BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Application for amendment of Certificate No. 106-W to add territory in Lake County by Florida Water Services Corporation.	)	Docket No. 991666-WU
		Filed: August 13, 2001

FLORIDA WATER SERVICE CORPORATION'S
LEGAL MEMORANDUM ON ISSUES A AND B

Florida Water Services Corporation ("Florida Water") hereby submits its Legal Memorandum on Issues A and B identified during the hearing on July 12, 2001 in Docket No. 991666-WU.

Issue A: Should Mr. Tillman and Mr. Mittauer be tendered as expert witnesses and, if so, in what areas?

Summary of Position: **It is not necessary to qualify Mr. Tillman or Mr. Mittauer as experts. Nonetheless, it is clear that Mr. Tillman is an expert in utility management. **

Analysis and Argument: Section 90.702, Florida Statutes, is the pertinent provision of the Evidence Code that governs the testimony of expert witnesses. That provision provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

As explained by Professor Ehrhardt in his well recognized treatise on Florida Evidence, this section "provides that an expert witness may testify in the form of an opinion. An expert is permitted to express an opinion on matters in which the witness has expertise when the opinion is based upon facts which the expert personally knows, is in response to a hypothetical question, or is in response

to facts disclosed to the expert out of or before the trial." [emphasis added]. Ehrhardt, *Florida Evidence* (2001 Ed.), Section 702.1, pp. 571-572. This provision is only relevant when opinion testimony is sought. Testimony related to technical or scientific matters does not always involve opinions. As noted by Ehrhardt, "when the witness is testifying to facts, it is immaterial whether the witness has been qualified as an expert." Ehrhardt, *Florida Evidence* (2001 Ed.), Section 702.1, p. 572.

As a preliminary matter to determining whether Mr. Tillman and/or Mr. Mittauer should be accepted as experts, the Commission should first analyze whether any of the testimony they have offered is opinion as opposed to factual testimony. In the case of Mr. Tillman, virtually all of the challenged testimony addresses factual issues rather than offering opinions. Mr. Tillman, as a senior executive officer of the company, has sponsored the Application and confirmed that it was prepared through an interdepartmental effort of Florida Water employees. (T. Vol. 2, pp. 150-151, Vol. 4, pp. 397-398). He is the current supervisor of the department that was responsible for preparing the Application. (T. Vol. 2, p. 397). He has discussed the Application with the staff involved in preparing it. While the Application contains technical information from the business records of the company, such information is necessarily produced and maintained as part of the utility's operations. Expert testimony is not required to verify the rated capacity of the wells that are part of the Palisades system or the average daily flows from that plant. The City has attempted to divert attention from the merits of the Application by erroneously claiming that technical information maintained in the ordinary course of business can only be sponsored by a technical expert. That suggestion is simply wrong. It is only opinion testimony related to technical or scientific evidence that requires expert testimony. See, Bluegrass Shows, Inc. v. Collins, 614 So.2d 626 (Fla. 1st DCA 1993)(testimony of

a paramedic concerning the "mechanism of injury" to a plaintiff was factual in nature so it was not necessary to lay a foundation of the paramedic's expertise).

As discussed in more detail in Issue B below, it is not necessary to accept either Mr. Mittauer or Mr. Tillman as experts to address any of the issues that are in dispute in this Docket as framed by the City's Objection and its Prehearing Statement. The actual flow from the Palisades plant and the capacity of that plant were not challenged by the City in either its Objection or its Prehearing Statement. In any event, it is clear that Mr. Tillman is an expert in the area of utility management. He is a senior vice president of one of the largest and most experienced investor owned water and wastewater utilities in the state. Florida Water has net utility assets in excess of $373 million. (T. Vol. 2, pp. 146, 156). His job responsibilities include all business development related activities for the company, including the development of new systems, and he is responsible for facilitating prompt and efficient water and wastewater utility services to new developments. (T. Vol. 2, p. 160). He supervises a staff which determines available water and wastewater capacity and performs water demand projections. (T. Vol. 2, p. 146). He works closely with developers, engineers and other applicants to provide water and wastewater service to new residental and commercial construction. (T. Vol. 2, p. 147). Thus, he clearly has expertise regarding the manner and cost of providing water and wastewater service.

