

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

DATE: February 1, 2007

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Division of Economic Regulation (Brady, Redemann)
Office of the General Counsel (Gervasi)

RE: Docket No. 020640-SU – Application for certificate to provide wastewater service in Lee County by Gistro, Inc.
County: Lee

AGENDA: 02/13/07 – Regular Agenda – Proposed Agency Action for Issues 3 and 4 -- Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Edgar

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\020640.RCM.DOC

Case Background

On July 1, 2002, Gistro, Inc. (Gistro) submitted 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, the 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, the 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 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 the 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, 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 from the Commission by virtue of having filed a Notice of Withdrawal, the 90 day statutory requirement to grant or deny the application became inapplicable.

Issue 1 is staff's recommendation on the acknowledgement of the Notice of Withdrawal. If the Commission acknowledges the applicant's Notice of Withdrawal, Issues 2 through 5 will become moot and the docket should be closed (Issue 6). However, if the Commission declines to acknowledge the applicant's Notice of Withdrawal, the Commission should rule on all issues of the recommendation.

As part of a decision to grant or deny authorization, staff believes it is important for the Commission to be aware of the history of this small collection system.

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 Owners 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, 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, 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 the Commission. 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, 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 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 in Issue 1.

In August 2003, staff was made aware that the applicant had published a notice which indicated that, until such time as its franchise request with the 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, staff reminded the applicant that the certificate application remained deficient. Further, by that letter, 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, 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 the Commission to deny the application as incomplete. 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 this assistance, the application was completed in December of 2005.

This recommendation addresses whether Gistro's Notice of Withdrawal should be acknowledged and, if not, whether the application for original wastewater certificate and initial rates and charges should be approved. The Commission has jurisdiction pursuant to Sections 367.011(2), 367.021(12), 367.031, and 367.045, Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission acknowledge Gistro, Inc.'s Notice of Withdrawal of its application for a wastewater certificate?

Recommendation: No. The Commission should decline to acknowledge the notice of withdrawal and should proceed with a ruling on the merits of the application as set forth in Issues 2 through 5 of this recommendation. If the Commission disagrees, Issues 2 through 5 need not be ruled upon and the docket should be closed in Issue 6. (Gervasi)

Staff Analysis: A recommendation on the merits of the certification application including rates and charges was filed on March 23, 2006, and deferred from the Commission's April 4, 2006, agenda conference at the request of the Owners Association. Thereafter, 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 staff that it plans to continue to provide wastewater collection service to existing customers without compensation.

Because 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, 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 the Commission, and stated that it would formalize and advise staff of its plans regarding service to the approximately 50 remaining undeveloped lots within 90 days.

Stock Purchase Agreement. Gistro has since provided staff a copy of a draft Stock Purchase Agreement and Bylaws of a corporation showing that Gistro intends to sell shares of stock in the corporation in exchange for the right to connect to the system. The Bylaws provide 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.

Legal Memoranda. On October 20, 2006, counsel for Gistro filed a letter presenting its legal arguments as to why Gistro believes the 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 states that it does not intend to take any action which would put it under the regulatory jurisdiction of the Commission, and argues that the Commission has no jurisdiction over the sale of stock of nonjurisdictional systems. Gistro argues 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 states 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 states 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 the Commission's jurisdiction. He states 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. The 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 the 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 objects 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. Gistro argues that it has an absolute right to withdraw its application and that the Notice of Withdrawal divests the Commission of jurisdiction over the application. Gistro argues 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 provides a number of examples to show that the Commission routinely receives notices of withdrawal of applications and routinely closes those dockets. Gistro cites to three

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

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-WS,⁴ (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,⁵ (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 cites to Order No. PSC-94-0310-FOF-EQ,⁷ which predates certain changes in the Commission's procedural rules relating to adoption of the uniform rules of procedure and additional Florida Supreme Court cases, but which Gistro argues 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 the 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.

BSU. BSU argues that Gistro does not have an absolute right to withdraw its application. He points 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 argues 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

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.

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 argues 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 argues that again, the dismissal was not an attempt to circumvent an otherwise unfavorable action by the Commission.

BSU further argues that six months after the 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 argues 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 the Commission adopted any such rule.

Gistro. In its November 27, 2006, letter filed in response to BSU's letter, Gistro argues that the authority cited by BSU supports the basic legal premise which requires the 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 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 states 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

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).

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 points 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 argues that it is well established in Florida that settlements of lawsuits are highly favored and will be enforced whenever possible.¹²

BSU argues that Gistro has 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 states that it disclosed to staff in 2003 that Gistro was paid \$187,500 as settlement in the court action, and 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.

Staff Analysis and Conclusion. Section 367.011(2), Florida Statutes, vests the 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

. . . 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, staff agrees with Gistro that it does not for the reasons expressed by Gistro. The sum of money paid to Gistro by FHB 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 the 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.

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).

