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August 13, 2001

HAND DELIVERY

Blanca Bayo, Clerk  
Florida Public Service Comm.  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850

RE: Docket No. 991666-WU  
Application for amendment of Certificate No. 106-W to add  
territory in Lake County by Florida Water Services  
Corporation

Dear Ms. Bayo:

Attached please find the originals and 15 copies each of the  
City of Groveland's Brief on Motions to Strike and to Reject or  
Accept Expert Witnesses and Brief on Issues to be filed in the  
above-styled case. Also attached is a disk formatted in  
WordPerfect 5.1 containing these documents. Please stamp the extra  
copies of these filings for our records and return them to our  
office.

Thank you for your attention to this matter. Should you have  
any questions, please contact me.

Very truly yours,

  
Suzanne Brownless

APP \_\_\_\_\_  
CAF \_\_\_\_\_ c: 3433  
CMP \_\_\_\_\_  
COM 3 \_\_\_\_\_  
CTR \_\_\_\_\_  
ECR \_\_\_\_\_  
LEG 1 \_\_\_\_\_  
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DOCUMENT NUMBER-DATE  
09874 AUG 13 2001  
FPSC-COMMISSION CLERK

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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

BRIEF ON MOTIONS TO STRIKE  
AND TO REJECT OR ACCEPT EXPERT WITNESSES  
OF  
THE CITY OF GROVELAND, FLORIDA

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FLORIDA

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ATTORNEY FOR CITY OF GROVELAND,  
FLORIDA

Pursuant to request of the Presiding Officer Lila Jaber at hearing on July 12, 2001, the City of Groveland, Florida (City), files this post hearing brief on its oral Motion to Strike, Motion to Reject Mr. Tillman as an expert witness and Motion to Accept Mr. Mittauer as an expert witness, and in support of its position states as follows:

FACTS

This docket is Florida Water Service Corporation's (FWSC) application to amend Certificate No. 106-W to add territory in Lake County, Florida pursuant to §367.045, F.S. and Rule 25-30.036, F.A.C. At hearing FWSC presented the testimony of only two witnesses: James A. Perry and John L. Tillman, Jr. Mr. Perry is the chief financial officer of FWSC and was offered for the limited purpose of supporting the fact that FWSC has the financial ability to provide water service to the Summit development, the area FWSC is requesting be added to Certificate No. 106-W. [T. 109-14] Mr. Perry sponsored JAP-1, admitted into evidence as Ex. 3, a copy of FWSC's complete audited 1999 and 2000 financial statements. [T. 110, 123] Mr. Perry did not sponsor or corroborate any data in FWSC's application. Mr. Perry, a CPA, CIA and CISA, with 21 years of experience in the area of utility accounting both as an outside auditor and utility executive, was tendered and accepted as an expert in the area of utility accounting. [T. 116]

Mr. Tillman is FWSC's senior executive vice president in charge of business development. [T. 133] Mr. Tillman was offered as the sole sponsor of the entire Application for Amendment of

Certificate No. 106-W in Lake County containing the application and exhibits required by Rule 25-30.036, F.A.C., dated November, 1999 as well as the Water Service Agreement entered into between FWSC and the Summit Land Trust dated February 25, 2000. These were combined and identified in the record as Ex. 5. [T. 141]

Mr. Tillman's educational background is limited to marketing and he holds a B.S. and M.B.A. in marketing from University of Southern Mississippi and La Salle University, respectively. [Ex. 6] Mr. Tillman does not have an engineering degree nor is he certified to operate a water or wastewater plant in the state of Florida. [T. 180] While a member of the American Water Works since his employment at FWSC, a period of three years, Mr. Tillman does not hold any position other than as a member in that organization nor has he received any training or certification from that organization. [T. 180-1] Mr. Tillman does not have any hands on experience with the operation, maintenance or construction of either a water or wastewater plant. [T. 181-2] The only experience that Mr. Tillman has in the water and wastewater industry is that since his employment by FWSC, a period of three years, he has supervised engineers and others who do have such utility expertise. [T. 182] Mr. Tillman has never previously testified nor been accepted as an expert in the area of utility construction, operation, maintenance or design. [T. 182]

