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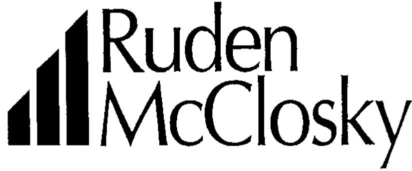

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November 27, 2006

Blanca S. Bayo, Director
Division of Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Via Hand-Delivery

Re: Docket No. 020640-SU: Application for wastewater certificate in Lee County by Gistro, Inc.

Dear Ms. Bayo:

Enclosed for filing in this docket are seven copies of a November 27, 2006 letter to Rosanne Gervasi concerning the above docket.

Please let me know if you have any questions.

Sincerely,

Kathryn G.W. Cowdery

Enclosure
~~cc~~ (via hand-delivery w/enc.): Pat Brady
Rosanne Gervasi, Esq.
Patti Daniel

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November 27, 2006

Rosanne Gervasi
Florida Public Service Commission
2540 Shumard Oak Blvd
Tallahassee, FL 32399-0863

Via hand delivery

Re: PSC Docket No. 020640-SU, Application for certificate to provide wastewater service in Lee County, by Gistro, Inc. ("Application")

Dear Ms. Gervasi:

The purpose of this letter is to reply to certain legal arguments and misstatements of fact raised in the November 7, 2006 letter from the Rose Sundstrom law firm to you. Although the letter does not so state, Rose Sundstrom represents Bonita Springs Utilities, a co-operative, PSC-exempt utility which provides wastewater treatment service to the Subdivision, and which is currently in circuit court litigation with Mr. Holzberg. Perhaps because of the current litigation, BSU's letter appears to me to be litigious in tenor, using unwarranted, unjustifiable, and unsupportable adjectives and statements to describe the legitimate actions taken by Gistro.

I am using the same defined terms in this letter as are found in my letter to you of October 20, 2006, and will address the issues in the same order as they appear in the October 20 letter.

<u>Point 1: The Notice of Withdrawal Divests the PSC of Jurisdiction over the Application</u>

BSU argues that the PSC has the discretion to deny Gistro's withdrawal of its Application, that Gistro does not have the absolute right to withdraw its application, and that the decisions relied upon by Gistro are factually distinguishable from the instant case and outdated. A reading of the caselaw shows BSU's position to be incorrect.

The authority cited by BSU fully supports the basic legal premise which requires the commission to acknowledge Gistro's Notice of Withdrawal and close this docket. This legal premise is, as cited on page 3 of Gistro's October 20, 2006 letter:

TAL:57232:1

> "the 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."

(emphasis added). City of North Port, Fla. v. Consolidated Minerals (also referred to in BSU's November 7th letter). Accord Wiregrass Ranch, Inc. v. Saddlebrook Resort, Inc,, 645 So. 2d 374, 375 (Fla. 1994).

BSU distinguishes PSC Orders cited by Gistro, In Re Florida Water Services Corporation, In Re Complaint of KMC Telecom, and In Re Ferncrest Utilities, from the instant case on the basis that in those cases the dismissal was "not an attempt to circumvent an otherwise unfavorable action by the Commission." BSU should not be allowed to color Gistro's filing of a Notice of Withdrawal as an unauthorized or underhanded action. Any party filing a Notice of Withdrawal does so because it does not wish the proceedings to continue. BSU does not raise a legal distinction between the PSC Orders it cites and Gistro's Notice of Withdrawal. BSU does not challenge the Florida Supreme Court cases, Fears v. Lunsford, and Randle-Eastern Ambulance Service, Inc. which stand for the proposition that the plaintiff's right to take a voluntary dismissal is absolute, and which cases are relied upon by the PSC in its Orders. Gistro does not wish to become a PSC 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.

Gistro's letter of October 20, 2006, cited additional, older PSC cases in support of Gistro's position that the Commission should acknowledge its Notice of Withdrawal and close the docket, specifically noting that certain reasoning in those older cases differs from the above-cited cases due to their predating changes in PSC procedural rules and their predating additional Florida Supreme Court cases. BSU ignores the case law raised in In re: General Peat Resources which is still good law and relied upon routinely by the PSC (Fears v. Lunsford and Randle-Eastern Ambulance Service), and instead focuses on the fact that the law has evolved since that Order was issued, a point which Gistro had already acknowledged. BSU's argument does not negate Gistro's position that pursuant to Fears v. Lunsford, Randle-Eastern Ambulance Service, and PSC Orders, the Commission should acknowledge its Notice of Withdrawal and close the docket.

