

# Holland & Knight

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COMMISSION  
CLERK

June 28, 2010

## Via Hand-Delivery

Ms. Ann Cole, Director  
Commission Clerk  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Betty Easley Conference Center, Room 110  
Tallahassee, FL 32399-0850

Re: *In Re: Petition of Aquarina Utility Association, Inc., For Order to Show Cause  
Against Service Management Systems, Inc., Docket No. 100318-WS*

Dear Ms. Cole:

On behalf of FI-Service Management, LLC, enclosed are the original and seven (7) copies of its Motion To Dismiss Aquarina Utility Association, Inc.'s Petition for Order to Show Cause for Failure to Properly Operate and Manage Water And Wastewater System or, Alternatively, Address Petition as a Complaint Under Rules 25-22.032 And 25-30.355.

For our records, please acknowledge your receipt of this filing on the enclosed copy of this letter. Thank you for your assistance with this filing.

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Sincerely,

HOLLAND & KNIGHT LLP

*D. Bruce May*  
D. Bruce May, Jr.

DBM:kjg  
Encls.

cc: Brian Armstrong  
Dennis Basile  
Anna Williams  
Patricia Daniel

(party added)  
6.29.10  
RM/McLean

DECLINING TO APPEAR  
05321 JUN 28 2010  
FPSC-CC-10-0017-0110

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In Re: Petition of Aquarina  
Utility Association, Inc., For  
Order to Show Cause Against  
Service Management Systems, Inc.

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Docket No. 100318-WS

Filed: June 28, 2010

**FL-SERVICE MANAGEMENT, LLC'S MOTION TO DISMISS  
AQUARINA UTILITY ASSOCIATION, INC.'S PETITION FOR ORDER TO SHOW  
CAUSE FOR FAILURE TO PROPERLY OPERATE AND MANAGE WATER AND  
WASTEWATER SYSTEM OR, ALTERNATIVELY, ADDRESS PETITION AS A  
COMPLAINT UNDER RULES 25-22.032 AND 25-30.355**

FL-Service Management, LLC, ("LLC"), by and through undersigned counsel and pursuant to Rule 28-106.204, Florida Administrative Code ("FAC"), respectfully requests that Aquarina Utility Association, Inc.'s Petition for Order to Show Cause Against Service Management Systems, Inc., for Failure to Properly Operate and Manage Waste and Wastewater System (the "Petition") be dismissed or, alternatively, treated as a complaint and addressed pursuant to Rules 25-22.032 and 25-30.355, FAC. In support of its Motion, LLC states :

**Summary**

1. The Association's attempt to use the Commission's show cause procedures against the LLC under these circumstances is improper and should be dismissed. The purpose of a show cause proceeding is to: (i) address specific instances where a utility knowingly refuses to comply with, or willfully violates, specific orders, rules, or statutes of the Commission, and (ii) bring the utility into compliance with those designated orders, rules and statutes. The Association's Petition identifies no specific orders, rules or statutes with which the LLC has refused to comply or is alleged to have violated. Instead, all of the concerns identified in

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FPSC-CONSUMER SERVICE

Petition are related to alleged non-compliance with the operational requirements of the Florida Department of Environmental Protection ("FDEP") and alleged "safety hazards" that are more appropriately addressed by local building and safety code authorities ("Local Enforcement Authorities"). Thus the Commission should dismiss the Petition and defer to the FDEP and the Local Enforcement Authorities to resolve the concerns. Alternatively, if the Commission is inclined to address the concerns raised in the Petition, those concerns are more effectively and cost-efficiently resolved through the Commission's complaint procedures rather than in a protracted and expensive show cause proceeding.

### **Background**

2. The water and wastewater treatment facilities referenced in the Petition were the subject of a foreclosure action filed by Compass Bank, which is pending in the Circuit Court of the Eighteenth Judicial Circuit in and for Brevard County, Florida titled *Compass Bank v. Service Management Systems, Inc., et al.*, (Case No. 05-2008-CA-61639) (the "Foreclosure Action"). On April 15, 2010, the LLC acquired ownership of certain real and personal property of Service Management Systems, Inc. ("SMS") by virtue of being the high bidder at the foreclosure sale and obtained title under the Certificate of Title recorded in Official Records Book 6148, page 1799 of the public records of Brevard County, Florida. Consequently, the LLC technically owns, and has retained an experienced operator to operate, the water and wastewater treatment utility facilities in Brevard County, Florida which were previously owned by SMS ("Utility Facilities").

3. During the course of the Foreclosure Action, the plaintiff, Compass Bank filed a motion for the appointment of a receiver to prevent waste and mismanagement of its collateral. The Aquarina Community Services Association, Inc. joined and supported the receiver motion.

