Diamond Williams 090478-WS

From: Bronwyn Revell [BRevell@RSBattorneys.com]
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To: Filings@psc.state.fl.us
Cc: John Wharton; Marty Deterding; Caroline Klancke
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a. The full name, address, telephone number, and e-mail address of the person responsible for the electronic filing:
   John L. Wharton
   Rose, Sundstrom & Bentley, LLP
   2548 Blairstone Pines Drive
   Tallahassee, Florida 32301
   (850) 877-6555/(850)656-4029 Fax
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BRONWYN S. REVELL
ASSISTANT TO JOHN L. WHARTON &
FREDERICK L. ASCHAUER, JR.

ROSE, SUNDSTROM & BENTLEY, LLP
Attorneys At Law
2548 Blairstone Pines Drive T: 850.877.6555
Tallahassee, Florida 32301 F: 850.656.4029
www.rsbattorneys.com

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 DATED: JUNE 21, 2010

SKYLAND'S RESPONSE TO THE MOTION TO STRIKE OF PASCO COUNTY AND HERNANDO COUNTY

Skyland Utilities, LLC, by and through its undersigned attorneys, hereby responds to the Motion to Strike filed by Pasco County and Hernando County as follows:

1. On June 14, 2010, Pasco and Hernando Counties jointly filed their Motion to Strike (the "Motion"). For the purposes of this Response, these counties shall hereinafter be referred to as "P/H". It is not until the conclusion of the Motion that we learn the actual underpinning of the Motion itself: the "limitation" P/H placed upon its own testimony – the manifestation of a so-called "strategic decision" to ostensibly withhold from the Commission and the record the full extent of the basis of the P/H case.

2. Setting aside the propriety of this "strategic decision" to skew the record (discussed *infra*), P/H have failed in the very result they hoped to achieve to slam an evidentiary door shut such that the last piece of evidence allowed to pass through it was the testimony of their own witnesses on the most pivotal issues on any certification case: whether the applicant's proposal is needed; whether the applicant's proposal is duplicative; and whether the applicant's proposal is in the public interest. This is because P/H did, in fact, prefile testimony on the very issues on which they now seek to muzzle any rebuttal.

3. Hernando County filed testimony of three witnesses. One opined that the application "is not otherwise in the public interest".[1] Another gave his opinion that Skyland's application "would not be in the public interest".[2] The third gave the opinion that Skyland's proposal was duplicative of Hernando County's, is not needed, and is not in the public interest.[3] Likewise, a Pasco witness prefiled testimony that Skyland's proposed services were not needed, were not in the public interest, and were duplicative of the county's' service.[4] Staff's witness opined that there was no "consumer need" for the services Skyland's proposes to provide.[5]

4. It is against the weight of this testimony (each of these conclusions addressing what will be seminal issues in this case) that the very evidence P/H now seek to preclude is proffered. Left unchallenged, unexplained, and unrepelled, these statements alone could cause Skyland's application to be denied. P/H has made known to the Commission and the record its positions on these critical issues. Skyland has every right and opportunity – and its rebuttal testimony is that opportunity – to refute, explain, and rebut any contention that its application is not in the public interest or that its application proposes a utility which is not needed. The fact that P/H "chose" -- if that in fact is what occurred – to bottom line these critical opinions, which were offered in a clear attempt to secure the denial of the application, cannot and should not be deemed to cuff Skyland in its response to the testimony. Unlike P/H, who offered scant basis for the very damaging opinions that the application is fatally flawed, Skyland seeks to fully explain and set forth in its responsive testimony why, contrary to the opinions of P/H, the application <u>is</u> in the public interest and why the service <u>is</u> in fact needed.

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[1] Wieczorek, p3, line 9-10.
[2] Pianta, p7, line 4.
[3] Stapf, see, e.g., p.2, line 5; et al; p.6, line 25.
[4] Stapf, several references lack of pagination makes paragraph citation impossible.
[5] Evans, DWE-1, p 2, line 2.

