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COMMISSION CLERK

Public Service Commission

May 12, 2011

Mr. J. Fritz Holzberg
Gistro, Inc.
P.O. Box 366-762
Bonita Springs, FL 34136

Re: Docket No. 100453-SU, Application for certificate to provide wastewater service in Lee County by Gistro, Inc.

Dear Mr. Holzberg:

I am writing to you in response to your letter dated April 28, 2011, which was addressed to all five Public Service Commissioners. In your letter, you state that on March 2006, the Commission granted Gistro, Inc. (Gistro) original certificate No. 541-S to provide wastewater service to the Forest Mere development in Bonita Springs, Florida. You further state that, "based on some misunderstandings," the certificate was returned to the Commission, and that "[o]n March 13, 2007 the return was approved by the P.S.C." You request the return of your original certificate "without formalities," and assert that all necessary documentation for issuing a certificate have been completed before 2006 to the satisfaction of the "issuing Authority" (which I presume to be the Commission).

I first wish to correct a number of misstatements in your letter. Gistro has never had a certificate of authorization issued to it by the Florida Public Service Commission. On July 1, 2002, Gistro filed an application for an original certificate and initial rates and charges for a wastewater collection system in Lee County (Docket No. 020640-SU). The history of that docket is encapsulated in Order No. PSC-07-0297-FOF-SU, issued April 9, 2007:

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 The request for hearing was subsequently withdrawn on December 13, 2005, making that the official filing date of the application, and making March 13, 2006, the statutory deadline for a decision.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

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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.¹ 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.

* * *

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.

Order No. PSC-07-0297-FOF-SU, at pages 1-2 and 11. A copy of this order is attached for your convenience. The Commission has never issued a certificate of authorization to Gistro, and it appears that the misunderstanding that resulted in the "return" of the certificate to the Commission is Gistro's withdrawal of its application for a certificate. The withdrawal of Gistro's application was ultimately approved by the Commission in Order No. PSC-07-0297-FOF-SU, as described above.

On December 2, 2010, Gistro filed another application for an original certificate pursuant to Section 367.045, Florida Statutes (F.S.), in Docket No. 100453-SU. I note that this application appears to be, in substantial part, a photocopied duplicate of the same application which was filed in Docket No. 020640-SU. Please bear in mind that the application in the 2002 docket was never ruled upon or in any way given approval by the Commission. On January 3, 2011, Commission staff provided you with a letter outlining the substantial deficiencies staff has identified with regard to your application for an original certificate in Docket No. 100453-SU. To this date, staff has received no response from you addressing any of these deficiencies. A copy of staff's letter is attached for your convenience.

Section No. 367.031, F.S., provides that each utility subject to the jurisdiction of the Commission must obtain from the Commission a certificate of authorization to provide water or wastewater service. Section 367.045, F.S., and Rule 25-30.033, Florida Administrative Code (F.A.C.)

¹ While the March 23, 2006 staff memorandum made a recommendation that Gistro be granted Certificate No. 541-S and authorized an initial wastewater service rate, that recommendation was never approved by the Commission. Thus, no certificate was issued, and no rates were approved. As indicated above, Gistro was instead ultimately allowed to withdraw its application.

Mr. J. Fritz Holzberg

May 12, 2011

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detail the information that a utility must provide when it applies for an initial certificate of authorization from the Commission. In addition, notice of the application must be given consistent with the requirements of Rule 25-30.030, F.A.C. Copies of Sections 367.031 and 367.045, F.S., and Rules 25-30.030 and 25-30.033, F.A.C., are attached for your convenience.

The requirements set forth in the statutes and rules noted above *must* be met in order for the Commission to grant Gistro a certificate of authorization. Even if Gistro had previously been granted a certificate of authorization and later returned it, Gistro would still need to, in this pending docket, demonstrate the technical, financial, and public interest qualifications required by the rules and statutes for the Commission to issue it a certificate.

As discussed above, in order for staff to proceed on your application for a certificate in Docket No. 100453-SU, you are required to respond fully and adequately to the deficiencies detailed in staff's January 3, 2011 letter. Until such time as the Commission issues an order approving your application and granting you a certificate of authorization, you are not authorized to provide service to the public for compensation under Chapter 367, F.S.

I hope this information is helpful. Please contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Jennifer Crawford". The signature is fluid and cursive, with a large initial "J" and "C".

