf of the third party plaintiffs and Daniel Mills on behalf of the third

party defendants. The other evidence which the Court considered were the exhibits of the plaintiffs and defendants that were admitted into evidence.

On the evidence presented, the Court makes the finding that the third-party defendant, Mills Venture Group, Inc., did purchase and construct, or cause to be constructed, homes on several lots within the Spring Lake Subdivision and sold them to homeowners; that Mills Venture Group, Inc. paid Bonita Springs Utility for hookup fees, approximately $5,000 for each home; that Mills Venture Group, Inc. complied with all permitting requirements and obtained permits from the county to construct the homes, constructed them in compliance with those permits; that Mills Venture Group, Inc. did tie the homes that it constructed in this subdivision into the sewer lines lying within the utility easement within the subdivision.

The third-party plaintiffs never notified third-party defendants, or either of them, of any application requirement or that there was a charge assigned to the sewer lines prior to third-party defendant constructing and completing the construction of the homes, ~~but that~~ and, in fact, third-party plaintiffs did not even have an application for this purpose; that after the homes were completed, by letter dated August 14th, 2002, the third-party plaintiffs through Gistro, Inc. notified third-party defendant, Mr. Mills, as an officer of Mills Venture Group, Inc., that three of five homes he had constructed had been disconnected from the sewer line and that two other homes, which it indicated in the letter had already been sold, would be disconnected within thirty days of July 31, 2002; and accused the third-party defendants of stealing services and requested a disconnect cost of $225.00.

As proof of his ownership of sewer lines, third-party plaintiffs submitted Exhibit 5, which is a quitclaim deed executed in March of 2002 from J. Fritz Holzberg to Gistro, Inc. There's no property description, but there is an exhibit attached which conveys the "sanitary sewer content".

Third party plaintiffs also submitted a warranty deed, Exhibit 19, dated April 28th, 1988 from Gulf Construction Partnership, which appears to be the original developer of the subdivision. However, third-party plaintiffs failed to present any chain of title as to what they owned prior to these conveyances or what had been conveyed away.

Third-party defendants introduced a sheriff's deed issued on an execution made on a judgment against J. Fritz Holzberg which purported to convey the waste water treatment plant which is located on the real property described in that sheriff's deed; and it also included the "collection system serving the Forest Mere and Spring Lakes Subdivision." That sheriff's deed was dated October 5th, 2000, which was prior in time to the deed by Mr. Holzberg to Gistro, Inc.

There was also testimony that some or all of the property within the subdivision was subject at some point to a mortgage foreclosure, but there was no evidence presented as to the property foreclosed or when that foreclosure took place.

Exhibit 1--entitled Declaration of Covenant Restrictions, Easements, Charges, and Liens for Forest Mere--shows that Gulf Construction Partnership, a Florida general partnership, recorded the declaration; and that was dated March 10th of 1984. In Article V of those covenants, there is a grant and conveyance for the benefit of the association and for all owners from time to time of the properties. Subsection Two of that Section One provides for the right to connect to and make use of utility lines. The recorded plat shows the utility lines and dedicates them to the public use. Utility easements are dedicated to the perpetual use of the public.

The evidence shows that the sewer pipes in which the third party plaintiffs claim an ownership interest lie within these easements which are dedicated for the perpetual use of the public.

No case law or statutory law was presented to the Court by third party plaintiffs regarding whether sewer lines lying within the dedicated easement continued to be owned by someone or whether they became the lot owners' property or the public's property. Irregardless of that, by reason of the covenants, the lot owners clearly have the right to connect and make use of those utility easements and sewer lines.

With respect to the claim by third-party plaintiffs that they can do so without payment, I reviewed the covenants. There's nothing in the restrictions and covenants that would authorize or allow anyone to charge a connection fee. It is therefore clear from the evidence that was presented that third party plaintiffs cannot charge fees without getting the approval of the public service commission.

In the evidence presented, third-party plaintiffs were not even sure whether they were claiming ownership of the sewer pipes by Gistro, Inc. by reason of the '02 deed or by reason of the '88 deed claiming an ownership in Forest Mere Joint Venture which is alleged to be the successor developer.

The evidence presented indicates that Forest Mere Joint Venture, the partnership, was a successor developer. Although if you look at the plat, all the entities, including some corporations, signed off on phase II and III/The first phase appears to have been done solely by Gulf Construction Partnership.

The third party plaintiffs have failed to establish the fact of the mortgage foreclosure, the fact of the sheriff's deed, which did specifically describe the waste water treatment plant and the existing collection system. You cannot ask the Court to determine ownership of something without presenting evidence of the chain of title. If Mr. Holzberg conveyed his interest away,

there's no way he could retain any interest in it. If he didn't, then there's an issue whether there could be any ownership interest in sewer pipes lying within a dedicated easement.

