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July 12, 2003

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By Hand Delivery (Federal Express No. 8372 6900 0317)

Blanca Bayo
Commission Clerk and Administrative Services
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: In Re: Application of Farnton Water Resources, LLC for original Water Certificate
in Volusia and Brevard Counties, Florida
Docket No. 021256-WU

Dear Ms. Bayo:

This firm represents the City of Titusville in the above-referenced matter. Enclosed please find an original and two copies of the following:

- 06170-03 1. Response to Farnton's Objection to Request for Production, Motion to Compel, and Motion for In Camera Inspection;
- 06171-03 2. Response to Farnton's Objection to Interrogatories and Motion to Compel Answers to Interrogatories;

Please file the original of these pleadings in the PSC's file. Please forward one of the copies of these pleadings to Staff Personnel and please date stamp the second copy and return it to me in the self-addressed stamped envelope.

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Thank you for your attention to this matter. Please call me or my paralegal, Linda Foy, if you have any questions or comments.

Sincerely,

de la PARTE & GILBERT, P.A.

A handwritten signature in black ink, appearing to read "Charles R. Fletcher". The signature is fluid and cursive, with a prominent initial "C" and a long, sweeping horizontal stroke at the end.

Charles R. Fletcher

Enclosures

7. Any analysis, research or other documents regarding the types of customers Farmton anticipates to be served by the services proposed in its application for the Certificate.
8. Any analysis, research or other documents regarding customer growth within the Proposed Service Area.
9. Any analysis, research or other documents regarding the cost to provide the services proposed in its application for the Certificate.
10. Any analysis, research or other documents regarding the financial ability of Farmton to provide the services proposed in its application for the Certificate.
11. Any analysis, research or other documents regarding the technical ability of Farmton to provide the services proposed in its application for the Certificate.

2. On July 7, 2003, Farmton served its Objections to Titusville's Request for Production.

Farmton objects to Titusville's Request for Production essentially on the following three grounds:

- A. The scope of the request for production is "overly broad, unduly burdensome and not reasonably calculated to discovery of admissible evidence."
- B. Definitions employed in the Request for Production are overbroad, vague, and confusing.
- C. The Request for Production "calls for documents which are privileged, work product or afforded similar or analogous protections under Florida law." and violates "privileges Farmton enjoys with regard to its relations with its attorneys, accountants or other professionals . . . including . . . provisions of F.R.Civ.P. 1.280."

3. The title of Farmton's Objections suggests that it is also requesting an extension of time to respond, but no such request was specifically made in its Objections.

4. In compliance with Florida Administrative Code Rule 28-106.204, the undersigned counsel attempted to contact counsel for Farmton regarding this response and motion. Attempts were made by phone and e-mail, but no response has been received.

**Requested Documents Are Clearly
Within The Scope of Discovery**

5. Florida Rule of Civil Procedure 1.280(b) provides that "parties may obtain discovery regarding any matter, not privileged, that is related to the subject matter of the pending action." In the instant case, Farmton's application to the Public Service Commission ("Commission") for a Water Utility Service Area Original Certificate (the "Certificate") is the subject matter of the pending action. Titusville has a right to discover any and all evidence reasonably anticipated to lead to the discovery of admissible evidence regarding whether Farmton can comply with the conditions for approval of the Certificate, including the requirements in Florida Administrative Code Rules 25-30.030, 25-30.032, and 25-30.033, which are Commission rules governing the application for the Certificate.

6. Titusville's requests 1 through 3 simply request documents related to compliance with the Commission application requirements in Rules 25-30.030, 25-30.032, and 25-30.033. Requests 4 through 11 more specifically request documents related to specific information required in Rule 25-30.033(1). Documents related whether Farmton gave appropriate notice to effected parties (Rule 25-30.030), followed appropriate application procedures (Rule 25-30.032), and fully and accurately provided the information required to demonstrate entitlement to the Certificate (Rule 25-30.033), are directly "related to the subject matter of the pending action" and within the scope of discovery in Florida Rule of Civil Procedure 1.280(b). Titusville has a right to any and all documents relevant to Farmton's ability to comply with these requirements, unless protected by an applicable privilege.

7. Under the Uniform Rules of Procedure in Chapter 28-106, Florida Administrative Code, Titusville has a right to discovery as provided in Florida Rules of Civil Procedure. See Fla. Admin. Code Rule 28-106.206. Farmton objects to Titusville's Request for Production simply because it

employs a definition of "documents" designed to include all relevant materials within the scope of Florida Rule of Civil Procedure 1.350(a). Farmton contends that this definition is overbroad. This objection is specious and without merit. Titusville has a right to all documents within the scope of discovery in Florida Rules of Civil Procedure 1.280(b) and 1.350(a) that are not otherwise privileged or protected from discovery.