Jennifer S. Crawford
Attorney Supervisor

JSC:th

Attachments

cc: Chairman Art Graham
Commissioner Lisa Polak Edgar
Commissioner Julie I. Brown
Commissioner Ronald A. Brisé
Commissioner Eduardo E. Balbis
Office of Commission Clerk
Mr. Richard M. Sepler

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

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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. Lunsford² 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. Vasta³ 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-WS⁴ (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-TP⁵ (in acknowledging a stipulation by the parties for dismissal of the case with prejudice); and Order No. PSC-02-1240-FOF-WS⁶ (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.

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

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. 2^d 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

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

(S E A L)

RG

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.

COMMISSIONERS:
ART GRAHAM, CHAIRMAN
LISA POLAK EDGAR
RONALD A. BRISÉ
EDUARDO E. BALBIS
JULIE I. BROWN

STATE OF FLORIDA



MARSHALL WILLIS, DIRECTOR
DIVISION OF ECONOMIC REGULATION
(850) 413-6900

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COMMISSION
CLERK

Public Service Commission

January 3, 2010

Mr. J. Fritz Holzberg
Gistro, Inc.
P. O. Box 366-762
Bonita Springs, Florida 34136

Re: Docket No. 100453-SU, Application for certificate to provide wastewater service in Lee County by Gistro, Inc.

Dear Mr. Holzberg:

The above referenced application has been received and reviewed by my staff. We have determined that your application is substantially incomplete and missing pages 5 through 9 of the required application for original certificate. Please complete the following deficiencies and provide the requested additional information. All items must be completed in order for your application to be processed.

A description of the rule requirement is provided in each deficiency listed below for your reference. Also, please refer to the original certificate application package on the Commission's Web site for rules and examples to help you complete some of the required items. The application package is available at <http://www.floridapsc.com/utilities/waterwastewater/applicationpkg/origapp.pdf>

Deficiencies

1. Financial and Technical Ability. Rule 25-30.033(1)(e), Florida Administrative Code (F.A.C.), requires the application to contain a statement showing the financial and technical ability of the applicant to provide service, and the need for service in the proposed area. The statement shall identify any other utilities within the area proposed to be served that could potentially provide service, and the steps the applicant took to ascertain whether such other service is available. Please provide the following information:
 - (a) Financial Ability. Although the application indicates you have operated and maintained the collection system since 1984, the Commission is required to verify that the applicant has sufficient financial resources to continue to support the operation of the utility in the future. Since you list yourself as the sole owner of Gistro, Inc., please provide a copy of your most recent personal financial statement.

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The statement should be accompanied by a pledge to continue to use the assets on behalf of the utility.

- (b) **Technical Ability.** Although the application indicates that you have operated the system since 1984, the statement does not contain sufficient detail to meet this rule requirement. Please provide a statement of Gistro, Inc.'s technical ability to continue operating and maintaining the collection system, including specific information about the utility owner's or operator's license from the Florida Department of Environmental Protection to operate the utility facilities.
 - (c) **Need for Service.** Prior to granting a new certificate, the Commission must determine whether there are any existing utilities that could provide that service. Please provide a statement describing the steps Gistro, Inc. took to determine whether any entities are currently able to assume operation of the collection lines. Specifically, indicate whether steps were taken to determine if the City of Bonita Springs, BSU, or a homeowners association can assume operation and maintenance of the collection system.
2. **Comprehensive Plan.** Rule 25-30.033(1)(f), F.A.C., requires the application to contain a statement that to the best of the applicant's knowledge, the provision of service will be consistent with the water and wastewater sections of the local comprehensive plan as approved by the Department of Community Affairs at the time the application is filed, or, if not consistent, a statement demonstrating why granting the certificate of authorization would be in the public interest. Please provide the required information.
 3. **Equivalent Residential Connections.** Rule 25-30.033(1)(h), F.A.C., requires the application to provide the number of equivalent residential connections (ERCs) proposed to be served, by meter size and customer class. If development will be in phases, separate this information by phase. The ERC, water meter size, and customer class information is necessary to calculate wastewater rates and to determine the appropriate filing fee. Exhibit B(1) of your application indicates that the system is serving all 141 single family homes and 49 of the 118 multi-family units projected to be served at buildout. Please provide the following information:
 - (a) When will the other 69 multi-family units be constructed and connected to the collection system?
 - (b) Have the collection lines already been built to serve the additional 69 multi-family units? If yes, when were they constructed? If no, when will they be constructed?
 - (c) Do all 141 single family homes have a 5/8" x 3/4" water meter? If no, please provide a schedule of the number of ERCs for the 141 homes broken down by meter size.
 - (d) Do all 49 of the current multi-family units have individual 5/8" x 3/4" water meters? If no, please provide a schedule of the number of ERCs for the 49 multi-family units broken down by meter size.
 - (e) Will the 69 projected multi-family units have individual 5/8" by 3/4" meters? If no, please provide a schedule of the number of ERCs for the 69 projected multi-family units broken down by meter size.
-

