

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIRST DISTRICT

HERNANDO COUNTY,

Petitioner,

v.

Case No.: 090478-WS

THE FLORIDA PUBLIC
SERVICE COMMISSION,

DCA No. 1D10-1784

Respondent.

_____ /

PETITION FOR WRIT OF QUO WARRANTO

Petitioner, HERNANDO COUNTY ("the COUNTY"), by and through its undersigned counsel and pursuant to Fla. R. App. P. 9.100, hereby petitions the Court for the entry of a Writ of Quo Warranto to be directed to Respondent, FLORIDA PUBLIC SERVICE COMMISSION ("the PSC" or "the COMMISSION").

I. BASIS FOR INVOKING JURISDICTION

This Court has jurisdiction to issue a Writ of Quo Warranto under Fla. Const. Art. V, § 4(b)(3) and Fla. R. App. P. 9.030(b)(3). This Petition is properly filed as an original action in this Court, as the COMMISSION, a state agency, is exercising its

COM _____ regulatory power in excess of its statutorily-derived authority.¹ As this Court has

APA _____

ECR _____

GCL _____ ¹*Crist v. Florida Ass'n of Criminal Defense Lawyers*, 978 So.2d 134, 138

RAD _____ (Fla.2008); *State ex rel. Merrill v. Gerow*, 85 So. 144, 145 (1920).

SSC _____

ADM _____

OPC _____

CLK Peña

exclusive jurisdiction to adjudicate appeals from the COMMISSION, this Court is the proper forum to consider the instant Petition.²

The instant Petition has been timely filed. Petitions for writs of quo warranto are not included within Fla. R. App. P. 9.100(c)'s thirty-day jurisdictional time limit. Notwithstanding that exception, the COUNTY has filed the instant petition within thirty days of the PSC's amended order denying the COUNTY's motion to dismiss.

The facts presented by the instant petition justify relief by extraordinary writ. In *City of Cape Coral v. GAC Utilities, Inc.*, the Florida Supreme Court held that “[a]ny reasonable doubt as to the lawful existence of a particular power that is being exercised by the [PSC] must be resolved against the exercise thereof, **and the further exercise of the power should be arrested.**”³

II. QUESTION PRESENTED

In a “non-jurisdictional” county such as Hernando County, the PSC only possesses the authority to regulate water and wastewater utilities whose existing

²*Compare Northwest Fla. Water Management Dist. v. Department of Community Affairs*, 7 So.3d 1129, 1130 (Fla. 1st DCA 2009) (holding original writ jurisdiction follows appellate jurisdiction) *with* Fla. Stat. § 350.128(1) (“The District Court of Appeal, First District, shall, upon petition, review any other action of the commission.”)

³*City of Cape Coral v. GAC Utilities, Inc.*, 281 So.2d 493, 496 (Fla.1973) (Emphasis Added).

facilities cross the county's boundaries. Applicant, Skyland Utilities, LLC. ("Skyland") has applied to the PSC for permission to operate an integrated water and wastewater utility system in Pasco and Hernando Counties. Skyland, however, does not actually own, control, or operate any facilities in Pasco or Hernando Counties, let alone any infrastructure that traverses the border between those counties.

The Florida Supreme Court has held that the PSC should resolve all doubts about its jurisdiction against the exercise thereof. In light of that standard, did the PSC err by holding that it had jurisdiction to grant a certificate of authority to Skyland for the operation of a water and wastewater utility in Hernando County, even though no infrastructure of Skyland currently traverses any of Hernando County's geographic boundaries?

III. STATEMENT OF THE CASE & FACTS

A. STATEMENT OF THE CASE

1. THE LEGISLATURE HAS CREATED A TWO-TIERED REGULATORY SCHEME FOR WATER/WASTEWATER UTILITIES.

The Florida Legislature established a two-tiered regulatory scheme for water utilities in this state by enacting the "Water and Wastewater System Regulatory Law" (the "Water Regulatory Act").⁴

⁴The Water and Wastewater System Regulatory Law, Fla. Stat. Ch. 367.

As the first tier, the Legislature has granted the PSC the exclusive jurisdiction to regulate “all utility systems whose service transverses county boundaries.”⁵ The PSC therefore has “exclusive jurisdiction over each utility [that it regulates] with respect to its authority, service, and rates.”⁶

The second tier consists of intra-county utility systems, which can be regulated either by the applicable county or the PSC. Under the Water Regulatory Act, “the various counties of Florida retain jurisdiction to regulate water and wastewater utilities providing service to customers within the boundaries of each county.”⁷ Each county, however, has the option to cede its regulatory authority to the PSC by passing a resolution declaring that the county has voluntarily subjected itself to the Water Regulatory Act.⁸ Otherwise, each county “shall regulate the rates of all utilities in that county which would otherwise be subject to regulation by the [PSC].”⁹

⁵Fla. Stat. § 367.171(7). The statute uses the word “transverse,” traditionally an adjective, as an active verb. For purposes of consistency, this petition also uses “transverse” as an active verb.

⁶Fla. Stat. § 367.011(2).

⁷*Hernando County v. Florida Public Service Commission*, 685 So.2d 48, 50 (Fla. 1st DCA 1996).

⁸Fla. Stat. § 367.171(1).

⁹Fla. Stat. § 367.171(8).

2. **HERNANDO COUNTY IS A “NON-JURISDICTIONAL” COUNTY FOR THE PURPOSES OF THE WATER REGULATORY ACT.**

On April 5, 1994, the Hernando County Board of County Commissioners enacted a resolution making the COUNTY “non-jurisdictional.” In an Order dated June 9, 1994, the PSC acknowledged the COUNTY’s rescission of its 1969 grant of regulatory authority to the Commission.¹⁰

3. **THE PSC RULES THAT IT HAS EXCLUSIVE JURISDICTION TO REGULATE SOUTHERN STATES UTILITIES’ ACTIVITIES IN HERNANDO COUNTY.**

The COUNTY regulated only one private water/wastewater utility, Southern States Utilities, in 1994. Southern States Utilities, however, operated independent utility systems in several other counties.

In an Order dated July 21, 1995, the PSC found that Southern States Utilities’ operations constituted a single, inter-county system.¹¹ On that basis, the PSC held that it, not the COUNTY, possessed exclusive jurisdiction to regulate Southern States Utilities’ operations pursuant to Fla. Stat. § 376.171.¹²

¹⁰*See In Re: Request for Acknowledgment of Resolution Rescinding Florida Public Service Commission Jurisdiction over Private Water and Wastewater Utilities in Hernando County*, 1994 WL 269812 (Fla. PSC 1994).

¹¹*In Re: Southern States Utilities, Inc.*, 1995 WL 466804 (Fla. PSC 1995).

¹²*Id.*

The COUNTY subsequently appealed the PSC's order to the First District Court of Appeal.

4. THIS COURT REVERSES THE PSC.

In *Hernando County v. Florida Public Service Commission*,¹³ this Court reversed the holding of the PSC. The PSC had held that Fla. Stat. § 376.171(7) granted it exclusive jurisdiction over utility systems that physically provided water and wastewater services across county lines and utilities that operated individual facilities in multiple counties with a common governance/management structure. This Court reversed the PSC's order on two, alternative grounds.

First, the Court held that the definition of the term "service," as used in Section 376.171(7), included only the physical provision of water and wastewater to customers.¹⁴ The PSC had erred when it defined "service" as also including all of the administrative services necessary for the provision of water and wastewater services. While the Legislature could have defined "service" as including the provision of administrative services, it did not. Since "any reasonable doubt as to the lawful existence of a particular power being exercised by the [PSC] must be resolved against

¹³*Hernando County v. Florida Public Service Commission*, 685 So.2d 48 (Fla. 1st DCA 1996), *rehearing denied* (Fla. 1st DCA 1997).

¹⁴*Id* at 51.

the exercise thereof,” the Court concluded that the Legislature intentionally limited the definition of “service” in Section 376.171(7) to limit the PSC’s jurisdiction over utilities operating in non-jurisdictional counties.¹⁵ The Court therefore held that the “PSC erred in finding that SSU’s existing facilities form a system . . . without making any findings that specific facilities [were] operationally integrated with one another in utility service delivery.”¹⁶

Alternatively, the Court held that the order had to be reversed because the PSC had “misinterpreted and misapplied the portion of the statute requiring a showing that the services provided by the facilities ‘transversed county boundaries.’”¹⁷ The Court found that the plain meaning of “transverse” was “situated or lying across.”¹⁸ Accordingly, the Court held “that the requirements of [Section 376.171(7)] can only be satisfied by evidence that the facilities forming the asserted ‘system’ exist in **contiguous counties across which the service travels.**”¹⁹

¹⁵*Id* at 51. (Internal Quotations Omitted).

¹⁶*Id* at 52.

¹⁷*Id*.

¹⁸*Id* quoting THE AMERICAN HERITAGE COLLEGE DICTIONARY at 1438 (3rd ed. 1993).

¹⁹*Hernando County*, 685 So.2d at 52. (Emphasis Added).

B. STATEMENT OF THE FACTS

1. SKYLAND APPLIES TO THE PSC FOR A CERTIFICATE TO OPERATE A WATER AND WASTEWATER UTILITY IN HERNANDO COUNTY.

On or about October 16, 2009, a limited liability company named Skyland Utilities, LLC. (“Skyland”), filed an application with the Florida PSC for a certificate to operate a water/wastewater utility. The utility proposed by Skyland would serve approximately 4,089 acres situated in northeastern Pasco County and southeastern Hernando County.²⁰

Skyland’s application states that the approximately 791 acres of land in the proposed utility’s Hernando County service area is overwhelming rural in nature.²¹ For example, all but one of the affected parcels are designated as “Rural” on the Future Land Use Map of Hernando County’s Comprehensive Plan.²² Likewise, Skyland stated in its application that Florida Power and Light did not yet have sufficient power sources in the proposed service area to run water and wastewater facilities.²³

²⁰Appendix at 24.

²¹Appendix at 24.

²²Appendix at 19.

²³Appendix at 26.

Due to the limited demand for water/wastewater service in the proposed service area, Skyland stated in its application that it planned to construct the proposed utility in five phases.²⁴ Skyland proposed to construct the first, very modest phase between 2010 and 2015.²⁵

Importantly, Skyland explicitly stated in its application it would not be constructing any facilities that would traverse the Pasco-Hernando County line as part of Phase 1. Skyland stated that “[p]hysical interconnections will occur that traverse county lines [between Hernando and Pasco Counties] during future phases” of construction.²⁶ Furthermore, Skyland has not proposed any construction in Phase 1 on the only two contiguous parcels in the proposed service area that abut the county line.²⁷

Skyland further admits that its plans to construct any infrastructure that will actually transverse the Hernando and Pasco County border are extremely speculative as to when and how it might occur. While Skyland states in its application that “[t]he [construction of] future phases will begin upon the completion of Phase 1,” it also

²⁴Application at 17; *see also* Appendix at 25.

²⁵Appendix at 23.

²⁶Appendix at 22.

²⁷Appendix at 24.

states that “no conceptual plans [have been] developed as of this time for future development phases.”²⁸ Elsewhere in the application, Skyland admits that “Phases II through V [of the utility] have not been conceptually designed at this time”²⁹

2. HERNANDO COUNTY MOVES TO DISMISS SKYLAND’S APPLICATION.

The COUNTY moved to dismiss Skyland’s application. Since Skyland’s Application stated that the company had no actual plans to construct infrastructure traversing the Pasco/Hernando county line, the COUNTY argued that the PSC lacked subject-matter jurisdiction to consider the Application pursuant to Fla. Stat. § 376.171(7) and *Hernando County*.³⁰

Skyland and the PSC’s Office of General Counsel both subsequently filed memoranda opposing the motion to dismiss.³¹

3. THE PSC DENIES THE MOTION TO DISMISS.

After hearing oral argument on February 9, 2010, the PSC denied the COUNTY’s motion to dismiss in a written order dated March 1, 2010.³²

²⁸*Compare* Appendix at 23 *with* Appendix at 26.

²⁹Appendix at 23.

³⁰Appendix at 27-37.

³¹Appendix at 38-56.

³²Appendix at 88-96.

The Commission began its analysis by conceding that the COUNTY was non-jurisdictional pursuant to Fla. Stat. § 367.171(3). The PSC then determined that the aforementioned statute did not apply, as “Skyland is proposing to serve areas which would span both Hernando and Pasco Counties[;] [t]hus, the proposed service territory would transverse county boundaries.”³³

The PSC then rejected the COUNTY’s argument regarding Skyland’s admissions that it had no plans to construct any infrastructure traversing the boundaries of Hernando and Pasco Counties. The Commission noted that Fla. Stat. § 367.021(12)’s definition of “utility” includes those “proposing construction of a [water/wastewater] system.” The Commission then noted that Fla. Stat. § 367.021(11) defines a “system” as “facilities and land used or useful in providing service.” Applying the purported plain meaning of those statutory definitions, the PSC held it had exclusive jurisdiction to consider Skyland’s application, as Skyland “is proposing to construct a utility system whose service would transverse county boundaries, thereby causing the application to fall within our jurisdiction.”³⁴

³³Appendix at 93.

³⁴Appendix at 93.

The PSC interpreted this Court's opinion in *Hernando County v. Florida Public Service Commission* as being limited to "whether [the PSC] had jurisdiction pursuant to [Fla. Stat. § 367.171(7)] over a utility whose facilities were located in a number of non-contiguous counties throughout Florida."³⁵ According to the PSC, this Court held in *Hernando County* only "that jurisdiction under [Fla. Stat. § 367.171(7)] cannot be exclusively founded upon evidence that the company utilizes an umbrella organizational structure or a central hub of management offices."³⁶ The PSC's order made no mention of *Hernando County*'s holding "that the requirements of [Section 367.171(7)] statute can only be satisfied by evidence that the facilities forming the asserted 'system' exist in contiguous counties across which the service travels."³⁷ Accordingly, the PSC held that it did "not believe that *Hernando County* restricts the Commission's jurisdiction over Skyland's application."³⁸

The PSC further found that the adoption of the COUNTY's interpretation of Fla. Stat. § 367.171(7) would lead to an absurd result. "We do not believe that it would be logical, nor legally accurate, to assert that we do not have jurisdiction to

³⁵Appendix at 93.

³⁶Appendix at 94.

³⁷*Hernando County*, 685 So.2d at 52.

³⁸Appendix at 94.

consider the application for certification, but that we would have jurisdiction to subsequently regulate the system, once consummated, because it transverses county boundaries.”³⁹

In an order dated March 12, 2010, the PSC amended its prior order denying the COUNTY’s motion to dismiss.⁴⁰

IV. THE NATURE OF THE RELIEF SOUGHT

The nature of the relief sought by this petition is the issuance of a writ of quo warranto directing the PSC to demonstrate that it acted legally in exercising its authority within the jurisdictional limits of the COUNTY. Ultimately, the COUNTY seeks a determination by the Court that the PSC does not have subject-matter jurisdiction to consider Skyland’s application to operate a water/wastewater utility system within the COUNTY.

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³⁹Appendix at 95.

⁴⁰Appendix at 97-98.

V. ARGUMENT

A. THE PLAIN LANGUAGE AND CONTEXT OF THE WATER REGULATORY ACT DEMONSTRATE THAT THE PROVISION OF TRANS-COUNTY SERVICES BY A WATER/WASTEWATER UTILITY IS A PREREQUISITE TO THE PSC'S JURISDICTION TO REGULATE THAT UTILITY'S OPERATIONS IN A NONJURISDICTIONAL COUNTY.

While “the contemporaneous construction of a statute by the agency charged with its enforcement and interpretation is entitled to great weight,” courts will depart from the agency’s construction if it is clearly erroneous.⁴¹ In the instant action, this Court must reject the PSC’s interpretation of Fla. Stat. § 376.171(7) as it clearly contradicts both the plain meaning and the legislative context of the statute.

1. THE PSC FAILED TO APPLY THE PLAIN MEANING OF FLA. STAT. § 367.171(7).

Fla. Stat. § 367.171(7) states that “the [C]ommission shall have exclusive jurisdiction over all utility systems whose service transverses county boundaries, whether the counties involved are jurisdictional or nonjurisdictional.” In the proceedings below, the PSC held that the above-quoted provision provided it with jurisdiction to regulate water/wastewater utilities that either provide service across county borders or propose to provide such trans-county services.⁴² The PSC’s

⁴¹*E.g., PW Ventures, Inc. v. Nichols*, 533 So.2d 281, 283 (Fla.1988).

⁴²Appendix at 88-96.

construction of that provision must fail, however, because it cannot be squared with the text of the statute.

The Florida Supreme Court has held that "[t]he cardinal rule of statutory construction is that the courts will give a statute its plain and ordinary meaning."⁴³ The PSC, however, eschewed the plain meaning of the statute and applied principles of statutory construction. The PSC looked to Fla. Stat. § 367.021(12)'s definition of "utility." The PSC held that since Fla. Stat. § 367.021(12) defined a "utility" as including "proposed" utilities, the traversing of county borders by water or sewer lines required by Fla. Stat. § 167.171(7) may be proposed as well. Accordingly, the PSC, found that it had "subject matter jurisdiction to consider Skyland's application under Section 367.171(7) . . . [as t]he Utility is proposing to construct a utility system whose service would transverse county boundaries."⁴⁴

As Fla. Stat. § 376.171(7) is clear and unambiguous, the PSC's complex and convoluted construction of that provision must fail.⁴⁵

⁴³*Weber v. Dobbins*, 616 So.2d 956, 958 (Fla. 1993).

⁴⁴Appendix at 93.

⁴⁵*E.g., Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984). April 6, 2010

2. **THE PSC FAILED TO CORRECTLY APPLY THE RULES OF STATUTORY CONSTRUCTION.**

Even if the PSC was correct to resort to the rules of statutory construction, it erred in doing so. It is a basic premise of statutory construction that a specific provision will trump a general provision in the same statute.⁴⁶ Here, the general definition of “utility” contained in Fla. Stat. § 367.021(12) is trumped by the more specific requirement contained in Fla. Stat. § 367.171(7) mandating that the service must transverse county boundaries as a prerequisite to the PSC obtaining exclusive jurisdiction. “Transverse,” as used in the statute, is an active verb. If the Legislature had intended that the mere proposal to cross county boundaries at some point in the future was sufficient to establish PSC jurisdiction it would not have used the active phrase “whose service transverses” county boundaries in Fla. Stat. § 367.171(7).

Additional, the PSC failed to construe Fla. Stat. § 367.171(7) *in para materia* with the other subsections of the statute recognizing the right of counties to self-govern water utilities within their boundaries. Creating the two-tiered regulatory system is the sole reason for the statute’s existence. What the PSC terms “an absurd

⁴⁶*E.g., School Board of Palm Beach County v. Survivors Charter Schools, Inc.*, 3 So.3d 1220, 1233 (Fla. 2009) (“principle that specific statutes covering a particular subject area will control over a statute covering the same subject in general terms”); *Murray v. Mariner Health*, 994 So.2d 1051, 1061 (Fla. 2008) (“where two statutory provisions are in conflict, the specific provision controls the general provision”).

result” is actually the first principle of Fla. Stat. § 367.171. Otherwise, the rights given to counties in the statute are illusory. A utility cannot avoid local jurisdiction by merely promising to provide cross-county service – at some undefined point in the future - and defeat counties from exercising self-governance over local utilities.⁴⁷

B. THIS COURT HELD IN HERNANDO COUNTY V. PUBLIC SERVICE COMMISSION THAT THE PROVISION OF TRANS-COUNTY SERVICES BY A WATER/WASTEWATER UTILITY IS A PREREQUISITE TO THE PSC’S JURISDICTION TO REGULATE THAT UTILITY’S OPERATIONS IN A NONJURISDICTIONAL COUNTY.

