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November 7, 2006

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Rosanne Gervasi, Esquire
OFFICE OF GENERAL COUNSEL
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

RE: Docket No. 020640-SU; Application for Certificate to Provide wastewater service in Lee County by Gistro, Inc.
Our File No.: 20989.25

Dear Ms. Gervasi:

This correspondence addresses the legal arguments and position set forth by Kathryn Cowdery in her October 20, 2006, correspondence to you in the above-referenced Docket involving Gistro, Inc. ("Gistro").

GISTRO DOES NOT HAVE THE ABSOLUTE RIGHT TO WITHDRAW ITS APPLICATION.

On March 23, 2006, the Staff issued its Recommendation recommending that Gistro be granted a wastewater certificate and that its annual revenue requirement be set at \$21,251 which is 22% of the amount requested by Gistro. Of Gistro's requested O & M expenses of \$66,000, the Staff recommended approximately 26% of that amount. Instead of the requested \$30,000 return on investment requested by Gistro, the Staff recommended \$1,673. The matter was deferred from the April 4, 2006, Agenda and Gistro filed a Notice of Withdrawal of its Application before it could be rescheduled for an Agenda.

Due to the Staff having issued its Recommendation and the public interest involved, Gistro does not have the absolute right to a withdrawal of its Application. The decisions relied upon by Gistro to support its assertion that it has an absolute right to withdraw its Application are factually distinguishable from the instant case and outdated.

In re: Petition by Florida Water Services Corporation, Order No. PSC-04-0070-FOF-

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WS (January 26, 2004) was Florida Water Services Corporation's application to determine that its systems in Hernando County are subject to PSC's jurisdiction notwithstanding Hernando County having taken back jurisdiction. Florida Water's application had been protested by Pasco and Hernando Counties. While the Application was pending, Hernando County exercised its powers of eminent domain and took over ownership of the utility system in Hernando County, rendering the PSC proceeding moot. The Notice of Dismissal was based upon the proceedings being moot, not as a result of its knowledge of proposed action by the Commission. The dismissal was not an attempt to circumvent an otherwise unfavorable action by the Commission.

Complaint of KMC Telecom, III, LLC v. Sprint-Florida, Order No. PSC-06-0418-FOF-TP (May 18, 2006) was a dismissal filed as a result of a settlement, and was not an attempt to circumvent an otherwise unfavorable action by the Commission.

In In re: Ferncrest Utilities, Inc., Order No. PSC-02-1240-FOF-WS (September 9, 2002), Ferncrest Utilities, Inc., was granted interim rates, but dismissed its application prior to implementing them. Again, the dismissal was not an attempt to circumvent an otherwise unfavorable action by the Commission.

The Commission in In re: General Peat Resources, L.P., Order No. PSC-94-0310-FOF-EQ (March 17, 1994) undertook a detailed analysis of the right to withdraw an application. Important to the instant case is the factual distinction in the type of application. That case was the approval of a negotiated power purchase agreement which could not be implemented without Commission approval. In that case, the Commission analyzed the case law as of that date, and while noting a split of opinion, concluded that the majority supported the right to dismissal. The Order then cites decisions from the First and Second District Courts of Appeal. One of these cases, Saddlebrook Resorts, Inc., v. Wiregrass Ranch, Inc., 630 So. 2d 1123 (Fla. 3rd DCA 1993) was subsequently reversed on appeal. Both the First and Second District Courts of Appeal have subsequently followed the then minority position as set forth in Middlebrooks v. St. Johns River Water Management District, 529 So. 2d 1167 (Fla. 5th DCA 1988). Thus, there has been a substantial change in the case law since the General Peat Resources decision by the Commission.