4. **Tariff.** Rule 25-30.033(1)(k), F.A.C., requires the application to contain one original and two copies of a sample tariff, containing all rates, classifications, charges, rules, and regulations, which shall be consistent with Chapter 25-9, F.A.C. The wastewater model tariff, with instructions for completing the tariff, is available on the Commission's Web site at: <http://www.floridapsc.com/utilities/waterwastewater/applicationpkg/index.aspx>. Please provide an original and two copies of Gistro, Inc.'s proposed wastewater tariff, including all proposed rates, classifications, charges, rules, and regulations.
5. **Territory Description.** Rule 25-30.033(1)(l), F.A.C., requires the application to contain a description of the territory to be served, using township, range and section references as specified in subsection 25-30.030(2), F.A.C. Although a territory description was included in the application, portions of the copy are illegible. Please provide a clear copy of the proposed territory description.
6. **System Map.** Rule 25-30.033(1)(m), F.A.C., requires the application to contain one copy of a detailed system map showing the proposed lines, treatment facilities and the territory proposed to be served. The map shall be of sufficient scale and detail to enable correlation with the description of the territory proposed to be served. Please provide the required map.
7. **System Capacity.** Rule 25-30.033(1)(o), F.A.C., requires the application to contain a statement regarding the separate capacities of the proposed lines and treatment facilities in terms of ERCs and gallons per day. If development will be in phases, separate this information by phase. Please provide the following information:
 - (a) Please provide the capacity in terms of ERCs and gallons per day for the existing collection system.
 - (b) Please provide the capacity in terms of ERCs and gallons per day for any additional lines that will be constructed to serve future customers.
 - (c) Has Gistro, Inc. contacted BSU to determine if BSU has available wastewater treatment capacity to serve the additional 69 multi-family units that will be added in the future? If yes, please provide documentation to support that BSU either has or will have the necessary capacity to serve the additional customers. If no, please explain why Gistro, Inc. has not contacted BSU to make this determination, and when Gistro, Inc. will request this information from BSU.
8. **Financial Statements.** Rule 25-30.033(1)(r), F.A.C., requires the application to contain a detailed financial statement (balance sheet and income statement), certified if available, of the financial condition of the applicant, that shows all assets and liabilities of every kind and character. The income statement shall be for the preceding calendar or fiscal year. The financial statement shall be prepared in accordance with Rule 25-30.115, F.A.C. If available, a statement of the source and application of funds shall also be provided. Please provide the required financial statements for Gistro, Inc.
9. **Funding.** Rule 25-30.033(1)(s), F.A.C., requires the application to contain a list of all entities, including affiliates, upon which the applicant is relying to provide funding to the utility, and an explanation of the manner and amount of such funding, which shall include their financial statements and copies of any financial agreements with the utility. This

requirement shall not apply to any person or entity holding less than 10 percent ownership interest in the utility. Please provide the required information.

For Items 10 through 13

When correcting the deficiencies listed in Items 11 through 14 below, please be aware of the following information. With respect to establishment of rates and charges, if you are granted a certificate of authorization, you will be allowed to recover prudent, annual operating costs. However, you will not be allowed to recover expenses incurred in prior years. In addition to recovering annual operating costs, you will also be allowed an opportunity to earn a fair return on your investment. However, you must be able to provide documentation, such as actual invoices, cancelled checks, and tax returns, to verify the amounts you have invested in the system and will only be allowed to earn a return on those assets that are currently being used to serve customers. Also, the cost of collection lines written off to the cost of goods sold on your tax returns when the lots were sold cannot be recovered through rates. In order to verify whether any lines have previously been written off, you will be required to produce copies of all tax returns for the utility from inception through the most recent tax return.

