

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request for hearing was subsequently withdrawn on December 13, 2005, making that the official filing date of the application, and making March 13, 2006, the statutory deadline for a decision.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.<sup>1</sup> According to Gistro, it is not a “utility” as defined by Section 367.021(12), Florida Statutes, because it does not provide or propose to provide wastewater service to the public for compensation.

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

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

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<sup>1</sup> City of Cape Coral v. GAC Utilities, Inc., 281 So. 2d 493, 494 (Fla. 1973).

<sup>2</sup> 314 So. 2d 578, 579 (Fla. 1975).

<sup>3</sup> 360 So. 2d 68, 69 (Fla. 1978).

<sup>4</sup> 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.

<sup>5</sup> 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.

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

<sup>7</sup> 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.,<sup>8</sup> 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.<sup>9</sup> 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."<sup>10</sup> Gistro argues that, by law, the Commission is required to acknowledge its notice of

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

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

<sup>10</sup> City of North Port, Florida v. Consolidated Minerals, Inc., 645 So. 2d 485, 486 (Fla. 2<sup>nd</sup> 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.<sup>11</sup> Further, Gistro argued that it is well established in Florida that settlements of lawsuits are highly favored and will be enforced whenever possible.<sup>12</sup>

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

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<sup>11</sup> 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).

<sup>12</sup> 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.,<sup>13</sup> 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.<sup>14</sup> 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

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<sup>13</sup> 645 So. 2d 374 (Fla. 1994) (see footnote 8).

<sup>14</sup> 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."<sup>15</sup> 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,<sup>16</sup> wherein this Commission declined to acknowledge a notice of withdrawal of a transfer application and voluntary dismissal. In that case, Bonita Springs Utilities (BSU), coincidentally the same exempt, not-for-profit, member-owned cooperative that provides wastewater treatment service to Gistro's customers, had been appointed by circuit court order as receiver for Harbor Utilities, Inc. (Harbor), a regulated company that had noticed its intent to abandon its system. BSU filed a transfer application on behalf of Harbor for the transfer of Harbor to BSU. While the transfer application was still pending, the circuit court issued an order discharging the receivership and conveying Harbor's assets and customers to BSU. BSU filed a notice of withdrawal of its transfer application, arguing that the court order divested the Commission of jurisdiction over the transfer because BSU is an exempt entity. This Commission disagreed, finding that the court-appointed receivership and conveyance of Harbor's assets to BSU did not divest the Commission of its authority to find whether or not the transfer was in the public interest pursuant to section 367.071, Florida Statutes. Accordingly, the Commission declined to acknowledge BSU's notice of withdrawal and voluntary dismissal, finding that "[u]nder Chapter 367, Florida Statutes, [the Commission's] jurisdiction with respect to the authority, service and rates of utilities is exclusive."

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

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<sup>15</sup> Id.

<sup>16</sup> 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

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.