Six months after this Commission's decision in the General Peat Resources docket, in September, 1994, the Florida Supreme Court decided Wiregrass Ranch, Inc., v. Saddlebrook Resort, Inc., 645 So. 2d 374 (Fla. 1994). In reaching its conclusion, the Court recognized that permitting cases are different from court cases because of the fact that the agency may have as much an interest in the outcome of a permitting case by virtue of its

statutory duty in protecting the public interest. The Court specifically adopted the reasoning in Middlebrooks and disapproved of the opinion of the First District Court of Appeal in concluding that the agency had the discretionary authority to continue with the proceedings. Similarly, due to the PSC's statutory duty to protect the public interest, it has the discretion not to allow dismissal by Gistro of its Application.

The First and Second District Courts of Appeal have subsequently followed the Middlebrooks Opinion. See, Holmes Regional Medical Center, Inc., v. AHCA, 737 So. 2d 608 (Fla. 1st DCA 1999) and City of North Port v. Consolidated Minerals, Inc., 645 So. 2d 485 (Fla. 2nd DCA 1994). In both of these decisions, it was also pointed out that the agency had adopted no rule authorizing voluntary dismissals or incorporated the Florida Rules of Civil Procedure into its proceedings. That is equally applicable in the instant case where the PSC has adopted no such rule.

Thus, it is clear that the Commission, in the exercise of its statutory duty to protect the public interest, has the discretion to deny Gistro's dismissal of its Application.

GISTRO, INC. IS OPERATING AS A UTILITY.

In order to circumvent the effects of the adverse Staff Recommendation, Gistro has devised a scheme to allow lots to be connected to its collection system if the owners or builders become shareholders pursuant to the Shareholder Agreement. Interestingly, Gistro has not disclosed the Shareholder Agreement or the specific terms by which it will sell its shares. It is likely that once Gistro has collected money for the remaining lots that it will have no incentive to continue ownership of the collection system and will cease to properly maintain it to the detriment of those connected. Even more importantly, Gistro has refused to disclose the Settlement Agreement that resulted from a builder's lawsuit against Gistro to allow the builder to connect to the system. That document is critical for a determination to be made regarding whether Gistro charged that builder to connect to the collection system, which would render Gistro a utility. Gistro attempts to obfuscate the importance of a review of the Settlement Agreement by asserting that the PSC has no jurisdiction to award monetary damages. Attempting to call the money paid to Gistro "monetary damages" does not change what the payment was actually for and the Commission has the statutory duty to analyze the facts.

Section 367.021 (12), Florida Statutes, defines "utility" to include every person owning a system and providing service for compensation. Gistro apparently is asserting, since it does not propose to charge monthly user fees, that it is not providing service for

Rosanne Gervasi, Esquire
Office of General Counsel
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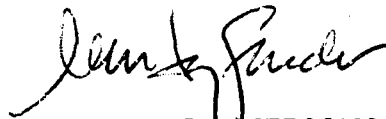
compensation. Compensation is not limited to the periodic user fee, but also encompasses a charge to connect to a utility system, no matter what it is called.

Gistro's attempt to analogize this instant case to those applicable to homeowner's associations are unsuccessful. It is absurd for Gistro to assert that the PSC cannot review and construe the Settlement Agreement to determine whether the actions by Gistro constitute operating as a utility. Gistro has clothed the Settlement Agreement in secrecy in an attempt to hinder the Commission's analysis of its action.

CONCLUSIONS,

The Commission in the exercise of its jurisdiction to protect the public interest has the discretion whether to accept Gistro's withdrawal of its Application after an unfavorable Staff Recommendation. In light of Gistro's attempts to circumvent the Commission's jurisdiction through a scheme of selling stock in exchange for connecting to the wastewater system, this Commission should deny the withdrawal and adopt the Staff Recommendation. Should the Commission choose to accept Gistro's withdrawal, it should immediately open a separate docket to investigate whether Gistro's shareholder scheme and its Settlement Agreement with First Home Builder of Florida constitute consideration for utility service.

Very truly yours,



MARTIN S. FRIEDMAN
For the Firm

MSF/mp

cc: Mr. Fred Partin
G. Donald Thomson, Esquire
Blanca Bayo, Commission Clerk
Kathryn Cowdery, Esquire
Ms. Patti Daniel

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