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 ORDER NO. PSC-01-1919-PCO-WU ISSUED: September 24, 2001

The following Commissioners participated in the disposition of this matter:

LILA A. JABER
BRAULIO L. BAEZ
MICHAEL A. PALECKI

ORDER ACCEPTING MR. TILLMAN AND MR. MITTAUER AS EXPERT WITNESSES AND DENYING THE CITY'S MOTION TO STRIKE CERTAIN PORTIONS OF MR. TILLMAN'S TESTIMONY

BY THE COMMISSION:

BACKGROUND

On November 3, 1999, Florida Water Services Corporation (FWSC or utility) filed an application for amendment of Certificate No. 106-W to add territory in Lake County. FWSC is a Class A utility.

The City of Groveland (City) timely filed a protest to the application on November 24, 1999. By Order No. PSC-00-0623-PCO-WU (Order Establishing Procedure), issued April 3, 2000, this matter was scheduled for an administrative hearing on December 11 and 12, 2000.

On October 27, 2000, the parties filed a Joint Motion for Extension of Time to File Rebuttal Testimony and Joint Motion for Continuance of the hearing dates. By Order No. PSC-00-2096-PCO-WU, issued November 6, 2000, the hearing dates were changed to March 13 and 14, 2001, the prehearing date was changed to March 1, 2001, and other key activity dates were consequently changed. By Order No. PSC-01-0279-PCO-WU, issued January 31, 2001, the hearing dates were

changed to March 15 and 16, 2001. Pursuant to Order No. PSC-01-0395-PCO-WU, issued February 16, 2001, the prehearing conference and hearing dates were changed to June 25, 2001, and July 11 and 12, 2001, respectively. In addition, by Order No. PSC-01-0395-PCO-WU, the discovery cutoff date was changed to June 18, 2001. By Order No. PSC-01-1287-PCO-WU, issued June 13, 2001, the prehearing conference date was changed to June 26, 2001, and the discovery cutoff date was extended to July 3, 2001.

On May 10, 2001, FWSC filed its Motion for Summary Final Order. On May 17, 2001, the City filed its Response in Opposition to Motion for Summary Final Order. On May 17, 2001, the City also filed a Motion Requesting Oral Argument on the Motion for Summary Final Order. By Order No. PSC-01-1478-FOF-WU, issued July 16, 2001, FWSC's Motion for Summary Final Order was denied. Thus, the matter proceeded to administrative hearing on July 11 and 12, 2001.

At the hearing, the City made an *ore tenus* Motion to Strike the testimony of Mr. John L. Tillman. Further, the City requested that Mr. Mittauer be tendered as an expert in the field of water and wastewater utility design, construction and permitting. We directed the parties to brief two additional issues related to the City's Motion: 1) should Mr. Tillman and Mr. Mittauer be tendered as expert witnesses, and if so, in what areas? and 2) should the City's Motion to Strike those portions of Mr. Tillman's testimony and exhibits identified at the July 11, 2001, hearing be granted? On August 13, 2001, the City filed its Brief on Motions to Strike and To Reject or Accept Expert Witnesses of the City of Groveland, Florida. On August 13, 2001, FWSC filed its Brief entitled Florida Water Service Corporation's Legal Memorandum on Issues A and B. This Order addresses these two issues.

We have jurisdiction pursuant to Sections 367.045, 120.569, and 120.57, Florida Statutes.

EXPERT WITNESSES

The crux of this issue is whether Mr. Tillman and Mr. Mittauer should be tendered as expert witnesses, and if so, in what areas. At the hearing, the City conducted *voir dire* of Mr. Tillman and requested that his testimony and exhibits be stricken based on his lack of expertise in the area of utility construction, operation,

maintenance or design and his lack of personal knowledge. Section 90.702, Florida Statutes, states:

> 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 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.