For example, many of the costs shown on the list of Forest Mere Subdivision Sanitary Sewer Costs included in your application are related to the wastewater treatment plant which is no longer in service. Those costs will not be considered by the Commission in determining your investment and potential rates. Also, due to the age of the collection system, many of the components have already exceeded their service life for depreciation purposes, and will thus have no value in determining your investment for ratesetting purposes. Please refer to Rule 25-30.140, F.A.C., to determine the average service lives and depreciation rates for the collection system components.

In addition, Rule 25-30.570, F.A.C., regarding Imputation of Contributions-in-Aid-of-Construction (CIAC), states:

If the amount of CIAC has not been recorded on the utility's books and the utility does not submit competent substantial evidence as to the amount of CIAC, the amount of CIAC shall be imputed to be the amount of plant costs charged to the cost of land sales for tax purposes if available, or the proportion of the cost of the facilities and plant attributable to the water transmission and distribution system and the sewage collection system.

Since the only plant that will be considered in your application is the collection system, this means that the entire value of the collection system will be imputed as CIAC if you do not submit competent substantial evidence that Gistro, Inc. currently owns the collection system and has not previously written off any of those costs on its income tax returns. Consequently, there will be no plant investment upon which Gistro, Inc. may earn a return on investment for ratemaking purposes, and only prudent, annual operating expenses going forward will be considered by the Commission when establishing rates. In consideration of this information, you may elect to exclude certain information (such as wastewater treatment plant items) from your answers to Items 10 through 13 below that you now understand will not be used by the Commission to establish rates for Gistro, Inc.

10. **Cost Study.** Rule 25-30.033(1)(t), F.A.C., requires the application to contain a cost study including customer growth projections supporting the proposed rates, charges and service availability charges. A sample cost study, and assistance in preparing initial rates and charges, are available from the Division of Economic Regulation. The list of Forest Mere Subdivision Sanitary Sewer Costs provided in the application does not include sufficient detail for this purpose. Please provide the required cost study, including the uniform system of accounts (USOA) account numbers, installation date, average service life for depreciation, and depreciation rate for each component. Also, please provide all available supporting documentation that verifies these costs, such as copies of invoices, cancelled checks, and all tax returns for the utility from inception through the most recent tax return.
 11. **Projected System Cost.** Rule 25-30.033(1)(u), F.A.C., requires the application to contain a schedule showing the projected cost of the proposed system(s) by USOA account numbers pursuant to Rule 25-30.115, F.A.C., and the related capacity of each system in ERCs and gallons per day. Since the collection system is already constructed, please provide the current collection system capacity in terms of ERCs and gallons per day. In addition, if Gistro, Inc. will be expanding the collection system to serve the additional 69 multi-family units, please provide the projected cost information for the expansion and related additional capacity in terms of ERCs and gallons per day.
 12. **Projected Operating Expenses.** Rule 25-30.033(1)(v), F.A.C., requires the application to contain a schedule showing the projected operating expenses of the proposed system by USOA account numbers, when 80 percent of the designed capacity of the system is being utilized. Please provide the required schedule.
 13. **Projected Capital Structure.** Rule 25-30.033(1)(w), F.A.C., requires the application to contain a schedule showing the projected capital structure including the methods of financing the construction and operation of the utility until the utility reaches 80 percent of the design capacity of the system. Please provide a schedule showing any projected financing that may be needed if additional collection lines will be built to serve the 69 future multi-family units.
 14. **Noticing.** Section 367.045(1)(a), Florida Statutes, and Rule 25-30.030, F.A.C., require that the utility provide notice of the application to certain government officials and utilities, the utility's customers, and for publication in a local newspaper. In addition, the applicant must provide affidavits that the required notices were sent. The notice must be appropriately styled and contain the correct legal territory description. Please refer to the original application packet available on the Commission's Web site for a sample notice. You may request that staff review your draft notice prior to mailing. Please complete the following:
 - (a) Notice of the application to staff's list of governing bodies, utilities, and other government officials (see attached list). After completing this noticing requirement, please provide to the Commission a copy of the notice that was sent, a list of the entities that were noticed (you may provide a copy of the Commission list that you used), and a notarized affidavit that the notices were sent, including the date the notices were sent.
-