Under the current legal test as is expressed in Middlebrooks and Wiregrass Ranch, Gistro is entitled to have its Notice of Withdrawal acknowledged by the PSC and this docket closed. BSU points out that six months after the Commission's decision in In re: General Peat Resources, the Florida Supreme Court decided Wiregrass Ranch, Inc. v. Saddlebrook Resort, Inc, wherein the court specifically adopted the Middlebrooks opinion and disapproved a First District court case, John A. McCoy Florida SNF Trust v. State, (589 So. 2d 351 (Fla. 1st DCA 1991) (concerning Ch. 381 certificate of need proceedings and holding that when a petition for a hearing is dismissed, the agency must reinstate its initial decision), which conflicted with its decision. BSU cited to Holmes Regional Medical Center and City of North Port v. Consolidated Minerals as also following Middlebrooks, and concludes that these cases mean that the PSC has

the discretion to deny Gistro's Notice of Withdrawal of its Application. BSU's conclusion is incorrect and not supported by those cases.

BSU's argument is a misapplication of the courts' rulings. Gistro does not take issue with the above-cited cases, and in fact cites to City of North Port in its letter of October 20. Contrary to BSU's insinuations, the above-cites cases do not overturn prior PSC cases or the caselaw cited therein. Rather, those cases support and are consistent with Gistro's position that the commission by law is required to acknowledge its Notice of Withdrawal and close this docket.

Wiregrass Ranch, which supports and is consistent with Gistro's position, is also distinguishable from the instant case on its facts which is why it was not cited in the October 20, letter. In Wiregrass Ranch, a permit applicant's permit was challenged by an adjacent landowner, a hearing was held before a hearing officer, the water management district ("WMD") filed a proposed recommended order, and the applicant filed its separate recommended order. The hearing officer made findings of fact and issued a recommended order recommending that the permit be issued. The landowner filed exceptions to the recommended order, but before the WMD could act on the recommended order, the landowner/petitioner, not the permit applicant, filed a motion for a voluntary dismissal of its exceptions. The WMD granted the motion and terminated its jurisdiction to act further on the objections raised by the affected party on the basis that it was bound by the court case John A. McCoy v. State. The WMD did, however, approve the permit's issuance. The issue that was appealed to the Second District Court of Appeals by the permit applicant was that by allowing the voluntary dismissal of the adjoining landowner/ petitioner concerning the matters litigated before the hearing officer, the WMD allowed relitigation at a later date of those matters even though the temporary permit was issued. The district court of appeals disagreed with McCoy, finding (consistent with the caselaw argued by Gistro):

> the jurisdiction of an agency is activated when the permit application is filed. Jurisdiction to proceed in that permitting process to a conclusion of whatever process has been activated is only lost by the agency when the permit is issued or denied or when the permit applicant withdraws its application prior to completion of the factfinding process.

(emphasis added). Id. at 375. The Florida Supreme Court specifically stated: "at the outset of our analysis, we with to emphasize, as did the district court, that this was not the applicant for a license or a permit who was seeking to have the proceeding terminated; this was an objector to the issuance of the permit." Id. at 376.

The explanation by the Florida Supreme Court in Wiregrass Ranch of the Middlebrooks case is consistent with the caselaw as explained by Gistro in the October 20 letter. The Court agreed with the First District Court in Middlebrooks, which held that the applicant for a permit could not withdraw immediately prior to oral argument before the adjudicatory agency in a chapter 120.57 proceeding to deprive the agency of jurisdiction to enter its final order, and that Florida Rule of Civil Procedure 1.420(a)(1) controlled. Because the hearing officer had concluded his fact-finding process, it was too late for the permit applicant to withdraw. This

analysis is completely consistent with the legal analysis supplied to Staff in Gistro's letter of October 20.

Point 2: The PSC has no basis for asserting jurisdiction over Gistro

Contrary to BSU's argument, Gistro is not operating as a utility as defined in Sec. 367, Florida Statutes. BSU's inflammatory argument is objectionable in its attempt to characterize Gistro's actions as somehow underhanded in nature, using words and phrases including: "circumvent," "devised a scheme," "attempt to obfuscate," "clothed the Settlement Agreement in secrecy in an attempt to hinder the Commission's analysis of its action." BSU unjustifiably but purposefully mischaracterizes Gistro's actions and business plans.