City's Arguments

In its brief, the City argues that in every certificate amendment case, two fundamental questions must be addressed. The City contends that the first question is whether there is a need for service and in what amount and the second question is how the applicant will meet the identified need. The City asserts that answers to both of these questions necessarily require that an engineer, or someone with specialized engineering training or experience, address the questions. The City contends that the two most basic facts upon which we base our decision, the amount of "need" and the ability to meet the "need", are ". . . by their very nature facts which require the witness to form an 'opinion'". The City further contends that the plant capacity and forecasted water demand for the Summit ". . . is 'beyond the common understanding of the average layman' and requires that application of a 'special knowledge, skill, experience or training.'" The City concludes that these opinions are absolutely necessary for the trier of fact to determine if FWSC has the ability to serve the Summit. The City concludes that pursuant to Section 90.702, Florida Statutes, this type of testimony is, by definition, expert testimony.

The City cites to Jones v. State[1] for the proposition that 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.'" The City contends

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[1]Jones v. State, 748 So.2d 1012, 1025 (Fla. 1999), reh. den., (Jan. 12, 2000), U.S. cert. den., 120 S.Ct. 2666 (2000).

that in the instant case, both Mr. Tillman and Mr. Mittauer must be qualified as experts in the field of water and wastewater utility design, construction and permitting based on the nature of their testimonies tendered on those points. The City concludes that absent the qualification and acceptance by this Commission, it is reversible error for this Commission to allow the witnesses to continue. The City asserts that this type of evidence must be in the record, and that the parties must be able to conduct *voir dire* regarding the witnesses' expertise and develop this point for the appeal record.

The City argues that the distinction between an expert and a layperson is an important one because a lay witness is required to confine his testimony to facts that are know to him, and is not permitted to give his opinions and conclusions. The City cites to Howland v. Cates[2] for the proposition that "[t]he 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 has already clearly and fully and as definitely as he knew, stated the facts with respect to the accident'". The City also cites to Thomas v. State[3].

The City contends that in this case Mr. Tillman admits that he is recounting the conclusions that other persons at FWSC have made. The City asserts that in some cases, Mr. Tillman requested others to calculate data, such as the average daily demand, and in other cases, unnamed persons have exercised their own judgment in developing the data. The City argues that Mr. Tillman has no personal knowledge of the data, the underlying calculations used to produce the data, or the underlying facts which were used in the calculations.

The City disagrees with our staff's recommendation made at hearing that Mr. Tillman can be tendered as an expert in water and wastewater utility management systems for several reasons. The City asserts that a utility systems management expertise is

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[2]Howland v. Cates, 43 So.2d 848, 851 (Fla. 1949).

[3]Thomas v. State, 317 So. 2d 450, 451-2 (Fla. 3d DCA 1975), cert. den., 333 So.2d 465 (Fla. 1975).

irrelevant to the engineering expertise at issue with regard to specific engineering calculations of plant capacity, average daily demand, maximum daily demand, fire flow capacity, etc. Second, the City contends that "[s]taff seems to be under the impression that Mr. Tillman can acquire engineering expertise himself simply by supervising engineers." Third, the City asserts that "[s]taff 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.'" The City argues that the proper predicates must by laid for expert testimony, and if not present, the testimony is improper and that only testimony which is properly in the record can be "weighed" by the trier of fact.

Finally, the City argues that it does not have to raise the issue of Mr. Tillman's expertise prior to the hearing. The City contends that *voir dire* of Mr. Tillman was appropriate at the hearing and is within the accepted scope of cross examination under Section 90.705(2), Florida Statutes, and Order No. PSC-01-1448-PHO-WU, issued July 6, 2001 at p. 5 "(All testimony remains subject to appropriate objections.)." Thus, the City concludes that Mr. Tillman and Mr. Mittauer must be tendered and qualified as experts in the areas of water and wastewater utility design, construction and permitting.

FWSC's Arqments

In its Brief, FWSC argues that the pertinent provision is Section 90.702, Florida Statutes, governing the testimony of expert witnesses. FWSC cites Professor Ehrhardt's treatise on Florida Evidence on this section for the proposition that 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.[4] [emphasis added]

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[4]Ehrhardt, Florida Evidence (2001 Ed.), Section 702.1, pp. 571-572.