5. The concept of "public interest" is a broad one. When a party testifies about the relative strength of its own utilities, the need for service, the economics of service, and the nature of customers in the area – and then presents a witness (or multiple witnesses) who concludes that the application of Skyland is not in the "public interest", the totality of the testimony necessarily provides context to that ultimate (and very critical conclusion). To argue that the statement must be read in isolation and any rebuttal to the isolated statement limited to an isolated response is to argue that the first party may attempt to deliver the administrative equivalent of a death blow, but the second party is handcuffed in its response. If literally the only testimony of a witness was "the application is not in the public interest", then this testimony would have no real practical or evidentiary value. And no witness presented such attenuated testimony. Here it is no coincidence that several witnesses concluded at the end of their testimony that the application was not in the public interest. Faced with the specific conclusion from several specific witnesses testifying on behalf of specific parties that Skyland's application is not needed or in the public interest, Skyland must be allowed to expand and explain and proffer why –even in the face of that testimony – its position is to the contrary. These opinions (and make no mistake – these "public interest" conclusions are opinions) were not stated in a vacuum. Accordingly, neither should Skyland's response be restricted to a vacuum, particularly one of P/H's making.

6. The opinions that an application is not in the "public interest" is just that – an opinion imbued with legal consideration which addresses a critical application criteria which -- as with all the determination herein – will ultimately be decided by the Commission. P/H had every right – and in fact every obligation – to support their testimony that (based upon the unique vagaries and the fact and circumstances of each County) the application of Skyland is not in the public interest. Skyland has every right to offer evidence and testimony to overcome those opinions.

The Nature of Rebuttal and the PSC Process

7. The Commission's decisions on Motions to Strike portions of prefiled testimony have endeavored to allow the development of the most complete record possible while attempting to prevent real and ascertainable prejudice to the party against whom the rebuttal is offered. This refusal to elevate form over substance is consistent with the Commission's practice that the role of staff is to ensure a fully developed record.[6] The Commission has broad discretion in determining whether rebuttal testimony should be admitted into the record. *Mendez v. John Cadell Constr. Co.*, 700 So.2d 439, 440-441 (FL 3d DCA 1977). As the Commission has noted:

> It is well settled that the purpose of rebuttal testimony is to "explain, repel, counteract, or disprove the evidence of the adverse party" and if the Defendant *opens the door* to the line of testimony, he cannot successfully object to the prosecution "*accepting the challenge and attempting to rebut the presumption asserted.*"

(Emphasis supplied)

In re: Complaints by Ocean Properties; Docket No. 030623-EI; Order No. PSC-04-0928-PCO-EI (2004); citing *United States v. Delk*, 586 F2d 513, 516 (5th Cir. 1978). In that case, the Commission denied the Motion to Strike, ruling that the customer's rebuttal testimony and exhibits did not exceed the *scope* of FPL's direct case and do not constitute improper rebuttal. *Id* at 6. Here, the contested portions of the testimony are clearly within the "scope" of the direct testimony of P/H, and should likewise not be considered improper rebuttal. While the admission or exclusion of rebuttal testimony is not normally an abuse of discretion, that general rule should not stand for the proposition that a plaintiff must prove all anticipated defenses in its main case – *that is exactly what rebuttal is supposed to accomplish* (emphasis added) *Heberling v. Fleisher*, 563 So.2d 1086 (4th DCA 1990), at 1087. Limiting rebuttal which goes to the heart of the

[6] For instance, the staff is not a party, yet routinely introduces substantive exhibits into the record, as will likely be done in this case for just this purpose.

principle defense and which is not cumulative *is* an abuse of discretion. Stated otherwise, a plaintiff has no obligation to anticipate the defendant's theory of the case and present evidence during the case in chief to disprove that theory. *Zanoletti v. Norle Properties*, 688 So.2d 952 (3rd DCA 1997) at 954. In the case of *In re: Petition of Tampa Electric Company for an increase in its rates and charges,* the Commission denied particular motions regarding two rebuttal witnesses, noting that no injury or denial of any right because of alleged "secrecy" or "surprise" had been demonstrated, and that the right to cross examine the rebuttal witnesses was preserved. *Id*, Docket No. 70532-EU; Order No. 5125 (1971).