BSU does not address Gistro's detailed explanation and legal argument supported by Florida Supreme Court law that the Commission has no jurisdiction over Gistro as a result of its entering into a 2003 settlement agreement in settlement of all claims in a judicial lawsuit, a lawsuit of which the PSC Staff was aware, and the issues of which were jurisdictional to the court and not to the PSC.

Another inflammatory position taken by BSU, also libelous and meritless, is that Gistro is attempting to "obfuscate" or "clothe the Settlement Agreement in secrecy in an attempt to hinder the Commission's analysis." During the course of this docket, Gistro disclosed in 2003 to Staff that it was paid $ 187,500 as settlement in the court action, and Staff is aware that as a result of the settlement, First Florida Homebuilders was allowed to reconnect and connect the residences which it built to Gistro's wastewater collection system. The Commission has all the information it needs, pursuant to Florida caselaw as cited in Gistro's October 20 letter, to determine that it has no jurisdiction over Gistro.

The Settlement Agreement was entered into by two parties to a lawsuit, and was deemed confidential by the parties; a very common practice in litigation. The Settlement Agreement contains a very commonly used provision: the parties agreed that the agreement shall be held confidential and not disclosed to any third parties except under subpoena or court order. This provision of the settlement agreement was in no manner used for purposes of confounding any action of the PSC, and such a statement is meritless, scandalous, and libelous.

BSU's arguments concerning how to determine whether a court or the PSC has jurisdiction over an issue are not supported by and are contrary to Florida courts' decisions. BSU's statement that the settlement agreement 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," is contrary to Florida caselaw as set forth beginning on page 4 of Gistro's October 20 letter: It is to the nature of relief sought that a court looks in resolving whether the PSC or the circuit court has jurisdiction over a dispute. The nature of relief sought, as explained in the October 20 letter, was based in contract and tort. Likewise without merit and misleading is BSU's statement that: Attempting to call the money paid to Gistro "monetary damages" does not change what the payment was actually for the Commission has the statutory duty to analyze the facts." The settlement amount was monetary damages, and the legal analysis in this regard is

clear: The PSC has no jurisdiction over monetary damages received in settlement of a court case based in contract and tort.

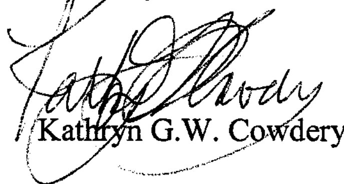
Point 3: The PSC has no jurisdiction over the sale of stock of nonjurisdictional systems

In the section of its letter entitled "Gistro, Inc. is Operating as a Utility," BSU again uses inflammatory language: that "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." It should be noted that the undersigned asked for a meeting, which was held pursuant to PSC notice on August 24, 2006, and in which Messrs. Friedman and Shippy participated on behalf of BSU, for the express purpose of explaining Gistro's future plans with regard to his collection system, as was requested by Staff. The plan of taking in new owners through a stock purchase agreement was explained. Staff did not ask to see a copy of the corporate bylaws or the stock purchase agreement. In November, 2006, Staff did request copies of those documents, and copies were provided, notwithstanding the undersigned's opinion that selling stock in a nonregulated company is not subject to the PSC's jurisdiction, and that Gistro was under no legal obligation to provide this information. Interestingly, BSU does not argue that the sale of stock would render Gistro a regulated company.

Gistro objects strongly to the BSU's libelous statement that: "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." This wholly unsupported statement is contrary to the fact that since Mr. Holzberg built the collection system in 1984 he has taken care of the system because it is his system and his responsibility. This statement also mischaracterizes the nature of the sale of stock. If an entity wishes to connect to this system, they must become a part owner in the system by buying stock. Once a stockholder, that entity by virtue of being a part owner in the system has the ability to connect its property to the system pursuant to the stock purchase agreement and corporate by-laws. BSU's statements are misleading, false, unwarranted, and unjustifiable.

Please let me know if you have any questions.

Sincerely,



Kathryn G.W. Cowdery

cc: Martin S. Friedman, Esq., Bonita Springs Utilities
Robert Burandt, Esq., Gistro, Inc.
Michael D'Onofrio, Esq., Gistro, Inc.

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