FWSC asserts that this provision is only relevant when opinion testimony is sought. FWSC contends that technical and scientific matters do not always involve opinions. As noted by Professor Ehrhardt, "when the witness is testifying to facts, it is immaterial whether the witness has been qualified as an expert".[5]

Thus, FWSC asserts that as a preliminarily matter with respect to whether Mr. Tillman or Mr. Mittauer should be accepted as experts, we should first determine whether any of the testimony these witnesses offered is opinion as opposed to factual testimony. FWSC contends that almost all of Mr. Tillman's challenged testimony addresses factual issues rather than opinion testimony. FWSC states that Mr. Tillman as a senior executive officer of the company has sponsored the amendment application and confirmed that it was prepared through an interdepartmental effort of FWSC employees. FWSC asserts that Mr. Tillman states that he now supervises the department responsible for the preparation of the application and discussed the application with the staff responsible for preparing it. FWSC contends that "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." FWSC asserts that technical testimony is not required to verify the rated capacity of the wells or the average daily flows of the plant. FWSC states that the City is attempting 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. FWSC contends that the City's suggestion is simply wrong. FWSC cites to Bluegrass Shows, Inc. v. Collins[6], for the proposition that the "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."

FWSC contends that it is not necessary for either Mr. Tillman or Mr. Mittauer to be accepted as expert witnesses to address the issues that are in dispute in this docket as framed by the City's

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[5]Id. at 572.

[6]Bluegrass Shows, Inc. v. Collins, 614 So.2d 626 (Fla. 1st DCA 1993).

Objection or its Prehearing Statement. FWSC asserts that neither the City's Objection nor its Prehearing Statement challenged the capacity or actual flow from the Palisades plant.

FWSC states that in any event, Mr. Tillman is an expert in the area of water and wastewater utility management. FWSC asserts that Mr. Tillman is a senior vice president of one of the largest investor-owned water and wastewater utilities in the state. FWSC contends that Mr. Tillman's job responsibilities include all business development related activities for the company which includes the development of new systems. FWSC asserts that Mr. Tillman supervises the staff which determines available capacity and performs water demand projects and works closely with developers, engineers and other applicants to provide service to new residential and commercial construction. FWSC contends that Mr. Tillman clearly has expertise regarding the manner and cost of providing water and wastewater service.

FWSC states that with respect to Mr. Mittauer, FWSC objects to the City's attempt to supplement his prefiled testimony subsequent to its filing. FWSC contends that if the City had wished to formally proffer Mr. Mittauer as an expert, an unnecessary exercise, it should have done so in its prefiled testimony. FWSC asserts that to allow the City to supplement Mr. Mittauer's testimony to tender him as an expert witness at the hearing is an academic exercise that wastes the resources of the parties and this Commission. FWSC states that to the extent that Mr. Mittauer's testimony does not contain opinion testimony, no formal proffer is required by counsel which is consistent with our practice. FWSC cites to Ehrhardt, Florida Evidence, and Chambliss v. White Motor Corporation[7], for the proposition that "it is not necessary for counsel to formally proffer a witness as an expert to the court." FWSC also cites to Berry v. City of Detroit[8], noting that one Federal Court stated that "[a] judicial ruling that a proffered expert is 'qualified' prior to the time that counsel has posed a

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[7] Florida Evidence at 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).

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

precise question soliciting expert testimony is premature and - unless an objection is interposed - unnecessary."

FWSC concludes that we 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. FWSC asserts that to the extent Mr. Mittauer seeks to offer opinions as to the effect or scope of the City's Utilities District, those opinions should be rejected as beyond the scope of any expertise he possesses.

Analysis

We agree with FWSC that the preliminary determination which we must make is whether the testimony being offered requires the witness to be tendered as an expert. An expert witness may offer both factual testimony, if personally known, or opinion testimony, based upon the witness' personal knowledge or facts provided to the witness, so long as those facts are of a type reasonably relied upon by other experts in that field. Section 90.704, Florida Statutes. We find that the parties do not dispute that Mr. Tillman can testify to facts of which he has personal knowledge.