- (b) Notice of the application to all of Gistro, Inc.'s customers. After providing the required notice to the customers, please provide to the Commission a copy of the notice sent to customers and a notarized affidavit that the notice of actual application was given in accordance with Rule 25-30.030, F.A.C., by regular mail or personal delivery to each customer of the system.
 - (c) Notice of the application in a newspaper of general circulation in the utility's service territory. Immediately upon completion of publication of the notice, please provide to the Commission an affidavit that the notice of actual application was published once in a newspaper of general circulation in the territory in accordance with Rule 25-30.030, F.A.C. Please include a copy of the proof of publication from the newspaper with the affidavit.
15. Filing Fee. Rule 25-30.020(2)(a), F.A.C., requires that all applicants for an original certificate pay a filing fee. Based upon the information in your application at this time, it appears that the collection system capacity is no more than 500 ERCs, therefore, your filing fee is \$750. However, if staff determines upon further review of your filing that the collection system capacity exceeds 500 ERCs, you will be required to pay an additional amount.

Additional Information

- 1. Types of Customers. Rule 25-30.033(1)(i), F.A.C., requires the application to contain a description of the types of customers anticipated, i.e., single family homes, mobile homes, duplexes, golf course clubhouse, commercial, etc. Please describe in more detail the types of multi-family units currently being served and projected to be served in the future (e.g., duplexes, quadruplexes, townhomes, apartment complexes, etc.).
- 2. Land Ownership. Rule 25-30.033(1)(j), F.A.C., requires the applicant to provide evidence, in the form of a warranty deed, that the utility owns the land upon which the utility treatment facilities are or will be located, or a copy of an agreement which provides for the continued use of the land, such as a 99-year lease. The Commission may consider a written easement or other cost-effective alternative. The applicant may submit a contract for the purchase and sale of land with an unexecuted copy of the warranty deed, provided the applicant files an executed and recorded copy of the deed, or an executed copy of the lease, within 30 days after the order granting the certificate. Please provide the following:
 - (a) Evidence that Gistro, Inc. either owns or has a long-term lease or utility easement for the land under the lift stations.
 - (b) Evidence that Gistro, Inc. has a utility easement for access to all collection lines and equipment for maintenance purposes.
- 3. Ownership of Wastewater Collection System. Commission staff are aware that Gistro, Inc. was involved in a prior foreclosure. Please provide documentation to support that Gistro, Inc. did not lose ownership of the wastewater collection system in the foreclosure proceedings.

Mr. J. Fritz Holzberg

Page 7

January 3, 2010

4. **Water Usage Information.** It will be necessary to have water consumption information to establish wastewater collection rates. Please indicate the steps you have taken to obtain monthly metered water usage information from BSU, the water service provider for the customers in Gistro, Inc.'s proposed service territory.
5. **Audit.** Once you have corrected all deficiencies indicated above, staff may request an audit of the utility's books and records and perform an engineering inspection of the utility facilities. To facilitate an audit inspection, please indicate where the utility books and records are located and the name and phone number of the contact person.

The **original and four copies** of the response to the information requested in this letter should be filed with the Commission on or before **February 3, 2011**. When filing the response, please be sure to refer to the docket number and to direct the response to:

Office of Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Should you have any questions concerning the information in this letter, please contact Jennifer Crawford at (850) 413-6228 for legal questions, or my staff members, Martha Golden at (850) 413-7015 or Tom Walden at (850) 413-6950 for technical questions.

Sincerely,



Patti Daniel
Public Utilities Supervisor
Bureau of Certification, Economics & Tariffs

pd/mg

Attachment

cc: Division of Economic Regulation (Golden, Walden)
Office of the General Counsel (Crawford)
Office of Commission Clerk

Select Year:

The 2010 Florida Statutes(including Special Session A)

Title XXVII
RAILROADS AND OTHER REGULATED
UTILITIES

Chapter 367
WATER AND WASTEWATER
SYSTEMS

View Entire
Chapter

367.031 Original certificate.—Each utility subject to the jurisdiction of the commission must obtain from the commission a certificate of authorization to provide water or wastewater service. A utility must obtain a certificate of authorization from the commission prior to being issued a permit by the Department of Environmental Protection for the construction of a new water or wastewater facility or prior to being issued a consumptive use or drilling permit by a water management district. The commission shall grant or deny an application for a certificate of authorization within 90 days after the official filing date of the completed application, unless an objection is filed pursuant to ss. [120.569](#) and [120.57](#), or the application will be deemed granted.

