

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: January 15, 2010
TO: Ann Cole, Commission Clerk, Office of Commission Clerk
FROM: Katherine E. Fleming, Senior Attorney, Office of the General Counsel
RE: Docket No. 090019-WS - Application for transfer of majority organizational control of Service Management Systems, Inc., holder of water Certificate No. 517-W and wastewater Certificate No. 450-S, in Brevard County, from IRD Osprey, LLC to Oak Lodge Utility, LLC

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10 JAN 15 PM 1:47
COMMISSION CLERK

Please place the attached in the docket file. If you have any questions regarding this information, please do not hesitate to contact me. Thank you.

DOCUMENT NUMBER-DATE

00391 JAN 15 09

FPSC-COMMISSION CLERK

Katherine Fleming

From: Katherine Fleming
Sent: Friday, January 15, 2010 11:48 AM
To: 'REILLY.STEVE'; 'bruce.may@hklaw.com'; 'thor.ibsen@askar.is'; taprte@gmail.com; davidw_accurate@bellsouth.net; dan@buildwithCBC.com
Cc: Patti Daniel; Connie Kummer; Marshall Willis; Tim Devlin; Steve Larson; Jennifer Brubaker; Anna Williams; Richard Redemann; Kathy Kaproth; Pat Brady
Subject: Docket No. 090019-WS

To all –

On Thursday, January 14, 2010, at 10:30 PM, an email was disseminated by technical staff to certain parties in the docket.

The email constitutes inappropriate communication expressing opinions on matters on which they were not authorized to comment. As a result, the technical staff member has been removed from this docket (Docket No. 090019-WS) and will no longer be involved. In addition, a copy of this email has been placed in the docket file.

In the future, questions regarding this docket should be made directly to the attorneys on the docket. Any written correspondence should be provided to all parties and filed with the Clerk's Office.

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If you have any additional questions, please feel free to contact me.

Thank you,

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1/15/2010

DOCUMENT NUMBER-DATE

00391 JAN 15 09

FPSC-COMMISSION CLERK

Katherine Fleming

From: bermuda4131@comcast.net
Sent: Thursday, January 14, 2010 10:30 PM
To: davidw_accurate@bellsouth.net
Cc: Patti Daniel; Connie Kummer; Marshall Willis; Tim Devlin; Katherine Fleming; awilliams@psc.state.fl.us; dan@buildwithCBC.com; thor.ibsen@askar.is; bruce.may@hkllaw.com; Pat Brady
Subject: Continued operations of SMS's water and wastewater systems

David --

Thank you for calling the Public Service Commission before you walked away from the utility. Also, thank you for agreeing to give everyone a little more time to work out the current situation. As my Supervisor, Patti Daniel, said, there wasn't much we could have done this evening to get someone in to replace you. However, much will be done tomorrow.

Everyone --

Since I will be out until Tuesday, thought it best to leave everyone a summary of what has transpired the last few hours. While I was still on the phone, our computer group had to knock me off the system, so I have logged back in under my personal e-mail. David Whiteside is also going to e-mail Patti Daniel with a short summary of his situation so she has precise information.

David has been the systems operator for SMS for about 28 years, I think, and does not want to walk away. However, years ago he contracted on behalf of IRD Osprey, LLC (Osprey, seller) for work to be done on the wastewater system. He was never paid by Osprey for that cost nor a good portion of his operating costs. The total cost, I believe, was approx. \$40,000 at the time of the transfer of majority control control to Oak Lodge Utility, LLC (Oak Lodge, buyer). Oak Lodge recognized the debt and has been trying its best to pay it down, but a substantial portion still remains. Thinking very highly of David's stellar services, as a courtesy, Dan Winkler of Oak Lodge spoke with David this afternoon to advise him that Oak Lodge was about to make a decision at 5:00 pm today whether to turn the keys, as it were, of the utility over to Compass Bank. Since sometime in December 2009, the buyer has been in discussions with the seller for terminating their contract. Oak Lodge believes that the contract has an unwind provision if the buyer could not reach a settlement with Compass Bank. Compass bank had foreclosed on the utility for a debt owed by the seller of approximately \$1,000,000. Since Compass Bank's position has remained that the full \$1,000,000 is due, Oak Lodge believes it is their right to terminate the contract. Osprey indicated that it was interested in taking back the utility, but asked for an extension to the end of December to make its decision. Since then, it has asked for more extensions. Two days ago, Osprey was given a final extension until 5:00 pm today to decide. Just before 5:00 pm, Osprey asked for another extension and Oak Lodge said no. Instead, tomorrow, Oak Lodge was intending to give notice of severing the contract with Osprey, turn over the keys of the utility to Compass Bank, and send a letter to the Commission withdrawing Docket No. 090019-WS. In relaying this information earlier today to David Whiteside, Mr. Winkler could give no assurances what would happen to David's SMS contract or to the repayment of his debt. Not believing he had any options, but not wanting to leave the utility without an operator, David called me this evening to