In Kelly v. Kinsey, the First District Court of Appeal found that "In order to qualify as an expert in a given area, a witness must show that he has acquired special knowledge of the subject matter by either education, training, or experience."[9] The Florida Supreme Court stated in Ramirez v. State[10] that "The determination of a witness's qualifications to express an expert opinion is peculiarly within the discretion of the trial judge, whose decision will not be reversed absent a clear showing of error." As noted by Order No. PSC-95-0576-FOF-SU[11], this Commission stated:

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[9]Kelly v. Kinsey, 362 So.2d 402, 404 (Fla. 1st DCA 1978); See also, Davis v. South Florida Water Management District, 715 So. 2d 996 (Fla. 4th DCA 1998).

[10]Ramirez v. State, 542 So.2d 352 (Fla. 1989).

[11]Order No. PSC-95-0576-FOF-SU, issued May 9, 1995, in Docket No. 940963, In Re: Transfer of Territory from Tamiami

> In practice, these witnesses are often not formally tendered as expert witnesses at hearing. For example, at the hearing in this docket neither NFMU's nor OPC's technical witness was formally tendered as an expert. Counsel for OPC explained that it is the Citizens' understanding that during the technical part of a proceeding before the Commission, the opinions of expert witnesses is offered. OPC understood that NFMU's witness was being offered as an expert by virtue of the qualifications that were put in his testimony. OPC did not challenge the expertise of NFMU's witness, or *voir dire* him to claim that he was not an expert. . . .

Due to the nature of this Commission's duties and the specialized and unique issues presented in Commission cases, most persons testifying at formal hearing are experts since they have acquired specialized training, education or extensive experience in the area in which they work. In Commission practice, a witness' professional and educational qualifications are set forth in his or her prefiled testimony and are accepted unless that witness' expertise is challenged, which is the case here regarding Mr. Tillman's testimony. Thus, the City's additional proffer at the hearing that Mr. Mittauer be accepted as an expert in the field of engineering is unnecessary since his engineering expertise was not challenged. Based on his education and experience, Mr. Mittauer is a water and wastewater utility engineering expert.

As noted above, Mr. Tillman's expertise was challenged. The City argues that in a certificate amendment case, one must necessarily produce an engineering expert to testify to need for service because of the plant capacity and average daily flow issues. The City contends that Mr. Tillman is not an expert in this area. We do not agree with the City's premise that one must necessarily be an engineering expert to testify to need for service issues. As FWSC points out, the application, Composite Exhibit No. 5 which was admitted into the record with the objection preserved, contains information regarding plant capacity and average daily flows that are required information in such an application. We believe that these numbers are factual in nature and do not

necessarily require testimony to be given in the form of an opinion. To the extent that the City challenges the factual information and seeks to elicit an expert engineering opinion from Mr. Tillman, Mr. Tillman's own statement is that he is not an engineer. Nevertheless, Mr. Tillman testified that he confirmed with the engineering staff under his supervision that the content of the application is true and accurate.

We agree with FWSC that Mr. Tillman should be accepted as an expert in the area of water and wastewater utility management. We find that Mr. Tillman's experience related to his job responsibilities, including development of new systems and service to developments and supervision of the staff which prepares applications for the Commission regarding new systems and development, qualifies him to give opinion testimony regarding the manner and cost of providing water and wastewater service to new developments. We note that the exact definition of water and wastewater utility management expert was not stated at the hearing. However, we find that as a water and wastewater utility management expert, Mr. Tillman has expertise regarding FWSC's applications processes, including supervision of his staff. Further, we find that Mr. Tillman has expertise regarding FWSC's development of new systems and customers.

We note that the application contains technical information from the business records of the company. We agree with FWSC that "Expert testimony is not required to verify the rated capacity of the wells . . . or the average daily flows" since this is information which the company keeps as part of its ordinary course of business. We do not believe that just because there is a conflict in the testimony regarding the information contained in the application this information should be precluded based solely on Mr. Tillman's lack of engineering expertise. This would go to the weight of the testimony on that point. Nevertheless, we find that as a water and wastewater utility management expert, Mr. Tillman can give opinion testimony regarding the application, application process, and development of new systems and customers.

For the foregoing reasons, we accept Mr. Tillman as an expert in the area of water and wastewater utility management. The City's additional proffer at the hearing that Mr. Mittauer be accepted as an expert in the field of engineering is unnecessary since his

engineering expertise was not challenged. It is clear that based on his education and experience, Mr. Mittauer is a water and wastewater utility engineering expert.