According to the PSC, *Hernando County* only “held that jurisdiction under [Fla. Stat. § 367.171(7)] cannot be exclusively founded upon evidence that the [utility] utilizes an umbrella organizational structure or a central hub of management offices.”⁴⁸ The PSC’s interpretation of *Hernando County* is simply incorrect.

In *Hernando County*, this Court overruled the PSC’s ruling – that a holding company’s centralized structure and provision of administrative services for multiple, intra-county utilities constituted the provision of service that transverses county boundaries – on alternative grounds.

⁴⁷As the Florida Supreme Court has stated: "A second relevant rule of statutory construction is that a statutory provision will not be construed in such a way that it renders meaningless or absurd any other statutory provision." *Murray*, 994 So.2d at 1061.

⁴⁸Appendix at 94.

First, this Court held that the provision of administrative services (i.e. billing, human resources, governance, etc.) did not constitute the provision of “service,” as that term is used in Section 376.171(7).⁴⁹ The Legislature could have written a broader definition of “service,” but it did not. Accordingly, this Court held that the Legislature must have intentionally limited the definition of “service” in order to limit the PSC’s jurisdiction over utilities operating in non-jurisdictional counties.⁵⁰ This Court then further held that the “PSC erred in finding that [the holding company’s] existing facilities form a system . . . without making any findings that specific facilities [were] operationally integrated with one another in utility service delivery.”⁵¹

As an alternative ground, this Court held that the order had to be reversed because the PSC had “misinterpreted and misapplied the portion of the statute requiring a showing that the services provided by the facilities ‘transversed county boundaries.’”⁵² The Court found that the plain meaning of “transverse” was “situated

⁴⁹*Id* at 51.

⁵⁰*Id* at 51 quoting *City of Cape Coral v. GAC Utilities, Inc.*, 281 So.2d 493, 496 (Fla. 1973).

⁵¹*Id* at 52.

⁵²*Id.*

or lying across.”⁵³ Accordingly, the Court held “that the requirements of [Section 376.171(7)] statute can only be satisfied by evidence that the facilities forming the asserted ‘system’ exist **in contiguous counties across which the service travels.**”⁵⁴

The PSC simply ignored this Court’s alternative holding in *Hernando County* when denying the COUNTY’s motion to dismiss.

The Florida Supreme Court unambiguously held in *Costarell v. Florida Unemployment Appeals Commission*⁵⁵ that an administrative agency must follow the interpretations of statutes made by the courts of this state.⁵⁶ Like trial courts, if there is a controlling interpretation by a district court of appeal in this state, [an administrative agency] must follow it”⁵⁷ Accordingly, the PSC had to apply this Court’s second holding in *Hernando County*. The agency did not have the option to ignore it.

⁵³*Id* quoting THE AMERICAN HERITAGE COLLEGE DICTIONARY at 1438 (3rd ed. 1993).

⁵⁴*Hernando County*, 685 So.2d at 52. (Emphasis Added).

⁵⁵*Costarell v. Florida Unemployment Appeals Commission*, 916 So.2d 778 (Fla.2005).

⁵⁶*Id* at 782.

⁵⁷*Id* at 782, n. 2 quoting *Mikolsky v. Unemployment Appeals Commission*, 721 So.2d 738, 740 (Fla. 5th DCA 1998).


V. CONCLUSION AND PRAYER FOR RELIEF

The PSC has exceeded the scope of its statutorily derived authority in considering Skyland's application. There is simply no way to square the PSC's interpretation of Fla. Stat. § 367.171(7) with the statute's text or this Court's binding opinion in *Hernando County*. This unilateral attempt by the Commission to re-write controlling law and alter fundamental policy violates Florida's separation of powers doctrine. For this reason, the COUNTY respectfully requests this Court to issue a Writ of Quo Warranto declaring that Fla. Stat. § 376.171(7)'s limitations on the PSC's regulatory authority in non-jurisdictional counties can only be satisfied by when the utility to be regulated operates existing facilities forming a system across which the inter-county service travels. Additionally, the COUNTY requests such other and further relief as this Court deems just and proper.

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CERTIFICATE OF SERVICE


I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail to the Director, Division of the Commission Clerk and Administrative Services, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, and to J.R. Kelly, Public Counsel, Office of Public Counsel, 111 West Madison Street, Room 812, Tallahassee, FL 32399-1400 on this 8th day of April, 2010.



Jon Jouben (FBN 149561)
Geoffrey Kirk (FBN 861626)
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Attorneys for Hernando County

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.100(l) Fla. R. App. P.



JON A. JOUBEN, ESQ.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application of Skyland Utilities, LLC
to operate a Water and Wastewater Utility
in Hernando and Pasco County, Florida

Docket No. 090478

Filed: October 16, 2009

**APPLICATION FOR ORIGINAL CERTIFICATES FOR PROPOSED WATER AND
WASTEWATER SYSTEM AND REQUEST FOR INITIAL RATES AND CHARGES**

Skyland Utilities, LLC (the "Utility"), by and through its undersigned attorney and pursuant to Sections 367.031 and 367.045, Florida Statutes, and Rule 25-30.033, Florida Administrative Code, files this application for original certificates to operate a water and wastewater utility in Hernando and Pasco Counties and for approval of initial rates and charges ("Application"). The Application is attached hereto. In support of the Application, the Utility states:

- 1. The Utility's name and address are:

Skyland Utilities, LLC
660 Beachland Blvd., Suite 301
Vero Beach, FL 32963

- 2. The names and addresses of the Utility's authorized representatives are:

Ronald Edwards, Manager
Skyland Utilities, LLC
660 Beachland Blvd., Suite 301
Vero Beach, FL 32963
Phone: (772) 234-2410
Fax: (772) 234-6059

and

Michael Minton
Dean, Mead, Minton & Zwerner
1903 South 25th Street, Suite 200
Fort Pierce, Florida 34947
Phone: (772) 464-7700
Fax: (772) 464-7877

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FLORIDA PUBLIC SERVICE COMMISSION

3. The Utility is subject to exclusive jurisdiction of the Commission because its service will transverse the boundaries of Hernando and Pasco Counties, Florida. Section 367.171(7), Florida Statutes.

4. Pursuant to Rule 25-30.030(2), Florida Administrative Code, the Utility has obtained from the Commission a list of names and addresses of the entities entitled to receive notice of the Application ("Notice List").

5. Within seven (7) days of filing this Application, the Utility will provide notice of the Application by regular mail to: (a) the governing bodies of Hernando and Pasco Counties, Florida; (b) the governing bodies of all municipalities within Hernando and Pasco Counties, Florida, stated on the Notice List; (c) the regional planning councils designated on the Notice List; (d) all water and wastewater utilities on the Notice List; (e) the Office of Public Counsel; (f) the Commission's Director of the Commission Clerk and Administrative Services; (g) the appropriate regional offices of Florida Department of Environmental Protection ("FDEP"); (h) the appropriate Water Management District; and (i) other entities stated on the Notice List. Such notice will contain all information required under Florida Administrative Code Rule 25-30.030(4)

6. Within seven (7) days of filing this Application, the Utility will provide a copy of the notice of the Application to the prospective customers of the system to be certificated.

7. Within seven (7) days of filing this Application, the Utility will publish notice of the Application once in a newspaper of general circulation in the territory proposed to be served.

8. Within fifteen (15) days of filing this Application, the Utility will submit affidavits to the Commission verifying that it has provided notice of its Application, along with a copy of the notice and list of entities receiving the notice pursuant to Florida Administrative Code Rule 25-30.030.

9. Included in the Application are all information, documents, and maps required by Florida Administrative Code Rule 25-30.033, including facts demonstrating the Utility's ability to provide service, the area and facilities involved, the need for service in the area involved, and the existence or nonexistence of services from other utilities in the proposed service area. Also included in the Application are Schedules showing all rates, classifications, charges for service of every kind proposed by the Utility, and all rules, regulations and service availability policies.

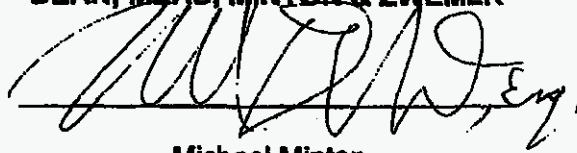
10. The application fee required by Section 367.145, Florida Statutes, and Florida Administrative Code Rule 25-30.020, has been submitted to the Commission Clerk of Administrative Services, along with the filing of this Application.

WHEREFORE, the Utility requests that the Commission:

- a. Grant Utility's application for original certificates for a proposed water and wastewater system;
- b. Approve initial rates and charges for the Utility;
- c. Issue certificates of authorization for the water and wastewater system; and
- d. Grant such other relief as appropriate.

Respectfully submitted this 16th day of October, 2009.

DEAN, MEAD, MINTON & ZWEMER

A handwritten signature in black ink, appearing to read "Michael Minton", written over a horizontal line.

**Michael Minton
Dean, Mead, Minton & Zwemer
1903 South 25th Street, Suite 200
Fort Pierce, Florida 34947
Phone: (772)-464-7700
Fax: (772)-464-7877**

Attorney for Skyland Utilities, LLC

ORIGINAL

**APPLICATION FOR ORIGINAL CERTIFICATE
FOR A PROPOSED OR EXISTING SYSTEM REQUESTING
INITIAL RATES AND CHARGES
(Pursuant to Section 367.045, Florida Statutes)**

To: **Office of Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850**

The undersigned hereby makes application for original certificate(s) to operate a water and wastewater utility in Hernando and Pasco Counties, Florida, and submits the following information:

PART I APPLICANT INFORMATION

A) The full name (as it appears on the certificate), address and telephone number of the applicant:

Skyland Utilities, LLC
Name of utility
(772) 234-2410 (772) 234-6059
Phone No. Fax No.
660 Beachland Blvd., Suite 301
Office street address
Vero Beach Florida 32963
City State Zip Code

Mailing address if different from street address

Internet address if applicable

B) The name, address and telephone number of the person to contact concerning this application:

Ronald Edwards, Manager - Skyland Utilities, LLC (772) 234-2410
Name Phone No.
660 Beachland Blvd., Suite 301
Street address
Vero Beach Florida 32963
City State Zip Code

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and

Michael Minton – Dean, Mead, Minton & Zwemer (772) 464-7700
Name Phone No.
1903 South 25th St., Suite 200
Street address
Ft. Pierce Florida 34947
City State Zip Code

and

Gerald Hartman, PE, BCEE, ASA – GAI Consultants (407) 423-8398
Name Phone No.
301 E. Pine St., Suite 1020
Street address
Orlando Florida 32801
City State Zip Code

C) Indicate the organizational character of the applicant: (circle one)

Corporation Partnership Sole Proprietorship

Other: Limited Liability Company
(Specify)

D) If the applicant is a corporation, indicate whether it has made an election under Internal Revenue Code Section 1362 to be an S Corporation:

Yes _____ No X

E) If the applicant is a corporation, list names, titles and addresses of corporate officers, directors, partners, or any other person(s) or entities owning an interest in the applicant's business organization. (Use additional sheet if necessary).

The Applicant is an LLC wholly owned by Evans Utilities Company, Inc.
Evans Utilities is the sole member of Applicant.

F) If the applicant is not a corporation, list names and addresses of all persons or entities owning an interest in the organization. (Use additional sheet if necessary.)

Not Applicable.

PART II NEED FOR SERVICE

- A) Exhibit A - A statement regarding the need for service in the proposed territory, such as anticipated (or actual) development in the area. Identify any other utilities within the area proposed to be served which could potentially provide such service in the area and the steps the applicant took to ascertain whether such other service is available.
- B) Exhibit B - A statement that to the best of the applicant's knowledge, the provision of service will be consistent with the water and wastewater sections of the local comprehensive plan, as approved by the Department of Community Affairs at the time the application is filed. If the provision of service is inconsistent with such plan, provide a statement demonstrating why granting the certificate would be in the public interest.

PART III SYSTEM INFORMATION

A) **WATER**

- (1) Exhibit C - A statement describing the proposed type(s) of water service to be provided (i.e., potable, non-potable or both).
- (2) Exhibit D - The number of equivalent residential connections (ERCs) proposed to be served, by meter size and customer class. If development will be in phases, separate this information by phase. In addition, if the utility is in operation, provide the current number of ERCs by meter size and customer class.
- (3) Description of the types of customers anticipated (i.e., single family, mobile homes, clubhouse, commercial, etc.):

The Applicant currently is proposing to serve general service, residential, and exempt and non-exempt bulk service customers.

- (4) In the case of an existing utility, provide the permit number and the date of approval of facilities by the Department of Environmental Protection (DEP) or the agency designated by DEP to issue permits:

N/A

- (5) Indicate the design capacity of the treatment plant in terms of equivalent residential connections (ERCs) and gallons per day (gpd). If development will be in phases, separate this information by phase.

<u>155</u>	(ERCs)	<u>54,250</u>	(GPD) Phase I
<u>255</u>	(ERCs)	<u>89,250</u>	(GPD) Phase II Max
<u>69</u>	(ERCs)	<u>24,150</u>	(GPD) Phase III Max
<u>110</u>	(ERCs)	<u>38,500</u>	(GPD) Phase IV Max
<u>35</u>	(ERCs)	<u>12,250</u>	(GPD) Phase V Max

- (6) Indicate the type of treatment:

Water facilities for Phase I will provide chlorination via a hypochlorinator for disinfection purposes. Phases II through V are yet to be determined.

- (7) Indicate the design capacity of the transmission and distribution lines in terms of ERCs and gpd. If development will be in phases, separate this information by phase.

<u>155</u>	(ERCs)	<u>54,250</u>	(GPD) Phase I
<u>255</u>	(ERCs)	<u>89,250</u>	(GPD) Phase II Max
<u>69</u>	(ERCs)	<u>24,150</u>	(GPD) Phase III Max
<u>110</u>	(ERCs)	<u>38,500</u>	(GPD) Phase IV Max
<u>35</u>	(ERCs)	<u>12,250</u>	(GPD) Phase V Max

- (8) Provide the date the applicant began or plans to begin serving customers:

Service will begin as soon as immediately possible after certification and rate approval by the Commission.

- (9) Exhibit E - Evidence, in the form of a warranty deed, that the utility owns the land where the water facilities are or will be located. If the utility does not own the land, a copy of the agreement which provides for the long term continuous use of the land, such as a 99-year lease. The Commission may consider a written easement or other cost-effective alternative.

The applicant may submit a contract for the purchase and sale of land with an unexecuted copy of the warranty deed provided the applicant files an executed and recorded copy of the deed, or executed copy of the lease, within thirty days after the order granting the certificate.

B) **WASTEWATER**

- (1) Exhibit F - The number of equivalent residential connections (ERCs) proposed to be served, by meter size and customer class. If development will be in phases, separate this information by phase. In addition, if the utility is in operation, provide the current number of ERCs by meter size and customer class.
- (2) Description of the types of customers anticipated (i.e., single family, mobile homes, clubhouse, commercial, etc.):

The Applicant currently is proposing to serve mainly general service and residential customers within the proposed service area.

- (3) In the case of an existing utility, provide the permit number and the date of approval of facilities by the Department of Environmental Protection (DEP) or the agency designated by DEP to issue permits:

N/A

- (4) Indicate separately the design capacity of the treatment plant and effluent disposal system in terms of equivalent residential connections (ERCs) and gallons per day (gpd). If development will be in phases, separate this information by phase.

<u>153</u>	(ERCs)	<u>41,310</u>	(GPD) Phase I
<u>255</u>	(ERCs)	<u>68,850</u>	(GPD) Phase II Max
<u>69</u>	(ERCs)	<u>18,630</u>	(GPD) Phase III Max
<u>110</u>	(ERCs)	<u>29,700</u>	(GPD) Phase IV Max
<u>35</u>	(ERCs)	<u>9,450</u>	(GPD) Phase V Max

- (5) Indicate the method of treatment and disposal (percolation pond, spray field, etc.):

The type of treatment and disposal for Phase I will be pre-engineered wastewater treatment plants utilizing an extended aeration/MLE treatment process with percolation ponds.

The full extent of treatment required for future Phases has not yet been determined.

- (6) Exhibit G - If the applicant does not propose to use reuse as a means of effluent disposal, provide a statement that describes, with particularity, the

reasons for not using reuse.

- (7) Indicate the design capacity of the collection lines in terms of ERCs and GPD. If development will be in phases, separate this information by phase.

<u>153</u>	(ERCs)	<u>41,310</u>	(GPD) Phase I
<u>255</u>	(ERCs)	<u>68,850</u>	(GPD) Phase II Max
<u>69</u>	(ERCs)	<u>18,630</u>	(GPD) Phase III Max
<u>110</u>	(ERCs)	<u>29,700</u>	(GPD) Phase IV Max
<u>35</u>	(ERCs)	<u>9,450</u>	(GPD) Phase V Max

- (8) Provide the date the applicant began or plans to begin serving customers:

Service will begin as soon as immediately possible after certification and rate approval by the Commission.

- (9) Exhibit H - Evidence, in the form of a warranty deed, that the utility owns the land where utility treatment facilities are or will be located. If the utility does not own the land, a copy of the agreement which provides for the long term continuous use of the land, such as a 99-year lease.

The Commission may consider a written easement or other cost-effective alternative. The applicant may submit a contract for the purchase and sale of land with an unexecuted copy of the warranty deed provided the applicant files an executed and recorded copy of the deed, or executed copy of the lease, within thirty days after the order granting the certificate.

PART IV FINANCIAL AND TECHNICAL INFORMATION

- A) Exhibit I - A statement regarding the financial and technical ability of the applicant to provide reasonably sufficient and efficient service.
- B) Exhibit J - A detailed financial statement (balance sheet and income statement), certified if available, of the financial condition of the applicant, showing all assets and liabilities of every kind and character. The income statement shall be for the preceding calendar or fiscal year. If an applicant has not operated for a full year, then the income statement shall be for the lesser period. The financial statement shall be prepared in accordance with Rule 25-30.115, Florida Administrative Code. If available, a statement of the source and application of funds shall also be provided.
- C) Exhibit K - A list of all entities, including affiliates, upon which the applicant is relying to provide funding to the utility, and an explanation of the manner and

amount of such funding, which shall include their financial statements and any financial agreements with the utility. This requirement shall not apply to any person or entity holding less than 10 percent ownership interest in the utility.