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1/15/2010

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ask the Commission's advice for how to walk away safely.

While David waited, I immediately contacted Compass Bank's attorney, Bruce May, to find out if the Bank was ready to take over operations. Compass Bank has petitioned the Court to appoint a receiver for SMS pending disposition of the foreclosure. This request is not automatic, nor can it be presumed granted. Based on the situation, especially with the blessings of the current owner of SMS, it is hoped that a decision could be moved up on an emergency basis. As of right now, though, Compass Bank is not prepared to take over the operations of SMS. With regard to David Whiteside, Mr. May said it was his intention to recommend that the receiver keep David on to manage operations.

My supervisor said to try to contact Thor Ibsen, Oak Lodge, to tell him about my calls with David and to Bruce and to ask what Oak Lodge was prepared to do. Thor returned my call immediately and we had a short conference call with Mr. Dan Winkler where the above information was relayed. Commission Legal staff has been in constant contact during this period of time with both Thor and Bruce and was going to try to get in touch with Osprey today. I do not yet know the result of that effort. However, as late as this morning staff met with legal and the best information at that time was that Oak Lodge was going to send a letter withdrawing the docket. We would decide at that time whether to close the docket or keep it open to acknowledge the Foreclosure Court's appointment of a receiver. Staff was intending to still have a conference call with all parties on January 22, 2009, including the seller, if staff could locate Osprey and if they agreed. Staff intended that its memo closing the docket would be sufficiently detailed to update parties, as well as some 250 other interested persons, of the reasons the docket was being closed.

The only kink in this plan, is David Whiteside. No one at Compass Bank, Oak Lodge, nor Osprey can step in and run the utility. An operator would need to be located immediately and that would be awkward with the appointment of a receiver pending. David Whiteside has agreed to hold on for awhile, but needs to be paid. His pay check is being written right now by Oak Lodge, which has only agreed to hold up on everything, including the withdrawal letter, for tomorrow and "possibly" through the weekend and bank holiday on Monday. Since I believe they have been told they can walk away upon (mailing ?, filing ?) their request, all their ownership rights to SMS end then. They have no authority to keep David on, they cannot join in Compass Bank's request for appointment of receiver, they cannot notice abandonment. Their statutory right to own and control the utility, prior to Commission vote, ends with the withdrawal of their application. Bruce May has been studying s.367.165, F.S., and has an interesting interpretation, which he may share. However, absent that interpretation, Bruce believes that the County would, in all likelihood, retain David Whiteside until a receiver is appointed. This is where I leave you. There is an aside for Patti Daniel, as well as contact information below.

[Patti --David has confirmed the customers complaints that the wastewater system is in bad shape. When I called DEP earlier this week for compliance status, I thought I was asking for both water and wastewater. In retrospect, I believe I only received the former. Can you have one of the Engineers call DEP wastewater compliance tomorrow? David has provided the contact number for DEP wastewater compliance and the Brevard County Utilities Director, Dick Martens. Mr. Martens has called David several times to check on the situation at the utility, so he is definitely interested.]

SMS contract operator. David Whiteside, Accurate Inc., (772) 216-4277 cell,
davidw_accurate@bellsouth.net

DEP wastewater compliance. Tom Powers, (321) 229-8930
Brevard County utilities director. Dick Martens, (321) 633-2091
Oak Lodge. Thor Ibsen (321) 298-2003 cell, thor.ibsen@askar.is
Oak Lodge. Dan Winkler (321) 302-1047, dan@buildwithCBC.com
Oak Lodge's legal representation. Dennis Fairbanks (321-255-0143,
dennis@CFL.RomeoRomeo.com
Compass Bank's legal representation, Bruce May (850) 224-7000, bruce.may@hklaw.com