With respect to Mr. Mittauer, Florida Water's objection was to the City's attempt to supplement Mr. Mittauer's prefiled testimony subsequent to its filing. If the City wished to formally proffer Mr. Mittauer as an expert, an unnecessary exercise,[1] it should have done so in its prefiled

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[1]Ehrhardt, *Florida Evidence*, (2001 Ed.), Section 702.01, p. 577.

testimony. To allow the City to unilaterally and gratuitously supplement its prefiled testimony by proffering the witness as an expert at the hearing is an academic exercise that only wastes the resources of the parties and the Commission. To the extent that Mr. Mittauer's testimony includes opinions, no formal proffer of a field of expertise by counsel is necessary (consistent with Commission practice). Despite the considerable efforts of counsel for the City to offer certain witnesses as experts, "it is not necessary for counsel to formally proffer a witness as an expert to the court." Ehrhardt, *Florida Evidence* (2001 Ed. 702.01, p. 577); Chambliss v. White Motor Corporation, 481 So.2d 6, 8 (Fla. 1st DCA 1985), rev. den'd. 491 So.2d 278 (Fla. 1986). As noted by one Federal court:

> A judicial ruling that a proffered expert is 'qualified' prior to the time that counsel has posed a precise question soliciting expert testimony is premature and - unless an objection is interposed - unnecessary.

Berry v. City of Detroit, 25 F.3d 1342, 1351 (6th Cir. 1994).

The Commission can evaluate the background and expertise of the witness as it relates to any opinions contained in the testimony and consider the testimony as it deems appropriate without the need for a formal proffer by counsel. To the extent that Mr. Mittauer seeks to offer opinions as to the legal effect or scope of the City's Utility Service District, those opinions should be rejected as clearly beyond the scope of any expertise he may possess.

Issue B: Should the City's Motion to Strike those portions of Mr. Tillman's testimony and exhibits identified at the July 11 hearing be granted?

Summary of Position: **The City's untimely and legally unfounded requests to strike portions of Mr. Tillman's testimony and related exhibits should be denied.**

Analysis and Arguments: The City's request to strike certain portions of Mr. Tillman's testimony should be denied on any of several equally valid grounds. It appears that the primary basis for the City's request to strike the testimony of Mr. Tillman is his lack of an engineering degree and his lack of direct involvement in calculating the average daily flows of the Palisades plant. See e.g., T. Vol. 2, pp. 184, 193; Vol. 4, pp. 410-411. Virtually all of the testimony that the City has requested to be stricken does not constitute opinion testimony but is instead factual testimony that is entirely appropriate for a senior executive of a company to provide based upon information provided to him by his staff. The flows at a particular plant and the capacity of that plant are facts contained in the business records of the company. Just because they relate to technical matters does not mean an expert opinion is required. Even if the testimony is considered to be opinion testimony, Mr. Tillman clearly is an expert in utility management as evidenced by his position as a senior executive of one of the largest investor owned utility in the state for more than 3 ½ years. He is clearly an appropriate witness to sponsor the Application which was assembled by a department of the company that reports to him. Finally, one of the most compelling reasons for denying the City's motion to strike is that it is untimely. The Commission should not allow the City to show up at the hearing and attempt to defeat the Application based upon issues that were not clearly articulated in the City's Objection, Prehearing Statement or Prefiled Direct Testimony.