History.—s. 1, ch. 71-278; s. 3, ch. 76-168; s. 1, ch. 77-457; ss. 5, 25, 26, ch. 80-99; ss. 2, 3, ch. 81-318; s. 1, ch. 85-85; ss. 4, 26, 27, ch. 89-353; s. 4, ch. 91-429; s. 8, ch. 93-35; s. 183, ch. 94-356; s. 3, ch. 96-407; s. 94, ch. 96-410.

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Select Year:

The 2010 Florida Statutes(including Special Session A)

Title XXVII
RAILROADS AND OTHER REGULATED
UTILITIES

Chapter 367
WATER AND WASTEWATER
SYSTEMS

View Entire
Chapter

367.045 Certificate of authorization; application and amendment procedures. –

(1) When a utility applies for an initial certificate of authorization from the commission, it shall:

(a) Provide notice of the actual application filed by mail or personal delivery to the governing body of the county or city affected, to the Public Counsel, to the commission, and to such other persons and in such other manner as may be prescribed by commission rule;

(b) Provide all information required by rule or order of the commission, which information may include a detailed inquiry into the ability of the applicant to provide service, the area and facilities involved, the need for service in the area involved, and the existence or nonexistence of service from other sources within geographical proximity to the area in which the applicant seeks to provide service;

(c) File with the commission schedules showing all rates, classifications, and charges for service of every kind proposed by it and all rules, regulations, and contracts relating thereto;

(d) File the application fee required by s. [367.145](#); and

(e) Submit an affidavit that the applicant has provided notice of its actual application pursuant to this section.

(2) A utility may not delete or extend its service outside the area described in its certificate of authorization until it has obtained an amended certificate of authorization from the commission. When a utility applies for an amended certificate of authorization from the commission, it shall:

(a) Provide notice of the actual application filed by mail or personal delivery to the governing body of the county or municipality affected, to the Public Counsel, to the commission, and to such other persons and in such other manner as may be prescribed by commission rule;

(b) Provide all information required by rule or order of the commission, which information may include a detailed inquiry into the ability or inability of the applicant to provide service, the need or lack of need for service in the area that the applicant seeks to delete or add; the existence or nonexistence of service from other sources within geographical proximity to the area that the applicant seeks to delete or add, and a description of the area sought to be deleted or added to the area described in the applicant's current certificate of authorization;

(c) Provide a reference to the number of the most recent order of the commission establishing or amending the applicant's rates and charges;

(d) Submit an affidavit that the utility has tariffs and annual reports on file with the commission;

(e) File the application fee required by s. [367.145](#); and

(f) Submit an affidavit that the applicant has provided notice of its actual application pursuant to this section.

25-30.033 Application for Original Certificate of Authorization and Initial Rates and Charges.

(1) Each application for an original certificate of authorization and initial rates and charges shall provide the following information:

- (a) The applicant's name and address;
- (b) The nature of the applicant's business organization, i.e., corporation, partnership, limited partnership, sole proprietorship, association, etc.;
- (c) The name(s) and address(es) of all corporate officers, directors, partners, or any other person(s) or entities owning an interest in the applicant's business organization;
- (d) Whether the applicant has made an election under Internal Revenue Code § 1362 to be an S corporation;
- (e) A statement showing the financial and technical ability of the applicant to provide service, and the need for service in the proposed area. The statement shall identify any other utilities within the area proposed to be served that could potentially provide service, and the steps the applicant took to ascertain whether such other service is available;
- (f) A statement that to the best of the applicant's knowledge, the provision of service will be consistent with the water and wastewater sections of the local comprehensive plan as approved by the Department of Community Affairs at the time the application is filed, or, if not consistent, a statement demonstrating why granting the certificate of authorization would be in the public interest;
- (g) The date applicant plans to begin serving customers;
- (h) The number of equivalent residential connections (ERCs) proposed to be served, by meter size and customer class. If development will be in phases, separate this information by phase;
- (i) A description of the types of customers anticipated, i.e., single family homes, mobile homes, duplexes, golf course clubhouse, commercial, etc.;
- (j) Evidence, in the form of a warranty deed, that the utility owns the land upon which the utility treatment facilities are or will be located, or a copy of an agreement which provides for the continued use of the land, such as a 99-year lease. The Commission may consider a written easement or other cost-effective alternative. The applicant may submit a contract for the purchase and sale of land with an unexecuted copy of the warranty deed, provided the applicant files an executed and recorded copy of the deed, or executed copy of the lease, within 30 days after the order granting the certificate;
- (k) One original and two copies of a sample tariff, containing all rates, classifications, charges, rules, and regulations, which shall be consistent with Chapter 25-9, F.A.C. Model tariffs are available from the Division of Economic Regulation, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850;
- (l) A description of the territory to be served, using township, range and section references as specified in subsection 25-30.030(2), F.A.C.;
- (m) One copy of a detailed system map showing the proposed lines, treatment facilities and the territory proposed to be served. The map shall be of sufficient scale and detail to enable correlation with the description of the territory proposed to be served;
- (n) One copy of the official county tax assessment map, or other map showing township, range, and section with a scale such as 1" = 200' or 1" = 400', with the proposed territory plotted thereon by use of metes and bounds or quarter sections, and with a defined reference point of beginning;
- (o) A statement regarding the separate capacities of the proposed lines and treatment facilities in terms of ERCs and gallons per day. If development will be in phases, separate this information by phase;
- (p) A written description of the type of water treatment, wastewater treatment, and method of effluent disposal;
- (q) If subsection (p) above does not include effluent disposal by means of reuse, a statement that describes with particularity the reasons for not using reuse;
- (r) A detailed financial statement (balance sheet and income statement), certified if available, of the financial condition of the applicant, that shows all assets and liabilities of every kind and character. The income statement shall be for the preceding calendar or fiscal year. If an applicant has not operated for a full year, then the income statement shall be for the lesser period. The financial statement shall be prepared in accordance with Rule 25-30.115, F.A.C. If available, a statement of the source and application of funds shall also be provided;
- (s) A list of all entities, including affiliates, upon which the applicant is relying to provide funding to the utility, and an explanation of the manner and amount of such funding, which shall include their financial statements and copies of any financial agreements with the utility. This requirement shall not apply to any person or entity holding less than 10 percent ownership interest

in the utility;

(t) A cost study including customer growth projections supporting the proposed rates, charges and service availability charges. A sample cost study, and assistance in preparing initial rates and charges, are available from the Division of Economic Regulation;

(u) A schedule showing the projected cost of the proposed system(s) by uniform system of accounts (USOA) account numbers pursuant to Rule 25-30.115, F.A.C., and the related capacity of each system in ERCs and gallons per day. If the utility will be built in phases, this shall apply to the first phase;

(v) A schedule showing the projected operating expenses of the proposed system by USOA account numbers, when 80 percent of the designed capacity of the system is being utilized. If the utility will be built in phases, this shall apply to the first phase; and

(w) A schedule showing the projected capital structure including the methods of financing the construction and operation of the utility until the utility reaches 80 percent of the design capacity of the system.

(2) The base facility and usage rate structure (as defined in subsection 25-30.437(6), F.A.C.) shall be utilized for metered service, unless an alternative rate structure is supported by the applicant and authorized by the Commission.

(3) A return on common equity shall be established using the current equity leverage formula established by order of this Commission pursuant to Section 367.081(4), F.S., unless there is competent substantial evidence supporting the use of a different return on common equity.

(4) Utilities obtaining initial certificates pursuant to this rule are authorized to accrue allowance for funds used during construction (AFUDC) for projects found eligible pursuant to subsection 25-30.116(1), F.A.C.

(a) The applicable AFUDC rate shall be determined as the utility's projected weighted cost of capital as demonstrated in its application for original certificate and initial rates and charges.

(b) A discounted monthly AFUDC rate calculated in accordance with subsection 25-30.116(3), F.A.C., shall be used to insure that the annual AFUDC charged does not exceed authorized levels.

(c) The date the utility shall begin to charge the AFUDC rate shall be the date the certificate of authorization is issued to the utility so that such rate can apply to the initial construction of the utility facilities.