Staff believes that Gistro's right to withdraw its application for certificate hinges on whether the Commission finds that 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 constitutes compensation for service. Gistro's proposed business plan provides that only by paying Gistro to become a part owner in the system may a person or entity connect property to the system. Staff recommends that this activity indeed constitutes a form of compensation for service, and therefore subjects Gistro to the Commission's exclusive jurisdiction over its authority, service, and rates. The purchase of stock in Gistro is not discretionary for persons wishing to connect to the system. Persons in need of new wastewater collection service in the territory where Gistro serves must either 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 cites 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 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 Staff believes 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, the 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 the Commission has not done, however, is to acknowledge the withdrawal of a certificate application filed by a company that required

¹³ 645 So. 2d 374 (Fla. 1994) (see footnote 8).

¹⁴ Id. At 376.

¹⁵ Id.

certification and authorization from the Commission in order to provide service to the public for compensation. Had Gistro decided to continue to provide service without compensation to new, as well as to existing customers, staff agrees that Gistro would clearly have had a legal right to withdraw its application. However, if the Commission finds that Gistro's plan constitutes compensation for service, Gistro has no legal right to withdraw its certificate application because it will be acting as a jurisdictional utility and, therefore, it has no legal right to choose whether to be regulated by the Commission.

Staff's recommendation in this regard is consistent with Order No. PSC-96-0992-FOF-WS,¹⁶ wherein the 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. The 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, staff recommends that Gistro enjoys no absolute right to withdraw its application and the Commission should decline to acknowledge it. Gistro seeks to require persons wishing to connect to the system to purchase stock in the company in exchange for service, which is a form of compensation, and renders Gistro subject to Commission jurisdiction pursuant to Sections 367.011(2) and 367.021(12), Florida Statutes. Therefore, the Commission should decline to acknowledge the applicant's Notice of Withdrawal and proceed with a ruling on the merits of the application as set forth in Issues 2 through 5 of this recommendation. If the Commission disagrees with staff's recommendation on this issue, Issues 2 through 5 need not be ruled upon and the docket should be closed in Issue 6.

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.

Issue 2: If the Commission declines to acknowledge Gistro, Inc.'s Notice of Withdrawal, should Gistro, Inc.'s application for a wastewater certificate be granted?

Recommendation: Yes. Gistro, Inc. should be granted Certificate No. 541-S to serve the territory described in Attachment A. The effective date of the certificate should be the date of the Commission vote. The resultant order should serve as Gistro Inc.'s wastewater certificate and should be retained by the applicant as such. Within 45 days after the issuance of a final order granting a certificate, the applicant should be required to file an affidavit attesting that Gistro's books and records have been established and will be maintained pursuant to the NARUC uniform system of accounts. The affidavit should attest that the applicant is aware of his responsibility to timely file annual reports and remit regulatory assessment fees for 2007 and in all future years. The applicant should also be put on notice that, pursuant to Rule 25-30.225(9), Florida Administrative Code, each utility is required to inspect its plant and facilities in such a manner and with such frequency as may be necessary to ensure that the plant and facilities are maintained in proper condition for rendering safe and adequate service and that failure to do so may result in show cause proceedings. (Brady, Redemann, Gervasi)

Staff Analysis: As originally filed and subsequently amended, the application is in compliance with the governing statute, Section 367.045, Florida Statutes, and Rule 25-30.033, Florida Administrative Code, and other administrative rules concerning an application for an original certificate and initial rates and charges. Compliance with specific rule requirements is discussed below.

Notice. The noticing requirements in Rule 25-30.030, Florida Administrative Code, were completed on July 26, 2005. In response, there were numerous timely objections, including two letters from an entity entitled "Homeowners in the Forest Mere (Bonita Preserve) Association" which cumulatively attached signatures from approximately 45 lot owners. However, only one of the objectors requested a formal hearing, which request was subsequently withdrawn on December 13, 2005. The majority of the objections concerned doubts about the applicant's ability to adequately maintain the system and the belief that lot owners were already receiving wastewater collection services from BSU. BSU had filed an earlier objection on July 24, 2002, indicating that it only objected to Gistro seeking a certificate to replace the wastewater treatment services currently being provided by BSU. It did not object to Gistro seeking a certificate to bill residents for the cost of maintaining the collection system.

Staff responded to all letters of objection by explaining that Gistro was applying for a certificate to continue to provide wastewater collection service and to begin charging for the service. The letter clarified that the application did not contemplate changing the wastewater treatment service provider, which would continue to be BSU. The protestors were asked to respond by a date certain if they wished a formal hearing. As noted, there was only one request for a formal hearing which was subsequently withdrawn.

Approximately two months prior to staff filing its recommendation on this matter for the April 4, 2006, agenda conference, staff contacted all interested persons it could locate advising them that a recommendation was about to be filed and requesting that they contact legal staff for information on procedure. By letter dated March 29, 2006, the Owners Association requested deferral of the agenda item in order for their association to fully discuss staff's recommendation.