With respect to the City's argument that it was not required to raise the issue of Mr. Tillman's expertise prior to the hearing, we agree that no such requirement was imposed upon the parties in this case. We note that for reasons of administrative efficiency, Orders Establishing Procedure now require parties wishing to challenge a witness's qualifications to testify as an expert to file such objections, in writing, by the time of the Prehearing Conference so that we may schedule adequate time at the hearing for the resolution of such disputes.

MOTION TO STRIKE

As previously stated, at the hearing, the City made an *ore tenus* Motion to Strike certain portions of the testimony and exhibits of Mr. Tillman. To the extent that this issue raises the same arguments which were addressed above, we shall not repeat that analysis here.

City's Arguments

In its brief, the City argues that as discussed above, certain portions of Mr. Tillman's testimony should be stricken because of his lack of expertise in engineering matters. The portions of Mr. Tillman's testimony which the City argues should be stricken are set forth in the hearing transcript, at pages 187-191. The specific language which the City has moved to strike is set forth on Attachment A submitted with the City's Brief, attached also to this Order. Moreover, the City also objected to the admission into the record of Composite Exhibit 5, FWSC's Application and FWSC's Developer Agreement with the Summit.

Specifically, the City contends that the calculations which form the basis for evaluating the system's existing capacity are by their very nature expert opinions. The City asserts that there is nothing in the record that supports that anyone from FWSC has the expertise to render expert engineering opinions which support the numbers in this case. The City also contends that the record does not reflect the data upon which the FWSC team relied to form the

expert engineering opinions in the application, exhibits and testimony presented by FWSC.

The City contends that Section 90.705(1), Florida Statutes, requires that on cross examination the expert shall be required to specify the facts or data upon which his opinions are based. The City further contends that Section 90.705(2), Florida Statutes, 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 City asserts that Mr. Tillman did not establish the underlying facts or data upon which his opinion was based because he reviewed no data, he formulated no opinion nor did he have the expertise to formulate an opinion. Thus, the City concludes that on this basis alone, Mr. Tillman's testimony should be stricken.

Second, the City argues that Mr. Tillman does not have personal knowledge of any of the data submitted. The City asserts that a lay witness must confine his testimony to the facts on which he has personal knowledge, and is not permitted to give opinions and conclusions. The City asserts that all expertise and mastery of the facts regarding the application exist with ". . . faceless, unproduced FWSC 'staff.'"

Furthermore, the City asserts that all of the information which Mr. Tillman testified to, which the City requests to be stricken, is hearsay. The City states that this proceeding is subject to the provisions of the Administrative Procedures Act (APA), citing to Legal Environmental Assistance Foundation, Inc. v. Clark and ASI, Inc. v. Florida Public Service Commission.[12] The City states that under Section 120.57(1)(c), Florida Statutes, ".

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[12] Legal Environmental Assistance Foundation, Inc. v. Clark, 668 So.2d 982, 988 ftn.9 (Fla. 1996); and ASI, Inc. v. Florida Public Service Commission, 334 So.2d 594, 595 (Fla. 1976).

. . 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". The City contends that no predicate has been established in the record ". . . which constitutes any exception to the hearsay rule which would allow the data objected to by the City to be admissible." The City contends that because there is no predicated exception to the hearsay rule this information cannot constitute competent, substantial evidence. The City cites to Durall v. Unemployment Appeals Comm.[13], for the proposition that

> 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.

The City also cites to Wark v. Home Shopping Club, Inc.[14], for the proposition that the Court rejected summaries of an employee's attendance record as inadmissible because no testimony at the hearing established the predicate necessary to admit the summaries as a business record exception to the hearsay rule.

Moreover, the City states that under Section 120.57(1)(c), Florida Statutes, hearsay is admissible if used for the purpose of supplementing or explaining other evidence where the other evidence is competent and substantial. The City asserts that no such other competent and substantial evidence exists in the record because all such evidence relates to the testimony, application, exhibits, and water service agreement about which Mr. Tillman has no personal knowledge.

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[13]Durall v. Unemployment Appeals Comm., 743 So.2d 166, 168 (Fla. 4th DCA 1999).