- D) Exhibit L - A schedule showing the projected cost of the proposed system (or actual cost of the existing system) by uniform system of accounts (USOA) account numbers pursuant to Rule 25-30.115, F.A.C. In addition, provide the capacity of each component of the system in ERCs and gallons per day. If the utility will be built in phases, this schedule shall apply to the design capacity of the first phase only. Provide a separate exhibit for the water and sewer systems.
- E) Exhibit M - A schedule showing the projected operating expenses of the proposed system by USOA account numbers when 80 percent of the designed capacity of the system is being utilized. If the utility will be built in phases, this schedule shall apply to the design capacity of the first phase only. In addition, if the utility has been in existence for at least one year, provide actual operating expenses for the most recent twelve months. Provide a separate exhibit for the water and sewer systems.
- F) Exhibit N - A schedule showing the projected capital structure, including the methods of financing the construction and operation of the utility until the utility reaches 80 percent of the designed capacity of the system(s).
- G) Exhibit O - A cost study, including customer growth projections, which supports the proposed rates, miscellaneous service charges, customer deposits and service availability charges. A sample cost study is enclosed with the application package. Provide a separate cost study for the water and sewer systems.
- H) Exhibit N/A - If the base facility and usage rate structure (as defined in Rule 25-30.437(6), F.A.C.) is not utilized for metered service, provide an alternative rate structure and a statement supporting why the alternative is appropriate.
- I) Exhibit N/A - If a different return on common equity other than the current equity leverage formula established by order of the Public Service Commission pursuant to Section 367.081(4), F.S. is utilized, provide competent substantial evidence supporting the use of a different return on common equity. Information on the current equity leverage formula may be obtained by contacting the accounting section at the listed number.

PART V ALLOWANCE FOR FUNDS USED DURING CONSTRUCTION (AFUDC)

Please note the following:

- A) Utilities obtaining initial certificates pursuant to Rule 25-30.033, F.A.C., are authorized to accrue AFUDC for projects found eligible pursuant to Rule 25-

30.116(1), F.A.C.

- B) A discounted monthly AFUDC rate calculated in accordance with Rule 25-30.116(3), F.A.C., shall be used to insure that the annual AFUDC charged does not exceed authorized levels.
- C) The date the utility shall begin to charge the AFUDC rate shall be the date the certificate of authorization is issued to the utility so that such rate can apply to initial construction of the utility facilities.

PART VI TERRITORY DESCRIPTION AND MAPS

A) TERRITORY DESCRIPTION

Exhibit P - An accurate description, using township, range and section references as specified in Rule 25-30.030(2), Florida Administrative Code. If the water and wastewater service territories are different, provide separate descriptions.

B) TERRITORY MAPS

Exhibit Q - One copy of an official county tax assessment map or other map showing township, range and section with a scale such as 1"=200' or 1"=400' on which the proposed territory is plotted by use of metes and bounds or quarter sections and with a defined reference point of beginning. If the water and wastewater service territories are different, provide separate maps.

C) SYSTEM MAPS

Exhibit R - One copy of detailed map(s) showing proposed lines, facilities and the territory proposed. **Additionally, identify any existing lines and facilities.** Map(s) should be of sufficient scale and detail to enable correlation with a description of the territory to be served. Provide separate maps for water and wastewater systems.

PART VII NOTICE OF ACTUAL APPLICATION

A) Exhibit S - An affidavit that the notice of actual application was given in accordance with Section 367.045(1)(a), Florida Statutes, and Rule 25-30.030, Florida Administrative Code, by regular mail to the following:

- (1) the governing body of the municipality, county, or counties in which the system or the territory proposed to be served is located;

- (2) the privately owned water and wastewater utilities that hold a certificate granted by the Public Service Commission and that are located within the county in which the utility or the territory proposed to be served is located;
- (3) if any portion of the proposed territory is within one mile of a county boundary, the utility shall notice the privately owned utilities located in the bordering counties and holding a certificate granted by the Commission;
- (4) the regional planning council;
- (5) the Office of Public Counsel;
- (6) the Public Service Commission's Director of the Division of the Commission Clerk and Administrative Services;
- (7) the appropriate regional office of the Department of Environmental Protection;
- (8) and the appropriate water management district.

Copies of the Notice and a list of entities noticed shall accompany the affidavit.
THIS MAY BE A LATE-FILED EXHIBIT

- B) Exhibit T - An affidavit that the notice of actual application was given in accordance with Rule 25-30.030, Florida Administrative Code, by regular mail or personal delivery to each customer of the system. A copy of the notice shall accompany the affidavit. THIS MAY BE A LATE-FILED EXHIBIT.
- C) Exhibit U - Immediately upon completion of publication, an affidavit that the notice of actual application was published once in a newspaper of general circulation in the territory in accordance with Rule 25-30.030, Florida Administrative Code. A copy of the proof of publication shall accompany the affidavit. THIS MAY BE A LATE-FILED EXHIBIT.

PART VIII FILING FEE

Indicate the filing fee enclosed with the application:

\$ 1,500.00 (for water) and \$ 1,500.00 (for wastewater).

Note: Pursuant to Rule 25-30.020, Florida Administrative Code, the amount of the filing fee as follows:

- (1) For applications in which the utility has the capacity to serve up to 500 ERC's, the filing fee shall be **\$750**.
- (2) For applications in which the utility has the capacity to serve from 501 to 2,000 ERC's the filing fee shall be **\$1,500**.
- (3) For applications in which the utility has the capacity to serve from 2,001 ERC's to 4,000 ERC's the filing fee shall be **\$2,250**.
- (4) For applications in which the utility has the capacity to serve more than 4,000 ERC's the filing fee shall be **\$3,000**.

PART IX TARIFF

Exhibit V - The original and two copies of water and/or wastewater tariff(s) containing all rates, classifications, charges, rules and regulations. Sample tariffs are enclosed with the application package.

PART X AFFIDAVIT

I, RONALD L. EDWARDS (applicant) do solemnly swear or affirm that the facts stated in the foregoing application and all exhibits attached thereto are true and correct and that said statements of fact thereto constitutes a complete statement of the matter to which it relates.

BY: Ronald L. Edwards
Applicant's Signature

RONALD L. EDWARDS
Applicant's Name (Typed)

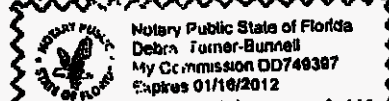
MANAGER
Applicant's Title *

Subscribed and sworn to before me this 1st day of October month in the year of 2009 by RONALD L EDWARDS who is personally known to me or produced identification _____

Type of Identification Produced

Debra Turner Bunnell
Notary Public's Signature

DEBRA TURNER BUNNELL
Print, Type or Stamp Commissioned Name of Notary Public



*If applicant is a corporation, the affidavit must be made by the president or other officer authorized by the by-laws of the corporation to act for it. If applicant is a partnership or association, a member of the organization authorized to make such affidavit shall execute same.

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EXHIBITS

<u>Exhibit</u>	<u>Name</u>
A	Need for Service
B	Consistency with Local Comprehensive Plan
C	Customers, Facility and Services
D	Number of ERCs to be Served-Water
E	Land Ownership for Water Facilities
F	Number of ERCs to be Served-Wastewater
G	Use of Reuse
H	Land Ownership for Wastewater Facilities
I	Financial and Technical Ability
J	Detailed Financial Statement
K	Funding of Utility
L	Projected Cost of the System
M	Operating Expenses
N	Projected Capital Structure
O	Cost of Service Study
P	Territory Description
Q	Tax Assessment Maps
R	System Maps
S	Affidavit: Notice of Application
T	Affidavit: Notice to Customers
U	Affidavit: Notice of Publication
V	Water Tariff and Wastewater Tariff

EXHIBIT A

Skyland Utilities, LLC (Skyland) proposes to provide potable and non-potable water and wastewater services to bulk exempt, bulk non-exempt, intensified agribusiness, residential and general service customers from the service territory described in this application within Hernando and Pasco Counties.

Skyland's affiliate, Evans Properties, Inc., (Evans) owns all of the land inside the service boundaries of the utility. In addition to an existing residence and shop that have a need for central service, Evans has plans for utilizing utility services for a variety of ventures. A copy of a request for service letter for existing facilities, signed by Mr. J. Emmet Evans III, VP of Evans Properties to Mr. Ron Edwards, Manager of Skyland Utilities, LLC, as well as a copy of a more general request for service, signed by Mr. Ron Edwards, President of Evans, to the Florida Public Service Commission is provided in **Appendix I**.

Skyland plans to expand its utility in phases to coincide with the need for utility service for Evans property. The most immediate need for water and wastewater services for Evans is the existing residential and commercial properties, exempt and non-exempt bulk water, intensified agribusiness and the first phase of development. The requirement for utility services is planned to be completed in five phases. Please refer to the phased development map in **Appendix I**. The map labels each section of land with an ID number. Phase I will encompass ID numbers 1, 2, 3 and 4. Phase II will encompass ID numbers 5, 6, 7A, 7B and 7C.

Skyland is proposing to establish a single water and wastewater utility system for Hernando and Pasco Counties. The Utility's facilities in both counties will be functionally related and operationally integrated. Skyland's system will be managed from a single centrally-located office. Personnel responsible for management, maintenance, customer service and administrative support will be the same for both counties. Staffing, planning, and budgeting will be done on a system-wide basis rather

than on a county-by-county basis. Moreover, operating costs will not vary materially from county to county and rates will be uniform throughout Skylands's proposed service area.

There is currently no central potable water or wastewater service in the service territory described in this application. No other utilities are within the area proposed to be served, and none are capable of providing the necessary level of service in the area. Since Skyland's affiliate currently owns all of the land within the proposed service area, they will be in the best position to provide water and wastewater service in the most efficient and cost-effective manner.

EXHIBIT B

Skyland Utilities (Utility) will be operating in both Hernando and Pasco Counties. Therefore, the discussion of consistency with the Comprehensive Growth Management Plan (Comprehensive Plan) will be addressed for each County separately.

For Hernando County, Chapter 5, Policy 4.01A(5) of the Comprehensive Plan states: "All future wastewater collection and treatment systems within Hernando County should be owned and operated by or under contract with Hernando County, the Hernando County Water and Sewer district, or a municipality within Hernando County."

Also for Hernando County, Chapter 8, Policy 4.13A(4) of the Comprehensive Plan states: "With the exception of cities within Hernando County, the County will be the sole franchiser of water production or supply."

It appears from the foregoing that Hernando County is trying to inhibit private utility development within the County. Chapter 5, which discusses wastewater systems, states that the County should own all future systems. This implies that it is a goal of the County and they are certainly within their right to state that as a goal. Chapter 8, which discusses potable water systems, sends a much stronger message stating that the County or a city will be the sole franchiser of water production or supply. The notion that a County can make this type of broad pronouncement in effect stating that they are the only possible provider of utility service in unincorporated areas has been adjudicated and found to be overly broad in scope. It is not the Utility's desire to adjudicate this issue but rather to work with the County in insuring that the level of service as prescribed in the Comprehensive Plan is provided by the Utility in provision of water and wastewater services within its proposed service area. The proposed territory has a land use element designation of rural use (RUR) with one small area have a designation of conservation. Chapter 1, Policy 1.01B(2) of the Comprehensive Plan discusses the allowed land use density of the RUR land use element. The allowed

density is one dwelling unit per 10 acre tract of land. The conceptual plan of utility services set forth in this application is consistent with the foregoing density.

While Hernando County's Comprehensive Plan appears to discourage private utility companies, the granting of a utility service area is under the jurisdiction of the Florida Public Service Commission because Skyland provides service traversing county boundaries (F.S. 367.171(7)). Besides the questionable ability of Hernando County to impede new private utility companies from operating within the County, it is the Utility's intent to provide water and wastewater service within the proposed service area in a manner consistent with the goals and objectives of the Comprehensive Plan.

Chapter 10, page 9 of the Pasco County Comprehensive Plan contains Policy WAT 2.1.1 which prohibits expansion of potable water service for lands designated with the Future Land Use Element AG (Agriculture) or AG/R (Agriculture/Rural) unless the area is designated as a Conservation Subdivision. Chapter 2, page 37 contains Policy FLU 2.2.4 which gives the specifics of what constitutes a Conservation Subdivision. Chapter 10, page 18 of the Comprehensive Plan contains Policy SEW 3.2.6 regarding the provision of central sewer in rural areas. Basically, Pasco County is prohibiting the building of a central sewer system unless the area is designated as a Conservation Subdivision. It is the Utility's understanding that the developer will work with the County to receive the Conservation Subdivision designation for the applicable lands within the proposed service area. The land in the proposed service area has Future Land Use Element designations of MU, AG and AG/R. The allowed density of these designations is 32 units per acre, 1 unit per 10 (ten) acres and 1 unit per 5 (five) acres, respectively. These densities can be found in Chapter 2, Appendix A of the Comprehensive plan beginning on page 16. The conceptual plan of utility services set forth in this application is consistent with the foregoing density. The pertinent sections from the referenced Comprehensive Plans for Hernando and Pasco Counties are included in **Appendix II**.

EXHIBIT C

Skyland plans to provide potable and non-potable water and wastewater service to exempt and non-exempt bulk customers, various existing structures including a maintenance shop and residence, intensified agribusiness, and new development throughout the proposed service territory, which traverses the boundaries between Hernando and Pasco Counties. The water will be chlorinated and will meet all Florida Department of Environmental Protection (FDEP) requirements for public drinking water. In Hernando County, Phase I utility services are planned for ID 2 that can serve the equivalent of developing the approximately 349 acres with an allowed density of 1 dwelling unit per 10 acres or approximately 35 ERCs. Potable water service will be provided by modifying an existing well. The existing structures will continue to utilize on-site septic systems while the remaining 33 ERCs' wastewater service will be provided by the use of a low-pressure wastewater collection system and a 10,000 gallon per day (gpd) wastewater package treatment plant utilizing Extended Aeration (EA)/Modified Ludzack-Ettinger (MLE) treatment for nitrogen removal. In Pasco County, Phase I utility services for ID 1 are planned that can serve the equivalent of developing the approximately 122 acres with an allowed density of 1 dwelling unit per 5 acres or approximately 24 ERCs. Potable water service will be provided by an existing 10" well. Wastewater service will be provided by the use of a low-pressure wastewater collection system and a 7,500 gallon per day (gpd) utility owned septic tank. Pasco County ID 4 utility services are planned can serve the equivalent of developing the approximately 77 acres with a density of 1 dwelling unit per 4 acres or approximately 16 ERCs. This area is designated as mixed use and has an allowed density of 32 dwelling units per acre but the intent is to treat this similar to the agriculture zoning of the other Evan's properties in this filing. Wastewater service will be provided by the use of a low-pressure wastewater collection system and a 5,000 gallon per day (gpd) utility owned septic tank. Pasco County ID 3 utility services are planned can serve the equivalent of developing the approximately 795 acres with a density of 1 dwelling unit per 10 acres or approximately 80 ERCs. Wastewater treatment will be provided by a 22,500 wastewater package treatment plant utilizing Extended Aeration (EA)/Modified Ludzack-Ettinger (MLE)

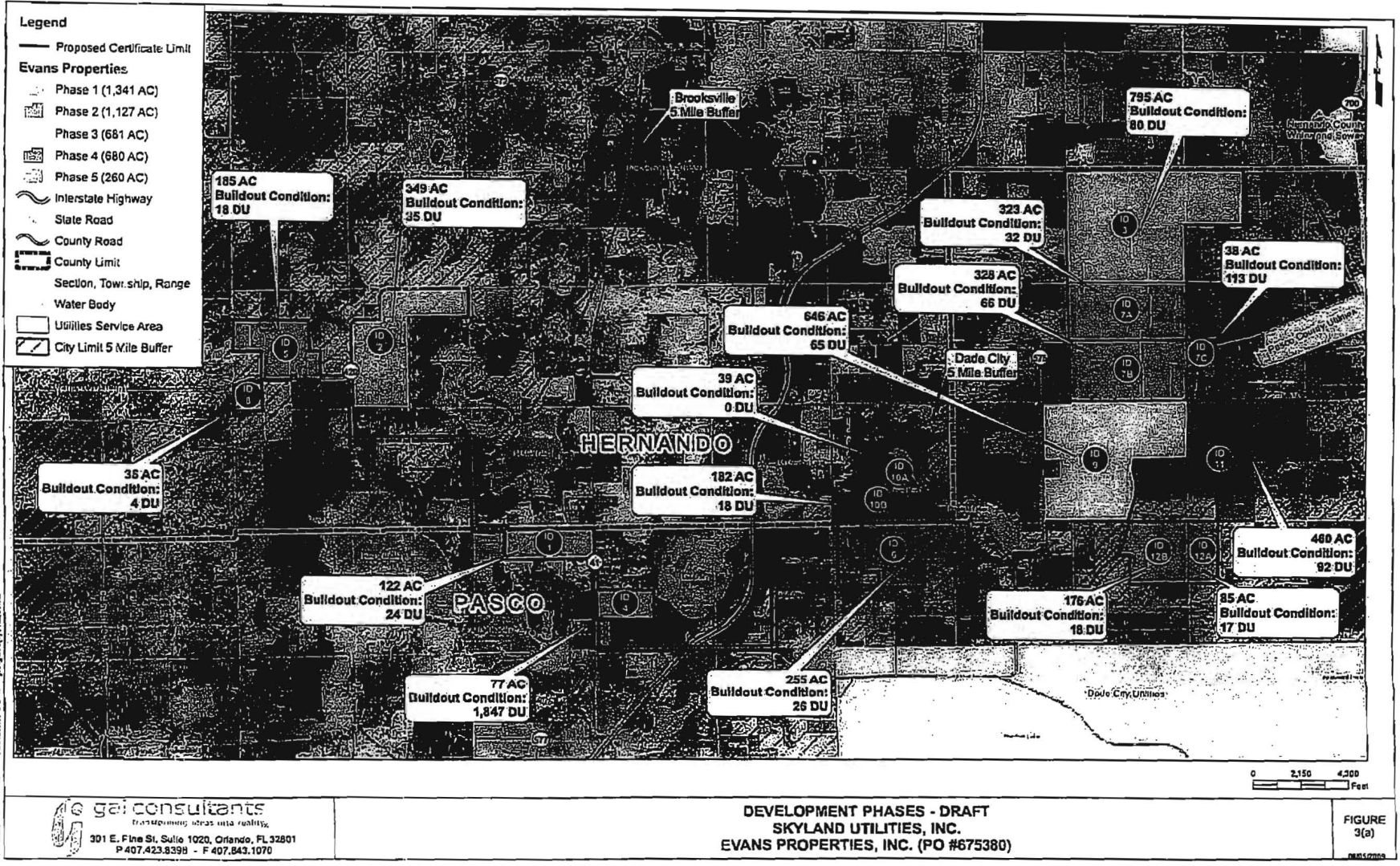
treatment for nitrogen removal. There will be several interconnected sites throughout the proposed service area once all phases are developed to insure efficient utility service. The Utility's system will be managed from one centrally located office. Personnel responsible for the management, maintenance, customer service, and administrative support will be the same the Utility's operation in both counties. Staffing, planning, and budgeting will be done on a system-wide basis, rather than county-by-county. Operation costs will not vary materially from county to county and rates will be uniform throughout the Utility's service area. Physical interconnections will occur that traverse county lines during future phases.

EXHIBIT D

Measurement of utility service need is typically stated as an equivalent residential connection (ERC). **Exhibit D** describes the number of ERCs proposed to be served by meter size and customer class, by utility service development phase for the water system. The utility service development in the proposed service area is planned to be in 5 phases. **Exhibit D** also discusses the types of customers anticipated, type of water treatment, the proposed facilities, and the capacity of the facilities in ERCs and gallons per day (gpd).