Mr. Tillman did not calculate any of the numbers that are in

the testimony originally filed by Mr. Sweat or in the application.<sup>1</sup>  
[T. 183] While Mr. Tillman changed Mr. Sweat's testimony to reflect a 319,000 gallon per day average daily flow rather than a 395,000 gallon per day average daily flow, he did not calculate either number. [T. 135-36, 183] Most importantly, Mr. Tillman testified as follows as to his expertise:

Q. Did you personally determine the average daily flow that's reflected on Line 8, Page 6 of the testimony?

A. I did not.

Q. Okay. Do you consider yourself qualified to calculate the rated capacity of a water treatment plant?

A. Given the formula for the calculation, I can do the math.

Q. Do you consider yourself competent to determine which formula is appropriate to apply?

A. No.

[T. 183-84]

At the conclusion of this testimony, the City objected to the introduction of any of the numbers that appeared in the testimony of Mr. Sweat as adopted by Mr. Tillman or any of the numbers in the associated application for certificate amendment and water services

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<sup>1</sup> "Q. Did you prepare and actually calculate any of the numbers that are either in the testimony that you've adopted from Mr. Charles Sweat or in the application filed by Florida Water in this proceeding?

A. I did not personally, but my staff did."

[T. 183]

agreement found in Ex. 5. [T. 184] The grounds for the objection were that these numbers were calculated numbers which required expertise in the area of water utility planning, design, construction, maintenance, operation and permitting which Mr. Tillman was not qualified to render. [T. 184] Commissioner Jaber overruled the objection, and allowed the questioning of Mr. Tillman to continue. [T. 185]

The City then made an oral motion to strike portions of the testimony of Mr. Tillman and associated exhibits on the grounds that such testimony and exhibits contained expert opinions regarding water utility design, construction, maintenance, operation and permitting that Mr. Tillman was not qualified to give.<sup>2</sup> [T. 187-191] Additionally, since Mr. Tillman had not personally calculated any of the numbers, and no other witnesses were being offered to corroborate these calculations, the City objected to the testimony on the grounds that it was uncorroborated hearsay. [T. 186]

Commissioner Jaber reserved ruling on the motion to strike. [T. 192] The objection of the City to the insertion of Mr. Tillman's testimony and Exhibits 5 and 6 into the record was incorporated into the City's motion to strike. However, having so noted, Commissioner Jaber allowed both the testimony and the

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<sup>2</sup> In light of the fact that the testimony of Mr. Sweat and Mr. Tillman was extensively modified by FWSC at hearing, and at the request of Commissioners Jaber and Palecki, the City has revised its motion to strike made at hearing as indicated on Attachment A. [T. 516] All line and page citations on Attachment A are to the hearing transcripts.

exhibits sponsored by Mr. Tillman to be admitted subject to being excluded should the motion to strike be subsequently granted. [T. 407-8, 514]

During the hearing, Mr. Tillman indicated that the permitted capacity of the existing Palisades water plant was 1.152 million gallons per day per the prefiled testimony of Mr. Sweat. [T.195-6] Mr. Tillman indicated that this rated capacity "was taken directly from the consumptive use permit." [T. 196] However, when provided the only consumptive use permit (CUP) associated with the Palisades water plant, the CUP attached as Exhibit E to the Amendment Application identified as part of Ex. 5, Mr. Tillman acknowledged that no rated capacity was listed. [T. 198] Further, after a series of questions, Mr. Tillman admitted that he did not know the accepted industry formula which should be applied to calculate the maximum permitted capacity of the Palisades water plant given the fact that the plant had two wells but no elevated storage tank, no high service water capacity pumps and a pneumatic tank of unknown size. [T. 205] Each and every MOR prepared by FWSC's employees and submitted to the Department of Environmental Protection (DEP) for the months July, 1999 through June, 2000 and the months January, February and May, 2001 state that the permitted maximum capacity of the Palisades water treatment plant was 576,000 gallons per day, not the 1.152 million gallons per day testified to by Mr. Tillman. [T. 221-2] Of his own knowledge, Mr. Tillman did not know which number was correct. [T.223-5]