In response, by letter dated March 30, 2006, Gistro granted a postponement of the statutory 90 days requirement until the July 18th agenda conference.

On May 10, 2006, staff held a noticed meeting to discuss Gistro's application for certificate in which a number of homeowners participated. Their comments and concerns were essentially the same as in the earlier responses to the notice of the application. After the applicant filed his Notice of Withdrawal, another noticed meeting was held on August 24, 2006, to discuss the applicant's plan for the provision of service to new connections. Only the applicant and BSU chose to participate in the meeting. Their arguments are fully discussed in Issue 1. Staff will ensure that all interested persons who have previously expressed an interest are sent a copy of this recommendation when it is filed and will advise of the date and time of the agenda conference in which it will be considered by the Commission.

Service Territory and System Maps. The applicant has provided adequate service territory and system maps. Staff has verified that the maps accurately represent the territory described in Attachment A.

Land Ownership. Rule 25-30.033(1)(j), Florida Administrative Code, requires evidence in the form of a warranty deed that the utility owns the land upon which the utility treatment facilities are located, or a copy of an agreement which provides for the continued use of the land, such as a 99-year lease. In this case, no treatment facilities are involved. The collection system within the development delivers wastewater by a master lift station to BSU's force mains. During the pendency of the application, staff received information which purported to dispute that the applicant owned the collection facilities. In response, the applicant provided an Attorney's Title Affidavit.

Books and Records, Annual Reports, and Regulatory Assessment Fees. Staff has explained to the applicant the need to maintain Gistro's books and records according to the National Association of Regulatory Utility Commissioners (NARUC) uniform system of accounts, as well as the need to keep the utility books and records separate from non-utility books and records. Staff has also explained the requirements, pursuant to Rules 25-30.110 and 25-30.120, Florida Administrative Code, for the applicant to timely file annual reports and remit regulatory assessment fees (RAFs). In response, the applicant indicated his intention to hire a firm familiar with regulatory accounting to establish his initial books and records and prepare his annual regulatory filings. To ensure that the books and records are properly established, staff recommends that, within 45 days after the issuance of a final order approving a certificate of authorization for Gistro, the applicant be required to file an affidavit attesting that Gistro's books and records have been established and will be maintained pursuant to the NARUC uniform system of accounts. The affidavit should also attest that the applicant is aware of his responsibility to timely file annual reports and remit RAFs for 2007 and in all future years.

Public Interest. Rule 25-30.033(1)(e), Florida Administrative Code, requires that Gistro provide a statement showing financial and technical ability to provide service. While the applicant provided a financial statement showing modest assets, staff believes that evidence of financial ability has been demonstrated by the applicant's maintenance of the collection system without compensation for approximately twenty years. The collection system has two lift

stations which need to be monitored and maintained. One of the lift stations is the master lift station which pumps all the development's flows into BSU's force mains. The applicant has indicated that he monitors both lift stations on a nearly daily basis and has a monthly maintenance contract for the master lift station. While the DEP does not regulate collection systems, it will step in when there is a malfunction affecting service or the environment. Staff is aware of numerous malfunctions in the collection system which have required DEP intervention. According to the DEP, most of the malfunctions were due to the failure of the applicant to perform preventative maintenance. Also, while all malfunctions were ultimately repaired, the DEP believes that the applicant's response has generally been slow, requiring DEP warnings. Staff, therefore, recommends that the applicant be put on notice that, pursuant to Rule 25-30.225(9), Florida Administrative Code, each utility is required to inspect its plant and facilities in such a manner and with such frequency as may be necessary to ensure that the plant and facilities are maintained in proper condition for rendering safe and adequate service and that failure to do so may result in show cause proceedings. Based upon the above, staff believes that the applicant meets the minimum threshold requirements for a showing of financial and technical ability.

Pursuant to Section 367.045(5)(a), Florida Statutes, the Commission may deny a certificate of authorization, if it determines that doing so is in the public interest. Should the Commission decide to deny the applicant's request for a certificate, this issue should become a proposed agency action issue to allow the applicant the opportunity to request a hearing. If a final post-hearing order denying the certificate is issued, staff believes that the applicant would have three choices: (1) continue to operate the collection system without compensation; (2) attempt to transfer the system to BSU, the Owners Association, or some other entity, possibly for compensation; or (3) abandon the system upon giving proper notice pursuant to Section 367.165, Florida Statutes, in which case a receiver would be appointed by the Circuit Court.

Even though staff believes that regulation of the applicant may prove to be difficult, the applicant is the only entity that has indicated a willingness to maintain the collection system. The Owners Association has not pursued an acquisition and attempts to negotiate a solution with BSU have failed. Moreover, staff is concerned that the collection system may become neglected if the applicant were to continue to operate it without compensation. Pursuant to Section 367.011(2), Florida Statutes, the Commission has exclusive jurisdiction over each utility with respect to its authority, service, and rates. By providing the service to the public for compensation, Gistro will meet the definition of a utility pursuant to Section 367.021(12), Florida Statutes. As such, the applicant will have both the resources to maintain the system and the responsibility, under penalty of law, for adhering to Commission-prescribed rules and regulations. Finally, there will be a forum for complaint resolution between Gistro and its customers. Staff believes this is a situation embodied in the legislative intent of Chapter 367, Florida Statutes, that regulation of non-exempt utilities is in the public interest.