The Court further finds that the third-party plaintiffs do not have all the necessary parties before the Court to make this determination, that the affirmative defense raised by the defendants is--that there are indispensable parties. The Court finds that to be so. The Court makes no determination with respect to ownership of any sewer lines and utility easements because third party plaintiffs have not established their case.

By reason of the foregoing, third party plaintiffs have not met its burden to show any trespass by Mills Venture Group, Inc. As to Mr. Mills individually, there's no trespass by him because everything he did--and the court agrees with that affirmative defense--was only through Mills Venture Group, Inc., who was the developer and possibly the contractor at some point. If not the general contractor on these homes, they caused, through a separate corporation, the construction of the homes.

It is therefore ORDERED AND ADJUDGED that:

Judgment is rendered in favor of Third Party Defendants and against Third Party Plaintiffs on Count I and Count II and Third Party Plaintiffs shall go henceforth without day.

That Third Party Defendants are the prevailing parties in this action and jurisdiction of this case is retained to enter further orders for attorney's fees and/or costs and for such other further relief may be just and proper for enforcement and execution of the judgment.

DONE AND ORDERED in Fort Myers, Lee County, Florida, this 28 day of Aug, 2008.

Sherra Winesett, Circuit Judge

Conformed copies this _____ day of AUG 28 2008, 2008 to: Michael D. Randolph, Esq.; Robert S. Burandt, Esq.

By: Linda J. Hayslip

IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT, IN AND FOR LEE COUNTY, FLORIDA

FOREST MERE JOINT VENTURE, a Florida Joint Venture, and GISTRO, INC.,

Plaintiff,

vs.

CASE NO. 04-CA-001695
Civil Action

BONITA SPRINGS UTILITIES, INC., a Florida not-for-profit corporation,

Defendant.
_____/

FINAL JUDGMENT

THIS CAUSE came before the Court as a non-jury trial held on August 5, 2009. Based on a review of the evidence presented during the trial, and the Court being otherwise fully advised in the premises, the Court finds as follows:

Findings of Fact

1. At the time of trial, the Complaint in this action sought a judgment against Defendant for trespass, unjust enrichment, or an implied contract if no contract was found. Plaintiff(s) sought damages under each count, the amount of the same to be determined in a subsequent phase of this bifurcated proceeding should liability be established. Plaintiff(s), and therefore the record, were at times inconsistent in their position as to whether the intent was to bring this action in Mr. Holzberg's individual capacity or under the auspices of one of the entities he claims to control. However, as set forth below, no such liability exists in any case.

2. This Court has jurisdiction over this action pursuant to Article V, Section 5 of the Constitution of the State of Florida, and Section 26.012.

3. Venue properly lies with this Court because the events and activities involved in the suit have occurred in Lee County, Florida.

4. There is no law or authority by which the factual basis set forth by Mr. Holzberg or his various entities constitutes a trespass. The allegation of the Plaintiff(s) that a personal trespass occurred because the Defendant "encouraged people to tie in" or "continued to tie people in" to the Plaintiff(s)' on-site wastewater system does not establish a trespass in any form or fashion by the Defendant. Defendant has continued to provide a collection point for sewage for the entire Forest Mere Development, but there is no possible construction of that fact that can constitute a trespass.

5. Based on the evidence at trial, the arguments of counsel, and the applicable case law, the Court finds that no claims exist in favor of Plaintiff under any theory on an actual or implied contract or unjust enrichment. Mr. Holzberg and his various entities initially entered into the relationship with the Defendant to benefit themselves and now, many years later, find themselves dissatisfied with the results that were achieved. Additionally, the Court finds that the Plaintiff(s) have a substantial and readily available remedy at the Florida Public Service Commission, but that Mr. Holzberg elected not to exercise that remedy in apparent dissatisfaction of what he anticipated the Commission would do.

6. The evidence in this proceeding establishes that the Plaintiff(s) placed themselves into the situation in which they now find themselves, and that they are looking to the Defendant to extricate them from this self-imposed status quo. The Court finds that this is something the Defendant never contracted to do, and that it is not legally or factually obligated to do, and that it would be unfair and inequitable to place additional burdens upon the Defendant which it never assumed or agreed upon.

7. This Court retains jurisdiction so as to entertain any appropriate motion for fees or costs and issue such other or further Orders as may be appropriate.

Based on the foregoing, it is hereby ORDERED AND ADJUDGED that the Plaintiff(s) take nothing by this suit.

DONE AND ORDERED in Chambers in Fort Myers, Lee County, Florida this 3rd day of November 2010.