8. P/H in each instance opened the door by offering expert pontifications on a critical issue, and should not be allowed to now assert that the door was in fact only "cracked" such that Skyland's response should be compelled to be as brief and as unexplained as is the bottom line assertion which Skyland now seeks to explain, repel, or counteract.

9. The testimony here at issue is rebuttal to the contentions of the witnesses of P/H. The Commission, in reviewing whether any particular line or portion of testimony is appropriate rebuttal, should also consider whether actual prejudice will result; the PSC's process; and the clear directives of the law. Beginning with the last point first, the case law (including those cases cited by P/H) do not fixate upon "the testimony". Those cases, as well as the Commission orders which implement and apply those cases, refer to the role of rebuttal testimony to explain, repel, counteract, or disprove "the evidence" of the adverse party.

10. In PSC proceedings, "evidence" comes from many sources. In this case, staff has circulated an exhibit list which includes numerous documents including, but not limited to, discovery responses and deposition transcripts.[7] The Uniform Rules contemplate that

[7] The cases refer to the rebuttal of "adverse" "evidence". The role of the staff in Commission proceedings is particularly unique. But the result is the same. If "evidence" comes from staff – essentially as a conduit – which is adverse to Skyland, the right to rebut exists.

depositions and the exhibits thereto may come into evidence. The Commissioners often solicit evidence by direct questions to witnesses. Written evidence is sometimes entered into the record when it has been used for cross examination.

11. As to the existence of actual prejudice, none exists. Surrebuttal – so often the solution of choice in these issues – is not even requested by P/H. It was incumbent upon P/H to throw their best pitch on the issues of public interest and need in their testimonies – not to ostensibly "hold back" their evidence per some "strategic decision" that hiding the ball from the Commission was a superior way to achieve "victory" in a way that Hernando's ill-fated Motion to Dismiss did not – on something less than the fully adjudicated merits. P/H's attempt to keep out evidence of this applicant's ability to finance (when it is a matter of record that Evans Properties is able to fund this venture by an order of magnitudes) is a perfect example of P/H's desire to circumvent the Commission's thorough vetting of each and every issue.[8]

12. P/H cannot have it both ways. They have casually tossed out evidence to the effect that the application does not satisfy the public interest criteria nor demonstrate a need at the end of the testimony of their witnesses, or those statements are in fact the manifestation of all the testimony that came before (in other words, perhaps all his prior testimony led each particular witness to conclude that the application was not in the "public interest" and the services "not needed"). Either way, Skyland has every right, and should have every opportunity, to testify in the form of rebuttal that the application is in the public interest, even in the face of planning, agency, and utility witnesses and experts who conclude that it is not.

13. P/H seeks a summary dispensation of the testimony of two of Skyland's witnesses (Edwards and Hartman). The testimony sought to be stricken may be fairly characterized into

[8] Indeed, counsel for Hernando County, at a meeting of all parties and staff on June 4, offered to stipulate this issue – stating that the depth and breadth of Evans Properties ability to finance Skyland's operations was known to him.

three categories: testimony that is improper rebuttal; testimony that is irrelevant; and testimony that is outside of Mr. Hartman's expertise.[9]