Conclusion. Staff therefore recommends that Gistro, Inc. be granted Certificate No. 541-S to serve the territory described in Attachment A. The effective date of the certificate should be the date of the Commission vote. The resultant order should serve as Gistro Inc.'s wastewater certificate and should be retained by the applicant as such. Within 45 days after the issuance of a final order granting a certificate, the applicant should be required to file an affidavit attesting that

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Gistro's books and records have been established and will be maintained pursuant to the NARUC uniform system of accounts. The affidavit should also attest that the applicant is aware of his responsibility to timely file annual reports and remit regulatory assessment fees for 2007 and in all future years. The applicant should also be put on notice that, pursuant to Rule 25-30.225(9), Florida Administrative Code, each utility is required to inspect its plant and facilities in such a manner and with such frequency as may be necessary to ensure that the plant and facilities are maintained in proper condition for rendering safe and adequate service and that failure to do so may result in show cause proceedings.

Issue 3: If the Commission grants Gistro, Inc. a certificate of authorization, what is the appropriate initial wastewater service rate?

Recommendation: A quarterly wastewater service rate of \$19.18 per residential connection should be approved. The applicant should be required to charge the approved rate until authorized to change by the Commission in a subsequent proceeding. The applicant should be put on notice that he may not require persons wishing to connect to the collection system to purchase stock in Gistro. The applicant should also be put on notice that, pursuant to Section 367.111(1), Florida Statutes, the utility is required to provide service to its certificated area within a reasonable time and that the Commission will not tolerate the refusal of such service. Within 10 days from the date of the Commission vote, the applicant should file a proposed customer notice and a revised tariff reflecting its approved rates and charges for staff's review. The approved rates and charges should be effective for service rendered as of the stamped approval date on the tariff sheets pursuant to Rule 25-30.475(1), F.A.C. The rates should not be implemented until staff verifies that the tariff sheets are consistent with the Commission decision and the proposed customer notice is adequate. The utility should provide proof of the date the staff-approved notice was given within 10 days after the date of notice. A return on equity of 8.88% plus or minus 100 basis points should be approved. (Brady, Redemann)

Staff Analysis: The applicant originally requested recovery of approximately \$2.5 million in plant and operating expenses. Upon obtaining legal counsel, the applicant asked that rate base not be established due to lack of original source documentation. Instead, the applicant requested a rate of \$28.88 per month per connection based on \$66,000 in expenses and a \$30,000 return on investment. Staff previously filed the following recommendation on Gistro's rates and charges for the April 4, 2006, agenda conference. While rate base has not been updated since last spring, staff believes that the information used is still reasonable for setting initial rates and charges. The applicant's proposed and staff's recommended revenue requirement, service rate, and service availability charge are discussed below.

RATE BASE

Utility-Plant-In-Service (UPIS). Staff determined the approximate original cost of the collection lines to be \$247,122, based on system maps and engineering cost estimates for similarly sized and aged facilities. In addition, the application contained a filing fee of \$750 pursuant to Rule 25-30.020, Florida Administrative Code, and an estimate of \$1,500 to establish Gistro's books and records pursuant to the NARUC uniform system of accounts. Staff believes these costs are reasonable and should be included in UPIS. Also, the applicant provided invoices for approximately \$21,000 in legal costs incurred from March 2004 through December 2005. Staff reviewed the invoices and determined that approximately one-third represent costs specifically related to establishing Gistro and filing for a certificate. Therefore, staff recommends that \$7,000 in legal costs is reasonable and should be included in rate base. The applicant provided documentation of plant replacements in the amount of \$4,400 for receiving wells and \$6,355 for pumping stations. Staff has reviewed the documentation and believes the costs are reasonable and should be included in UPIS. Therefore, staff recommends that UPIS as of December 31, 2005, is \$267,127.

Accumulated Depreciation. Staff calculated accumulated depreciation balances using the guidelines for average service lives as set forth in Rule 25-30.140, Florida Administrative Code. Based on those calculations, staff recommends that accumulated depreciation as of December 31, 2005, is \$150,563.

Contributions in Aid of Construction (CIAC). The applicant did not provide evidence to show that the cost of the collection system was not written off to costs of goods sold on the developer's tax returns despite numerous requests for copies of the developer's tax returns. Therefore, staff recommends that the estimated original cost of the lines of \$247,122 be imputed as CIAC, pursuant to Rule 25-30.570, Florida Administrative Code.

Amortization of CIAC. Based on the guidelines for average service lives as set forth in Rule 25-30.140, Florida Administrative Code, staff recommends that amortization of CIAC is \$149,403, as of December 31, 2005.