HONORABLE LYNN GERALD, JR.
Circuit Judge

Conforming Copies:

G. Donald Thomson, Esq.
John L. Wharton, Esq.
Robert Burandt, Esq.

Diana Golden 11/3/10

Bonita\Forest Mere\Final Order

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Application for certificate to provide wastewater service in Lee County by Gistro, Inc.	DOCKET NO. 020640-SU ORDER NO. PSC-07-0297-FOF-SU ISSUED: April 9, 2007

The following Commissioners participated in the disposition of this matter:

LISA POLAK EDGAR, Chairman
MATTHEW M. CARTER II
KATRINA J. McMURRIAN

ORDER ACKNOWLEDGING NOTICE OF WITHDRAWAL OF APPLICATION AND CLOSING DOCKET

BY THE COMMISSION:

Background

On July 1, 2002, Gistro, Inc. (Gistro) filed an application for an original certificate and initial rates and charges for a wastewater collection system in Lee County. The application was prepared by J. Fritz Holzberg (applicant) as the sole owner of Gistro. The facilities have existed since 1984, with service provided without compensation. The collection system currently serves approximately 225 residential connections in the Forest Mere and Spring Lakes subdivisions of Bonita Springs, Florida (development), which is also sometimes referred to as Bonita Preserve. At build-out, it is anticipated that there will be a total of 277 connections consisting of single and multi-family homes. Wastewater treatment service, as well as water service, is provided by Bonita Springs Utilities, Inc. (BSU), which is exempt from Commission regulation as a nonprofit corporation providing service solely to members who own and control it, pursuant to Section 367.022(7), Florida Statutes. The service territory is located in a water use caution area of the South Florida Water Management District.

Pursuant to Section 367.031, Florida Statutes, this Commission must grant or deny an application for certificate of authorization within 90 days after the official filing date of the completed application, unless an objection is filed pursuant to Section 120.569, Florida Statutes, or the application will be deemed granted. The initial application was found to be substantially deficient. The deficiencies were corrected on July 26, 2005, when the application was noticed. However, multiple objections to the application were timely filed, including one request for hearing. Based on that objection, this Commission issued Order No. PSC-05-1170-PCO-SU, on November 23, 2005, establishing procedure for a hearing to be held on June 27, 2006. The

request for hearing was subsequently withdrawn on December 13, 2005, making that the official filing date of the application, and making March 13, 2006, the statutory deadline for a decision. However, on February 17, 2006, the applicant filed a waiver of the statutory deadline in order to allow our staff time to review the cost information which had just recently been filed in the docket. Based upon the time frame specified in the applicant's waiver, the statutory deadline was April 4, 2006.

A recommendation on the merits of the certification application and initial rates and charges was filed on March 23, 2006, for this Commission's April 4, 2006, agenda conference. At the request of the Forest Mere Property Owners Association, Inc. (Owners Association) for a temporary deferral of the agenda item, the applicant agreed to another waiver of the statutory deadline until the July 18, 2006, agenda conference. On May 10, 2006, our staff held a noticed meeting to discuss Gistro's application for certificate. A number of homeowners as well as the applicant and his legal counsel participated. Thereafter, on June 5, 2006, the applicant filed a Notice of Withdrawal of Application (Notice of Withdrawal). Because the applicant indicated he was no longer seeking a certificate of authorization by virtue of having filed the Notice of Withdrawal, the 90-day statutory deadline to grant or deny the application became inapplicable.

History of Collection System

As the original developer, the applicant constructed the development's water and wastewater facilities. Upon completion in 1989, the applicant donated the water system to BSU. Because there was no wastewater provider in the area at that time, the applicant established the Homeowners Association for purposes of maintaining the wastewater facilities but retained ownership of the facilities as Forest Mere Joint Venture (Forest Mere). After building approximately 100 homes, the applicant lost construction rights due to foreclosure, but continued to retain ownership of the wastewater facilities.

The collection system was connected to BSU's wastewater treatment facilities pursuant to a 1991 Sewer Capacity Presale Agreement (Presale Agreement) between BSU and Forest Mere. The Presale Agreement anticipated that BSU would take over ownership and operation of the collection system, but a dispute over the cost of BSU's required upgrades prevented the transfer. Instead, BSU began billing, and continues to bill, the individual property owners directly for wastewater service at the same rate it charges other customers where BSU owns and maintains the collection system.

In 1997, the Florida Department of Environmental Protection (DEP) brought suit against the applicant and the Owners Association for overflow of the collection system, as well as for failure to dismantle the wastewater treatment plant after connection to BSU. When the applicant attempted to collect the cost of lift station repairs through the Owners Association, our staff received its first complaint. Because the Owners Association did not appear to qualify for an exemption from regulation, the applicant was warned not to charge for service without Commission authorization and was provided with an application and instructions to apply for a certificate. This sequence of complaints, warnings, applications, and filing instructions was

repeated over the intervening years until the application in this docket was ultimately filed in 2002.