With regard to the average daily flow at the Palisades water



plant, Mr. Tillman modified the testimony at hearing from 395,000 gpd to 319,000 gpd. [T. 140] The revised 319,000 number was computed by Chris Arcand, not Mr. Tillman, and Mr. Tillman admitted that he did not have the technical ability to verify the accuracy of the number nor could he be sure exactly which months were included in the calculation. [T. 231] Mr. Tillman could not explain the difference between the 38,400 gpd average daily flow reserved to the Summit per the Water Service Agreement and the 78,750 gpd average daily flow indicated on DEP Permit WD35-0080593-010, the Summit's permit to construct a water distribution system extension, other than to say that the 38,400 gpd was the "Public Service Commission standard" while the 78,750 gpd was the "DEP standard". [T. 266-7] Neither could Mr. Tillman explain why the application from the Summit had an average daily demand of 200,000 gpd typed in and crossed out or 2,500 gpd for fire flow also crossed out. [T. 267-7] Finally, Mr. Tillman did not know whether the 38,400 gpd average demand reserved pursuant to the Water Service Agreement included fire flow. [T.268] However, based on the construction plans provided to FWSC, Mr. Tillman admitted that FWSC was responsible for providing fire flow protection to the Summit. [T. 248] Yet another set of average daily demand numbers for the Summit development are found in Ex. D of the Application prepared by the unnamed staff at FWSC: 135,000 gpd with estimated maximum demand of approximately 270,000 gpd. [Ex.5 at 00010]

At the conclusion of the hearing Commissioner Jaber identified two additional issues to be briefed separately: Issue A: Should

Mr. Tillman and Mr. Mittauer be tendered as expert witnesses, and if so, in what areas? and Issue B: Should the City's motion to strike those portions of Mr. Tillman's testimonies and exhibits identified at the July 11th hearing be granted? [T. 515-6] The brief on these two issues is separate from that of the previously identified issues in the case and not subject to any page limit. [T. 519]

#### ISSUES AND POSITIONS

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

Position: Given the nature of the testimony presented by both Mr. Mittauer and Mr. Tillman, it is necessary that both witnesses be tendered and qualified as experts in the areas of water and wastewater utility design, construction and permitting.

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In every certificate amendment case there are two fundamental questions which must be answered: first, is there a need for service and if so, in what amount and second, how will the applicant meet that identified need. The first question necessarily requires that an engineer, or someone with specialized engineering training or experience, calculate the estimated demand for the additional certificated territory, which is almost always, as it is in this case, a residential development combined with commercial or recreational uses. [Ex. 5 at 000007; Ex. 15 at Sheet 5] The second question also requires that an engineer, or someone with specialized engineering training or experience, either design a water/wastewater plant to meet the estimated utility service demand or evaluate whether the existing water/wastewater plant is

sufficient to meet the identified need and if not, what type of additions need to be made to the utility plant or utility system to meet that identified need.

The calculations of estimated water utility service demand for a new territory to be added, and the knowledge necessary to evaluate the existing capacity of a water or wastewater plant, and based on that evaluation develop a plan of service for the new territory, are not within the common understanding of the average layman. Indeed, Mr. Tillman specifically testified that he did not have the knowledge or special training necessary to make such calculations, or evaluate the correctness of such evaluations, since he was not an engineer. [T. 183-4]