Rate Base Summary. Staff recommends that rate base as of December 31, 2005, is \$18,845. Staff's calculation of rate base and recommended account balances for UPIS and accumulated depreciation are shown on Schedule 1. The schedule of rate base is for informational purposes and is not intended to formally establish rate base. This is consistent with Commission practice in original certificate applications.

RETURN ON INVESTMENT

The applicant requested a \$30,000 return on investment, but provided no basis for the request. The applicant has stated that the utility has no debt. Therefore, pursuant to the Commission's leverage graph formula in effect as of December 31, 2005,¹⁷ the applicant should be allowed to earn an 8.88% return on equity. Based on staff's recommended rate base of \$18,845, a return on equity of \$1,673 should be included in the Gistro's revenue requirement for setting initial rates. Further staff recommends that the Commission set Gistro's authorized return on equity at 8.88% with a range of plus or minus 100 basis points.

REVENUE REQUIREMENT

Operating and Maintenance Expense. A comparison of the applicant's proposed and staff's recommended annual revenue, O&M expenses, and return on investment is shown on Schedule 2. The applicant's proposed annual revenue requirement of \$96,000 is based on proposed O&M expenses of \$66,000 and a proposed return on investment of \$30,000.

Salary and Wages—Officer (703). The applicant requested \$18,000 per year in salary and wages based on an estimate of approximately 15 hours per week spent administering and managing the collection system. Since the applicant's O&M expense includes contract services for maintenance and accounting and billing, staff recommends that the applicant's salary be based on 20 hours per month at \$25.00 per hour for checking the lift stations, responding to

¹⁷ Order No. PSC-05-0680-PAA-WS, issued June 20, 2005, in Docket No. 050006-WS, In Re: Water and wastewater industry annual reestablishment of authorized range of return on common equity for water and wastewater utilities pursuant to Section 367.081(4)(f), F.S.

customers, coordinating consultant work (accounting, maintenance, billing), and generally running the company. Therefore, staff recommends that the appropriate amount for salary and wages is \$6,000.

Purchased Power (715). The applicant requested an annual amount of \$2,000 for purchased power. Staff recommends \$1,600 for purchased power be approved based on the average monthly kilowatt hours for both lift stations at estimated 2006 electric rates.

Material and Supplies (720). The applicant requested an annual amount of \$15,000 to maintain the lines and lift stations. Because the lift stations have recently been substantially replaced, staff recommends that \$2,500 is a reasonable amount for material and supplies.

Contract Services—Professional (731). The applicant provided an annual estimate of \$4,912 for billing, bookkeeping, and annual regulatory filings. The applicant's estimated billing cost of \$1,662 was based on \$1.50 per bill per quarter for 277 connections. The estimated annual costs of \$2,000 for bookkeeping and \$1,250 for annual regulatory filings were provided by the accounting firm the applicant intends to hire for these purposes. Staff believes that all these costs are reasonable and recommends that \$4,912 be approved for professional contract services.

Contract Services—Other (736). The applicant requested an annual amount of \$4,000 for contract services to maintain the master lift station. Staff recommends \$2,280 be allowed based on the applicant's contract service costs of \$190 per month.

Miscellaneous Expenses (775). The applicant originally requested an annual amount of \$20,000 for office work and supplies, which included the cost of billing, plus \$7,000 in unspecified costs. Subsequently, the applicant provided a specific amount of \$4,912 for professional billing services, as described above. Staff assumes that the applicant intends for the remaining \$22,088 in office work and supplies and unspecified costs to be considered miscellaneous expenses. However, the applicant did not provide any basis for these costs. Absent cost justification, staff believes that \$500 is a reasonable amount for miscellaneous expenses.

Depreciation Expense. Staff recommends that an annual depreciation expense of \$7,780 be included in revenue requirement. The amount is calculated based on the guideline depreciation rates in Rule 25-30.140, Florida Administrative Code.

Amortization Expense. Staff recommends that an annual amortization expense of (\$6,949) be included in the revenue requirement to reflect the amortization of CIAC based on the guideline rates in Rule 25-30.140, Florida Administrative Code.

Taxes Other Than Income. Staff recommends that an annual amount of \$955 for taxes other than income be included in Gistro's revenue requirement. This amount is based on estimated annual RAFs of 4.5% on staff's proposed revenue requirement of \$21,251.

Revenue Requirement Summary. As described above, staff's recommended annual revenue requirement of \$21,251 is based on operating and maintenance expenses, depreciation

expenses, amortization expense, and taxes other than income. A comparison of the applicant's proposed and staff's recommended annual revenue requirement is shown on Schedule 2.