Meanwhile, in 1999, the applicant attempted to repermit the wastewater treatment plant, after which time he intended to disconnect from BSU and apply for a certificate to charge for wastewater collection and treatment service. This led to separate disputes with the property owners and BSU. In January of 2000, DEP issued a Consent Final Judgment in the 1997 Circuit Court case which held the applicant responsible for: constructing and placing the collection systems into service without a certificate of completion by a professional engineer; five occasions in 1997 when the collection system discharged to the ground; and failure to properly abandon the wastewater treatment plant after connection to BSU. At approximately the same time, the wastewater treatment plant was dismantled and removed by a successor in the bank foreclosure, resulting in another lawsuit. The applicant then began to require potential new customers to obtain his permission to connect to his wastewater collection lines. When the builders ignored the applicant and only sought BSU's permission to connect, the applicant petitioned Lee County to stop issuing building permits without his signature, which Lee County refused to do.

In July 2002, the applicant began disconnecting lots under construction and, in some instances, lots that were occupied, from the collection system by capping the lines. In response, our staff began receiving complaints alleging that the applicant had first demanded payment for connection to his lines and then disconnected service. By letter dated August 16, 2002, staff advised the applicant that Section 367.031, Florida Statutes, prohibited him from providing utility service for compensation until Gistro had received a certificate and approved rates and charges from this Commission. Our staff further advised that Commission rules do not allow for disconnection during the pendency of a complaint. In response, the applicant clarified that he had not requested compensation for connection to his collection system, but believed he had the right to disconnect any new service connections that he did not authorize. By letter dated September 24, 2002, our staff advised the applicant that he had no authority to disconnect service under Commission rules, and that he needed to cure the application deficiencies in order for staff to process the application. Early in 2003, the applicant informed our staff that a dispute between himself and a builder was in Circuit Court and requested more time to complete the application. The Circuit Court temporarily enjoined the applicant from disconnecting new service connections and the construction of new homes continued. The Circuit Court also ordered mediation which resulted in a settlement agreement as described in more detail below.

In August 2003, our staff was made aware that the applicant had published a notice which indicated that, until such time as its franchise request with this Commission was approved and connection fees established, he was not authorized by the Commission to allow any wastewater hook-ups. By letter dated September 24, 2003, our staff reminded the applicant that the certificate application remained deficient. Further, by that letter, the staff noted that the notice appeared to imply that the Commission had prohibited Gistro from allowing any hookups to the collection system until the application was ruled upon, that the Commission had taken no such action, and that in fact staff had urged the applicant to maintain the status quo by continuing to allow the hookups at no charge until a decision was made regarding the application. Also by that

letter, our staff required the applicant to complete the application by a date certain, advising that failure to do so would result in a staff recommendation to this Commission to deny the application as incomplete. Our staff also had a meeting with the applicant in November of 2003 to emphasize the information necessary to establish rates and charges. Shortly thereafter, the applicant hired legal counsel to assist him in completing the application. With that assistance, the application was completed in December of 2005.

This Order addresses Gistro's Notice of Withdrawal and whether the application for original wastewater certificate and initial rates and charges should be approved. We have jurisdiction pursuant to Sections 367.011(2), 367.021(12), 367.031, and 367.045, Florida Statutes.

Notice of Withdrawal of Application

On June 5, 2006, Gistro filed a Notice of Withdrawal stating that it withdraws its application for original wastewater certificate but reserves the right to refile a complete application in the future. Gistro advised our staff that it plans to continue to provide wastewater collection service to existing customers without compensation.

Because our staff had continuing concerns about what action Gistro intended to take regarding the remaining undeveloped lots in the subdivision served by the collection system and the financial viability of the company if no rates and charges are to be established, the staff requested a firmer understanding of Gistro's future plans. By letter dated July 5, 2006, Gistro indicated that the company understands it may not charge a connection fee to any developer or resident without first obtaining a certificate of authorization from this Commission, and stated that it would formalize and advise our staff of its plans regarding service to the approximately 50 remaining undeveloped lots within 90 days.

1. Stock Purchase Agreement

Gistro later provided our staff a copy of a draft Stock Purchase Agreement and Bylaws of a corporation showing that Gistro intended to sell shares of stock in the corporation in exchange for the right to connect to the system. The Bylaws provided that

> [e]ach shareholder shall have the right to connect one residential unit to the System for each share owned by the shareholder. . . . Once the right to connect has been exercised with regard to one share of stock, there is no further or additional right to connect which may be exercised with regard to that share of stock. In the event that a shareholder sells a share of stock for which the right to connect has been exercised, the purchaser of said share of stock will not obtain a right of connection.