The issues raised by the City's Motion to Strike are easily disposed of based upon the First District Court of Appeal decision in Woodholly Associates v. Department of Natural Resources, 451 So.2d 1002 (1st DCA 1984). In that case, the builder of a condominium development petitioned for a formal administrative hearing to contest a city's application for a coastal construction control permit. On appeal, the challenger argued that the applicant had not carried its burden of proving the

necessity or justification for the development as required by the applicable rule. The court noted as follows:

> ...[the challenger] contends that it was incumbent upon the [applicant] to present evidence at the hearing to show necessity and justification for the project beyond the mere formality of introducing the application into evidence. On the state of the record before us, we find that this contention has no merit. [The challenger's] petition for formal hearing does not challenge the completeness of [the Applicant's] application nor does it contest the adequacy of [the applicant's] explanation of necessity and justification for the project, either a matter of fact or as a matter law. Neither does the prehearing stipulation filed by the parties set forth any issue to be heard and determined with respect to the necessity or justification for the project.
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> As pointed out by this court in Florida Department of Transportation v. J.W.C., Inc., 396 So.2d 778 (Fla. 1st DCA 1981), although the applicant for a permit has the burden of proof in hearings where the application is contested, the petitioner challenging the issuance of the permit 'must identify the areas of controversy and allege a factual basis for the contention that the facts relied upon by the applicant fall short of carrying the...burden cast upon the applicant.' [citation omitted]. Thus, [the challenger] simply failed to make an issue, for resolution by the hearing officer, of the matter of which it now complains.

Just as in the Woodholly case, the applicant in this docket (Florida Water) satisfied the requirements of a "prima facie case" through introduction of its Application. It was up to the City to raise in its Objection and Prehearing Statement the issues to be tried. Rather than appropriately framing the issues prior to the hearing, the City waited until Mr. Tillman's testimony was entered into the record to try to defeat the Application based not upon the merits but some concocted legal technicality. The Commission should not countenance such a blatant effort at trial by ambush.

The City has had ample opportunity to raise and seek a resolution of any substantive issues related to the merits of the Application. The Order Establishing Procedure in this docket, Order No.

PSC-00-0623-PCO-WU issued April 3, 2000, provides that "the scope of this proceeding shall be based upon the issues raised by the parties and staff up to and during the prehearing conference, unless modified by the Commission." The Order Establishing Procedure further directs that the prehearing statements filed by the parties shall include:

> . . . (d) a statement of each question of fact that the party considers at issue. . .;
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> (e) a statement of each question of law the party considers at issue...;
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> (f) a statement of each policy question the party considers at issue...;
>
> (h) a statement of all pending motions or other matters the party seeks action upon...
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> Prehearing Procedure: Waiver of Issue
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> Any issue not raised by a party prior to the issuance of the Prehearing Order shall be waived by that party, except for good cause shown. A party seeking to raise a new issue after the issuance of the Prehearing Order shall demonstrate that: it was unable to identify the issue because of the complexity of the matter; discovery or other prehearing procedures were not adequate to fully develop the issue; due diligence was exercised to obtain facts touching on the issue; information obtained subsequent to the issuance of the Prehearing Order was not previously available to enable the party to identify the issue; and introduction of the issue could not be to the prejudice or surprise of any party. [emphasis added]

The Commission's procedure of requiring prefiled direct testimony is a further effort to require that all issues be identified and framed prior to the hearing. Neither the Order Establishing Procedure nor the Prehearing Order specifically authorize a party to ore tenus move to strike prefiled testimony during the actual hearing. Indeed, the City's ore tenus motion to strike the testimony of Mr. Tillman after it was entered into the record (without objection by the City!) contravenes several of the due process requirements and goals of the Order Establishing Procedure. Specifically, the

motion to strike was: (1) untimely; (2) not raised in the City's Prehearing Statement as required by subsection (h) of the Order; (3) raises issues which were not identified in the City's Objection; and (4) raises issues which were not identified in the City's statement of the questions of fact, law or policy at issue.