WASTEWATER SERVICE RATE

The applicant requested a wastewater service rate of \$86.64 per quarter (\$28.88 per month) per connection. The applicant's rate was based on an annual revenue requirement of \$96,000 and 277 connections. Based on an annual revenue requirement of \$21,251, staff recommends that a rate of \$19.18 per quarter (\$6.39 per month) be approved. Staff notes that the customers will also be paying BSU for wastewater treatment service at the same rate it charges other customers where BSU owns and maintains the collection system.

SERVICE AVAILABILITY CHARGE

The applicant originally requested that a service availability charge not be established and staff concurred. Pursuant to the guidelines in Rule 25-30.580, Florida Administrative Code, the minimum amount of CIAC should not be less than the percentage of facilities and plant represented by the wastewater collection system. In the case of Gistro, the wastewater collection system represents \$257,877 out of total UPIS of \$267,127, or 96.5%. Therefore, the minimum guideline amount of CIAC has been met and no service availability charge should be established.

Subsequent to deferral of staff's recommendation on this matter from the Commission's April 4, 2006, agenda conference, the applicant proposed to require persons wishing to connect to the system to purchase stock in Gistro. In Issue 1, staff recommends that such a requirement is a form of compensation for service availability. If the Commission concurs that no service availability charge should be established, then staff recommends that the applicant be put on notice that he may not require persons wishing to connect to the system to purchase stock in Gistro. Moreover, the applicant should also be put on notice that, pursuant to Section 367.111(1), Florida Statutes, the utility is required to provide service to its certificated area within a reasonable time and that the Commission will not tolerate the refusal of such service.

CONCLUSION

Staff recommends that a quarterly wastewater service rate of \$19.18 per residential connection should be approved. The applicant should be required to charge the approved rate until authorized to change by the Commission in a subsequent proceeding. The applicant should be put on notice that he may not require persons wishing to connect to the collection system to purchase stock in Gistro. The applicant should also be put on notice that, pursuant to Section 367.111(1), Florida Statutes, the utility is required to provide service to its certificated area within a reasonable time and that the Commission will not tolerate the refusal of such service. Within 10 days from the date of the Commission vote, the applicant should file a proposed notice of its Commission-approved wastewater service rate for staff's review. The notice should indicate that the rate is subject to a 21-day protest period from the date of the order and specify the time-frame and manner by which any person whose substantial interests are affected by the action may file a petition for a formal proceeding. Within 10 days from the date of the Commission vote, the applicant should file a proposed customer notice and a revised tariff reflecting its approved rates and charges for staff's review. The approved rates and charges

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should be effective for service rendered as of the stamped approval date on the tariff sheets pursuant to Rule 25-30.475(1), F.A.C. The rates should not be implemented until staff verifies that the tariff sheets are consistent with the Commission decision and the proposed customer notice is adequate. The utility should provide proof of the date the staff-approved notice was given within 10 days after the date of notice. A return on equity of 8.88% plus or minus 100 basis points should be approved.

Issue 4: If the Commission grants Gistro, Inc. a certificate of authorization, what are the appropriate miscellaneous service charges?

Recommendation: The Commission's standard miscellaneous wastewater services charges, as described in staff's analysis, should be approved. In addition, a \$5.00 late payment charge is reasonable and should be approved. These charges should become effective on or after the stamped approval date, pursuant to Rule 25-30.475, Florida Administrative Code, and should be included in the notice described in Issue 3. (Brady)

Staff Analysis: The applicant has requested the Commission's standard miscellaneous wastewater service charges of \$15.00 for initial connection; \$15.00 for normal reconnection; actual cost for violation reconnection; and \$10.00 for premise visit in lieu of disconnection. Since Gistro does not provide water service, the cost for violation reconnection will include the cost to dig up and cap the line and then reverse the process upon verification of payment. As such, the applicant has indicated that he only intends to disconnect service for extreme cases of non-payment. Instead, the applicant has requested that the Commission approve a \$5.00 late payment charge to discourage delinquent payment. Staff believes this request is reasonable and the amount is consistent with recent Commission decisions.¹⁸

Based on the above, staff recommends that the Commission's standard miscellaneous wastewater service charges and a \$5.00 late payment charge are reasonable and should be approved. These charges should become effective on or after the stamped approval date, pursuant to Rule 25-30.475, Florida Administrative Code, and should be included in the notice described in Issue 3.

¹⁸ Order No. PSC-06-0170A-PAA-WS, issued March 9, 2006, in Docket No. 050281-WS, In Re: Application for increase in water and wastewater rates in Volusia County by Plantation Bay Utility Company.

Issue 5: If the Commission grants Gistro, Inc. a certificate of authorization, should the approved rates be implemented on a temporary basis, subject to refund with interest, in the event of a protest?