2. Legal Memoranda

On October 20, 2006, counsel for Gistro filed a letter presenting its legal arguments as to why Gistro believed this Commission must acknowledge its Notice of Withdrawal. On

November 9, 2006, counsel for BSU filed a letter addressing the legal arguments and positions set forth by Gistro in its October 20, 2006 letter. Finally, on November 27, 2006, Gistro filed a letter in reply to BSU's letter. Below is a summary of the legal arguments presented in these legal memoranda.

Commission Jurisdiction

Gistro stated that it does not intend to take any action which would put it under the regulatory jurisdiction of the Commission, and argued that the Commission has no jurisdiction over the sale of stock of nonjurisdictional systems. Gistro argued that in order to assert jurisdiction over it, the Commission must find that Gistro is providing service to the public for compensation, pursuant to Section 367.021(12), Florida Statutes. Gistro stated that it has not provided service, is not providing service, and will not be providing service to the public for compensation. Gistro is interested in selling its system, but knows of no party interested in buying the entire system. Gistro further stated that as the owner of a privately owned system, no one has the right to connect to it without Gistro's permission. However, any shareholders/ owners of the system would have the right to make connections to the system pursuant to the Stock Purchase Agreement and Bylaws of the corporation.

According to BSU, Gistro's scheme of selling stock in exchange for connecting to the collection system is an attempt to circumvent this Commission's jurisdiction. BSU stated that it is likely that once Gistro has collected money for the remaining lots, it will have no incentive to continue ownership of the system and will cease to properly maintain it to the detriment of those connected. This Commission should deny Gistro's Notice of Withdrawal and adopt the March 23, 2006 staff recommendation on the merits of the application that was deferred from the April 4, 2006 agenda conference. If this Commission chooses to accept Gistro's withdrawal, it should immediately open a separate docket to investigate whether Gistro's shareholder scheme and monies it received in a settlement agreement with a home builder (as described below) constitute consideration for utility service.

In response to BSU's letter, Gistro strongly objected to BSU's statement regarding incentive to continue ownership of the system. Since Mr. Holzberg built the system in 1984, he has taken care of the system because it is his system and his responsibility. If an entity wishes to connect to the system, it must become a part owner in the system by buying stock. Once a stockholder, that entity has the ability to connect its property to the system by virtue of being a part owner in the system.

Absolute Right to Withdraw Application

Gistro argued that it has an absolute right to withdraw its application and that the Notice of Withdrawal divests this Commission of jurisdiction over the application. Gistro argued that the Commission only has those powers and authority granted to it by statute, and that any reasonable doubt as to the lawful existence of a particular power sought to be exercised by the

Commission must be resolved against the exercise thereof.[1] According to Gistro, it is not a "utility" as defined by Section 367.021(12), Florida Statutes, because it does not provide or propose to provide wastewater service to the public for compensation.

Gistro provided a number of examples to show that this Commission routinely receives notices of withdrawal of applications and routinely closes those dockets. Gistro cites to three Commission orders issued since 2002 in which the Commission cites to Fears v. Lunsford[2] in finding that the law is clear that a plaintiff's right to take a voluntary dismissal is absolute, and to Randle-Eastern Ambulance Service, Inc. v. Vasta[3] in finding that it is established civil law that once a timely voluntary dismissal is taken, the trial court loses its jurisdiction to act and cannot revive the original action for any reason. Order No. PSC-04-0070-FOF-WS[4] (in acknowledging a notice of dismissal of a petition and withdrawal of an application for original certificates for an existing utility currently charging for service); Order No. PSC-06-0418-FOF-TP[5] (in acknowledging a stipulation by the parties for dismissal of the case with prejudice); and Order No. PSC-02-1240-FOF-WS[6] (in acknowledging the withdrawal of a petition for rate increase).

Gistro also cited to Order No. PSC-94-0310-FOF-EQ,[7] which predates certain changes in this Commission's procedural rules relating to adoption of the Uniform Rules of Procedure and additional Florida Supreme Court cases, but which Gistro argued also fully supports its absolute right to withdraw its application. By that Order, the Commission cited to Fears v. Lunsford and to Randle-Eastern Ambulance Service, Inc. v. Vasta, as well as to other applicable case law, in finding that the notice of voluntary dismissal filed in the docket divested this Commission of further jurisdiction over a matter which had been ruled upon by proposed agency action. The proposed agency action was protested and was scheduled to go to hearing four days after the notice of voluntary dismissal was filed.

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[1] City of Cape Coral v. GAC Utilities, Inc., 281 So. 2d 493, 494 (Fla. 1973).

[2] 314 So. 2d 578, 579 (Fla. 1975).

[3] 360 So. 2d 68, 69 (Fla. 1978).