The City's 11th hour request to strike the prefiled testimony is contrary to the purpose of requiring prefiled testimony. Requiring prefiled testimony enables the Commission to streamline the proceeding and narrow the issues so that decisions can be made on the merits. Allowing a party to wait until the day of the hearing to file a motion to strike will only encourage parties to refrain from fully disclosing their positions in advance of the hearing and will create obstacles to the resolution of disputes based upon the merits as opposed to technicalities. Under the Order Establishing Procedure, even if the City had a valid basis to strike the testimony of Mr. Tillman (which it does not), the City has waived the right to raise it.[2]

Granting the City's motion to strike Mr. Tillman's testimony would create a horrendous precedent that would threaten confusion and uncertainty in future Commission proceedings. The City had more than a year to conduct discovery with respect to the merits of the Application. Florida Water produced the monthly operating reports and other records related to the Palisades plant in August of last year. The discovery responses identified the engineers on staff who assembled the documents and are involved in the daily operations of the facility. Mr. Tillman was made available for deposition and any other employee of the company would also have been made available if requested. Rather than attempting to deal with the merits of the Application, the City seeks a hyper-

[2]Further, it was incumbent upon the City to object to Mr. Tillman's testimony before it was admitted into the record - - without objection.

technical way to defeat it without having placed the issue before the Commission or alerting the parties prior to the commencement of the hearing. If the City had legitimate concerns about Mr. Tillman adopting the testimony of Mr. Sweat, those issues could have and should have been raised in a motion well in advance of the hearing.[3]

Rule 25-30.036 requires a regulated utility seeking to expand its service territory to provide certain relevant information in the application. The Rule does not require the company to retain an engineer to calculate the flow at any particular time nor does it require an expert opinion to confirm the manufacturer's rated capacity of the wells that will provide the service. Instead, the rule simply requires the utility to provide the relevant information. Florida Water provided that information in its Application. Nothing in the Commission rule or the statute requires an applicant to identify or produce the individuals responsible for calculating or reporting the daily flows or permitted capacities of the facility that will provide the service. That information is reported and contained in the business records of the company.[4] The Application was properly introduced into evidence and, to the extent the City sought to challenge any portion of that Application, it was incumbent upon the City to specifically delineate its challenges in its Objection and its Prehearing Statement. Woodholly Associates v. Department of Natural Resources, supra.

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[3]The testimony that was originally prepared by Mr. Sweat was filed on August 10, 2000, more than 11 months prior to the hearing in this case. Mr. Tillman adopted that testimony in his rebuttal testimony submitted on November 30, 2000, more than 7 ½ months prior the hearing.

[4]In this particular case, it appears that some of the business records (the MORs) were not updated to reflect the addition of an additional well at the Palisades plant as discussed in Issue 4 of Florida Water's Posthearing Brief. The MORs are not part of the Application and, despite the initial confusion, the testimony ultimately clarified that the permitted capacity represented in the Application was correct. (T. Vol. 4, pp. 399, 405-406; Ex. 11, p. 2, Section III).

Contrary to the suggestion made by the City, it is not necessary to produce a witness to swear to every aspect of a written document such as the Application in this case. ITT Real Estate Equities, Inc. v. Chancellor Insurance Agency, Inc., 617 So.2d (4th DCA 1993). "Evidence is authenticated when prima facie evidence is introduced to prove that the proffered evidence is authentic." (Citations omitted) Id. See also, Kuklis v. Hancock, 428 F.2d 608 (5th Cir. 1970)("it is not always necessary...that the person who made the entry or prepared the document which is sought to be admitted into evidence be called to testify"); Nordyne, Inc. v. Florida Mobile Home Supply, 625 So.2d 1283 (Fla. 1st DCA 1283); Ehrhardt, *Florida Evidence* (2001 Ed.) Section 901.2, p.861. Thus, a senior executive of a company is an appropriate witness to authenticate business records even if he did not prepare them. In re: the National Trust Group, Inc. 27 Fed. R.E.S., 804; 98 B.R. 90 (U.S. Bankruptcy Crt. M.D. Florida, 1989).