ERCs and Projected Annual Demand

The Utility proposes to provide potable and non-potable water and wastewater service to exempt and non-exempt bulk customers, various existing structures including a maintenance shop and several residences, intensified agribusiness, and new development throughout the proposed service territory which transverses the boundaries between Hernando and Pasco Counties. It is anticipated that all customers other than bulk will be served by a 5/8" x 3/4" meter. The need for Phase I utility services are anticipated to occur from 2010 to 2015, with 80% capacity reached in 2015. For this filing, 2015 will be the Test Year. The future phases will begin upon the completion of Phase I. It is anticipated that Phase I will have approximately 1 general service ERC to service an existing shop. Phases II through V have not been conceptually designed at this time and; therefore, the ERCs and gallons per day shown are for the maximum allowable by future land use element density.



**SKYLAND UTILITIES, LLC
COST OF SERVICE STUDY**

GENERAL

The Utility's proposed service territory includes approximately 4,000 acres in Hernando and Pasco Counties, Florida. Currently, this land is owned by the Utility's affiliate, Evans Properties, Inc (Evans). This land is currently zoned mostly agricultural and has been used primarily to grow citrus crops. The existing land use densities are from 32 per acre to 1 per 10.0 acres. The parcel zoned 32 per acre is being treated in a similar fashion as the other parcels and for purposes of utility services is being treated as if there is 1 unit per approximately 4 acres. This filing is based on anticipated utility service requirements for Phase I. Phase I is projected to encompass years 2010 to 2015, with the 80% capacity reached, and thus a Test Year, of 2015. Evans plans to utilize utility services for their 4,000 acres in 5 separate phases. Measurement of utility service need is typically stated as an equivalent residential connection (ERC). It is anticipated that Phase I utilization will take place over a 6-year time horizon and will consist of 155 water and 153 wastewater ERCs. In the 705 acre parcel in Phase I in Pasco County (ID 3), there are an existing 2 ERCs, 1 residential connection and 1 general service connection. These existing structures will be connected to central water service but will continue to use their existing on-site septic systems. Each of the 155 ERCs will be serviced with a 5/8" x 3/4" meter off of a 1" service line.

It is anticipated that the future phases will be utilized in the order indicated on the proposed service area map in **Appendix I** and as discussed in more detail in **Exhibit A**. There have been no conceptual plans developed as of this time for future development phases. Where units and/or consumption have been assumed in future phases in this filing, the maximum permitted dwelling units have been used without consideration of any restrictive issues.

Skyland is proposing to establish a single utility system for Hernando and Pasco Counties that will provide potable and non-potable water and wastewater service to bulk exempt, bulk non-exempt, intensified agribusiness, residential and general service customers. The Utility's facilities in all counties will be functionally related and operationally integrated. Skyland's system will be managed from a single centrally-

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located office. Personnel responsible for management, maintenance, customer service and administrative support will be the same for both counties. Staffing, planning, and budgeting will be done on a system-wide basis rather than on a county-by-county basis. Moreover, operating costs will not vary materially from county to county and rates will be uniform throughout Skyland's proposed service area. It is anticipated that physical interconnection between the counties will occur during Phase II or III.

Detailed discussion of the proposed facilities can be found in **Exhibit D** for water and **Exhibit F** for wastewater. Currently at the proposed water and wastewater facility sites there are not appropriate power sources from Florida Power & Light (FP&L) to run the water and wastewater facilities. Initial discussions with representatives from FP&L have indicated that they might run the required services at their own costs. For the purposes of this cost study it is assumed that FP&L will provide the necessary power requirements. For informational purposes only, **Attachment O** appended herein contains a cost estimate for running power to each water and wastewater facility site along with **Figures O-1, O-2, O-3 and O-4**, conceptual layouts of power lines for Area IDs 1 through 4, respectively.

It is anticipated that each customer other than bulk customers will be metered with a 5/8" X 3/4" meter. The wastewater bill will be based on the water meter reading. There is a possibility to provide bulk water service upon certification of Skyland's service area from the Florida Public Service Commission (FPSC). Rates for bulk services will be negotiated on a case-by-case basis.

POTABLE WATER SERVICE

Customer, ERC, and Flow Projections

Schedule 1 provides the water customer projections for Skyland Utilities in both Hernando and Pasco Counties. In Hernando County, service will be provided beginning in 2010. A total of 56 ERCs are anticipated in the Hernando County area by year 2024. In Pasco County, service is anticipated to begin in 2010. A total of 386 ERCs are anticipated in Pasco County by 2024. It is assumed that all of the projected customers will be served by 5/8" X 3/4" meters.

STATE OF FLORIDA
PUBLIC SERVICE COMMISSION

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IN RE: APPLICATION OF SKYLAND
UTILITIES, LLC, TO OPERATE A WATER
AND WASTEWATER UTILITY IN
HERNANDO AND PASCO COUNTIES,
FLORIDA.

Case No.: 090478-WS

**HERNANDO COUNTY'S MOTION TO DISMISS APPLICATION OF
SKYLAND UTILITIES, LLC., FOR LACK OF JURISDICTION
WITH INCORPORATED MEMORANDUM OF LAW**

Objector¹, HERNANDO COUNTY ("the COUNTY"), by and through undersigned counsel, hereby moves to dismiss the *Application for Original Certificates for Proposed Water and Wastewater System and Request for Initial Rates and Charges* ("the Application") filed with the Public Service Commission by Applicant, SKYLAND UTILITIES, LLC. ("SKYLAND"). As grounds therefore, the COUNTY states that the Public Service Commission lacks jurisdiction to grant the *Application*.

I. Question Presented

In a "non-jurisdictional" county, the Public Service Commission only possesses the authority to regulate water and wastewater utilities whose existing facilities cross the county's boundaries. SKYLAND has applied to the Public Service Commission for permission to operate an integrated water and wastewater utility system in Pasco and Hernando Counties. SKYLAND, however, does not actually own, control, or operate any facilities in Pasco or Hernando Counties, nevertheless any

COM infrastructure that traverses the border between those counties.

APA

ECR + Diskette

GCL

RAD

SSC

ADM

OPC

CLK

The COUNTY will file its *Objection to the Application of Skyland Utilities, LLC., and Request for Formal Administrative Hearing* contemporaneously with the filing of the instant motion with the Public Service Commission. All factual allegations and legal arguments that are contained in the COUNTY's *Objection* are hereby incorporated herein by reference.

1 of 11

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FPSC-COMMISSION CLERK

The Florida Supreme Court has held that the Public Service Commission should resolve all doubts about its jurisdiction against the exercise thereof. In light of that standard, does the Public Service Commission have the power to grant certificates of authority to SKYLAND to operate a water and wastewater utility in Hernando County, even though no infrastructure of SKYLAND currently traverses any of Hernando County's geographic boundaries?

II. Preliminary Statement

The COUNTY is aware that the argument made in this motion contradicts the Public Service Commission's decision in *In Re: Application for Certificates to Operate a Water and Wastewater Utility in Duval and St. Johns Counties by Intercoastal Utilities, Inc.*, 2000 WL 1092990 (Fla. P.S.C. July 11, 2000) ("*Intercoastal Utilities*").

The COUNTY presents the arguments made in this motion as a good faith argument for the extension, modification, revised interpretation, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success. Specifically, the COUNTY asks the Public Service Commission to either overrule the above-referenced order or to limit its scope. If unsuccessful, the COUNTY intends to seek similar relief in the appropriate appellate court.

III. Factual and Procedural Background

While the *Application* states that SKYLAND intends to establish a new water and wastewater utility in various locations in Pasco and Hernando Counties, the *Application* explicitly states that no facilities currently traverse the borders of Hernando County. In fact, the *Application* indicates that SKYLAND plans to build an entirely new system from scratch.²

²*Application*, passim. All factual allegations and assertions that are contained in the *Application* are hereby incorporated herein by reference.

IV. Legal Argument

As explained herein, the Public Service Commission lacks jurisdiction to grant the relief requested in SKLYAND's *Application*. No infrastructure owned or controlled by SKYLAND currently traverses a boarder of the COUNTY. The actual existence of such infrastructure is a prerequisite to the exercise of jurisdiction by the Public Service Commission over a water or wastewater utility situated in a non-jurisdictional county. Accordingly, the Public Service Commission lacks the necessary jurisdiction to grant SKYLAND's application.

The COUNTY respectfully suggests that to the extent that the Public Service Commission held otherwise in *Intercoastal Utilities*, that decision was in error. That being said, the COUNTY believes that *Intercoastal Utilities* can be distinguished via the facts presented in the instant case.

A. All Doubts Regarding the Public Service Commission's Jurisdiction to Regulate a Water and Wastewater Utility must be Resolved Against the Existence of Jurisdiction.

In *City of Cape Coral v. GAC Utilities, Inc.*, the Florida Supreme Court held that "[a]ny reasonable doubt as to the lawful existence of a particular power that is being exercised by the [Public Service Commission] must be resolved against the exercise thereof, and the further exercise of the power should be arrested."³

³*City of Cape Coral v. GAC Utilities, Inc.*, 281 So.2d 493, 496 (Fla.1973).

B. Fla. Stat. Ch. 367 Limits the Jurisdiction of the Public Service Commission to Regulate Water and Wastewater Utilities in "Non-Jurisdictional" Counties.

The Florida Legislature established a two-tiered regulatory scheme for water utilities in this state by enacting the "Water and Wastewater System Regulatory Law" (the "Water Regulatory Act").⁴ As the first tier, the Legislature has granted the Public Service Commission the exclusive jurisdiction to regulate "all utility systems whose service transverses county boundaries."⁵ The Public Service Commission therefore has "exclusive jurisdiction over each utility [that it regulates] with respect to its authority, service, and rates."⁶

The second tier consists of intra-county utility systems, which can be regulated either by the applicable county or the Public Service Commission. Under the Water Regulatory Act, "the various counties of Florida retain jurisdiction to regulate water and wastewater utilities providing service to customers within the boundaries of each county."⁷ Each county, however, has the option to cede its regulatory authority to the Public Service Commission by passing a resolution declaring that the county has voluntarily subjected itself to the Water Regulatory Act.⁸ Otherwise, each county retains the authority to regulate all water and wastewater "utilities in that county which would otherwise be subject to regulation by the [Public Service Commission]."⁹

⁴The Water and Wastewater System Regulatory Law, Fla. Stat. Ch. 367.

⁵Fla. Stat. § 367.171(7).

⁶Fla. Stat. § 367.011(2).

⁷*Hernando County v. Florida Public Service Commission*, 685 So.2d 48, 50 (Fla. 1st DCA 1996).

⁸Fla. Stat. § 367.171(1).

⁹Fla. Stat. § 367.171(8).

Hernando County is a non-jurisdictional county for the purposes of the Water Regulatory Act.¹⁰

C. The Public Service Commission Only Possesses Jurisdiction to Regulate Water and Wastewater Utilities in Non-Jurisdictional Counties when a Utility's Service Traverses a County Border.

In an Order dated June 6, 1994, the Public Service Commission initiated an investigation to determine whether it retained jurisdiction to regulate the operations of Southern States Utilities, a water and wastewater utility then operating in Hernando County.¹¹ Specifically, the Public Service Commission decided to investigate whether Southern States Utilities' operations in Hillsborough, Polk, and Hernando Counties constituted a single, inter-county utility system. If so, the Public Service Commission would have exclusive jurisdiction to regulate Southern States Utilities' operations. If not, the individual counties would have regulatory jurisdiction.

In an Order dated July 21, 1995, the Public Service Commission found that Southern States Utilities' operations constituted a single, inter-county system.¹² On that basis, the Public Service Commission held that it, not the COUNTY, possessed exclusive jurisdiction to regulate Southern States Utilities' operations.¹³

¹⁰See *In re: Request for Acknowledgment of Resolution Rescinding Florida Public Service Commission Jurisdiction Over Private Water and Wastewater Utilities in Hernando County*, 1994 WL 269812 (Fla. P.S.C. June 9, 1994).

¹¹See *In re: Southern States Utilities, Inc.'s Petition for Declaratory Statement Regarding Commission Jurisdiction Over Its Water and Wastewater Facilities in Hillsborough and Polk Counties*, 1994 WL 328024 (Fla. P.S.C. June 6, 1994).

¹²See *In re: Investigation Into Florida Public Service Commission Jurisdiction Over Southern States Utilities, Inc., in Florida*, 1995 WL 466804 (Fla. P.S.C. July 21, 1995).

¹³*Id.*

The COUNTY promptly appealed the Public Service Commission's order to the First District Court of Appeal.

On December 12, 1996, the First District Court of Appeal reversed the Public Service Commission's determination that it held exclusive regulatory jurisdiction over Southern States Utilities' operations in Hernando County.¹⁴ The court held that the Public Service Commission's jurisdiction pursuant to Fla. Stat. § 367.171(7) depends upon the *actual existence* of operationally integrated water and/or wastewater facilities that traverse a county boundary.¹⁵ "We conclude that the requirements of this statute can only be satisfied by evidence that the facilities forming the asserted "system" *exist in contiguous counties across which the service travels.*"¹⁶

D. The Public Service Commission Lacks Jurisdiction to Consider the *Application* Because No Water or Wastewater Facilities Currently Exist or Traverse Hernando County's Borders.

As discussed supra, SKYLAND does not currently provide service in either Pasco County or Hernando County. SKYLAND possesses no infrastructure or equipment in either county. SKYLAND explicitly states in the *Application* that it intends to build its entire utility system from scratch sometime in the future.

Since the facilities forming SKYLAND's proposed system *do not exist and do not provide service across the border of Pasco and Hernando Counties*, the Public Service Commission does not have jurisdiction to grant SKYLAND's *Application*.

¹⁴*Hernando County v. Florida Public Service Commission*, 685 So.2d 48, 52 (Fla. 1st DCA 1996).

¹⁵*Id.* at 52.

¹⁶*Id.* (Emphasis Added)

E. The Public Service Commission Must Reverse its Decision in *Intercoastal Utilities*.

In *Intercoastal Utilities*, the Public Service Commission considered two applications that proposed to construct trans-county water and wastewater systems in the future. The Commission overruled objections by several counties that the existence of physical infrastructure was a prerequisite to the exercise of jurisdiction by the Commission pursuant to *Hernando County*. In doing so, the Public Service Commission distinguished *Hernando County* as follows:

- The Commission reasoned that Fla. Stat. § 367.021(12) defines “utility” to include “every person . . . proposing construction of a system, who is providing, or proposes to provide, water or wastewater service to the public for compensation.”¹⁷
- The Commission then maintained that *Hernando County* was not applicable to its consideration because that case did not reach the issue of whether the existence of inter-county facilities is a prerequisite to the existence of Commission jurisdiction pursuant to Fla. Stat. § 367.171(7). Instead, the Commission concluded that the First DCA merely held that the fact that a utility operates within multiple counties cannot give rise to Commission jurisdiction.
- Thus, the Commission held that it had jurisdiction to consider the applications “because each [applicant] is proposing to construct a utility system whose service would transverse county boundaries, thus causing the applications to fall within our exclusive jurisdiction.”¹⁸

¹⁷2000 WL 1092990, *20 (Fla. P.S.C. 2000).

¹⁸*Id.* (Internal Quotations Omitted)

The COUNTY respectfully suggests that the Public Service Commission's decision in *Interlocal Utilities* must be reversed because it artificially distinguished *Hernando County*. The First DCA actually held in *Hernando County* that the Public Service Commission's jurisdiction pursuant to Fla. Stat. § 367.171(7) depends upon the actual existence of operationally integrated water and/or wastewater facilities that traverse a county boundary.¹⁹ The opinion specifically "conclude[d] that the requirements of this statute can only be satisfied by evidence that the facilities forming the asserted "system" exist in contiguous counties across which the service travels."²⁰

Since the Public Service Commission's decision in *Interlocal Utilities* is directly and fatally undermined by the First DCA's decision in *Hernando County*, the Commission must reverse *Interlocal Utilities*.

G. Even if the Public Service Commission Does Not Reverse Its Decision in *Intercoastal Utilities*, That Order Is Based Upon Facts That Are Distinguishable From the Instant Facts.

In *Interlocal Utilities*, the Public Service Commission considered applications by two utilities that sought original certificates to provide water and wastewater services to the residents of Nocatee, a master-planned community in St. Johns County and the extreme southeast corner of Duval County. At the time of the applications, Nocatee had already been approved as a Development of Regional Impact (DRI) as a mixed-use development on approximately 13,323 acres. Thus, the Public Service Commission was not being speculative when it found that whichever utility was selected to service Nocatee, the provision of service would span two adjacent counties.

¹⁹*Id* at 52.

²⁰*Id.* (Emphasis Added)

In this case, SKYLAND's proposed provision of inter-county water and wastewater services is purely speculative at best. SKYLAND admits in its *Application* that no planning, design, or exact timing has been planned for future phases.²¹ In fact, the traversing of county boundaries will not occur until some future phase.²² Thus, SKYLAND's *Application* clearly demonstrates that the company has no present intention of providing inter-county service in the foreseeable future.

Should the Public Service Commission not wish to readdress *Interlocal Utilities* at this time, it should find that SKYLAND's plan for inter-county service is simply too speculative at this time to invoke the Commission's jurisdiction under Fla. Stat. § 367.171(7).

V. Prayer For Relief


WHEREFORE, Objector, HERNANDO COUNTY, prays for the entry of an Order dismissing SKYLAND UTILITIES' *Application for Original Certificates for Proposed Water and Wastewater System and Request for Initial Rates and Charges*, and granting such other and further relief as the Public Service Commission deems just and proper.

²¹ *Application* at Section I.D.

²² *Id.*

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail
to all persons listed on the attached service list on this 13th day of November, 2009.



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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

090478-WS

IN RE: Application of Skyland Utilities, LLC
to operate a water and wastewater utility
in Hernando and Pasco Counties, Florida.

Docket No. 040478-WS

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**SKYLAND UTILITIES, LLC'S RESPONSE
TO HERNANDO COUNTY'S MOTION TO DISMISS
APPLICATION OF SKYLAND UTILITIES, LLC, FOR LACK OF
JURISDICTION WITH INCORPORATED MEMORANDUM OF LAW**

SKYLAND UTILITIES, LLC (Skyland), by and through its undersigned
counsel, hereby files this Response to Hernando County's Motion to Dismiss
Application of Skyland Utilities, LLC, for Lack of Jurisdiction With Incorporated
Memorandum of Law (the Motion), and would state and allege as follows:

The Motion notes that, in order to grant the relief requested therein, the PSC
would have to reverse agency action reflected by a prior Commission Order.¹
Hernando County (the County) also asserts that its argument is made for the
extension, modification, revised interpretation, or reversal of existing law.² Yet,
the County never addresses, much less wrestles with, the most fundamental

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¹In fact, to adopt the County's theory the Commission would have to reverse, rescind, or otherwise abandon several prior Orders.

²This statement is obviously an attempt to fend off any motion for attorney's fees against the County. See, §57.105(1)(b).

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Rose, Sundstrom & Bentley, LLP
2548 Blaristone Pines Drive, Tallahassee, Florida 32301
PPSC-COMMISSION CLERK

question presented by its Motion. Skyland is a "utility" under §367.021(12). That is a given. The legislature has seen fit to provide that not only existing systems comprise "utilities" under Chapter 367, but that proposed systems meet that definition as well. Thus, the relief demanded by the County begs the question: who will regulate Skyland's activities in Pasco and Hernando Counties if the County's Motion is granted? Will the County regulate the Hernando portion, and Pasco County (or the Commission) regulate the Pasco portion? *This is the exact situation the legislature sought to prevent and avoid in the enactment of §367.171(7).*

The Statute

1. Under §367.021 (12), Skyland is a utility, plain and simple. Skyland proposes construction of a system which will provide water or wastewater service to the public for compensation. Under §367.171(7), the Commission has "exclusive jurisdiction" over all "utility" systems (of which Skyland is one) whose service transverses county boundaries. The County does not dispute that Skyland proposes a utility system which will transverse the Pasco-Hernando County boundary. The issue presented by the County's Motion is whether the Commission has jurisdiction over that utility.