[4] Issued January 26, 2004, in Docket No. 020554-WS, In Re: Petition by Florida Water Services Corporation (FWSC) for determination of exclusive jurisdiction over FWSC's water and wastewater land and facilities in Hernando County, and application for certificate of authorization for existing utility currently charging for service.

[5] Issued May 18, 2006, in Docket No. 050581-TP, In Re: Complaint of KMC Telecom III LLC and KMC Telecom V, Inc. against Sprint-Florida, Incorporated and Sprint Communications Company Limited Partnership for alleged failure to pay intrastate access charges pursuant to interconnection agreement and Sprint's tariffs, and for alleged violation of Section 364.16(3)(a), F.S.

[6] Issued September 9, 2002, in Docket No. 011073-WS, In Re: Application for rate increase in Broward County by Ferncrest Utilities, Inc.

[7] Issued March 17, 1994, in Docket No. 920977-EQ, In Re: Petition for approval of contract for the purchase of firm capacity and energy between General Peat Resources, L.P. and Florida Power and Light Company.

BSU argued that Gistro does not have an absolute right to withdraw its application. BSU pointed out that in its March 23, 2006 recommendation, staff recommended approval of approximately 26% of Gistro's requested Operating and Maintenance expenses of $66,000, and recommended approval of $1,673 of Gistro's requested $30,000 return on investment. According to BSU, due to the issuance of the staff recommendation and the public interest involved, Gistro does not have the absolute right to withdraw its application.

BSU argued that the decisions relied upon by Gistro to support its assertion that it has an absolute right to withdraw the application are factually distinguishable from the instant case and outdated. According to BSU, by Order No. PSC-04-0070-FOF-WS (see footnote 4), the County in which the utility was located exercised its powers of eminent domain and took over ownership of the utility system, rendering the Commission proceeding moot. The Commission's acknowledgement of the notice of dismissal filed in that case was based on the proceedings being moot, not as a result of the utility's knowledge of proposed action by the Commission. BSU further argued that in Order No. PSC-06-0418-FOF-TP (see footnote 5), the notice of dismissal was filed as a result of a settlement and was not an attempt to circumvent an otherwise unfavorable action by the Commission. Regarding Order No. PSC-02-1240-FOF-WS (see footnote 6), in that case, the utility was granted interim rates, but dismissed its rate case application prior to implementing them. BSU argued that again, the dismissal was not an attempt to circumvent an otherwise unfavorable action by the Commission.

BSU further argued that six months after this Commission's decision in the General Peat Resources docket (see footnote 7), the Florida Supreme Court decided Wiregrass Ranch, Inc. v. Saddlebrook Resort, Inc.,[8] which concluded that the agency had the discretionary authority to continue with the proceedings despite the filing of a voluntary dismissal. The Court recognized that permitting cases are different from court cases because an agency may have an interest in the outcome of a permitting case by virtue of its statutory duty in protecting the public interest. Finally, BSU argued that in two Florida District Court of Appeal decisions, the Courts pointed out that the agencies involved in those cases had adopted no rule authorizing voluntary dismissals nor incorporated the Florida Rules of Civil Procedure into their proceedings.[9] Nor has this Commission adopted any such rule.

In its November 27, 2006, letter filed in response to BSU's letter, Gistro argued that the authority cited by BSU supports the basic legal premise which requires this Commission to acknowledge its Notice of Withdrawal. "[T]he jurisdiction of an agency is activated when the permit application is filed and is only lost by the agency when the permit is issued or denied or when the permit applicant withdraws its application prior to the completion of the fact-finding process."[10] Gistro argues that, by law, the Commission is required to acknowledge its notice of

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[8] 645 So. 2d 374 (Fla. 1994) (overruling John A. McCoy Florida SNF Trust v. HRS, 589 So. 2d 351 (Fla. 1st DCA 1991) and approving Saddlebrook Resorts, Inc. v. Wiregrass Ranch, Inc., 630 So. 2d 1123 (Fla. 2d DCA 1993)).

[9] Holmes Regional Medical Center, Inc. v. AHCA, 737 So. 2d 608 (Fla. 1st DCA 1999); City of North Port, Florida v. Consolidated Minerals, Inc., 645 So. 2d 485 (Fla. 2nd DCA 1994).

[10] City of North Port, Florida v. Consolidated Minerals, Inc., 645 So. 2d 485, 486 (Fla. 2nd DCA 1994).

withdrawal. Gistro does not wish to become a regulated utility. The staff-proposed rates and lack of service availability charges simply do not justify this small company becoming regulated. For this reason, it chose to withdraw its application.