Titusville's Request is Not Unduly Burdensome

8. Titusville's request for production is not overly burdensome. As noted above, Titusville's Request for Production closely tracks the Commission's rule requirements. The documents requested by Titusville go directly to the ultimate issue of the pending action: whether Farmton can satisfy the requirements for the Certificate as stated in the Commission's rules. These documents are essential for Titusville to prepare its case for hearing. The purposes of the rules of discovery are to "eliminate surprise, encourage settlement and assist parties in arriving at just results." Zuberbuhler v. Division of Administration, 344 So. 2d 1304, 1307 (Fla. 2d DCA 1977). Failure to allow Titusville timely access to documents that go to the very heart of the pending action will prevent Titusville from fully and effectively preparing for hearing and would frustrate the purposes of the discovery process.

9. Farmton is required under Commission rules to address in its application each of the topics on which Titusville requested documents be produced. Titusville has not requested that Farmton prepare any analysis or compellations not otherwise prepared. The mere fact that it may cost Farmton time or money to comply with the discovery request does not mean that it is unduly burdensome.

10. In considering whether a discovery request is unduly burdensome, the Hearing Officer should "weigh the relevance of the information sought against burdensomeness of the request."

Krypton Broadcasting of Jacksonville v. MGM Pathe Communications Co. 629 So. 2d 852, 855 (Fla. 1st DCA 1993). In the instant case, the documents sought by Titusville go to the ultimate facts of the pending action in that the requested information is focused on Farmton's ability to comply with the Commission's rules governing application for the Certificate. The burden on Farmton in complying with the request is minimal because each request for production is focused on an issue Farmton is already required to address under the Commission's rules.

Titusville's Use of Definitions is not Overbroad, Vague, or Confusing

11. Farmton generally objects to Titusville's definitions of the words "its" and "documents." Titusville respectfully submits to the Hearing Officer that these objections are red herrings intended to deflect attention from the real issue, which is Farmton's refusal to comply with a valid discovery request. Opposing counsel is using tortured interpretations to plead confusion and avoid producing the documents Titusville has a right to inspect. Farmton's objections to the definitions employed in Titusville's Request for Production should be rejected.

12. Titusville's definition of "its" is not circular, but is intended to clearly state that the discovery request is intended to include Farmton, its employees, agents and other such representatives of Farmton as a creative attorney may imagine to avoid discovery and increase the cost of parties seeking discovery. Even if opposing counsel did not understand the use of the definition, he points out that he did not believe it was used in the actual requests for production. If the defined term was not used in the requests for production, then there can be no harm in opposing counsel's purported confusion by the term.

13. It is irrelevant if opposing counsel reads into the definition of "its" entities that are not parties to the proceeding. Farmton is entitled to information from employees, agents, servants, and past employees when such information is related to the scope of their employment by Farmton.

14. Farmton further complains that Titusville's definition of the term "documents" is overbroad, vague, and confusing, and for this reason Farmton refuses to produce materials outside the scope of what it believes to be a reasonable definition of the term. This is an absurd position. Even the Florida Rules of Civil Procedure recognize that in an age of computer modeling, the internet, and digital imaging, that information relevant to a proceeding will not be limited to paper "documents" printed on 8" x 11" sheets. Florida Rule of Civil Procedure 1.350(a) defines the term documents to include "writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which data can be obtained." It would be a waste of the resources of the parties and the Commission to require parties to submit separate requests for any additional information that is discoverable, but is in an electronic or other form not within the common usage of the term "documents."

15. Farmton's assertion that it can unilaterally redefine the scope of discovery and the timing of its response to serve its purposes is also absurd. The Florida Rules of Civil Procedure set a detailed and specific process for complying with discovery requests, and Farmton should be required to comply with these rules. See F.R.Civ.P. 1.280 and 1.350. Farmton should be ordered to timely comply with the rules of discovery and produce all responsive "documents" as that term is defined in Titusville's Request for Production.