In short, the two most basic facts upon which the Commission must base its decision in this proceeding, the amount of "need" and the ability of the applicant to meet that "need" are by their very nature facts which require the witness to form an "opinion". Further, the subject of the opinion, in this case plant capacity and forecasted water demand for the Summit, is "beyond the common understanding of the average layman" and requires the application of a "special knowledge, skill, experience or training." Finally, these opinions are absolutely necessary for the trier of fact to determine if FWSC has the ability to serve the Summit. In sum, this type of testimony is, by definition, "expert testimony"

pursuant to §90.702, F.S.<sup>3</sup>

Under Florida law, "before expert testimony is admitted the trial court must make the following determinations: "First, the subject must be beyond the common understanding of the average layman. Second, the witness must have such knowledge as 'will probably aid the trier of facts in its search for truth.'" Jones v. State, 748 So.2d 1012, 1025 (Fla. 1999), reh. den., (Jan. 12, 2000), U.S. cert. den., 120 S.Ct. 2666 (2000) (Emphasis added.)

In this instance, both Mr. Tillman and Mr. Mittauer due to the nature of their testimony must be qualified as experts in the field of water and wastewater utility design, construction and permitting, tendered on that point and that tender ruled upon by the Commission. Absent such qualification and acceptance by the Commission it is reversible error for the Commission to allow the witnesses to continue. The predicate for this type of testimony must be in the record and parties must be allowed to voir dire regarding the expertise of the witness and develop this point for the record on appeal.

The nature of this testimony as that of an expert is an important evidentiary distinction because it is established Florida law that lay witnesses are required to confine their testimony to

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<sup>3</sup> "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 the evidence at trial." §90.702, F.S.

facts that are known to them, and are not permitted to give their opinions and conclusions. Howland v. Cates (Howland), 43 So.2d 848, 851 (Fla. 1949) (The Court found no reversible error where the trial court did not allow the lay witness to "express a personal opinion on one of the material issues of fact presented by the pleadings and evidence, after the witness had already clearly and fully and as definitely as he knew, stated the facts with respect to the accident."); Thomas v. State, 317 So.2d 450, 451-2 (Fla. 3d DCA 1975), cert. den., 333 So.2d 465 (Fla. 1975). In the case at hand, Mr. Tillman, by his own admission, is simply recounting conclusions that others in his organization have reached. In some cases he has specifically requested that they calculate data (the new 319,000 gpd average daily demand number produced for the first time at hearing) and in other cases these unnamed persons have exercised their own judgment in developing the data (the contents of the application). [T. 230-31, 397] In either instance, however, Mr. Tillman has absolutely no personal knowledge himself of this data, the calculations used to produce the data or the underlying facts which were used in the calculations.

At hearing Staff suggested that Mr. Tillman be tendered as an "expert in utility systems management." [T. 194] The City disagrees with this tender for several reasons. First, "utility systems management" expertise is totally irrelevant to the engineering expertise at issue here: that is the ability of Mr. Tillman to offer his opinion with regard to the specific engineering calculations of plant capacity, average daily demand,

maximum daily demand, fire flow capacity, etc. Second, Staff seems to be under the impression that Mr. Tillman can acquire engineering expertise himself simply by supervising engineers. Third, Staff seems to be under the impression that the improper admittance of such evidence can be remedied by simply giving the engineering testimony "the weight that it deserves." For expert testimony, the proper predicates must be laid, and if not present, the testimony is improper. It is only testimony which is properly in the record which the trier of fact has the ability to "weigh".

Finally, the City does not have to raise the issue of Mr. Tillman's expertise prior to the hearing. Voir dire on Mr. Tillman's expertise is appropriate at the hearing and is within the accepted scope of cross examination. §90.705(2), F.S; Prehearing Order No. PSC-01-1448-PHO-WU, issued on July 6, 2001 at 5 ("All testimony remains subject to appropriate objections.")

For the reasons stated above, both Mr. Tillman and Mr. Mittauer must be tendered and qualified as experts in the areas of water and wastewater utility design, construction and permitting.

Issue B: Should the City's motion to strike those portions of Mr. Tillman's testimonies and exhibits identified at the July 11th hearing be granted?