At the recommendation of the Aquarina Community Services Association, Inc., Dennis Basile was appointed Receiver for the SMS assets in February 3, 2010. As stated above, Compass Bank has subsequently foreclosed on its interest in the Utility Facilities.<sup>1</sup> The utility has limited financial resources, but from the time its Receiver was appointed it has been making steady improvements to the Utility Facilities. Given its limited financial resources, however, the utility has made such improvements in a sequence that reflects the priorities of the community it serves, and has not been able to accomplish every needed repair at once. For instance, the first issue that the Receiver addressed after appointment was ensuring that there was sufficient water volume and pressure for fire hydrants in the community, which was successfully accomplished.

4. During the ongoing Foreclosure Action, Compass Bank and the LLC have been actively engaged in an effort to sell the Utility Facilities to a responsible buyer and have made several requests to counsel for the Aquarina Utility Association, Inc. (the "Association") to submit a written purchase proposal. To date, Compass Bank and the LLC have received no written proposal from the Association to acquire the Utility Facilities.

5. The Association has now filed its Petition requesting that the Commission issue an order requiring the utility to show cause why its rates should not be reduced due to alleged FDEP compliance and equipment problems.

#### **Argument**

6. Under the circumstances described above, the Association's attempt to use the Commission's show cause procedures should be disallowed. The Commission has consistently explained that the purpose of a show cause proceeding is (i) to address specific instances where a utility knowingly refuses to comply with, or willingly violates, specific orders, rules, or statutes

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<sup>1</sup> The Receiver is diligently preparing a final report to take the property out of receivership. Accordingly, the LLC has not yet filed documentation of the transfer with the Commission but intends to do so as soon as the Receiver's final report is finalized.

of the Commission, and (ii) bring the utility into compliance with those designated orders, rules and statutes. *See* Section 367.161, Florida Statutes; *In re: Application for transfer of Certificates Nos. 277-W and 223-S in Seminole county from Alafaya Palm Valley Associates, Ltd to CWS Communities LP, d/b/a Palm Valley*, 00 F.P.S.C. 9:252, Docket No. 991984-WS, Order No. PSC-00-1675-PAA-WS (September 19, 2000); *In re: Application for transfer of facilities and Certificate No. 424-W in Highlands County from Lake Josephine Water to AquaSource Utility, Inc.*, 00 F.P.S.C. 7:382, Docket No. 991001-WU, Order No. PSC-00-1389-PAA-WU (July 31, 2000); *In re: Request for authorization, pursuant to Rule 25-7.015, F.A.C., to keep records out of state, by City Gas Company of Florida*, 98 F.P.S.C. 12:10, Docket No. 981039-GU, Order No. PSC-98-1594-FOF-GU (December 1, 1998). The Petition completely fails to identify any specific orders, rules or statutes with which the LLC has knowingly refused to comply or which the LLC willfully violated.<sup>2</sup> Instead, the Petition makes several unsupported general allegations that the utility is “noncompliant” with FDEP’s wastewater treatment requirements and that there are “safety hazards” associated with the utility’s “clarifier arm”, a catwalk above the utility’s wastewater tank, and an oil storage tank. The LLC respectfully submits that these alleged “problems” are not the proper basis for the Commission to initiate a protracted show cause proceeding. Indeed, all of the concerns identified in the Petition are subject to the primary regulatory control of the FDEP and the relevant Local Enforcement Authorities.

7. Furthermore, the Petition fails to accurately apprise the Commission of actions taken by the utility to address the Association’s concerns. For example, the LLC has been steadily addressing the repair items noted in the January 13, 2010 letter from the FDEP, which

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<sup>2</sup> Indeed, the only order, rule or statute referenced in the Petition is a singular reference to Section 367.081(2)(a)(1) [which sets forth the Commission’s general authority to establish rates] and Section 367.0822 [which sets forth the Commission’s general authority to conduct limited proceedings]. However, the Petition makes no allegations that the LLC violated either of those statutes nor could it.

the Association raises in paragraph 6 of the Petition. The concerns raised in the FDEP letter primarily relate to back-up components that do not become an issue unless and until the primary component fails. The LLC and the Receiver recognize the importance of repairing these issues, and have been working on them in their order of importance. The FDEP can take additional enforcement steps if it believes otherwise.

8. The LLC and the Receiver are particularly focused on repairing the “clarifying arm,” which is an issue addressed in the FDEP letter and in the Association’s Petition. The clarifying arm is a large, motor-driven piece of equipment that ordinarily operates to stir the contents at the bottom of a 20-foot-deep wastewater tank. Its repair is expensive and difficult. In particular, the repair requires draining the entire tank into numerous catch basins, removing those contents, and shutting down the entire plant during the course of the repair. If it is not done correctly the first time, it must be redone completely. The LLC and the Receiver have been taking all prudent steps to make this repair. In particular, a third-party vendor’s repair of the motor and gearbox was just completed on June 22, 2010. In any event, the absence of the clarifying arm has not adversely affected the utility’s ability to comply with relevant wastewater and water quality standards.