[14]Wark v. Home Shopping Club, Inc., 715 So.2d 323, 324 (Fla. 2nd DCA 1998).

The City cites to McDonald v. Department of Banking and Finance[15], stating that in this case the First District Court of Appeal found that one significant statement contained in the final order was based entirely on hearsay testimony which standing alone is incompetent to support the findings. The City also cites to Pasco County School Board v. Florida Public Employee Relations Comm.[16], for the proposition that although the Court found that the hearsay testimony was supported by other substantial competent evidence that ". . . [I]f 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". The City contends that the data relied on in this case is entirely the expert opinions of unnamed persons not produced at hearing, and is thus a classic case of hearsay. The City asserts that there is no corroborating admissible evidence available to support the hearsay evidence of Mr. Tillman.

Finally, the City argues that admission of Mr. Tillman's testimony would violate the essential requirements of law. The City states that the rationale behind the hearsay rule is that if a statement is being offered for its truth, the party should be able to test the reasonableness of the statement by cross examination, citing to Emmco Insurance Co. v. Wallencius Caribean Line, S.A. and Dollar v. State.[17] The City also cites to Section 120.57(1)(b) and Deel Motors, Inc. v. Department of Commerce,[18] for the proposition that the right of cross examination is necessary to meet the essential requirements of law standard in APA proceedings. The City asserts that Mr. Tillman's lack of personal knowledge

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[15]McDonald v. Department of Banking and Finance, 346 So.2d 569 (Fla 1st DCA 1977).

[16]Pasco County School Board v. Florida Public Employee Relations Comm., 353 So.2d 108 (Fla. 1st DCA 1977).

[17]Emmco Insurance Co. v. Wallencius Caribean Line, S.A., 492 F.2d 508, 511 ftn. 3 (5th Cir 1974); and Dollar v. State, 685 So.2d 901, 903 (Fla. 5th DCA 1996), rev. den., 695 So.2d 701 (Fla. 1997).

[18]Deel Motors, Inc. v. Department of Commerce, 252 So.2d 389, 394 (Fla. 1st DCA 1971).

denies the City the ability to conduct such an inquiry to adequately test the actual validity of these proffered opinions. The City states that in Jones v. City of Hialeah[19], the Third District Court of Appeal found that the problem of whether or not hearsay is admissible boils down to a question of fundamental fairness. The City contends that it is fundamentally unfair to allow FWSC to be able to admit this information without producing the person who actually calculated the information. The City cites to Spicer v. Metropolitan Dade County[20], in which the Court overturned dismissal of a police officer because the County did not prove that it had taken steps to procure the testimony of a hearsay declarant.

The City argues that FWSC has the burden of proof to support its application. The City cites to Florida Department of Transportation v. J.W.C. Co., Inc.[21], for the proposition that the applicant for a licence or permit carries the ultimate burden of persuasion of entitlement though the entire proceeding until final agency action has been taken. The City asserts that it is not its responsibility to calculate the capacity or the average daily flow or verify if fire flow is required. That is FWSC's job. The City also contends that it is not our staff's job to substitute its expertise after the fact and outside the record for the missing expertise of Mr. Tillman and that this goes beyond our staff's charge to develop the record. The City asserts that uncorroborated hearsay does not constitute competent substantial evidence and reliance solely on such evidence fails to comply with the essential requirements of law and due process. Campbell v. Vetter[22]. The City concludes that such evidence cannot satisfy FWSC's burden of proof in this case and that therefore its Motion to Strike should be granted.

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[19]Jones v. City of Hialeah, 294 So. 2d. 686, 688 (Fla. 3rd DCA 1974).

[20]Spicer v. Metropolitan Dade County, 458 so.2d 792, 794 (Fla. 3rd DCA 1984).

[21]Florida Department of Transportation v. J.W.C. Co., Inc., 396 So.2d 778, 787 (Fla. 1st DCA 1981).

[22]Campbell v. Vetter, 392 So.2d 6, 8 (Fla 4th DCA 1980).