Position: Yes, for the following reasons: the testimony contains expert opinions in the field of water and wastewater utility design, construction and permitting which Mr. Tillman is not qualified to give; Mr. Tillman has no personal knowledge of the facts to which he is testifying thus, the facts about which Mr. Tillman is testifying are uncorroborated hearsay; and allowing this testimony in the record is a denial of the City's right to cross examine the person who actually developed the facts on which the application is based with the result that the hearing violates the essential requirements of law.

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The City's motion to strike portions of Mr. Tillman's testimony and exhibits identified at the July 11th hearing should be granted for the reasons stated below.

Lack of expertise

First, as discussed in detail above, the calculations which form the basis for evaluating whether the Palisades water plant has the existing capacity to serve the identified need imposed by the proposed Summit development are by their very nature expert engineering opinions. The record is clear that Mr. Tillman by his own admission does not have such expertise. [T. 183-4] Mr. Tillman, again by his own testimony, is relying on a "team of qualified individuals", not his own knowledge, ability, experience or expertise. [T. 398] There is absolutely nothing in this record that establishes the names of, much less the expertise of, Mr. Tillman's "team", the persons on whose expertise Mr. Tillman totally relies. This record does not support the expertise of anyone from FWSC to render the expert engineering opinions which

support any of the numbers in this case.

Neither does this record reflect the data upon which Mr. Tillman's "team" relied to form the expert engineering opinions in the application, exhibits and testimony presented by FWCS. Mr. Tillman did not know exactly which months were included in the original calculation of an average daily flow of 395,000 gpd or which were used in the calculation of the new 139,000 gpd number.

[T. 231] Mr. Tillman could not explain any discrepancies between the various calculations of his own staff for maximum daily flow and average daily flow for the Palisades plant nor for the fire flow or potable water demands for the Summit. [T. 248] Mr. Tillman could offer no credible explanation why the DEP permit indicated that 78,750 gpd was needed while FWSC only calculated 38,400 gpd as necessary. [T. 266-67] Mr. Tillman testified both that fire flow was to be provided by FWSC to the Summit and that he didn't know if fire flow was included in the 38,400 gpd reserved for the Summit. [T. 268] Explaining why all the MORs in the record, prepared by FWSC's same expert staff, indicated until May of this year a maximum rated capacity for the Palisades plant of 576,000 gpd while his testimony indicated 1.152 million gpd, "administrative error" was given as the reason. [T. 399-400]. This was not Mr. Tillman's administrative error, however, since he was not responsible for the preparation of the MORs. [T. 398-99]

Section 90.705(1), F.S., states as follows: "On cross-examination the expert shall be required to specify the facts or data [on which his opinion are based]." Further, §90.705(2), F.S.,



states that "If the party [against whom the opinion or inference is offered] establishes prima facie evidence that the expert does not have sufficient basis for the opinion, the opinions and inferences of the expert are inadmissible unless the party offering the testimony establishes the underlying facts or data."

The bottom line here is that Mr. Tillman did not, and could not, establish any underlying facts or data on which his opinion was based because he reviewed no data, he formulated no opinion nor did he have the expertise to formulate one. On this basis alone, Mr. Tillman's testimony must be stricken.

Lack of personal knowledge/hearsay

Lay witnesses are required to confine their testimony to facts that are known to them, and are not permitted to give their opinions and conclusions. Howland, 43 So.2d at 851; §90.604, F.S.<sup>4</sup> Mr. Tillman has no personal knowledge of any of the data submitted in this case as discussed above. Whatever expertise or mastery of the facts exists with regard to this application or the Palisades water plant, reposes in faceless, unproduced FWSC "staff".

Absolutely everything that Mr. Tillman testified to with regard to the portions of the testimony the City has requested be stricken, is hearsay. With regard to certification amendments of water or wastewater certificates, the Commission is subject to the provisions of the Administrative Procedures Act (APA). Legal

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<sup>4</sup> "Except as otherwise provided in s. 90.702 [Testimony by experts], a witness may not testify to a matter unless evidence is introduced which is sufficient to support a finding that the witness has personal knowledge of the matter."