9. The other concerns raised by the Association address “safety hazards” to persons who might be walking on a catwalk above the wastewater tank. But this is a working plant, and the LLC acknowledges that it is in the process of repairing the clarifying arm. Even if any of these additional “hazards” were present at the time of the Association’s unauthorized inspection, they do not indicate anything improper.<sup>3</sup> The only real hazard here is the Association’s

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<sup>3</sup> There may have been a board missing because employees were working on a component. The hose and sprinkler laying across was being used as an additional means, in lieu of the clarifying arm, to disperse solids in the tank, not in lieu of proper aeration. The LLC and the Receiver are unaware of what alleged pipe may have been on the catwalk at the time of the Association’s trespass inspection. The clarifier arm is a large piece of equipment that

unauthorized inspection of the facility. While the Association quoted an email from the Receiver in paragraph 8 of the Petition, that excerpt excluded the Receiver's request that those persons stop trespassing on private property. Finally, assuming for sake of argument that the alleged "safety hazards" are real, those issues are more properly addressed in proceedings before Local Enforcement Authorities and not in a show cause proceeding before the Commission.

10. The Petition also argues that the Receiver does not have adequate experience to run a plant of this type. The Receiver does not and never has claimed to be an expert in water and wastewater facilities. That is why the Receiver relies on an experienced operator, David Whiteside, to run the plant's operations. Paragraph 10 of the Petition itself quotes from Mr. Whiteside's statements, which expressly refer to his "experience." Those statements also expressly refer to the utility's need for an adequately funded budget to make needed repairs, although the Association inappositely offers them to argue that utility's rates should be cut.

11. The Association also asserts it worries about an underground fuel storage tank at the plant. The Receiver himself has only been made aware of the fuel tank issue in the last two months. He has diligently been in contact with an environmental specialist equipped to specifically address the permitting, removal and clean-up (if needed) of an underground fuel tank.

12. As noted above, FDEP could enforce its regulations with respect to the quality of drinking water or the effluent that the wastewater plant produces if those were outside of established standards.<sup>4</sup> Although the LLC acknowledges that the equipment issues raised in the FDEP letter need to be addressed, the Association has not alleged, and cannot allege, that these

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requires a crane to move safely. The expense of moving it immediately, in light of the fact that a repair will require moving it again, is not prudent.

<sup>4</sup> Likewise, the Local Enforcement Authorities could enforce their regulations if current operating conditions truly posed "safety hazards."

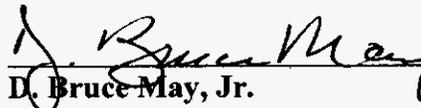
equipment issues have caused the quality of utility service delivered to them to fall below established standards. In sum, the Association has not shown and cannot show how these equipment issues have caused the utility to violate any specific order, rule or statute of the Commission that would give rise to a show cause order. The concerns identified in the Petition should be directed to the FDEP and the Local Enforcement Authorities.

13. In the event that the Commission is inclined not to defer to the FDEP and the Local Enforcement Authorities, the LLC alternatively requests that the Commission address the Association's concerns pursuant to its complaint resolution procedures set forth in Rules 25-22.032 and 25-30.355, Florida Administrative Code. The Commission's complaint procedures are expressly designed to resolve disputes "between regulated companies and their customers . . . as quickly, effectively, and inexpensively as possible." *See* Rule 25-22.032(1), Fla. Admin. Code. That process is particularly appropriate here where LLC is diligently working to repair and upgrade the Utility Facilities, and where an ancillary administrative litigation proceeding would divert crucial financial resources from ongoing efforts to improve those facilities. All of the concerns raised in the Petition can be effectively and cost efficiently addressed through the Commission's complaint procedures.

WHEREFORE, based upon the foregoing, the LLC respectfully requests that the Commission:

- 1) Dismiss the Petition for failure to state an appropriate cause of action; or alternatively,
- 2) Address the concerns identified in the Petition pursuant to its complaint resolution procedures set for in Rules 25-22.032 and 25-30.355, Florida Administrative Code.

Respectfully submitted,



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*Attorneys for FL-Service Management, LLC*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy was provided by U.S. Mail this 28<sup>th</sup> day of

June, 2010 to:

Aquarina Utility Association, Inc.  
Brian P. Armstrong  
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Tallahassee, FL 32308

Service Management Systems, Inc.  
Mr. Dennis Basile, Receiver  
826 Creel Street  
Melbourne, FL 32935-5992



Attorney

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