The developer relations section of Florida Water, which Mr. Tillman oversees, is the principle contact between developers and the company. It is the division within Florida Water responsible for filing new territory requests. (T. Vol. 4, p. 397). As a senior executive of the company and the person who oversees the department responsible for assembling the information necessary to go into the Application, Mr. Tillman can authenticate the Application filed by Florida Water. Although the Application was prepared when Charles Sweat oversaw the Department, Mr. Sweat has subsequently left Florida Water and Mr. Tillman has assumed those job responsibilities. The testimony established that the Application was an interdepartmental effort within Florida Water. (T. Vol. 2, p. 151). Mr. Tillman confirmed that the information in the Application was accurate and correct and that the appropriate team of qualified individuals was involved in preparing the Application. (T. Vol. 2, p. 151; Vol 4, p. 398).

As noted in the discussion of Issue A above, the primary basis for the City's argument to strike the testimony of Mr. Tillman was that he lacked the expertise to express the opinions set forth in the testimony he was adopting. However, upon examination, it is clear that most of the testimony that the City seeks to strike does not constitute expert opinion. For example, the City moved to strike lines 4-9 on page 6 of the prefiled direct testimony adopted by Mr. Tillman and page 7, lines 17 through page 8, line 6. This testimony simply describes the rated capacity of the wells and the maximum daily capacity of the plant. These are facts rather than expert opinions. This information is utilized daily in the operations of a utility and maintained in the normal course of business. Perhaps if the City had raised the method of calculating the flows or operating the wells as an issue in this proceeding, expert opinion related to these issues may have been necessary. But the City did not raise any such issues. The fact that Mr. Tillman does not regularly calculate the average daily flow at one of the many facilities operated by Florida Water or that he doesn't actually fill out the MORs is simply of no consequence. As a senior officer of one of the largest water and wastewater utility in the state, Mr. Tillman would not be involved in making the measurements or recording the flows at any particular facility, but he would regularly and normally be provided with such information by his staff. The staff that reports to Mr. Tillman actually prepared and calculated the numbers in the testimony. (T. Vol. 2, p. 183). As a senior executive of the utility company, Mr. Tillman is qualified to confirm the facts reported to him by his employees with respect to these types of issues.

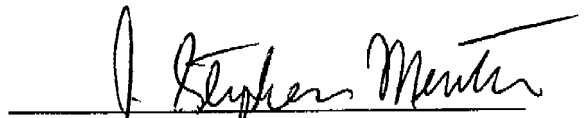
Other portions of the testimony which the City seeks to strike relate to the benefits that would accrue to Florida Water if the Application is granted. See, page 12, line 19 through page 13, lines 17 and page 14, lines 1-14 of the prefiled direct testimony adopted by Mr. Tillman which appears

in T. Vol. 2, pages 156-158. Some portions of this testimony could possibly be categorized as opinion, but it relates to the anticipated impact on Florida Water. As a senior officer of the company in charge of developer relations and business development, these are matters that are clearly within the purview of Mr. Tillman's direct job responsibilities.[5]

A contention that an applicant must prove every period and comma in an application through an expert witness with expertise on the exact detail is simply erroneous. To establish such a requirement would arguably necessitate rulemaking by the Commission and would certainly guarantee lengthy and protracted proceedings dealing with endless minutia. As recognized in the Woodholly case, an applicant presents a *prima facie* case in an administrative proceeding by presenting its application. It is up to the challenger to frame the issues at which point the parties present evidence on the issues that are framed to the appropriate tribunal. The Commission should deny any attempt to defeat the Application based on matters not clearly identified prior to the commencement of the hearing.

[5]The City has also requested to strike page 5, line 8 through page 7, line 3 of Mr. Tillman's rebuttal testimony. The portions of this testimony that relate to cost estimates could be classified as opinions. The City has not explained why Mr. Tillman is not qualified to opine on these matters. Mr. Tillman's direct involvement in negotiating and facilitating the delivery of service to new construction development qualifies him to present this testimony. Regarding Florida Water's possible need for another well in three years, such information would clearly be within the realm of Mr. Tillman's business planning and responsibilities.

Respectfully submitted this



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CERTIFICATE OF SERVICE

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