Environmental Assistance Foundation, Inc. v. Clark, 668 So.2d 982, 988 ftn. 9 (Fla. 1996); ASI, Inc. v. Florida Public Service Comm., 334 So.2d 594, 595 (Fla. 1976). Under the APA, hearsay can only substitute for competent substantial evidence on which a factual finding can properly be based if it would be admissible over objection in a civil action. §120.57(1)(c), F.S.<sup>5</sup> No predicate exists in this record which constitutes any exception to the hearsay rule which would allow the data objected to by the City to be admissible. Given this fact, the data the City is seeking to strike cannot constitute competent, substantial evidence. See: Durall v. Unemployment Appeals Comm., 743 So.2d 166, 168 (Fla. 4th DCA 1999) ("Because the transcript was the only evidence presented of the statements alleged to constitute Durall's misconduct and because no testimony was presented at [the Chapter 120] hearing which could establish the predicate necessary to admit the transcript as an exception to the hearsay rule, we find that the appeals referee's decision was not based on competent, substantial evidence."); Wark v. Home Shopping Club, Inc., 715 So.2d 323, 324 (Fla. 2d DCA 1998) (Court rejected summaries of employee's attendance records as inadmissible because "no testimony was presented at hearing which could establish the predicate necessary to admit the summaries as a business record exception to the hearsay rule.")

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<sup>5</sup> "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

Under the APA hearsay is also admissible if used for the purpose of "supplementing or explaining other evidence" where the other evidence is competent and substantial. §120.57(1)(c), F.S. However, there is no such "other evidence" in this record. All of the data objected to by the City is found in the testimony, application, exhibits and water services agreement about which Mr. Tillman has no personal knowledge. This fact is clearly set forth in Mr. Tillman's redirect examination:

Q. In that description on Line 2 on Page 7 [it] talks about a interdepartmental effort. Is that the typical approach that Florida Water uses in putting together a territory expansion request?

A. That is correct.

Q. Why is that?

A. Anytime that we put together a document that covers a number of areas such as engineering, customer service, finance and so forth, we put together a team of qualified individuals to complete that project.

Q. Does Florida Water have engineers on staff?

A. Yes, we do.

Q. And have you confirmed with your engineering department that they were involved in the preparation of this application?

A. Yes, I have.

Q. And since you have assumed responsibility for this application, have you subsequently conferred with the engineering department regarding the contents of this application?

A. I have.

Q. Has the engineering department advised you that Florida Water has the capacity to provide the service to the Summit as set forth in the application?

A. Yes, they have.

[T. 397-98]

The First District Court of Appeal has addressed this issue directly in two landmark cases: McDonald v. Department of Banking and Finance (McDonald), 346 So.2d 569 (Fla. 1st DCA 1977) and Pasco County School Board v. Florida Public Employees Relations Comm. (Pasco Co.), 353 So.2d 108 (Fla. 1st DCA 1977). In McDonald, the First District found that "[o]ne significant statement in the Department's final order, to the effect that a proposed officer has 'not done a satisfactory job in running' another bank, was based entirely on hearsay testimony which standing alone is incompetent to support the Department's finding." 346 So.2d at 585. In Pasco County, the Court addressed the School Board's objection to PERC's finding that other contract teachers were unwilling to be publicly involved with the union as the result of the plaintiff's failure to get tenure. 385 So.2d at 120. The Board argued that this finding was based totally on the testimony of the plaintiff recounting his conversations with other teachers. In reviewing the record, the Court disagreed with this contention citing the fact that the plaintiff's testimony was supported by the direct testimony of other teachers as to their own apprehensions of retaliation and therefore, found it admissible. However, the Court clearly stated

as follows: "If the entire evidence presented were only hearsay, then clearly we would be required to set aside agency action [as] not supported by competent and substantial evidence." Id.