Specific Authority 350.127(2), 367.045(1), 367.121, 367.1213 FS. Law Implemented 367.031, 367.045, 367.1213 FS. History—New 1-27-91, Amended 11-30-93.

25-30.030 Notice of Application.

(1) When a utility applies for a certificate of authorization, an extension or deletion of its service area, or a sale, assignment or transfer of its certificate of authorization, facilities or any portion thereof or majority organizational control, it shall provide notice of its application in the manner and to the entities described in this section.

(2) Before providing notice in accordance with this section, a utility shall obtain from the Commission a list of the names and addresses of the municipalities, the county or counties, the regional planning council, the Office of Public Counsel, the Commission's Office of Commission Clerk, the appropriate regional office of the Department of Environmental Protection, the appropriate water management district, and privately-owned water and wastewater utilities that hold a certificate granted by the Public Service Commission and that are located within the county in which the utility or the territory proposed to be served is located. In addition, if any portion of the proposed territory is within one mile of a county boundary, the utility shall obtain from the Commission a list of the names and addresses of the privately-owned utilities located in the bordering counties and holding a certificate granted by the Commission. The utility's request for the list shall include a complete legal description of the territory to be requested in the application that includes:

(a) A reference to township(s), range(s), land section(s) and county; and

(b) A complete and accurate description of the territory served or proposed to be served in one of the following formats. The description may reference interstates, state roads, and major bodies of water. The description shall not rely on references to government lots, local streets, recorded plats or lots, tracts, or other recorded instruments.

1. Sections: If the territory includes complete sections, the description shall only include the township, range, and section reference. If the territory includes partial sections, the description shall either identify the subsections included or excluded.

2. Metes and bounds: A point of beginning which is referenced from either a section corner or a subsection corner, such as a quarter corner. The perimeter shall be described by traversing the proposed territory and closing at the point of beginning. The description shall include all bearings and distances necessary to provide a continuous description.

(3) The notice shall be appropriately styled:

(a) Notice of Application for an Initial Certificate of Authorization for Water, Wastewater, or Water and Wastewater Certificate;

(b) Notice of Application for an Extension of Service Area;

(c) Notice of Application for Deletion of Service Area;

(d) Notice of Application for a Transfer of Water, Wastewater, or Water and Wastewater Certificate(s); or

(e) Notice of Application for a Transfer of Majority Organizational Control.

(4) The notice shall include the following:

(a) The date the notice is given;

(b) The name and address of the applicant;

(c) A description, using township, range and section references, of the territory proposed to be either served, added, deleted, or transferred; and

(d) A statement that any objections to the application must be filed with the Director, Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, no later than 30 days after the last date that the notice was mailed or published, whichever is later.

(5) Within 7 days of filing its application, the utility shall provide a copy of the notice by regular mail to:

(a) The governing body of the county in which the utility system or the territory proposed to be served is located;

(b) The governing body of any municipality contained on the list obtained pursuant to subsection (2) above;

(c) The regional planning council designated by the Clean Water Act, 33 U.S.C. 1288(2);

(d) All water or wastewater utilities contained on the list(s) obtained pursuant to subsection (2) above;

(e) The office of Public Counsel;

(f) The Commission's Office of Commission Clerk;

(g) The appropriate regional office of the Department of Environmental Protection; and

(h) The appropriate Water Management District.

(6) No sooner than 21 days before the application is filed and no later than 7 days after the application is filed, the utility shall also provide a copy of the Notice, by regular mail or personal service, to each customer, of the system to be certificated, transferred, acquired, or deleted.

(7) The Notice shall be published once in a newspaper of general circulation in the territory proposed to be served, added,

deleted, or transferred. The publication shall be within 7 days of filing the application.

(8) A copy of the notice(s) and list of the entities receiving notice pursuant to this rule shall accompany the affidavit required by Sections 367.045(1)(e) and (2)(f), F.S. The affidavit shall be filed no later than 15 days after filing the application.

(9) This rule does not apply to applications for grandfather certificates filed under Section 367.171, F.S., or to applications for transfers to governmental authorities filed under Section 367.071, F.S., or to name changes.

Specific Authority 350.127(2), 367.121(1) FS. Law Implemented 367.031, 367.045, 367.071 FS. History—New 4-5-81, Formerly 25-10.061, 25-10.0061, Amended 11-10-86, 1-27-91, 11-30-93.