Farmton Failed to Properly Object to Request for Production

16. Undoubtedly some documents related to Farmton's application for the Certificate might be privileged attorney-client communication, work product, or otherwise privileged. However, this does not give Farmton the right to speciously reject Titusville's discovery request in total. Farmton's Objections are not sufficiently specific, fail to comply with the requirements of Florida

Rule of Civil Procedure 1.280(5), and should be rejected by the Hearing Officer. Florida Rule of Civil Procedure 1.280(5) requires that objections to discovery must be stated with specificity:

(5) *Claims of Privilege or Protection of Trial Preparation Materials.* When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

17. A Florida District Court of Appeal has consistently found that failure to properly assert privileges pursuant to Florida Rule of Civil Procedure 1.280(5) waves any such privilege. Omega Consulting Group, Inc. v. Templeton, 805 So. 2d 1058, 1060 (Fla. 4th DCA 2002); TIG Ins. Corp. of Am. v. Johnson, 799 So. 2d 339, 341-2 (Fla. 4th DCA 2001). In these cases attorney-client privilege was waived because the objecting party did not prepare a privilege log with sufficient detail. Omega Consulting Group, 805 So. 2d at 1060; TIG Ins. Corp., 799 So. 2d at 341-2. In the case of Farmton's Objections, no privilege log whatsoever was prepared.

18. Farmton also has the burden of demonstrating that the asserted privilege is applicable to the withheld documents. Paskoski v. Johnson, 626 So.2d 338 (4th DCA 1993). Farmton has made no such showing.

19. Farmton should be ordered to fully comply with Titusville's Request for Production, or in the alternative, Farmton should be ordered to produce all responsive documents to the Hearing Officer for an *in camera* inspection. Such an *in camera* inspection is required for the Hearing Officer to determine the applicability of the asserted privilege. Snyder v. Value Rent-A-Car, 736 So. 2d 780 (Fla. 4th DCA 1993); Paskoski, 626 So.2d at 339.

Farmton Cannot Use Privilege as a Sword

20. When a party asserts a claim or a defense, the party cannot use privilege to prevent discovery of ultimate facts necessary to prove or disprove the claim or defense. Savino v. Luciano, 92 So. 2d 817, 819 (Fla. 1975); First Southern Baptist Church v. First National Bank, 610 So. 2d 452, 454 (Fla. 1st DCA 1992) ("If a party 'has injected into the litigation issues going to the very heart of the litigation,' such party cannot avoid discovery into such issues by invoking attorney-client privilege"). Farmton has asserted a claim of entitlement to the Certificate through its application for the Certificate. Titusville has a right to all evidence supporting Farmton's claim of entitlement. To the extent that Farmton chooses to demonstrate compliance with documents it believes to be privileged, these documents must be produced and subjected to scrutiny by opposing parties.

21. Farmton should not be allowed to use privilege to prevent discovery of evidence, and then be allowed to rely on the "secret" evidence at hearing. This would allow Farmton to use the privilege to block discovery of any unfavorable evidence, while selectively offering favorable evidence at hearing. See Johnson v. State, 608 So. 2d 4, 10 (Fla. 1992) (ruling that a defendant may not use privilege "selectively to elicit favorable testimony and to block unfavorable testimony"). Privilege may be used as a shield, but not as a sword. See Rollins Burdick Hunter of New York, Inc. v. Euroclassics Ltd., Inc., 502 So. 2d 959, 962 (Fla. 3d DCA 1987) (prohibiting use of the Fifth Amendment privilege against self-incrimination to block discovery of evidence essential to opposing party's defense). Accordingly, any documents to be relied upon by Farmton at hearing should be subject to discovery and scrutiny by opposing parties.

WHEREFORE, Titusville respectfully requests the presiding officer to enter an order compelling Farmton to produce the requested documents, or in the alternative, conduct an *in camera* inspection of the withheld documents to determine if such documents have been properly withheld.

Respectfully Submitted,

de la PARTE & GILBERT, P.A.



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Co-Counsel for City of Titusville, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Titusville's Response to Objection, Motion to Compel, and Motion for In Camera Inspection has been furnished by **Hand Federal Express* and U.S. Mail** this ____ day of July, 2003, to the following:

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John L. Whearton, Esq.
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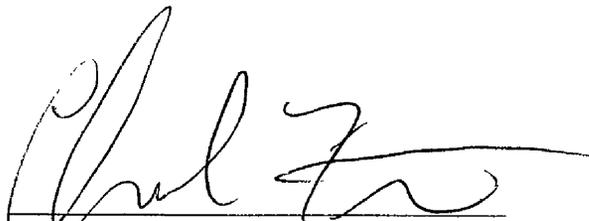
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