Here, as in McDonald, the data at issue is entirely the expert opinions of unnamed persons who were not produced at hearing, i.e., a classic case of hearsay<sup>6</sup>. Since there is nothing in the record to admit the contested application or exhibits as an exception to the hearsay rule, nor is there any record to establish that the unnamed persons who actually did the calculations which supported the expert were unavailable or were experts, there is no corroborating admissible evidence available to support the hearsay evidence of Mr. Tillman.<sup>7</sup>

Essential requirements of law

The rationale behind the hearsay rule is simple: if a statement is offered for the truth of that statement, the other party is entitled to test the reasonableness of that statement via cross examination. Emmco Insurance Co. v. Wallenius Caribbean Line, S.A., 492 F.2d 508, 511 ftn. 3 (5th Cir. 1974) ("The main justification for excluding hearsay is lack of opportunity for the adversary to cross-examine out of court declarant."; Dollar v.

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<sup>6</sup> "(c) "Hearsay" is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted."

<sup>7</sup> Even if Mr. Tillman had been qualified as a water and wastewater engineering expert, his complete lack of knowledge of the exact calculations which support the opinions expressed would disqualify these opinions as "competent and substantial evidence" under the requirements of §90.705(1) and (2), F.S.

State, 685 So.2d 901, 903 (Fla. 5th DCA 1996), rev.den., 695 So.2d 701 (Fla. 1997) ("[T]he essence of the hearsay rule is the requirement that testimonial assertions shall be subjected to the test of cross examination.") Since statements made by someone other than the witness cannot be subjected to this type of inquiry, they are inadmissible. Stated another way, the right of cross examination is necessary in order to meet the "essential requirements of law" standard applicable to administrative hearings. §120.57(1)(b), F.S.; Deel Motors, Inc. v. Department of Commerce, 252 So.2d 389, 394 (Fla. 1st DCA 1971).

As the record reflects, Mr. Tillman's complete lack of knowledge about the data at issue denies the City the ability to conduct such an inquiry, i.e., to adequately test the actual validity of these proffered opinions. As stated by the Third District Court of Appeals: "[T]he problem of whether or not hearsay should be permitted at a particular administrative hearing boils down to a question of fundamental fairness." Jones v. City of Hialeah, 294 So.2d 686, 688 (Fla. 3d DCA 1974). It is fundamentally unfair for FWSC, who could have produced the "staff" who actually calculated the Palisades plant's maximum rated capacity, and thereby produced the details of the calculations, to be allowed to introduce this evidence into the record. Spicer v. Metropolitan Dade County, 458 So.2d 792, 794 (Fla. 3d DCA 1984) (Court overturned dismissal of police officer where County did not prove that it had taken steps to procure the testimony of hearsay declarant.)

Burden of proof

It is established Florida law that FWSC has the burden of proof to support its application for the amendment of its service territory. Florida Department of Transportation v. J.W.C. Co., Inc., 396 So.2d 778, 787 (Fla. 1st DCA 1981) ("We view it as fundamental that an applicant for a license or permit carries the 'ultimate burden of persuasion' of entitlement through all proceedings, of whatever nature, until such time as final agency action has been taken by the agency.") It is not the responsibility of the City to calculate the correct maximum rated capacity or the actual maximum or average daily demand of the Palisades plant or to verify whether the fire flows required by Lake County are actually included in the 38,400 gpd reserved by FWSC for the Summit development. It is FWSC's job to do that.

Nor is it appropriate for the Staff to calculate exactly how much the average daily or maximum daily flows at the Palisades plant really are and apply the Staff's expertise to determine if FWSC really has the ability to provide adequate service from its existing Palisades plant. That is, the Staff cannot substitute its own expertise after the fact and outside of the record for the missing expertise of the Mr. Tillman. Such calculations go beyond the Staff's charge of "developing the record."

Uncorroborated hearsay evidence does not constitute competent substantial evidence and reliance solely on such evidence fails to comply with procedural due process and the essential requirements of law. Campbell v. Vetter, 392 So.2d 6, 8 (Fla. 4th DCA 1980).

Thus, such evidence cannot satisfy FWSC's responsibility to carry the burden of proof in this case.

For the reasons stated above, the City's Motion to Strike Mr. Tillman's testimony and exhibits identified at the July 11th hearing should be granted.