The Motion as to Mr. Edwards

14. Notably, the Motion never directly addresses the public interest aspect of Mr. Edwards' testimony, despite the P/H uniformity of position that the application of Skyland is not, in fact, in the public interest. Mr. Edwards' testimony describes (in a broader and more prospective sense than was set forth in the application), the probabilities, potentialities and the applicant's intent with regard to the various and sundry public benefits which Skyland and Evans Properties proffer the certificate will present. Mr. Edwards' public interest testimony explains and counteracts the consistent theme of P/H in their testimony and evidence that the application is not in the public interest. Mr. Edwards' testimony, which P/H has characterized as testimony on "cooperation and proposed facilities," is exactly that: testimony intended to support Skyland's positions that its application is in the public interest, despite of and contrary to the testimony of the witnesses of P/H that it is not. Mr. Edwards' testimony, characterized by P/H as addressing "urban sprawl", is proffered in the face of what P/H candidly acknowledges is a contrary opinion by "all the non-Skyland witnesses". Despite this, the Motion then says "Edwards' testimony does not address these opinions." Edwards' testimony on this issues offers the unique prospective which only he is in a position to offer: the intent of the landowner with regard to how the property which is requested to be certificated will grow and develop. He does not attempt to offer expert planning testimony, but rather to give a prospective that none of the professional planners can give as it relates to urban sprawl – the non-theoretical and non-academic proffer of what is the present intent of the landowner. The testimony clearly explains and is proffered to

[9] The Motion seeks to an Order striking the whole of Mr. Edward's testimony, and significant portions of Mr. Hartman's testimony.

counteract the apparent assumption of P/H's planners that urban sprawl is somehow the end game here. P/H's utility witnesses explained at length the capability of their own government utilities. Mr. Edwards' testimony, characterized in the Motion as addressing the "technical and operational ability of the Skyland utility", explains and counteracts that testimony by providing context regarding Skyland's technical and operational abilities. Finally, as to Skyland's financial ability, P/H's actions have made clear that this continues to be an issue. If this is not an issue and if there is no genuine question whether this burden has been met (P/H infers that none of their witnesses addressed this issue), then it should be declared as a stipulated issue.

The Motion as to Mr. Hartman

15. Mr. Hartman is one of the most experienced expert witnesses in water and wastewater matters in Florida, if not the most experienced. His qualifications to offer varied expert opinions are extensive and well established. He also has a wide range of facts at his command as to the operations of public and private utilities throughout Florida for the last 30 years. The testimony of Mr. Hartman that P/H characterizes as "legal issues" is Mr. Hartman's perspective (as always the appropriate weight to be given to the testimony by the Commission) of why various policies, as embodied in Florida's statutes and in agency and statutory mandates, are consistent with Skyland's application and intent and therefore the testimony goes to the issue of public interest. The planning testimony of Mr. Hartman (who, in point of fact, could qualify as an expert in many aspects of planning because he has the skill, knowledge, education, training and experience necessary) is rendered from the unique perspective of his experience with *planning from a utility standpoint.* The comprehensive land planning testimony of Skyland will be rendered by Mr. DeLisi. Mr. Hartman's testimony on utility planning, again from the perspective of one who has designed, started, owned, operated, and administered utilities in the State of Florida, is from a perspective that no other witness can offer, and is intended to further

explain or further repel the planning testimony of the planners of P/H. Despite the uniformity of the opinions of P/H that Skyland's application is not in the public interest, they seek to strike even that testimony of Mr. Hartman which they candidly admit is responsive to those public interest considerations. That part of the Motion addressed to Mr. Hartman's testimony (characterized as "non-rebuttal, rebuttal testimony") is a rambling discourse in which P/H seeks to strike all that portion of Hartman's testimony they simply do not like, despite the fact that the comments which they characterize as "gratuitous" and based on "incompetent evidence" are comments within Mr. Hartman's knowledge and competency and which are intended to explain or repel the primary suggestion of P/H that Skyland's application is not in the public interest. Hartman's perspective regarding similar utilities in similar situations in past PSC actions lends credence and context to the public interest question which the Commission must ultimately adjudicate. The Commission will ultimately afford all of the evidence the weight it is deemed to merit, but the testimony of Mr. Hartman is offered, in *toto*, to rebut the testimony of P/H that Skyland is not needed nor is its proposed certification in the public interest.