Recommendation: Yes. In the event of a protest, the applicant should be authorized to implement the approved rates on a temporary basis, subject to refund, pending the final outcome of this proceeding. Should the final rates be lower than the temporary rates, the applicant should be required to refund the difference, with interest, pursuant to Rule 25-30.360, Florida Administrative Code. Prior to the implementation of any temporary rates, the applicant should be required to provide evidence of security as described in staff's analysis. In addition, after the temporary rates are in effect, pursuant to Rule 25-30.360(6), Florida Administrative Code, the applicant should file monthly reports no later than the 20th of each month indicating the monthly and total amount of money that was subject to refund at the end of the preceding month until the final order is issued. The monthly reports should also indicate the status of the security being used to guarantee repayment of any potential refund. (Brady, Gervasi)

Staff Analysis: This recommendation proposes an initial wastewater service rate of \$19.18 per quarter and miscellaneous service charges. A timely protest might delay the implementation of rates. Therefore, in the event of a protest, staff recommends that the Commission authorize the applicant to implement the approved proposed agency action rates on a temporary basis, pending the final outcome of this proceeding. If the final rates are lower than the temporary rates, the applicant should be required to refund the difference, with interest, pursuant to Rule 25-30.360, Florida Administrative Code.

In staff-assisted rate cases, Section 367.0814(7), Florida Statutes, authorizes the Commission to provide for the collection of temporary rates, subject to refund with interest, in the event of a protest or an appeal by a party other than the utility. In file and suspend rate cases processed under the proposed agency action procedure, if a protest is filed by a party other than the utility, Section 367.081(8), Florida Statutes, authorizes the utility to place the requested rates into effect under bond, escrow, or corporate undertaking subject to refund, upon notice to the Commission and upon filing the appropriate tariffs. The Commission has recognized in those types of cases that a protest might delay what may be a justified rate increase resulting in an unrecoverable loss of revenue to the utility.

Staff believes that the same logic applies here. Although Section 367.045, Florida Statutes, does not expressly provide for such a vehicle for certification dockets, the Commission has found in other certification cases that Section 367.011(3), Florida Statutes, provides the Commission the implicit authority to approve temporary rates, subject to refund.¹⁹ Furthermore, Section 367.081(2)(a), Florida Statutes, provides that the Commission, either upon request or upon its own motion, shall fix rates which are just, reasonable, compensatory, and not unfairly discriminatory. For these reasons, staff believes that the applicant should be authorized to implement the approved rates on a temporary basis in the event of a protest. Should a refund ultimately be required, the refund should be with interest and undertaken in accordance with Rule 25-30.360, Florida Administrative Code.

¹⁹ See, e.g., Order No. PSC-95-0624-FOF-WU, issued May 22, 1995, in Docket No. 930892-WU, In Re: Application for amendment of Certificate No. 488-W in Marion County by Venture Associates Utilities Corp.

Prior to the implementation of any temporary rates, the applicant should be required to provide evidence of security in the form of a bond or letter of credit in amount of \$24,000. Staff would note that it is not recommending an escrow account as a security option. This option requires Commission approval to withdraw funds from the escrow account. Since the funds in the escrow account would represent Gistro's entire revenue, the escrow account option would require Commission approval for the utility to use any funds. Staff believes this would create an undue regulatory burden on both the applicant and the Commission.

The bond should contain wording that it will be renewed annually until the final order of the Commission addressing any refund requirements. The letter of credit should contain the wording that it can only be revoked upon final order of the Commission addressing any refund requirements.

In no instance should the maintenance and administrative costs associated with the refund be borne by the customers. These costs are the responsibility of, and should be borne by, the applicant. Irrespective of the form of security chosen by the applicant, an account of all monies received in rates should be maintained by the applicant. If a refund is ultimately required, it should be paid with interest calculated pursuant to Rule 25-30.360, Florida Administrative Code. In addition, after the temporary rates are in effect, pursuant to Rule 25-30.360(6), Florida Administrative Code, the applicant should file monthly reports no later than the 20th of each month indicating the monthly and total amount of money subject to refund at the end of the preceding month until the final order is issued. The monthly reports should also indicate the status of the security being used to guarantee repayment of any potential refund.

In conclusion staff recommends that, in the event of a protest, the applicant should be authorized to implement the approved proposed rates on a temporary basis, subject to refund, pending the final outcome of this proceeding. Should the final rates be lower than the temporary rates, the applicant should be required to refund the difference, with interest, pursuant to Rule 25-30.360, Florida Administrative Code. Prior to the implementation of any temporary rates, the applicant should be required to provide evidence of security as described in staff's analysis. In addition, after the temporary rates are in effect, pursuant to Rule 25-30.360(6), Florida Administrative Code, the applicant should file monthly reports no later than the 20th of each month indicating the monthly and total amount of money that was subject to refund at the end of the preceding month until the final order is issued. The monthly reports should also indicate the status of the security being used to guarantee repayment of any potential refund.

Issue 6: Should this docket be closed?