Settlement of Circuit Court Action

With respect to another matter involving Gistro's acceptance of a sum of money from First Home Builders of Florida (FHB) in 2003, that amount was paid to Gistro in settlement of a trespass action filed by Gistro against FHB. Gistro stated that FHB connected to the system without Gistro's permission in 2002 and Mr. Holzberg disconnected the lines. FHB filed suit against Gistro in Circuit Court and Gistro filed a counterclaim for, among other things, monetary damages in excess of $15,000. Gistro did not seek connection fees from FHB, and recognizes that the Commission has jurisdiction over setting rates and charges. Gistro and FHB ultimately entered into a confidential settlement agreement in early 2003. Gistro pointed out that the Commission does not have any authority to decide tort claims or to assess monetary damages, and that the nature of the relief sought in the case was not within the jurisdiction of the Commission to resolve.[11] Further, Gistro argued that it is well established in Florida that settlements of lawsuits are highly favored and will be enforced whenever possible.[12]

BSU argued that Gistro refused to disclose the terms of the settlement agreement, and that the agreement is critical for a determination to be made regarding whether Gistro charged the builder to connect to the system, which would render Gistro a utility. Attempting to call the money paid to Gistro "monetary damages" does not change what the payment was actually for. Compensation is not limited to the periodic user fee, but also encompasses a charge to connect to a utility system, no matter what it is called.

In its response to BSU's letter, Gistro stated that it disclosed to our staff in 2003 that Gistro was paid $187,500 as settlement in the court action, and that our staff is aware that FHB was allowed to reconnect and connect the residences which it built to Gistro's system as a result of the settlement. The Commission had no jurisdiction to resolve the lawsuit which resulted in this settlement. As explained in Gistro's previous letter, it is to the nature of the relief sought that a court looks in resolving whether the Commission or the circuit court has jurisdiction over a dispute. The nature of relief sought here was based in contract and in tort.

3. Analysis and Conclusion

Section 367.011(2), Florida Statutes, vests this Commission with "exclusive jurisdiction over each [water and wastewater] utility with respect to its authority, service, and rates." Section 367.021(12), Florida Statutes, defines "utility" to mean

[11] Southern Bell Telephone and Telegraph Co. v. Mobile America Corp., Inc., 291 So. 2d 199, 201 (Fla. 1974). See also Winter Springs Development Corp. v. Florida Power Corp., 402 So. 2d 1225 (Fla. 1981).

[12] Robbie v. City of Miami, 469 So. 2d 1384 (Fla. 1985); Abramson v. Florida Psychological Ass'n, 634 So. 2d 610 (Fla. 1994).

> . . . a water or wastewater utility and, except as provided in s. 367.022 [which enumerates certain exemptions from Commission regulation which do not apply here], includes every person, lessee, trustee, or receiver owning, operating, managing, or controlling a system, or proposing construction of a system, who is providing, or proposes to provide, water or wastewater service to the public for compensation.

With respect to whether the monies accepted by Gistro in settlement of a court action constitutes compensation for service, we agree with Gistro that it does not for the reasons expressed by Gistro. The sum of money paid to Gistro by FMB was not paid as compensation for service but in settlement of a contract and tort action related to the provision of service. It is well settled that this Commission's powers are derived from statute and the Commission does not have the statutory authority to resolve disputes arising in contract or tort law.

At our March 13, 2007, agenda conference, we found that Gistro's right to withdraw its application for certificate hinged on whether Gistro's intent to require those wishing to connect to the system to purchase stock in the company in exchange for a right to connect constituted compensation for service. Gistro's proposed business plan provided that only by paying Gistro to become a part owner in the system may a person or entity connect property to the system. We found that this activity indeed constituted a form of compensation for service, and therefore subjected Gistro to this Commission's exclusive jurisdiction over its authority, service, and rates. The purchase of stock in Gistro would not have been discretionary for persons wishing to connect to the system. Persons in need of new wastewater collection service in the territory where Gistro serves would have either had to pay Gistro to become a stockholder or construct their own wastewater collection system. There is no exemption from Commission regulation for this type of activity (sale of stock) enumerated in Section 367.022, Florida Statutes.

BSU cited to Wiregrass Ranch, Inc. v. Saddlebrook Resort, Inc.,[13] for the proposition that an agency has the discretionary authority to continue with a proceeding despite the filing of a voluntary dismissal. In that case, the Florida Supreme Court resolved a timing conflict between decisions of the First and Second District Courts of Appeal as to whether an affected party who had objected to a Water Management District permit application could file a voluntary dismissal of the objection after an adverse factual finding by the hearing officer but before the agency had acted on the hearing officer's recommendations. The Court held that the affected party could not terminate the agency's jurisdiction over its objection and that the motion for voluntary dismissal was not timely filed.[14] That holding is inapplicable to the instant case because here, no hearing has yet been held on a protest to proposed agency action. Nevertheless, in dicta, the Court points out that a permitting agency differs from a court in that the agency must protect the public interest as directed by the legislature. The voluntary dismissal rule contained in the Florida Rules of Civil Procedure cannot be utilized to divest an adjudicatory agency of its jurisdiction granted to it by the legislature. The Court found that "[t]o conclude otherwise . . . could

[13] 645 So. 2d 374 (Fla. 1994) (see footnote 8).