#### CONCLUSION

The nature of the testimony presented by Mr. Tillman and Mr. Mittauer require that both witnesses be tendered and qualified as experts in the areas of water and wastewater utility design, construction and permitting. While Mr. Mittauer does have such expertise, Mr. Tillman by his own admission does not. Based on this representation, and Mr. Tillman's own lack of personal knowledge concerning the calculations underlying the opinions expressed, the City's Motion to Strike should be granted. Failure to grant the City's Motion to Strike, and allowing Mr. Tillman's objected to testimony to be inserted into the record is a denial of the City's due process rights and violates the essential requirements of law.



ATTACHMENT A

Testimony

- Page 146 Lines 4-6 This testimony "should be rewritten to reflect that I am adopting the prefiled testimony previously submitted by Charles Sweat." [T. 134] The transcript does not reflect this correction. The language that is currently in the transcript should be stricken as inconsistent with Commissioner Jaber's ruling to insert the testimony of Mr. Tillman into the record as modified. [T. 141]
- Page 147 Lines 8-13 This testimony "should be changed to reflect that I have been an officer of Florida Water for approximately three years." The transcript does not reflect this correction with regards to lines 8-10 since Mr. Tillman also has only been employed by Florida Water for a period of three years. [T. 180] In order to correct the testimony per Mr. Tillman's modifications, and Commissioner Jaber's ruling, Page 147, line 10 should read "Approximately 3 years." [T. 141]
- Page 150 Lines 3-9 Strike from line 3 starting at "at" through line 9 which contain rated well capacities, permitted plant capacities and average daily flow calculations all of which are expert opinions.
- Page 152 Lines 2-6 Strike from "In" on line 2 through line 6 which contain expert opinions regarding the capacity of the Palisades water plant.
- Page 154 Lines 7-12  
Lines 16-18 Strike from line 7 through line 13 ending at "day"; strike line 16 through line 18. This section is expert opinion as to the average daily flow of the plant and its permitted capacity and the ability of FWSC to provide adequate service to the requested territory.
- Page 157 Lines 15-16 Strike from line 15 "capabilities and resources" and "excellent and"; strike from line 16 "reliable" since these are based on engineering expertise Mr. Tillman does not possess.

Page 158 Lines 3-6 Strike from line 3 "in" through line 6  
 Lines 11-12 plans."; strike from line 11 "in" through  
 line 12 "manner." Expert opinion  
 testimony.

Page 164 Lines 11-14 Strike from line 11 "The" through line 14  
 "property." Expert opinion testimony.

Page 165 Lines 18-25 Strike from line 18 through line 25;  
 expert opinion regarding FWSC's capacity  
 and the plant additions or improvements  
 needed to provide service to Summit.

Page 167 Lines 11-24 Strike from line 11 "The" through line  
 Page 168 Lines 1-2 24 on page 167; strike from line 1  
 through line 2 on page 168. Expert  
 opinion as to the average consumption per  
 month and conclusions to be drawn from  
 that opinion.

Page 171 Line 4-9 Strike from line 4 "(2)" through line 9.  
 This testimony contains expert opinions  
 as to the ability of FWSC to provide  
 wastewater service and the City's lack of  
 ability to do so.

Page 172 Line 5-25 Expert opinion testimony regarding  
 ability of FWSC and City to provide  
 wastewater service.

Page 173 Line 1-18 Expert opinion testimony regarding cost  
 of providing wastewater services by FWSC  
 and City.

Exhibits

Composite Exhibit 5  
 Application for Amendment of Certificate No. 106-W (CLS-1)

Exhibit D  
 Page 000010

Strike the entire second and third  
 paragraphs on this exhibit starting with  
 "The existing water treatment plant".  
 This material is expert opinion with  
 regard to the rated capacities of the  
 Palisades plant, estimated water demand  
 and types of improvements needed to  
 provide service.

c: 3431

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing were furnished by Hand Delivery(\*) and U.S. Mail to the following on this 13th day of August, 2001:

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