2. The interpretation which the County urges the Commission to adopt assumes at its very foundation that the legislature was incapable of setting forth, in

plain and unambiguous language, the statutory and practical result that the County hopes to achieve: In any County in which no utility transverses county boundaries as of the date of the enactment of §367.171(7), no Commission regulated utility may ever transverse county boundaries. If the legislature had meant to mandate this result, it could have simply stated so. Instead, the County's tortured interpretation of Chapter 367 attempts to achieve an end which the legislature clearly never intended.³

3. The County's Motion addresses the authority of the Commission to regulate water and wastewater utilities in a "non-jurisdictional" county. In point of fact, since the enactment of §367.171(7), there is no "non-jurisdictional" county, at least not in the perpetual, all-encompassing way in which the County uses that phrase (to wit: a county in which the Commission can never, under any circumstance, exercise any jurisdiction whatsoever). The Commission, under §367.171(7) not only has jurisdiction, it has *exclusive jurisdiction*, over all utility systems whose facilities and/or service transverses county boundaries. To read Chapter 367 the way the County urges (which would require the Commission to ignore the definition of a "utility" set forth in §367.020(12) as not only including

³ While the Motion does make a protracted argument, discussed *infra*, that the First District Court of Appeals has interpreted this statute consistent with the County's interpretation, it makes no argument, and none could be made, that it was the intention of the legislature that §367.171(7) only apply to existing systems transversing county boundaries at the time the statute was enacted, yet this is the practical effect of the County's theory.

existing systems but proposed systems as well) would completely and entirely circumvent the will of the legislature in enacting §367.171(7).

The Hernando County Case

4. The County's narrow interpretation of *Hernando County v. Florida Public Service Commission*, 685 So.2d 48 (Fla. 1st DCA 1996), and its fixation on a single out of context sentence there from, misconstrues the clear holding in the case.

In *Hernando County*, the Commission found that certain facilities in separate counties were "functionally related", thus rendering the utility jurisdictional as one transversing county boundaries. In that case:

. . . the PSC relied primarily upon centralized organization out of the utility's Apopka office, as well as regional management, to provide the basis for its decision that these various facilities constitute a single system providing service which transverses county boundaries.

Hernando County, at 50.

In what the court praised as a "well-reasoned dissent", Chairman Deason had disagreed with the majority decision and "logically concluded that service means the physical delivery of water and/or wastewater". *Id.*, at 51. The court noted that:

If the legislature had intended the administrative and operational functions of the company to satisfy the cross-county activity necessary to support PSC jurisdiction, under Section 367.171(7), it could have simply used the word "system" instead of also referring to "service". In other words, the legislature could have provided that the Commission shall have exclusive jurisdiction over all utility systems

which transverse county boundaries, or even more expansively, which operate in multiple counties.

Id., at 51.

Similarly, as previously discussed, the legislature could have easily and plainly have drafted §367.171(7) to reflect the interpretation which the County now seeks the Commission, *ex post facto*, to adopt.

The *Hernando* court concluded that:

The relevant inquiry when determining the existence of jurisdiction under §367.171(7) is the actual inter-relationship of two or more facilities providing utility services in a particular geographic area. . .

The Court held that the conclusion that the correct focus is on the relationship between the particular identified facilities (rather than the general corporate structure of the utility) is supported by the use of the word “transverses” in the statute, which indicates legislative intent that the facilities and land forming a system must exist in close geographical proximity across the county boundary. In essence, all the court substantively found was that jurisdiction under §367.171(7) cannot be exclusively founded upon evidence that the company utilizes a umbrella organizational structure, or the central hub of management offices described in that particular case.

In this case, Skyland proposes facilities and land forming a system which will exist in close geographical proximity across a county boundary. In this case, jurisdiction is not founded upon an “umbrella organizational structure”, a “central

hub of management offices”, a “functionally related system”, nor “regional management”. In this case, the Commission’s jurisdiction is established by §367.171(7) by the physical delivery of water and/or wastewater (as Chairman Deason described in his dissent, which the court characterized as “well-reasoned”). Here, it is the proposed physical delivery of water and/or wastewater by Skyland which invokes the jurisdiction of the Commission. Nothing in the court’s holding in *Hernando County* changes that fact.

The County attempts to distinguish the Commission’s decision in *Intercoastal Utilities*. However, nothing about that decision is particularly notable or unique as it relates to the County’s point. The fact of the matter is that the Commission has, over time, read §367.171(7) more expansively (as opposed to more narrowly) in orders not analyzed nor addressed by the Motion. For instance, in Order No. PSC-07-0717-FOF-WS, *In re: Application for certificates to provide water and wastewater service at Glades County and water service in Highlands County by Silver Lake Utilities, Inc.*, the Commission found that although Silver Lake intended ultimately to provide wastewater service in Highlands County, initially, it would only be providing wastewater service in Glades County, a non-jurisdictional county. Nonetheless, the Commission determined that the jurisdiction over one service that crosses county boundaries also involves jurisdiction over the other service, even when the other service does not initially

transverse county boundaries (Silver Lake did intend to immediately provide water service in both counties). Likewise, in Order No. PSC-08-0540-PAA-WS, *In re: Application for Certificates to provide water and wastewater service in Hardee and Polk Counties by TBBT Utility, LLC*, the Commission found that although the proposed utility system would be designed so that the developments in Polk and Hardee Counties would have “separate distribution, collection, and treatment facilities”, the proposed utility was still jurisdictional under §367.171(7) because its systems were to be “located relatively close to one another” and “all administrative, billing, collection, accounting, maintenance, testing, permitting, and functions of every type would be housed within the same offices and utilized the same personnel, tools, and equipment”. There is no nuance in the case of Skyland, as there was in these two orders, as to the application of §367.171(7). Skyland proposes facilities which will physically and operationally transverse county boundaries.

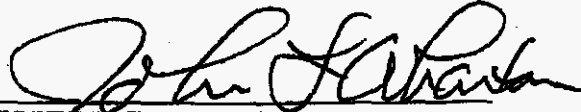
The Practical Result of the County's Theory, If Adopted

5. The interpretation of §367.171(7), and the *Hernando County* decision, urged by the County would lead to an absurd result. If the Commission determines it does not have jurisdiction over that portion of Skyland which lies within the County's boundaries, this will not somehow cause Skyland's proposal to magically disappear. If it is ultimately determined, by the County, a Court, or whatever

power that be, that Skyland should be allowed to establish a utility in Hernando County, then Skyland will construct its proposed system, and at some moment in time, it will become *an existing system*. Will that existing utility, which is comprised of that portion of Skyland in Hernando and the portion of Skyland in Pasco, then fall within the exclusive jurisdiction of the Commission, *even under the County's interpretation of §367.171(7)*, because Skyland will be an "existing system" which transverses county boundaries? Absurdly, at that point, even under the County's argument as to the limits of the Commission's jurisdiction, the County would be divested of jurisdiction and that jurisdiction would be returned to the Commission. For all practical purposes, even if the County's argument prevails, all it will allow the County to do is make an initial decision, based on whatever prevailing law, as to whether Skyland will be certificated or licensed. This could not have been what the legislature intended. Alternatively, if the legislature did intend this absurd result, it could have simply and plainly stated so in the statute.

For all the reasons set forth herein, Skyland respectfully requests that the Commission deny Hernando County's Motion.

Respectfully submitted this 23rd day of
November, 2009, by:



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been
furnished by U.S. Mail or Hand Delivery* on this 23rd day of November, 2009, to:

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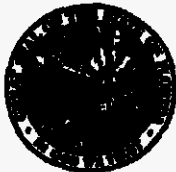
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JOHN L. WHARTON

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
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-M-E-M-O-R-A-N-D-U-M-

DATE: January 28, 2010

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Klancke) *[Signature]*
Division of Economic Regulation (Brady, Simpson) *[Signature]*

RE: Docket No. 090478-WS – Application for original certificates for proposed water and wastewater system, in Hernando and Pasco Counties, and request for initial rates and charges, by Skyland Utilities, LLC.

AGENDA: 02/09/10 – Regular Agenda – Oral Argument Requested – Participation is at the Commission’s Discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Skop

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: Oral Argument Requested – Issue 1

FILE NAME AND LOCATION: S:\PSC\ECR\WP\090478.RCM.DOC

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Case Background

On October 16, 2009, Skyland Utilities, LLC, (Skyland or Utility) filed an application for original certificates to operate a water and wastewater utility in Hernando and Pasco Counties and for approval of initial rates and charges. According to the application, the Utility proposes to provide potable and non-potable water and wastewater services to customers in southeastern Hernando and northeastern Pasco Counties. The Utility asserted that the proposed interconnections will transverse county lines.

On November 13, 2009, Hernando County (Hernando) timely filed a protest to the Utility’s application and requested a formal hearing. In its protest, Hernando argued that: the

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Docket No. 090478-WS
Date: January 28, 2010

proposed citing of the Utility will violate Hernando's Comprehensive Plan; that the proposed Utility territory is wholly within the service district of Hernando County Water and Sewer District (HCWSD), which is governed by the locally elected Board of County Commissioners; that the Utility has not demonstrated that its current and future water and wastewater needs could not be satisfied by the HCWSD; that the proposed service is not in the public interest; and that Skyland is not a utility which proposes to provide service to the public for compensation as required by Section 367.021(13), Florida Statutes (F.S.).

Contemporaneously with its objection, on November 13, 2009, Hernando also filed a Motion to Dismiss Application of Skyland Utilities, LLC, for Lack of Jurisdiction with Incorporated Memorandum of Law (Motion to Dismiss or Motion). In its Motion, Hernando asserted that the Commission does not have jurisdiction to consider Skyland's application pursuant to Section 367.171(7), F.S., since facilities forming Skyland's proposed system do not exist and do not currently provide service across the border of Pasco and Hernando Counties. Hernando acknowledged that the Commission has addressed this issue in Order No. PSC-00-1265-PCO-WS,¹ but requested that the Commission overrule this order or limit its scope.

On November 23, 2009, Skyland filed its response to Hernando's Motion to Dismiss, asserting that Skyland is a utility as defined by Section 367.021(12), F.S., which has proposed the construction of a system which will provide water or wastewater service to the public for compensation. Skyland asserts that the proposed service will transverse the border of Pasco and Hernando Counties. Further, Skyland argued that Section 367.171(7), F.S., clearly provides that the Commission has exclusive jurisdiction over all utility systems (of which Skyland is one) whose service transverses county boundaries. Skyland notes that to read Chapter 367 the way the Hernando urges would require the Commission to ignore the definition of "utility" set forth in Section 367.021(12), F.S.

For the reasons described below, the Commission should deny Hernando's Motion to Dismiss. The Commission has jurisdiction pursuant to Section 367.171(7), F.S.

¹Order No. PSC-00-1265-PCO-WS, issued July 11, 2000, in Docket Nos. 990696-WS and 992040-WS, In re: Application for original certificates to operate a water and wastewater utility in Duval and St. Johns Counties by Nocatee Utility Corporation and Application for certificates to operate a water and wastewater utility in Duval and St. Johns Counties by Intercoastal Utilities, Inc.

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Discussion of Issues

Issue 1: Should Hernando's Request for Oral Argument on its Motion to Dismiss be granted?

Recommendation: The Request for Oral Argument should be denied as being untimely filed. However, the Commission has the discretion to request oral argument from the parties if it believes oral argument would assist the Commission in rendering its decision. In such an event, staff recommends that each side should be allowed 10 minutes to address the Commission on the matter. (Klancke)

Staff Analysis: Hernando filed its Request for Oral Argument by separate written request filed January 19, 2010. In its request, Hernando suggests that there are factual and legal issues specific and unique with respect to this matter and that the Commission would benefit from oral argument.

While Skyland did not file a written request for oral argument, counsel for Skyland conveyed to staff counsel in a telephonic conversation on January 19, 2010, that it, too, would like to be able to orally address the Commission.

Rule 25-22.0021(1), Florida Administrative Code (F.A.C.), provides that participation at the Commission's Agenda Conference may be informal or by oral argument. Subsection (3) of the rule provides that informal participation is not permitted on dispositive motions (such as motions to dismiss), and that participation on such items is governed by Rule 25-22.022, F.A.C.

Rule 25-0022(1), F.A.C., provides in its pertinent part:

Oral argument must be sought by separate written request filed concurrently with the motion on which argument is requested, or no later than 10 days after exceptions to a recommended order are filed. Failure to timely file a request for oral argument shall constitute waiver thereof. Failure to timely file a response to the request for oral argument waives the opportunity to object to oral argument...

(emphasis added).

As discussed in the case background, Hernando's Motion to Dismiss was filed on November 13, 2009; Hernando's Request for Oral Argument was filed over two months later. Staff therefore recommends that, pursuant to Rule 25-22.022(1), F.A.C., the Request for Oral Argument should be denied as being untimely filed.

However, Rule 25-22.0022(7)(b), F.A.C., also provides:

The Commission can request oral argument on any issue to be decided by a dispositive motion or recommended order. The listing of the dispositive motion or recommended order on the notice of the agenda conference shall serve as notice to the parties to be prepared for oral argument on all issues associated with the dispositive motion or recommended order on the agenda, even if a request for

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oral argument has not been made by a party, or if a request made by a party pertains to a limited number of issues....

The Commission has the discretion to request oral argument from the parties if it believes oral argument would assist the Commission in rendering its decision. In such an event, staff recommends that each side should be allowed 10 minutes to address the Commission on the matter.

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Issue 2: Should the Commission grant Hernando County's Motion to Dismiss Application of Skyland Utilities, LLC., for Lack of Jurisdiction with Incorporated Memorandum of Law?

Recommendation: No. The Commission should deny Hernando County's Motion to Dismiss Application of Skyland Utilities, LLC., for Lack of Jurisdiction with Incorporated Memorandum of Law. (Klancke)

Staff Analysis: A motion to dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action. Meyers v. City of Jacksonville, 754 So. 2d 198, 202 (Fla. 1st DCA 2000). The standard to be applied in disposing of a motion to dismiss is whether, with all the allegations in the petition assumed to be true, the petition states a cause of action upon which relief can be granted. *Id.* When making this determination, only the petition can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993).

Hernando County's Motion to Dismiss

As stated in the case background, Hernando timely filed a Motion to Dismiss Skyland's application on the grounds that the Commission lacked subject matter jurisdiction over Skyland's application. In its Motion, Hernando argued that it is a non-jurisdictional county pursuant to the Hernando County Board of County Commissioners' adoption of Resolution No. 94-77 rescinding Florida Public Service Commission jurisdiction in Hernando County on April 5, 1994. Hernando's rescision of the Commission's jurisdiction was recognized in Order No. PSC-94-0719-FOF-WS.²

Hernando acknowledges that Section 367.171(7), F.S., affords the Commission with exclusive jurisdiction over utility systems whose service transverse county boundaries. Hernando asserts, however, that Section 367.171(7), F.S., does not afford the Commission with subject matter jurisdiction over Skyland's application because Skyland's utility system does not currently exist and does not currently provide service across the border of Pasco and Hernando Counties. In support of this assertion, Hernando argued that pursuant to Hernando County v. Florida Public Service Commission, 685 So. 2d 48 (Fla. 1st DCA 1996), the Commission does not have jurisdiction to regulate utilities within its geographic boundaries. Citing to Hernando County, Hernando alleges that jurisdiction under Section 367.171(7), F.S., depends upon the actual existence of operationally integrated water and/or wastewater facilities that transverse county boundaries. Since no such facilities are present in the instant case, Hernando asserts that the Commission lacks the necessary jurisdiction to grant Skyland's application.

Skyland's Response

In its response to Hernando's Motion to Dismiss filed on November 23, 2009, Skyland asserted that it is a utility as defined by Section 367.021(12), F.S., which has proposed the construction of a system which will provide water or wastewater service to the public for compensation. Further, Skyland argued that Section 367.171(7), F.S., clearly provides that the

² Issued June 9, 1994, in Docket No. 940408-WS, In re: Request for acknowledgement of resolution rescinding Florida Public Service Commission jurisdiction over private water and wastewater utilities in Hernando County.

Commission has exclusive jurisdiction over all utility systems (of which Skyland is one) whose service transverse county boundaries. Skyland notes that to read Chapter 367 the way that Hernando urges would require the Commission to ignore the definition of utility set forth in Section 367.021(12), F.S.

Skyland further asserted that Hernando's reliance upon Hernando County is misplaced. Skyland argues that Hernando's narrow interpretation of Hernando County misconstrues the holding in that case. Skyland alleged that the court in Hernando County focused its analysis with respect to the determination of jurisdiction under Section 367.171(7), F.S., upon the inter-relationship of particular identified facilities rather than the general corporate structure of the utility. Skyland further argued that in this case the proposed facilities and land forming a system will exist in close geographical proximity across a county boundary. Moreover, Skyland asserted that it is the proposed physical delivery of water and/or wastewater across county boundaries that invokes the Commission's jurisdiction under Section 367.171(7), F.S., and nothing in the court's holding in Hernando County changes that fact.

Staff's Analysis

Pursuant to Section 367.171(3), F.S., and Order No. PSC-94-0719-FOF-WS Hernando is excluded from the Commission's jurisdiction. However, Skyland is proposing to serve areas which would span both Hernando and Pasco Counties. Thus, the proposed service territory would transverse county boundaries. The relevant statute to determine whether the Commission has jurisdiction over the Utility's application is Section 367.171(7), F.S. That section provides:

Notwithstanding anything in this section to the contrary, the [C]ommission shall have exclusive jurisdiction over all utility systems whose service transverse county boundaries, whether the counties involved are jurisdictional or nonjurisdictional, except for utility systems that are subject to, and remain subject to, interlocal utility agreements in effect as of January 1, 1991, that create a single governmental authority to regulate the utility systems whose service transverse county boundaries, provided that no such interlocal agreement shall divest commission jurisdiction over such systems, any portion of which provides service within a county that is subject to [C]ommission jurisdiction under this section.

(emphasis added).

In Section 367.021(12), F.S., the Legislature defines "utility" as "every person, lessee, trustee, or receiver [except those exempted under Section 367.022, F.S.] 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." (emphasis added). Further, Section 367.021(11), F.S., defines a "system" as "facilities and land used or useful in providing service." Based on the plain meaning of the statute using the definitions provided by the Legislature, staff believes that the Commission has subject matter jurisdiction to consider Skyland's application under Section 367.171(7), F.S. The Utility is proposing to construct a utility system whose service would transverse county boundaries, thereby causing the application to fall within the jurisdiction of the Commission. Contrary to the interpretation

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provided by Hernando, Section 367.171(7), F.S., provides this Commission with exclusive jurisdiction and authority to determine whether to grant the Utility's application.