Recommendation: If the Commission acknowledges the applicant's Notice of Withdrawal in Issue 1, no further action is necessary and the docket should be closed. If the Commission declines to acknowledge the applicant's Notice of Withdrawal, grants a certificate of authorization, sets initial rates and charges and no timely protest is received to the proposed agency action issues, the Order will become final upon the issuance of a Consummating Order. However, the docket should remain open pending receipt of a proposed notice reflecting the applicant's approved rates, a statement confirming that the notice has been given, a revised tariff, and an affidavit attesting that the books and records for Gistro have been established pursuant to the NARUC uniform system of accounts, and that the applicant is aware of his responsibility to timely file annual reports and remit RAFs for 2007 and in all future years. Upon receipt and verification of such documents, the docket should be administratively closed. If a timely protest to a proposed agency action issue is filed by a person whose interests are substantially affected, the docket should remain open in order to proceed to hearing. (Gervasi)

Staff Analysis: If the Commission acknowledges the applicant's Notice of Withdrawal in Issue 1, no further action is necessary and the docket should be closed. If the Commission declines to acknowledge the applicant's Notice of Withdrawal, grants a certificate of authorization, sets initial rates and charges, and no timely protest is received to the proposed agency action issues, the Order will become final upon the issuance of a Consummating Order. However, the docket should remain open pending receipt of a proposed notice reflecting the applicant's approved rates, a statement confirming that the notice has been given, a revised tariff, and an affidavit attesting that the books and records for Gistro have been established pursuant to the NARUC uniform system of accounts, and that the applicant is aware of his responsibility to timely file annual reports and remit RAFs for 2007 and in all future years. Upon receipt and verification of such documents, the docket should be administratively closed. If a timely protest to a proposed agency action issue is filed by a person whose interests are substantially affected, the docket should remain open in order to proceed to hearing.

GISTRO, INC.
Wastewater Service Territory
Lee County, Florida

Township 47 South, Range 25 East, Section 25

That portion of the North 1/2 of the Southeast 1/4 lying West of Southern Pines Drive, Section 25, Township 47 South, Range 25 East, Lee County, Florida.

Also described as:

The North 1/2 of the Southeast 1/4 of Section 25, Township 47 South, Range 25 East, less and except the following parcel: Commencing at the East 1/4 corner, also the Point of Beginning, thence run a distance of 540 feet due West, thence run South 9 degrees East a distance of 1350 feet, thence run 300 feet due East to the East line of said Section, thence run due North a distance of 1280 feet to the Point of Beginning.

FLORIDA PUBLIC SERVICE COMMISSION

authorizes

GISTRO, INC.

pursuant to

CERTIFICATE NUMBER 541-S

to provide wastewater service in Lee County in accordance with the provisions of Chapter 367, Florida Statutes, and the Rules, Regulations, and Orders of this Commission in the territory described by the Orders of this Commission. This authorization shall remain in force and effect until superseded, suspended, cancelled or revoked by Order of this Commission.

<u>Order Number</u>	<u>Date Issued</u>	<u>Docket Number</u>	<u>Filing Type</u>
*	*	020640-SU	Original Certificate

* Order Number and Date Issued to be provided at time of issuance.

GISTRO, INC.
Wastewater Rate Base
As of December 31, 2005

Description	Staff Recommended
Utility Plant in Service	\$ 267,127
Accumulated Depreciation	(150,563)
Contributions in Aid of Construction (CIAC)	(247,122)
Amortization of CIAC	<u>149,403</u>
Rate Base	\$ 18,845

GISTRO, INC.
Staff Recommended Wastewater Account Balances
As of December 31, 2005

Acct. No.	Account Name	Plant Balance	Accumulated Depreciation Balance
351	Organization	\$ 9,250	\$(260)
360	Collecting Sewers – Force	\$ 10,418	\$(8,299)
361	Collecting Sewers – Gravity	\$173,016	\$(101,974)
363	Services to Customers	\$ 63,688	\$(39,130)
370	Receiving Wells	\$ 4,400	\$(440)
371	Pumping Equipment	<u>\$ 6,355</u>	<u>\$(460)</u>
		\$267,127	\$(150,563)

GISTRO, INC.
Revenue Requirement

Description	Gistro Proposed	Staff Recommended
Revenue	\$ 96,000	\$21,251
O& M Expense		
Salaries and Wages—Officer	18,000	6,000
Purchased Power	2,000	1,600
Materials and Supplies	15,000	2,500
Contract Services—Professional	4,912	4,912
Contract Services—Other	4,000	2,280
Miscellaneous Expenses	<u>22,088</u>	<u>500</u>
Total O&M Expense	66,000	17,792
Depreciation Expense	0	7,780
Amortization Expense	0	(6,949)
Taxes Other Than Income	<u>0</u>	<u>955</u>
Return on Investment	\$ 30,000	\$ 1,673

GISTRO, INC.

Staff Recommended Rates and Charges

Quarterly Wastewater Service Rate

Quarterly Flat Rate (per residential connection)	\$19.18
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Miscellaneous Service Charges

Initial Connection	\$15.00
Normal Reconnection	\$15.00
Violation Reconnection	Actual Cost
Premises Visit (in lieu of disconnection)	\$10.00
Late Payment Charge	\$ 5.00