16. The last straw at which P/H grasps, that the responsive testimony to the effect that Skyland's application does propose the certification of a utility which is both needed and in the public interest, constitutes "trial by surprise" is entirely specious. P/H, despite having allegedly made the "decision" to withhold evidence addressing the very issues on which their witnesses testified, either took advantage of the opportunity to engage in discovery on these very issues, or declined to do so despite the clear opportunity for the same. Mr. Hartman has been deposed by P/H. Mr. Edwards was made available for deposition, but as of now (assumably for some "strategic" reason) that deposition has not been set. The responses to Pasco's First Request for Admissions, First Set of Interrogatories and First Request for Production of Documents are due on June 23 – including numerous inquiries on these exact issues. Hernando chose to send no

written discovery to Skyland. A key factor in "trial by surprise" is that is occurs "at trial". P/H's claim of surprise, and its faux umbrage that its testimony of duplication, a lack of need, and the failure to show a public interest should merit a response in rebuttal is but another assertion of prejudice where none exists. The issue presented by the P/H Motion is not one of genuine surprise, but rather whether the Commission will reward the "strategic decision" P/H made to withhold opinions or evidence which supposedly support its positions. Under the P/H view of the process, it is actually Brooksville (who chose to file no testimony whatsoever) who best implemented this "strategy". Unfortunately for P/H, their witnesses, their discovery responses, and their post testimony postures and positions did address the very issues of need and public interest and duplication which they now assert they never intended to put at issue. The real issue here is one of testimonial remorse, not surprise.

Conclusion

17. Having admitted the proffering of adverse testimony on these key issues, P/H now creatively claim that the testimony to rebut these key contentions should have been as limited and as narrow as the bottom line assertions of their own witnesses. Perhaps this was an extension of the "strategic decision" to limit the facts and evidence the Commission should consider. It is the prerogative of Skyland, not P/H, to determine the depth and breadth to which it responds to the P/H testimony suggesting that neither need nor public interest can be established. Thereafter, it will be the decision of the PSC as to the weight and persuasiveness of that evidence. The P/H "strategic decision" to have it both ways to its own advantage is a strategy which should fail.

WHEREFORE, based on the foregoing, Skyland respectfully requests that the Motion to Strike be denied.

Respectfully submitted this 21st day of June, 2010, by:

JOHN L. WHARTON
FL BAR ID NO. 563099
F. MARSHALL DETERDING
FL BAR ID NO. 515876
ROSE, SUNDSTROM & BENTLEY, LLP
2548 Blairstone Pines Drive
Tallahassee, FL 32301
(850) 877-6555/(850) 656-4029 FAX

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Skyland Utilities, LLC's Response to Motion to Strike filed by Pasco County and Hernando County has been served by electronic mail this 21st day of June, 2010, to:

Caroline Klancke
Lisa Bennett
Office of General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
cklancke@psc.state.fl.us
lbennett@psc.state.fl.us

Derrill Lee McAteer
City Attorney
20 South Broad Street
Brooksville, FL 34601
derrill@hoganlawfirm.com

Michael Minton
Lee Dobbins
Dean Mead Minton & Zwemer
1903 South 25th Street, Suite 200
Fort Pierce, FL 34947
mminton@deanmead.com
ldobbins@deanmead.com

Geoffrey Kirk
Jon Jouben
Garth Coller
20 N. Main Street, Suite 462
Brooksville, FL 34601
gkirk@hernandocounty.us

William Hollimon
Howard Adams
Sidney Kilgore
Pennington Moore Wilkinson Bell
& Dunbar, P.A.
215 South Monroe Street (2nd Floor)
Tallahassee, FL 32301
bhollimon@penningtonlaw.com
gene@penningtonlaw.com
skilgore@penningtonlaw.com

Joseph Richards
West Pasco County Government Center
7530 Little Road, Suite 34
New Port Richey, FL 34654
jrichards@pascocountyfl.net

Stephen C. Reilly
Association Public Counsel
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street Room 812
Tallahassee, FL 32399
reilly.steve@leg.state.fl.us

JOHN L. WHARTON