In support of its Motion, Hernando relies upon Hernando County v. Florida Public Service Commission, 685 So. 2d 48 (Fla. 1st DCA 1996). In Hernando County the court addressed the issue of whether the Commission had jurisdiction pursuant to Section 367.171(7), F.S., over a utility whose facilities were located in a number of non-contiguous counties throughout Florida. The court stated that the relevant inquiry when determining the existence of jurisdiction under Section 367.171(7), F.S., is whether there is an "actual inter-relationship of two or more facilities providing utility services in a particular geographic area comparable to the 'service area' defined in Section 367.021(10), over which the PSC ordinarily has jurisdiction." Id. at 52. The court further stated that the correct focus is on the relationship between particular identified facilities rather than the general corporate structure of the utility and that this "is supported by the use of the word 'transverses' in the statute, which indicates a legislative intent that the facilities and land forming a system must exist in close geographical proximity across a county boundary." Id. The court characterized the inter-relatedness of operationally integrated facilities as "functional relatedness." The court further specified that, "jurisdiction under Section 367.171(7) cannot be found upon evidence that the company utilizes an umbrella organizational structure, or the central hub of management offices described by [the utility] in this case." Id. In essence, the court held that jurisdiction under Section 367.171(7), F.S., cannot be exclusively founded upon evidence that the company utilizes an umbrella organizational structure or a central hub of management offices.

In the instant case, Skyland has proposed facilities and land forming a system which will exist in close geographical proximity across a county boundary. Thus, the proposed service will result in its facilities physically crossing the Hernando County and Pasco County border, thereby placing it within the Commission's jurisdiction pursuant to Section 367.171(7), F.S. Moreover, because the proposed system would constitute one system, staff does not believe that the question of functional relatedness is an issue in this matter. Thus, staff does not believe that Hernando County restricts the Commission's jurisdiction over Skyland's application.

The Commission squarely addressed this issue in Order No. PSC-00-1265-PCO-WS. In that case, the Commission considered the applications of two utilities that sought original certificates to provide water and wastewater services to a development in Nocatee, Florida. Although no facilities existed at the time of the submission of the applications, the proposed service area would span two adjacent counties. Both applications were protested and several Motions to Dismiss for lack of subject matter jurisdiction were filed. In Order No. PSC-00-1265-PCO-WS, the Commission determined that pursuant to the clear and unambiguous language of Section 367.171(7), F.S., using the definitions provided by the Legislature, it had exclusive jurisdiction over the proposed utility system whose service would transverse county boundaries. Quoting Order No. 22459,³ the Commission discussed the legislative intent behind Section 367.171(7), F.S. In that order, the Commission stated:

³ Order No. 22459, issued January 24, 1990, in Docket No. 891190-WS, In re: Petition of General Development Utilities, Inc. For Declaratory Statement Concerning Regulatory Jurisdiction Over its Water and Wastewater System in DeSoto, Charlotte, and Sarasota Counties. (GDU).

We do not believe that the Legislature intended ... to perpetuate a situation where a utility would be subject to several regulators. On the contrary, we believe that the Legislature intended to eliminate regulatory problems that exist when utility systems provide service across political boundaries and are subject to regulation by two or more regulatory agencies This duplicative economic regulation is inefficient and results in potential inconsistency in the treatment of similarly situated customers These inefficiencies could result in unnecessary and wasteful efforts which would translate into higher rate case expense and higher rates to customers. Inconsistency can occur when regulators apply different ratemaking principles to the same system or make inconsistent determinations on the same issue.

The Legislature chose to promote efficient, economic regulation of multi-county systems by giving the Commission exclusive jurisdiction over all utilities whose service crosses county boundaries By concentrating exclusive jurisdiction over these systems in the Commission, the Legislature has corrected the problem of redundant, wasteful, and potentially inconsistent regulation.

Similarly, in the instant case, staff believes that the interpretation of Section 367.171(7), F.S., urged by Hernando would lead to an untenable and inefficient result. An interpretation of a statute that would produce absurd results should be avoided if the language is susceptible to an alternative interpretation. Amente v. Newman, 653 So. 2d 1030, 1032 (Fla. 1995). In this case, if the Commission does not have jurisdiction over the Utility's application pursuant to Section 367.171(7), F.S., then the Utility will be required to apply to two regulatory authorities, Hernando County and Pasco County, for separate certificates to provide service. Then, when the Utility begins providing service, the Commission would regulate the whole system. Staff does not believe that it would be logical, nor legally accurate, to assert that the Commission does not have jurisdiction to consider the application for certification, but that this Commission would have jurisdiction to subsequently regulate the system because it transverses county boundaries. Thus, staff believes that the legislative intent behind Section 367.171(7), F.S., the logical construction of this statute, as well as court and Commission precedent support the conclusion that the Commission has jurisdiction to consider Skyland's application.

Assuming that all of the allegations in the applications are true and viewing all reasonable inferences in favor of Hernando the application falls within the Commission's subject matter jurisdiction. Thus, staff recommends that Hernando County's Motion to Dismiss should be denied.

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Issue 3: Should this docket be closed?

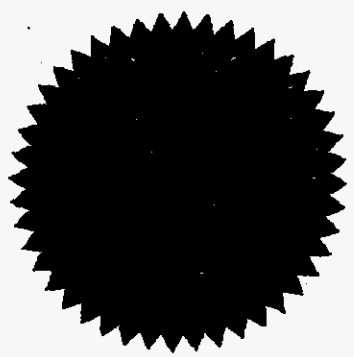
Recommendation: No. This docket should remain open to allow this matter to proceed to hearing. (Klancke)

Staff Analysis: This docket should remain open to allow this matter to proceed to hearing.

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of: DOCKET NO. 090478-WS

APPLICATION FOR ORIGINAL
CERTIFICATES FOR PROPOSED
WATER AND WASTEWATER SYSTEM,
IN HERNANDO AND PASCO COUNTIES,
AND REQUEST FOR INITIAL RATES
AND CHARGES, BY SKYLAND
UTILITIES, LLC.



PROCEEDINGS: AGENDA CONFERENCE
ITEM NO. 3

COMMISSIONERS
PARTICIPATING: CHAIRMAN NANCY ARGENZIANO
COMMISSIONER LISA POLAK EDGAR
COMMISSIONER NATHAN A. SKOP
COMMISSIONER DAVID E. KLEMENT
COMMISSIONER BEN A. "STEVE" STEVENS III

DATE: Tuesday, February 9, 2010

PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: LINDA BOLES, RPR, CRR
Official FPSC Reporter
(850) 413-6734

DOCUMENT NUMBER DATE

01139 FEB 22 2010

FPSC-COMMISSION CLERK

FLORIDA PUBLIC SERVICE COMMISSION

P R O C E E D I N G S

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3 **CHAIRMAN ARGENZIANO:** Okay. Staff, we're
4 going to have to come back to Item 9. Sorry. We're
5 having difficulties.

6 So let's move on to Item 3, Issue 3, please.
7 And, staff, you're recognized.

8 **MS. KLANCKE:** Absolutely. Item 3 pertains to
9 Hernando County's motion to dismiss the application of
10 Skyland Utility, Inc., for lack of subject matter
11 jurisdiction.

12 Item 1 addresses the issue for oral
13 modification -- I mean, the issue for oral arguments on
14 this matter. Staff notes that oral argument is at the
15 Commission's discretion. Staff would also like to note,
16 that the City of Brooksville has filed a motion for
17 joinder affirming the pleadings of Hernando County. And
18 should the Commission desire to hear oral argument, the
19 City of Brooksville is present and here to answer
20 questions of the Commission.

21 Item 2 addresses the utility's, the --
22 Hernando County's motion to dismiss.

23 Commission staff is available to answer any
24 questions.

25 **CHAIRMAN ARGENZIANO:** Commissioners?

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1 Commissioner Stevens.

2 **COMMISSIONER STEVENS:** Yes, ma'am. Thank you.
3 Am I on now? On? Good. Thanks.

4 I agree with staff. I understand that the
5 motion was filed late, but particularly in this weather,
6 if some people came to see us, I think we, we ought to
7 hear them. So that's where I am.

8 **CHAIRMAN ARGENZIANO:** Commissioner Stevens, I
9 feel the same way. It can't hurt to have, to hear what
10 they have to say. And Commissioner Skop, Commissioner
11 Klement.

12 **COMMISSIONER SKOP:** Thank you. Thank you,
13 Madam Chair. And I believe brief oral argument would be
14 appropriate.

15 **COMMISSIONER EDGAR:** Madam Chair, I --

16 **CHAIRMAN ARGENZIANO:** I'm sorry. Commissioner
17 Edgar.

18 **COMMISSIONER EDGAR:** I would just say I do
19 agree that the staff made the right recommendation and
20 right read of our rules and all of that, but I concur
21 that I'd like to hear from them as long as they are here
22 and have made the request.

23 **CHAIRMAN ARGENZIANO:** Commissioner Klement.

24 **COMMISSIONER KLEMENT:** (Inaudible. Microphone
25 off.)

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CHAIRMAN ARGENZIANO: Same? Okay. Well, then I guess we're going for oral discussion.

MS. KLANCKE: If it is the preference of the Commission, if it's the will of the Commission to hear oral arguments, staff would recommend that you limit oral argument to five or ten minutes per side.

CHAIRMAN ARGENZIANO: I would think -- did you --

MR. WHARTON: Madam Chairman, if I may, I think one -- John Wharton, Rose, Sundstrom & Bentley, on behalf of Skyland Utilities, LLC. I think one thing that it would behoove the Commission to keep in mind is even though you're all here, we're sitting quasi-judicially in a motion hearing in an ongoing litigation, maybe one in which some of you won't be on the panel. Maybe that doesn't really affect oral argument because at hearing you might say you don't want to hear oral argument. But I have two ore tenus motions I want to make upfront about these late filings, this joinder and this reply to the staff rec. And it's not trivial because Hernando has said right in there they're going to seek an interlocutory appeal. I don't think, I don't think I want to wait until that appeal to say, hey, they shouldn't have been allowed to file a response to the staff rec. So I would like to make two motions.

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1 **CHAIRMAN ARGENZIANO:** I think you're
2 recognized to make your motions.

3 **MR. WHARTON:** Okay. Thank you.

4 First of all, Skyland would move to strike the
5 reply to the staff recommendation of Hernando County.
6 This motion was filed on November the 13th. The
7 response was filed by Skyland on November the 23rd. The
8 staff recommendation was on January the 28th. The reply
9 was filed on February 2nd. There is nothing in either
10 the uniform rules or the practice of the Commission that
11 allows a reply to a staff recommendation. One could
12 easily argue it is the oral response that Hernando seeks
13 to supplement here today. But I know that in all the
14 years that I have practiced in front of the Commission,
15 I've never seen a response to a staff recommendation
16 like this. It doesn't mean you guys haven't seen them.

17 And, again, it is not a trivial matter because
18 Hernando has indicated in their motion they're going to
19 seek an interlocutory appeal if the staff recommendation
20 is accepted. I move to strike Hernando's reply to the
21 staff recommendation.

22 **CHAIRMAN ARGENZIANO:** Commissioners?
23 Commissioner Klement.

24 **COMMISSIONER KLEMENT:** May I just ask for
25 clarification, who is the witness and who does he

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1 represent?

2 **MR. WHARTON:** My name is John Wharton, Rose,
3 Sundstrom & Bentley here in town, and I'm the attorney
4 for Skyland Utilities, for the applicant.

5 **COMMISSIONER KLEMENT:** Thank you.

6 **COMMISSIONER STEVENS:** I'm sorry. Last name?

7 **MR. WHARTON:** Wharton.

8 **CHAIRMAN ARGENZIANO:** Staff?

9 **MS. KLANCKE:** I don't think, although the
10 response to staff's recommendation may constitute
11 superfluous pleadings, I don't think there's anything in
12 the rules -- the rules don't contemplate prohibiting the
13 Commission from considering them. So I think it's at
14 the Commission's discretion whether or not to strike.

15 **CHAIRMAN ARGENZIANO:** Commissioners?

16 Commissioner Skop, then Commissioner Edgar.

17 **COMMISSIONER SKOP:** Thank you, Madam Chair.

18 I appreciate Hernando County's reply. If it's
19 a procedural issue that is going to result in protracted
20 litigation, perhaps granting the motion to strike would
21 be appropriate to the extent that it just simplifies the
22 case before us. I'd just leave it at that and move
23 forward.

24 **MS. KLANCKE:** I think before we go forward
25 with anything though we should afford Hernando County,

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1 who filed the pleading --

2 **CHAIRMAN ARGENZIANO:** An opportunity to --
3 absolutely. Commissioner Edgar first.

4 **COMMISSIONER EDGAR:** Thank you, Madam Chair.

5 I just wanted to ask a procedural question.
6 Realizing that a motion has been made orally to us as a
7 body this morning, and I do agree with hearing from both
8 sides before we act, but procedurally I would -- is that
9 something that should be dealt with by a vote of the
10 Commission or is it something that is within the
11 decision of the Chairman sitting basically as our
12 administrative officer?

13 **CHAIRMAN ARGENZIANO:** Whether -- you mean to
14 accept the motion?

15 **COMMISSIONER EDGAR:** To rule on the motion.

16 **CHAIRMAN ARGENZIANO:** To rule on the motion.

17 To rule --

18 **COMMISSIONER EDGAR:** To accept and/or rule.

19 **CHAIRMAN ARGENZIANO:** Right. Right. Well, I,
20 I have no problem letting the Commission, the full
21 Commission decide what they want to do. Either way,
22 whatever you prefer. Whatever is procedurally the right
23 way to go is fine with me.

24 **COMMISSIONER EDGAR:** And that's my question is
25 what is the way procedurally? How do we generally deal

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1 with that? I mean, I think I remember some similar
2 instances in the past and having them dealt with, and I
3 don't feel strongly one way or the other, other than I
4 think parties coming before us should, should know how
5 we're going to deal with those sorts of issues.

6 **MS. HELTON:** I think that if the motion had
7 been filed in writing instead of being made as an ore
8 tenus motion here today, that it would have been
9 something that the Prehearing Officer who was assigned
10 to the case could have dealt with if there had been, if
11 time had allowed. But obviously that's not the posture
12 that we are in today. So I think it would be within the
13 discretion of the Chairman to rule as the chief
14 administrative officer, or if she wants to defer to the
15 full panel, that certainly has been done and is
16 appropriate here.

17 **MR. WHARTON:** And if I may, Madam Chairman,
18 Commissioner Skop is right. The point should not be
19 belabored. The uniform rules clearly state that a
20 motion may be made in writing or on the record at a
21 hearing.

22 The only other point I want to make, if you're
23 going to decide to move on it or dispose of it, is I
24 would move to strike the city's joinder. What you've
25 got is a single piece of paper looking back two months

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1 saying that's my motion, that's my filing, that's my
2 argument, but now I'm going to be looking at a whole
3 separate brief at the court of appeal. So whether that
4 motion is well taken or not, I want to make it for the
5 record. I also want to move to strike the city's
6 joinder which was just filed in the last few weeks.
7 Those are my two motions.

8 **CHAIRMAN ARGENZIANO:** Okay. Commissioners,
9 any discussion? We have two motions, a motion to
10 strike, and then to, if we move forward, to remove the
11 city's joinder.

12 Commissioner Skop.

13 **COMMISSIONER SKOP:** Thank you, Madam Chair.

14 Just a procedural question to our General
15 Counsel. With respect to the, Mr. Wharton's point about
16 joinder, where would we as a Commission revisit that
17 request? Would it be filed as a, as a -- if we denied
18 it here, would it be a denial without prejudice and they
19 could refile it if we went into an evidentiary hearing
20 to join? Or if you could elaborate on that a little
21 bit.

22 **MS. HELTON:** Could I confer?

23 (Pause.)

24 It's my understanding that the City of
25 Brooksville has already intervened and been granted

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1 intervention in this case. So it's not a question of
2 whether they're a party or not. They are a party.

3 AS I understand what they filed with respect
4 to joining in on the motion to dismiss, it's simply a
5 notice of joinder. It's not something that you would
6 rule on per se. It's just giving you notice and the
7 world notice that they support Hernando County's
8 arguments that if it's your will and within your
9 discretion, you could allow them to share Hernando
10 County's time with respect to the oral argument and be
11 heard with respect to the oral argument. And it's also
12 I guess letting the court, in case there is actually an
13 interlocutory appeal, letting the court know that they
14 support Hernando County's arguments.

15 So as far as the process goes, it's really
16 within your discretion whether you want to hear from the
17 City of Brooksville as well. I would recommend though
18 that if you designate time per side, that Brooksville
19 share its time with Hernando County.

20 **MR. MCATEER:** Madam Chairman, my apologies.
21 Derrill McAteer, Hogan Law Firm, for the City of
22 Brooksville.

23 Just to concur with what counsel stated, it is
24 a simple notice of joinder endorsing and supporting
25 Hernando County's motion to dismiss for lack of

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1 jurisdiction. It is not our intent to take away any of
2 Hernando County's oral argument time. If the Commission
3 has questions of the City of Brooksville regarding this
4 case, I'm here to respond, I'm here to support the
5 county and, in their pleadings and in their arguments.
6 But I defer the argument to Mr. Kirk of Hernando County.
7 It is his motion. I don't want to take time away from
8 him or split time that he may need to make his argument
9 or to counter arguments made by the other side.

10 **CHAIRMAN ARGENZIANO:** Okay. So then you're
11 here if we have questions, if there are questions.

12 **MR. MCATEER:** Exactly. I'm here if you need
13 to talk to me.

14 **CHAIRMAN ARGENZIANO:** Okay. Commissioners,
15 any, any questions? I'll put it before the whole
16 Commission. What is the pleasure of the Commissioners?
17 I have no problem with, with moving forward and giving
18 ten minutes to each side.

19 Is that okay? All right. Let's, let's move
20 forward with ten minutes for each side. Is that too
21 much?

22 **MS. KLANCKE:** I think at this time perhaps we
23 should make a ruling on the ore tenus motions to strike.

24 **CHAIRMAN ARGENZIANO:** Oh, I'm sorry.
25 Absolutely.

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1 **MS. KLANCKE:** For -- the reply of Hernando
2 County was the first ore tenus motion to strike, and he
3 also moved to strike the City of Brooksville's joinder,
4 which was filed on February 3rd. So perhaps we can --

5 **CHAIRMAN ARGENZIANO:** Okay. Commissioners, do
6 I have a motion on the, on the --

7 **MR. WHARTON:** With that clarification of what
8 the joinder is I'll withdraw that motion.

9 **CHAIRMAN ARGENZIANO:** Okay. So the second
10 motion is withdrawn. The first motion is on the table.
11 And do I have a -- go ahead, Commissioner Skop.

12 **COMMISSIONER SKOP:** Thank you, Madam Chair.
13 And thank you, Mr. Wharton, because my, my motion would
14 have been styled to approve the first motion to strike
15 but deny the second, but only one is relevant. So I'd
16 move to grant the motion to strike the reply by Hernando
17 County.

18 **COMMISSIONER STEVENS:** Second.

19 **CHAIRMAN ARGENZIANO:** Okay. All in favor,
20 aye.

21 (Simultaneous vote.)

22 All opposed. Okay. We can move forward.

23 Thank you.

24 **MR. KIRK:** Good morning and birthday
25 greetings. Jeff Kirk on behalf of Hernando County, a

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1 political subdivision of the State of Florida, on behalf
2 of the Hernando County Water and Sewer District and on
3 behalf of the Hernando County Utility Regulatory Agency.