[14] Id. At 376.

effectively allow an objecting party to unilaterally terminate jurisdiction and in effect declare null and void factual findings made in a proceeding clearly within an agency's area of responsibility and jurisdiction as directed by the legislature."[15] We found that this reasoning should hold true regardless of whether the party seeking to withdraw from the case is the objecting party or the party who sought the permit (or, in this case, certificate) in the first place. Party litigants should not be permitted to voluntarily dismiss away an agency's legislatively mandated jurisdiction.

As pointed out by Gistro, this Commission has recognized a utility's legal right to withdraw applications in the past and has routinely acknowledged notices of withdrawal in other dockets, such as when the case becomes moot, is settled by the parties, or a utility decides to withdraw a request for rate increase. What this Commission has not done, however, is to acknowledge the withdrawal of a certificate application filed by a company that required certification and authorization from the Commission in order to provide service to the public for compensation. If Gistro decided to continue to provide service without compensation to new, as well as to existing customers, we agreed that Gistro would clearly have had a legal right to withdraw its application. However, we found that because Gistro's plan constituted compensation for service, Gistro had no legal right to withdraw its certificate application. In such a case, Gistro would be acting as a jurisdictional utility and therefore would have no legal right to choose whether to be regulated by the Commission.

Our decision in this regard is consistent with Order No. PSC-96-0992-FOF-WS,[16] wherein this Commission declined to acknowledge a notice of withdrawal of a transfer application and voluntary dismissal. In that case, Bonita Springs Utilities (BSU), coincidentally the same exempt, not-for-profit, member-owned cooperative that provides wastewater treatment service to Gistro's customers, had been appointed by circuit court order as receiver for Harbor Utilities, Inc. (Harbor), a regulated company that had noticed its intent to abandon its system. BSU filed a transfer application on behalf of Harbor for the transfer of Harbor to BSU. While the transfer application was still pending, the circuit court issued an order discharging the receivership and conveying Harbor's assets and customers to BSU. BSU filed a notice of withdrawal of its transfer application, arguing that the court order divested the Commission of jurisdiction over the transfer because BSU is an exempt entity. This Commission disagreed, finding that the court-appointed receivership and conveyance of Harbor's assets to BSU did not divest the Commission of its authority to find whether or not the transfer was in the public interest pursuant to section 367.071, Florida Statutes. Accordingly, the Commission declined to acknowledge BSU's notice of withdrawal and voluntary dismissal, finding that "[u]nder Chapter 367, Florida Statutes, [the Commission's] jurisdiction with respect to the authority, service and rates of utilities is exclusive."

For the foregoing reasons, we found that Gistro enjoys no absolute right to withdraw its application and we declined to acknowledge it. Gistro sought to require persons wishing to

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[15] Id.

[16] Issued August 5, 1996, in Docket No. 950758-WS, In Re: Petition for approval of transfer of facilities of Harbor Utilities Company, Inc., to Bonita Springs Utilities and cancellation of Certificates Nos. 272-W and 215-S in Lee County.

connect to the system to purchase stock in the company in exchange for service, which we found was a form of compensation, and rendered Gistro subject to Commission jurisdiction pursuant to Sections 367.011(2) and 367.021(12), Florida Statutes. Therefore, we declined to acknowledge the applicant's Notice of Withdrawal.

We were ready to proceed with a ruling on the merits of the certificate application when Gistro advised, during the agenda conference, that it would instead withdraw its proposed business plan involving a stock purchase agreement to sell stock in exchange for service and that it would not provide service for compensation because it did not wish to be a regulated utility. With that understanding, we acknowledged the Notice of Withdrawal of Gistro's certificate application and directed the docket to be closed upon receipt of written verification of the withdrawal of the proposal to sell stock in exchange for service connections and that Gistro will not provide wastewater service to the public for compensation. The next day, on March 14, 2007, Gistro filed verification that it will not proceed with the proposed business plan to sell stock. On April 9, 2007, Gistro filed verification that it will not provide wastewater service to the public for compensation. Therefore, the Notice of Withdrawal of Application is hereby acknowledged and the docket shall be closed.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Gistro, Inc.'s Notice of Withdrawal of Application is acknowledged. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 9th day of April, 2007.

ANN COLE
Commission Clerk

(SEAL)

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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 Office of Commission Clerk, 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 Office of Commission Clerk 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.