4 The precise issue upon which Hernando County
5 has moved to dismiss is an interpretation of Section
6 367.171. It is Hernando County's position that because
7 Skyland Utilities does not have any physical pipes,
8 water or wastewater across Hernando or Pasco County
9 boundaries that this Commission respectfully lacks
10 jurisdiction, and we would humbly request that the
11 Public Service Commission grant Hernando County's motion
12 to dismiss.

13 Our reliances upon reading chapter --
14 fundamental principles of statutory interpretation that
15 a statute should be given the plain meaning. Secondly,
16 that's where you have a general statute and a specific
17 statute, the specific statute governs. And, third,
18 statutes and their subsections should be read in pari
19 materia, i.e., that they should be read in harmony with
20 each other.

21 Section 367.171, the Legislature does a
22 balancing. They say local governments, county
23 governments that wish to regulate water and wastewater
24 utilities by resolution can opt out of regulation and
25 they get to regulate utilities within their county's

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1 jurisdiction. The Legislature has also carved out an
2 exception, and that is if a utility, you have two
3 contiguous counties and you have a utility providing
4 service to both counties, then they've said the PSC has
5 jurisdiction. And that makes sense because if the
6 PSC -- you have common utility, common infrastructure,
7 water going back and forth between counties, you should
8 have common rates, and the PSC is, has an ability to
9 govern rates.

10 We disagree with staff's memorandum for two
11 reasons. One, we believe that they have put the general
12 definition of utility ahead of the more specific
13 requirements set forth in 367.171(7). And that says
14 that you have a utility whose services transverse county
15 lines. Service and the word transverse modifies the
16 word utility. And what staff is saying it's sufficient,
17 because the definition of utility includes proposed
18 infrastructure, it's sufficient to have future or
19 proposed infrastructure in order to acquire
20 jurisdiction. We would respectfully submit that this
21 misses the fundamental principles of statutory
22 interpretation.

23 Secondly, we believe the controlling case in
24 this matter is an old, is a 1st District Court of Appeal
25 case, *Hernando County versus Public Service Commission*.

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1 In that case -- and that is at 685 So.2d 48, and it's a
2 1st District Court of Appeal. It's the only case that
3 has, only appellate decision that has actually defined
4 the words, that phrase, service that transverses county
5 lines. And the court goes in great detail looking both
6 at what the term service means and what the term
7 transverses means.

8 In that case, the court -- and that's at Page
9 51 -- the Court goes on to note that Chairman Deason,
10 and Chairman Deason was a former Chairman of the PSC who
11 wrote a dissenting opinion at the PSC level, and the 1st
12 DCA goes on to say that, "Chairman Deason logically,
13 logically conferred that service meant the physical
14 delivery of water, waste and/or wastewater," physical
15 delivery.

16 And the court goes on to note that looking
17 through Chapter 367 there was over 40 references to the
18 term of service, and the court concluded that that
19 connotated a physical delivery of service.

20 Now one thing very interesting about that
21 case, in that case the PSC held that because you had a
22 utility operating in multiple counties, it was Hernando
23 and a few other counties, and you had administrative
24 offices in one county and billing offices and
25 administrative services and utility services, that it

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1 was a functionally related utility. And the court says,
2 no, that's not enough. You have to have more. And in
3 defining the term service and defining the term
4 transverse they concluded that you have to have an
5 existing physical utility in order to invoke, in order
6 to usurp the ability of local government, county
7 government, in order for the PSC to usurp the local
8 sovereignty you had to have a physical connection.

9 And in fact the 1st District said, "We
10 conclude that the requirements of the statute can only
11 be satisfied by evidence that the facilities performing
12 their asserted system exist in contiguous counties
13 across which the service travels." And I'm citing to
14 Page 52 of the opinion.

15 Interesting about that case is on below the
16 Public Service Commission exerted jurisdiction over the
17 existing facilities of seven state utilities, but
18 expressly, expressly declined to exercise jurisdiction
19 over future acquired facilities.

20 Here staff is relying upon future acquired
21 facilities of Skyland Utilities. Looking within the
22 four corners of the application of Skyland Utilities,
23 Skyland says, "We anticipate having 155 ERC connections
24 over the Phase I planning period," which is
25 approximately 2010 to 2015. Skyland goes on to note

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1 that "We have not conceptually designed the future
2 phases of this system." And this is Exhibit D to the
3 application.

4 In Exhibit C of the application Skyland says,
5 "Physical connection between the counties will occur
6 with some future phase," but they don't identify the
7 phase or how it would occur. It is extremely
8 speculative at best, and we would suggest humbly to this
9 Commission that if this Commission wanted to rule on
10 this matter very narrowly, that it could do so because
11 of the very speculative nature of what they are
12 proposing and how they are proposing to transverse
13 county lines.

14 There's a second fundamental principle of
15 statutory interpretation, and we would first -- well,
16 going back to the plain meaning, we would suggest humbly
17 to this Commission that the ruling in *Hernando County*
18 *versus Public Service Commission* is equally applicable
19 to the facts, to the unique facts present here and is
20 the controlling precedent upon which should be guiding
21 this body.

22 A second principle of statutory interpretation
23 is that a specific statute would govern over a general.
24 Here the general statute is a definition of utility,
25 which includes proposed utilities. However, the more

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1 specific statute is 367.171(7), which says that, it
2 says, "A utility," and then it goes on to say, "which
3 service transverses, which service transverses," the
4 active verb modifies the utility. And as the court
5 reasoned in *Hernando County versus Public Service*
6 *Commission*, this means something more than just
7 something future, proposed, speculative or conjecture.

8 The third principle of statutory
9 interpretation we'd like this Commission to focus on is
10 the principle of reading statutes in *pari materia*. The
11 subsections dealing with a local government, a county
12 government's ability to regulate within its boundaries
13 is balanced with the, with the Legislature's grant of
14 authority to the Public Service Commission when you have
15 utilities across county boundaries.

16 We would humbly ask, Hernando County would
17 humbly ask this Commission to respect Hernando County's
18 sovereignty until such time as Skyland actually has
19 physical connections to Pasco County, Sumter County,
20 Citrus County or one of the other adjoining counties to
21 Hernando. At this time everything that Skyland is is
22 proposed. It's proposed, it's on paper, it's not built,
23 and they don't even have it designed when they're going,
24 designed or conceptualized as to when they're going to
25 cross county lines.

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1 There is ample -- and in terms of the specific
2 governing over the general I cite to two cases, *School*
3 *Board of Palm Beach County versus Survivors Charter*
4 *School*, 3 So.3d 1220, Florida Supreme Court 2009, and
5 *Murray versus Mariner Health*, 994 So.2d at Page 1051,
6 Florida Supreme Court 2008, where they say, where the
7 court quotes, "Where two statutory provisions are in
8 conflict, the specific provisions control over the
9 general provisions."

10 We believe the basic principles of statutory
11 construction and the reasoned holding, and we believe
12 the PSC staff does not properly apply the holding. They
13 gave a very narrow interpretation of the holding in the
14 case of *Hernando versus Public Service Commission*, but
15 we submit that that case is equally applicable here.

16 Previously you had a system that was being
17 tied together by functional but not, not physical
18 components. Here you have a system being tied together
19 by future acquired facilities not yet built or
20 conceptualized or designed.

21 We would ask humbly, Hernando County would
22 humbly ask that you would, you would grant our motion to
23 dismiss only as to Hernando County. I believe Pasco
24 County is a jurisdictional county. And if you grant
25 Hernando County's motion, that would not affect, I

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1 believe, the PSC's jurisdiction involving Pasco County.

2 We would ask that you grant it as a matter of
3 law and alternatively based upon the specific facts of
4 this case, upon the very highly speculative, conjectural
5 and illusory nature of what this specific utility, and
6 staying within the four corners of the application as
7 filed. I humbly thank the Commission for its time.

8 **CHAIRMAN ARGENZIANO:** Thank you. Thank you
9 very much. And just a little bit over the ten minutes,
10 so we'll do the same for the -- Mr. Wharton, do you want
11 to begin?

12 **MR. WHARTON:** Thank you. First of all,
13 Commissioners, I don't consider the bowls of candy to be
14 a positive step forward.

15 **CHAIRMAN ARGENZIANO:** I haven't seen you eat
16 any yet, so.

17 **MR. WHARTON:** I, I do think that the
18 Commission should consider the statutory construction
19 and its role in the statutory construction. I think
20 what it's important for the Commission to remember is
21 that your interpretation of Chapter 367 and all the
22 statutes that enable you, including 367.171(7) here, is
23 entitled to great weight. And I also think while there
24 are maybe hundreds of cases saying this about the higher
25 courts, maybe there are none about you, it's true

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1 nonetheless. When you think of that responsibility that
2 our interpretation is entitled to great weight, you need
3 to think about the fact that prior Commissions have
4 looked at this exact statute, this unchanged statute,
5 and interpreted it the way that the staff recommendation
6 does. And everyone on this side of these ropes needs to
7 be able to depend on that kind of consistency. There's
8 nothing new in the statute. It's been around a long
9 time.

10 Another principle of statutory construction
11 that I think it's important that you keep in mind is --
12 and that you really have the latitude to do as you're
13 interpreting these statutes, and that interpretation is
14 entitled to great weight, is to avoid an absurd result
15 or an untenable or undesirable result.

16 Basically what Hernando County is asking you
17 to do would lead to one of two scenarios. Skyland
18 proposes to operate in Pasco and Hernando Counties. The
19 counsel for Hernando County said, well, if it's a common
20 utility with common infrastructure and common rates, we
21 understand why you would regulate it.

22 Well, imagine what might come out of this. If
23 you've got a utility that is on Evan's property in
24 Hernando and a utility that is on Evan's property in
25 Pasco and you are attempting to avoid that scenario, no

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1 common infrastructure, no common billing, no -- one
2 water plant in Pasco, one in Hernando, one sewer plant
3 in Pasco, one in Hernando, that's no way to run a
4 utility. That is very inefficient and very inexpensive
5 (sic.), and I don't think this Commission should find
6 that's what the Legislature intended.

7 It also leads to the rather absurd result that
8 if we do fight a battle in Hernando and we get a
9 utility, then we fight a battle in Pasco and we get us a
10 utility, and then we do run some lines across and we do
11 bill from one building and we do serve from one water
12 plant, well then suddenly even under Hernando's
13 interpretation we're an existing utility and maybe we're
14 back here. I don't think that makes any sense either.

15 But rather than repeat what's in the briefs,
16 what's in the filings and what you've already read, let
17 me ask you to consider one thing: The Legislature
18 carved out, fully understanding that the statute allows
19 some counties to opt out of the jurisdiction of the
20 Commission, the Legislature carved out a certain class
21 of utilities and said these types of utilities, these
22 utilities that transverse county boundaries, it makes
23 sense for these utilities to be regulated by the
24 Commission.

25 Why would the Legislature -- nobody has

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1 addressed this question and I don't think there's any
2 way to answer it -- why would the Legislature just have
3 meant to those utilities existing in 1991 or '93 or
4 whenever the statute came in but not to all the
5 subsequent utilities that are likely situated?

6 I think the Commission should find that what
7 the Legislature meant was here's a class of utilities
8 that by the vagaries of their operations and their
9 economics and the politics and the fact that utilities
10 operate in monopoly service areas and that that
11 theoretically works to the benefit of the customers
12 through the consolidation of facilities and operations,
13 these class of utilities, the regulation should not be
14 divided. To say, well, this was a snapshot, this
15 applied to existing utilities when the statute went in
16 but not those that came after I just don't think is
17 consistent with any reasonable interpretation of what
18 the Legislature intended.

19 The last thing I would say to the Commission,
20 and this is related to my point of the consistency of
21 the interpretation of your decisions, is that
22 everyone -- and I know that the Commission does
23 understand this and sometimes maybe stating the obvious
24 for the record is a good thing to do -- if you've got a
25 bunch of utilities out there you've regulated under this

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1 statute, that if you accept what Hernando County is
2 telling you, you've done it wrong. They're going to
3 have to be looked at somehow because you regulated them
4 because they transversed county boundaries but they came
5 into existence after the statute was put in.

6 So I just think this Commission is entitled
7 to, to enforce the statute and interpret the statute in
8 the reasonable way that it sees fit, that it's important
9 that it be done so consistently, and we do support the
10 staff recommendation and the interpretations of both the
11 Hernando case and the statute in the staff
12 recommendation.

13 **CHAIRMAN ARGENZIANO:** Commissioner Klement and
14 then Commissioner Skop.

15 **COMMISSIONER KLEMENT:** Thank you, Madam
16 Chairman.

17 Regarding Hernando's assertions about the
18 status of the plans for the cross-county service, is it
19 appropriate to ask Mr. Wharton whether -- what is the
20 status of those, that plant? He said it's just some
21 words on paper and not even a design. Is there a
22 timeline when you think that you would be doing it?

23 **MR. WHARTON:** I can -- I would have to look
24 more thoroughly in the application, which is a large
25 application, for a timeline. But I can tell you that I

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1 know that I was an attorney at the PSC and joined my
2 firm in 1987. Marty was here at the PSC and he was
3 already at my firm. This is pretty much the way it's
4 done. I mean, right now you design that utility to the
5 extent that it is feasible to do so to get a certificate
6 to allow you to operate. You don't do a lot of extra
7 effort that might be superfluous if you don't get that
8 certificate. The statute says you're a utility if you
9 provide or propose to provide water and wastewater
10 service to the public. I.

11 Think that we feel that our application
12 satisfies the Commission's rules even if Hernando County
13 feels that it's not sufficiently laid out in detail.
14 Obviously the future is sometimes affected by events of
15 economy and et cetera. I can tell you that in our
16 application we're saying there's a need. We think we'll
17 be able to meet that need. We'll have the technical and
18 financial ability laid out in the application.

19 **COMMISSIONER KLEMENT:** But no specific year in
20 which you would plan to do that.

21 **MR. WHARTON:** I cannot answer, Commissioner
22 Klement, whether there, whether we have said in our
23 application that we will begin to provide service in, in
24 2014 or what not. I would imagine that it says as soon
25 as we get the certificate, that to the extent that we

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1 have demonstrated need, which is implicit in the fact
2 that we got the certificate, that that need will begin
3 to be met.

4 **CHAIRMAN ARGENZIANO:** Commissioner.

5 **MR. KIRK:** May I respond?

6 **CHAIRMAN ARGENZIANO:** Yes, please.

7 **MR. KIRK:** Regarding the application, and I'm
8 just staying within the four corners of the application
9 because the document speaks for itself, Skyland
10 projects, I quote, "The need for Phase I utility
11 services are anticipated to occur from 2010 to 2015,
12 with 80 percent capacity reached in 2015. For this
13 filing, 2015 will be the test year." It's Page 23 on
14 the online docket, it's Exhibit 2 at Paragraph 2.

15 It then goes on to say, "During the first five
16 years Skyland projects providing water supply to 20
17 ERCs," blah, blah, blah, "155 over up to year six."
18 That's Page 26 on the online docket, Exhibit D, Table
19 D2 on the application.

20 They go on to say, "Future phases will begin
21 upon the completion of Phase I." That's Page 23 of the
22 online docket, Exhibit D at Paragraph 2. And then it
23 goes on to say, however, according to the application,
24 quote, "Phases II through V have not been conceptually
25 designed at this time," close quote. Again, that's Page

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1 23 of the online docket application, Exhibit D at
2 Paragraph 2.

3 And then in the Skyland Utility, LLC, cost of
4 service study at Page 1 -- this is Page 610 on the
5 online docket, "It is anticipated that the future phases
6 will be utilized in the order indicated on the proposed
7 service area map in Appendix I and as discussed in more
8 detail in Exhibit A."

9 **CHAIRMAN ARGENZIANO:** Mr. Kirk --

10 **MR. KIRK:** "There have been no conceptual
11 plans developed as of this time for future development
12 phases," that's quoting. And then Exhibit C at
13 Paragraph 1 says, "Physical interconnect --

14 **CHAIRMAN ARGENZIANO:** Mr. Kirk, let me, let me
15 cut you off just for a moment because I think the
16 Commissioners read that. And did that answer your
17 question?

18 **COMMISSIONER KLEMENT:** Yes, it did.

19 **CHAIRMAN ARGENZIANO:** I think it did. And
20 we've read that.

21 **COMMISSIONER KLEMENT:** He's made the point
22 well.

23 **CHAIRMAN ARGENZIANO:** Yes.

24 Commissioner Skop, and then we'll move on.

25 **COMMISSIONER SKOP:** Thank you, Madam Chair.

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1 And I just want to get to the matter before
2 us. Again, getting into these ancillary evidentiary
3 issues I think is problematic at this point in the
4 process.

5 What I wanted to state is that the matter
6 before us today is the Hernando County motion to dismiss
7 for lack of subject matter jurisdiction. It's well
8 settled that the Commission has subject matter
9 jurisdiction. Accordingly, the motion to dismiss should
10 be properly denied by the Commission pursuant to the
11 staff recommendation.

12 The Hernando County protest, however, raises
13 several general -- excuse me. The Hernando County
14 protest, however, raises several genuine questions of
15 material fact and issues of law which will need to be
16 addressed through an evidentiary hearing. And in this
17 regard I wish to emphasize that the denial of the motion
18 to dismiss for lack of subject matter jurisdiction
19 should not be construed to mean that the applicant will
20 ultimately prevail on the merits with respect to the
21 application for original certificate. In fact, using
22 the statute and the Commission rules by a developer to
23 circumvent a comprehensive use plan of the county I
24 think would be an abuse of the process. So, again, that
25 would remain to be determined in the course of an

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1 evidentiary hearing. But the matter before us today is
2 a motion to dismiss for lack of subject matter
3 jurisdiction. We clearly have subject matter
4 jurisdiction, so denial of the motion is proper.

5 **CHAIRMAN ARGENZIANO:** Commissioner Edgar.

6 **COMMISSIONER EDGAR:** Thank you, Madam Chair.

7 I just wanted to ask our staff so I kind of
8 understand where we are in the process, have dates been
9 set or held -- excuse me -- set or held for a potential
10 hearing on this? And if so, do we know when? Realizing
11 that could change, of course.

12 **MS. KLANCKE:** We do have tentative dates
13 currently. We wanted to --

14 **COMMISSIONER EDGAR:** Sure.

15 **MS. KLANCKE:** -- allow this determination to
16 be made prior to the issuance of an Order Establishing
17 Procedure which would contain those hearings dates.
18 We're looking at the summer.

19 **COMMISSIONER EDGAR:** Okay. That's what I
20 wanted. Just a little, a little time frame. Again,
21 realizing that there are steps to come before that
22 should we go down that route.

23 And then -- excuse me -- are there -- has this
24 been assigned to a panel or to the full Commission?

25 **MS. KLANCKE:** I believe that this will go to

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1 the full Commission.

2 **COMMISSIONER EDGAR:** I just wanted to kind of
3 understand where we were in the process. Thank you.

4 **CHAIRMAN ARGENZIANO:** Commissioner Skop.

5 **COMMISSIONER SKOP:** Thank you. And to staff,
6 noting that I guess the tentative dates for hearing are
7 in summer, is there a way that this might be able to be,
8 move forward a little bit into the docket for late
9 spring?

10 **MS. KLANCKE:** We will try to the best of our
11 ability to accommodate that request.

12 **COMMISSIONER SKOP:** I think -- I don't know
13 whether the counties and the City of Brooksville may
14 want to do that, but certainly I think they would like
15 to get resolution of this issue dispositively sooner
16 rather than later. Thank you.

17 **CHAIRMAN ARGENZIANO:** Okay. Commissioners?
18 Staff, anything to add?

19 Okay. Do I have a motion?

20 **COMMISSIONER SKOP:** Yes, Madam Chair.

21 I'd move to approve staff recommendation on
22 Issues 2 and 3.

23 **COMMISSIONER STEVENS:** Second.

24 **CHAIRMAN ARGENZIANO:** All those in favor, say
25 aye.

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(Simultaneous vote.)

Opposed, same sign. Show it approved. Thank
you very much.

MR. WHARTON: Thank you, Commissioners.

(Agenda item concluded.)

* * * * *

FLORIDA PUBLIC SERVICE COMMISSION

1 STATE OF FLORIDA)
 2 COUNTY OF LEON) CERTIFICATE OF REPORTER

3
 4 I, LINDA BOLES, RPR, CRR, Official Commission
 5 Reporter, do hereby certify that the foregoing
 6 proceeding was heard at the time and place herein
 7 stated.

8 IT IS FURTHER CERTIFIED that I
 9 stenographically reported the said proceedings; that the
 10 same has been transcribed under my direct supervision;
 11 and that this transcript constitutes a true
 12 transcription of my notes of said proceedings.

13 I FURTHER CERTIFY that I am not a relative,
 14 employee, attorney or counsel of any of the parties, nor
 15 am I a relative or employee of any of the parties'
 16 attorneys or counsel connected with the action, nor am I
 17 financially interested in the action.

18 DATED THIS 2nd day of February,
 19 2010.

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FLORIDA PUBLIC SERVICE COMMISSION

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for original certificates for proposed water and wastewater system, in Hernando and Pasco Counties, and request for initial rates and charges, by Skyland Utilities, LLC.

DOCKET NO. 090478-WS
ORDER NO. PSC-10-0123-FOF-WS
ISSUED: March 1, 2010

The following Commissioners participated in the disposition of this matter:

NANCY ARGENZIANO, Chairman
LISA POLAK EDGAR
NATHAN A. SKOP
DAVID E. KLEMENT
BEN A. "STEVE" STEVENS III

ORDER ON JURISDICTION AND DENYING
HERNANDO COUNTY'S MOTION TO DISMISS

BY THE COMMISSION:

BACKGROUND

On October 16, 2009, Skyland Utilities, LLC (Skyland or Utility) filed an application for original certificates to operate a water and wastewater utility in Hernando and Pasco Counties and for approval of initial rates and charges. According to the application, the Utility proposes to provide potable and non-potable water and wastewater services to customers in southeastern Hernando and northeastern Pasco Counties. The Utility asserted that the proposed interconnections will transverse county lines.

On November 13, 2009, Hernando County (Hernando) timely filed a protest to the Utility's application and requested a formal hearing. In its protest, Hernando argued that: the proposed citing of the Utility will violate Hernando's Comprehensive Plan; that the proposed Utility territory is wholly within the service district of Hernando County Water and Sewer District (HCWSD), which is governed by the locally elected Board of County Commissioners; that the Utility has not demonstrated that its current and future water and wastewater needs could not be satisfied by the HCWSD; that the proposed service is not in the public interest; and that Skyland is not a utility which proposes to provide service to the public for compensation as required by Section 367.021(13), Florida Statutes (F.S.).

Contemporaneously with its objection, on November 13, 2009, Hernando also filed a Motion to Dismiss Application of Skyland Utilities, LLC, for Lack of Jurisdiction with Incorporated Memorandum of Law (Motion to Dismiss or Motion). In its Motion, Hernando asserted that this Commission does not have jurisdiction to consider Skyland's application pursuant to Section 367.171(7), F.S., since facilities forming Skyland's proposed system do not

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exist and do not currently provide service across the border of Pasco and Hernando Counties. Hernando acknowledged that this Commission has addressed this issue in Order No. PSC-00-1265-PCO-WS,¹ but requested that we overrule this order or limit its scope.

On November 23, 2009, Skyland filed its response to Hernando's Motion to Dismiss, asserting that Skyland is a utility as defined by Section 367.021(12), F.S., which has proposed the construction of a system which will provide water or wastewater service to the public for compensation. Skyland asserts that the proposed service will transverse the border of Pasco and Hernando Counties. Further, Skyland argued that Section 367.171(7), F.S., clearly provides that the Commission has exclusive jurisdiction over all utility systems (of which Skyland is one) whose service transverses county boundaries. Skyland notes that to read Chapter 367 the way the Hernando urges would require us to ignore the definition of "utility" set forth in Section 367.021(12), F.S.

Our staff filed its recommendation on Hernando's Motion on January 28, 2010. On February 2, 2010, Hernando filed a Reply to PSC Staff's Memorandum (Response).

For the reasons described below, we hereby deny Hernando's Motion to Dismiss. We have jurisdiction pursuant to Section 367.171(7), F.S.

**MOTION TO STRIKE HERNANDO COUNTY'S RESPONSE TO
PSC STAFF'S MEMORANDUM**

As discussed above, Hernando filed its Response on February 2, 2010. At the Agenda Conference on Tuesday, February 9, 2010, the Utility raised an ore tenus motion to strike Hernando's Response on the grounds that there is nothing in either the uniform rules or the practice of the Commission that allows a reply to a staff recommendation.

Pursuant to our authority provided in Rule 28-106.204, Florida Administrative Code (F.A.C.), and in the interests of clarifying the record, we granted the Utility's Motion to Strike Hernando County's Reply to PSC Staff's Memorandum.

REQUEST FOR ORAL ARGUMENT

Rule 25-22.0021(1), F.A.C., provides that participation at the Commission's Agenda Conference may be informal or by oral argument. Subsection (3) of the rule provides that informal participation is not permitted on dispositive motions (such as motions to dismiss), and that participation on such items is governed by Rule 25-22.0022, F.A.C.

Rule 25-22.0022(1), F.A.C., provides in its pertinent part:

¹Order No. PSC-00-1265-PCO-WS, issued July 11, 2000, in Docket Nos. 990696-WS and 992040-WS, In re: Application for original certificates to operate a water and wastewater utility in Duval and St. Johns Counties by Nocatee Utility Corporation and Application for certificates to operate a water and wastewater utility in Duval and St. Johns Counties by Intercoastal Utilities, Inc.

Oral argument must be sought by separate written request filed concurrently with the motion on which argument is requested, or no later than 10 days after exceptions to a recommended order are filed. Failure to timely file a request for oral argument shall constitute waiver thereof. Failure to timely file a response to the request for oral argument waives the opportunity to object to oral argument....

(emphasis added).

Rule 25-22.0022(7)(b), F.A.C., also provides:

The Commission can request oral argument on any issue to be decided by a dispositive motion or recommended order. The listing of the dispositive motion or recommended order on the notice of the agenda conference shall serve as notice to the parties to be prepared for oral argument on all issues associated with the dispositive motion or recommended order on the agenda, even if a request for oral argument has not been made by a party, or if a request made by a party pertains to a limited number of issues....

Hernando filed its Request for Oral Argument by separate written request filed January 19, 2010. In its request, Hernando suggested that there are factual and legal issues specific and unique with respect to this matter and that we would benefit from oral argument.

While Skyland did not file a written request for oral argument, counsel for Skyland conveyed to our staff counsel in a telephonic conversation on January 19, 2010, that it, too, would like to be able to orally address this Commission.

As discussed previously, Hernando's Motion to Dismiss was filed on November 13, 2009; Hernando's Request for Oral Argument was filed over two months later. Thus, the Request for Oral Argument filed by Hernando was not timely filed in this proceeding. However, at our Agenda Conference, pursuant to our discretion under 25-22.0022(7)(b), F.A.C., we granted Hernando's request for oral argument. We also allowed oral argument by Skyland on Hernando's Motion to Dismiss.

MOTION TO DISMISS

A motion to dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action. Meyers v. City of Jacksonville, 754 So. 2d 198, 202 (Fla. 1st DCA 2000). The standard to be applied in disposing of a motion to dismiss is whether, with all the allegations in the petition assumed to be true, the petition states a cause of action upon which relief can be granted. Id. When making this determination, only the petition can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993).

Hernando County's Motion to Dismiss

As stated previously, Hernando timely filed a Motion to Dismiss Skyland's application on the grounds that the Commission lacked subject matter jurisdiction over Skyland's application. In its Motion, Hernando argued that it is a non-jurisdictional county pursuant to the Hernando County Board of County Commissioners' adoption of Resolution No. 94-77 rescinding Florida Public Service Commission jurisdiction in Hernando County on April 5, 1994. We recognized Hernando's rescision of our jurisdiction in Order No. PSC-94-0719-FOF-WS.²

Hernando acknowledged that Section 367.171(7), F.S., affords us with exclusive jurisdiction over utility systems whose service transverses county boundaries. Hernando asserted, however, that Section 367.171(7), F.S., does not afford us with subject matter jurisdiction over Skyland's application because Skyland's utility system does not currently exist and does not currently provide service across the border of Pasco and Hernando Counties. In support of this assertion, Hernando argued that pursuant to Hernando County v. Florida Public Service Commission, 685 So. 2d 48 (Fla. 1st DCA 1996), we do not have jurisdiction to regulate utilities within its geographic boundaries. Citing to Hernando County, Hernando alleged that jurisdiction under Section 367.171(7), F.S., depends upon the actual existence of operationally integrated water and/or wastewater facilities that transverse county boundaries. Since no such facilities are present in the instant case, Hernando asserted that we lack the necessary jurisdiction to grant Skyland's application.

Skyland's Response

In its response to Hernando's Motion to Dismiss filed on November 23, 2009, Skyland asserted that it is a utility as defined by Section 367.021(12), F.S., which has proposed the construction of a system which will provide water or wastewater service to the public for compensation. Further, Skyland argued that Section 367.171(7), F.S., clearly provides that we have exclusive jurisdiction over all utility systems (of which Skyland is one) whose service transverses county boundaries.

Skyland further asserted that Hernando's reliance upon Hernando County was misplaced. Skyland argued that Hernando's narrow interpretation of Hernando County misconstrues the holding in that case. Skyland alleged that the court in Hernando County focused its analysis with respect to the determination of jurisdiction under Section 367.171(7), F.S., upon the inter-relationship of particular identified facilities rather than the general corporate structure of the utility. Skyland further argued that in this case the proposed facilities and land forming a system will exist in close geographical proximity across a county boundary. Moreover, Skyland asserted that it is the proposed physical delivery of water and/or wastewater across county boundaries that invokes this Commission's jurisdiction under Section 367.171(7), F.S., and nothing in the court's holding in Hernando County changes that fact.

² Issued June 9, 1994, in Docket No. 940408-WS, In re: Request for acknowledgement of resolution rescinding Florida Public Service Commission jurisdiction over private water and wastewater utilities in Hernando County.

Analysis and Decision

Pursuant to Section 367.171(3), F.S., and Order No. PSC-94-0719-FOF-WS, Hernando is excluded from our jurisdiction. However, Skyland is proposing to serve areas which would span both Hernando and Pasco Counties. Thus, the proposed service territory would transverse county boundaries. The relevant statute to determine whether we have jurisdiction over the Utility's application is Section 367.171(7), F.S. That section provides:

Notwithstanding anything in this section to the contrary, the [C]ommission shall have exclusive jurisdiction over all utility systems whose service transverses county boundaries, whether the counties involved are jurisdictional or nonjurisdictional, except for utility systems that are subject to, and remain subject to, interlocal utility agreements in effect as of January 1, 1991, that create a single governmental authority to regulate the utility systems whose service transverses county boundaries, provided that no such interlocal agreement shall divest commission jurisdiction over such systems, any portion of which provides service within a county that is subject to [C]ommission jurisdiction under this section.

(emphasis added).

In Section 367.021(12), F.S., the Legislature defines "utility" as "every person, lessee, trustee, or receiver [except those exempted under Section 367.022, F.S.] 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." (emphasis added). Further, Section 367.021(11), F.S., defines a "system" as "facilities and land used or useful in providing service." Based on the plain meaning of the statute using the definitions provided by the Legislature, we find that we have subject matter jurisdiction to consider Skyland's application under Section 367.171(7), F.S. The Utility is proposing to construct a utility system whose service would transverse county boundaries, thereby causing the application to fall within our jurisdiction. Contrary to the interpretation provided by Hernando, Section 367.171(7), F.S., provides this Commission with exclusive jurisdiction and authority to determine whether to grant the Utility's application.

In support of its Motion, Hernando relies upon Hernando County v. Florida Public Service Commission, 685 So. 2d 48 (Fla. 1st DCA 1996). In Hernando County the court addressed the issue of whether we had jurisdiction pursuant to Section 367.171(7), F.S., over a utility whose facilities were located in a number of non-contiguous counties throughout Florida. The court stated that the relevant inquiry when determining the existence of jurisdiction under Section 367.171(7), F.S., is whether there is an "actual inter-relationship of two or more facilities providing utility services in a particular geographic area comparable to the 'service area' defined in Section 367.021(10), over which the PSC ordinarily has jurisdiction." Id. at 52. The court further stated that the correct focus is on the relationship between particular identified facilities rather than the general corporate structure of the utility and that this "is supported by the use of the word 'transverses' in the statute, which indicates a legislative intent that the facilities and land forming a system must exist in close geographical proximity across a county boundary." Id. The court characterized the inter-relatedness of operationally integrated facilities as "functional

relatedness." The court further specified that, "jurisdiction under Section 367.171(7) cannot be found upon evidence that the company utilizes an umbrella organizational structure, or the central hub of management offices described by [the utility] in this case." *Id.* In essence, the court held that jurisdiction under Section 367.171(7), F.S., cannot be exclusively founded upon evidence that the company utilizes an umbrella organizational structure or a central hub of management offices.

In the instant case, Skyland has proposed facilities and land forming a system which will exist in close geographical proximity across a county boundary. Thus, the proposed service will result in its facilities physically crossing the Hernando County and Pasco County border, thereby placing it within our jurisdiction pursuant to Section 367.171(7), F.S. Moreover, because the proposed system would constitute one system, we do not believe that the question of functional relatedness is an issue in this matter. Thus, we do not believe that Hernando County restricts the Commission's jurisdiction over Skyland's application.

We squarely addressed this issue in Order No. PSC-00-1265-PCO-WS. In that case, we considered the applications of two utilities that sought original certificates to provide water and wastewater services to a development in Nocatee, Florida. Although no facilities existed at the time of the submission of the applications, the proposed service area would span two adjacent counties. Both applications were protested and several Motions to Dismiss for lack of subject matter jurisdiction were filed. In Order No. PSC-00-1265-PCO-WS, we determined that pursuant to the clear and unambiguous language of Section 367.171(7), F.S., using the definitions provided by the Legislature, it had exclusive jurisdiction over the proposed utility system whose service would transverse county boundaries. Quoting Order No. 22459,³ we discussed the legislative intent behind Section 367.171(7), F.S. In that order, we stated:

We do not believe that the Legislature intended ... to perpetuate a situation where a utility would be subject to several regulators. On the contrary, we believe that the Legislature intended to eliminate regulatory problems that exist when utility systems provide service across political boundaries and are subject to regulation by two or more regulatory agencies This duplicative economic regulation is inefficient and results in potential inconsistency in the treatment of similarly situated customers These inefficiencies could result in unnecessary and wasteful efforts which would translate into higher rate case expense and higher rates to customers. Inconsistency can occur when regulators apply different ratemaking principles to the same system or make inconsistent determinations on the same issue.

The Legislature chose to promote efficient, economic regulation of multi-county systems by giving the Commission exclusive jurisdiction over all utilities whose service crosses county boundaries By concentrating exclusive jurisdiction over

³ Order No. 22459, issued January 24, 1990, in Docket No. 891190-WS, In re: Petition of General Development Utilities, Inc. For Declaratory Statement Concerning Regulatory Jurisdiction Over its Water and Wastewater System in DeSoto, Charlotte, and Sarasota Counties, (GDU).

these systems in the Commission, the Legislature has corrected the problem of redundant, wasteful, and potentially inconsistent regulation.

Similarly, in the instant case, we believe that the interpretation of Section 367.171(7), F.S., urged by Hernando would lead to an untenable and inefficient result. An interpretation of a statute that would produce absurd results should be avoided if the language is susceptible to an alternative interpretation. Amente v. Newman, 653 So. 2d 1030, 1032 (Fla. 1995). In this case, if we do not have jurisdiction over the Utility's application pursuant to Section 367.171(7), F.S., then the Utility will be required to apply to two regulatory authorities, Hernando County and this Commission (in the case of Pasco County), for separate certificates to provide service. Then, when the Utility begins providing service, we would regulate the whole system. We do not believe that it would be logical, nor legally accurate, to assert that we do not have jurisdiction to consider the application for certification, but that we would have jurisdiction to subsequently regulate the system, once consummated, because it transverses county boundaries. Thus, we believe that the legislative intent behind Section 367.171(7), F.S., the logical construction of this statute, as well as court and Commission precedent support the conclusion that we have jurisdiction to consider Skyland's application.

Assuming that all of the allegations in the applications are true and viewing all reasonable inferences in favor of Hernando, we find that the application falls within our subject matter jurisdiction. Thus, Hernando County's Motion to Dismiss shall be denied.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Skyland Utilities, LLC's *ore tenus* Motion to Strike Hernando County's Reply to PSC Staff's Memorandum is granted. It is further

ORDERED that the request by Hernando County for oral argument on its Motion to Dismiss Application of Skyland Utilities, LLC, for Lack of Jurisdiction with Incorporated Memorandum of Law is granted. It is further

ORDERED that Hernando County's Motion to Dismiss Application of Skyland Utilities, LLC, for Lack of Jurisdiction with Incorporated Memorandum of Law is hereby denied. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission this 1st day of March, 2010.



ANN COLE
Commission Clerk

(SEAL)

CMK

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

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

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

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for original certificates for proposed water and wastewater system, in Hernando and Pasco Counties, and request for initial rates and charges, by Skyland Utilities, LLC.

DOCKET NO. 090478-WS
ORDER NO. PSC-10-0123A-PCO-WS
ISSUED: March 12, 2010

AMENDATORY ORDER

BY THE COMMISSION:

On March 1, 2010, we issued Order No. PSC-10-0123-FOF-WS, Order on Jurisdiction and Denying Hernando County's Motion to Dismiss. In the Notice of Further Proceedings or Judicial Review, Order No. PSC-10-0123-FOF-WS provided that all actions contained within the order were final agency action. However, Order No. PSC-10-0123-FOF-WS should have specified that the actions contained within the order were preliminary and procedural. The correct Notice of Further Proceedings or Judicial Review is contained herein as Attachment A.

Order No. PSC-10-0123-FOF-WS is reaffirmed in all other respects.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Order No. PSC-10-0123-FOF-WS is hereby amended as set forth in the body of this Order. It is further

ORDERED that Order No. PSC-10-0123-FOF-WS is reaffirmed in all other respects.

By ORDER of the Florida Public Service Commission this 12th day of March, 2010.

ANN COLE
Commission Clerk

By: Dorothy E. Menasco
Dorothy E. Menasco
Chief Deputy Commission Clerk

(SEAL)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

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

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.