FWSC's Arguments

In its Brief, FWSC states that the City's Motion to Strike should be denied on several equally valid grounds. First, FWSC contends that virtually all of the testimony the City has requested be stricken does not constitute opinion testimony, but fact testimony. FWSC contends that it is appropriate for a senior vice president to provide factual testimony based on information provided to him by his staff. Further, FWSC asserts that even if it is opinion testimony, Mr. Tillman is an expert in water and wastewater utility management and is clearly an appropriate witness to sponsor the application which was assembled by departments which report to him. Finally, FWSC contends that the Motion should be denied as untimely.

FWSC cites to Woodholly Associates v. Department of Natural Resources[23], to assert that the issues raised in the Motion are easily disposed of based on the First District Court of Appeal's ruling. FWSC states that in that case, the challenger argued that the applicant had not carried its burden of proving the necessity or justification for approval of a project as required by applicable rule. FWSC notes that the Court stated:

> . . . [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 the necessity and justification of the project, either as a matter of fact or as a matter of law. . . . 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

[23]Woodholly Associates v. Department of Natural Resources, 451 So.2d 1002 (1st DCA 1984).

> controversy and allege a factual basis for the contention that the facts relied upon by the application fall short of carrying the . . . burden cast upon the applicant.

(Citations omitted) FWSC asserts that it has satisfied the requirements of a *prima facie* case through the introduction of the application. FWSC contends that rather than framing the issues appropriately in its Objections and Prehearing Statement, the City waited until Mr. Tillman's testimony was entered into the record to try to defeat the application "based not on the merits but on some concocted legal technicality." FWSC asserts that "the Commission should not countenance such a blatant effort at trial by ambush."

FWSC further contends that the City had ample opportunity to raise and seek resolution of any substantive issues related to the merits of the application. FWSC contends that by Order No. PSC-00-0623-PCO-WU, issued April 3, 2000 (Order Establishing Procedure), the scope of the proceedings is limited to those issues raised up to the Prehearing Conference unless modified by this Commission. FWSC asserts that the Order Establishing Procedure requires that the parties file prehearing statements that contain a statement of all pending motions or other matters the parties seek action upon and that except for good cause shown any issue not raised by a party prior to the issuance of the Prehearing Order shall be waived by the parties. FWSC also states that this Commission's procedure to prefile testimony is further effort to require that all issues be identified and framed prior to the hearing. FWSC contends that neither the Order Establishing Procedure nor the Prehearing Order authorize a party to make an *ore tenus* motion to strike prefiled testimony during the hearing. FWSC further argues that the City's *ore tenus* motion to strike Mr. Tillman's testimony was made after the testimony was moved into the record without objection from the City, which ". . . contravenes several of the due process requirements and goals of the Order Establishing Procedure."

FWSC asserts that the City's 11th hour motion to strike Mr. Tillman's prefiled testimony is contrary to the purpose of requiring prefiled testimony. FWSC asserts that allowing parties to wait until 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 resolutions based on the merits as opposed to technicalities."

FWSC concludes that even if the City had a valid reason to strike Mr. Tillman's testimony, under the Order Establishing Procedure, the City waived its right to raise it.

FWSC also argues that allowing Mr. Tillman's testimony to be stricken would create a horrendous precedent that would create confusion and uncertainty in future Commission proceedings. FWSC contends that the City had ample opportunity to conduct discovery with respect to the application which identifies the staff who assembled the application. FWSC asserts that rather than dealing with the application on its merits, the City ". . . seeks a hyper-technical way to defeat it without having placed the issue before the Commission or alerting the parties prior to the commencement of the hearing." FWSC states that the City could have and should have raised any concerns regarding Mr. Tillman's adoption of Mr. Sweat's testimony prior to the hearing.

FWSC argues that Rule 25-30.036, Florida Administrative Code, requires that regulated utilities provide certain relevant information in the application, but does not require the company to retain an engineer to calculate the flow at any particular time or the rated capacity of the wells to provide service. FWSC contends that the rule simply requires the utility to provide relevant information, which FWSC did in its application. FWSC argues that nothing in our rule or the statute requires an applicant to identify or produce the individuals responsible for calculating or reporting the Monthly Operation Reports (MORs) or permitted capacities, which are reported and contained in the business records of the company. FWSC states that the application was properly introduced into evidence and it was incumbent upon the City to specifically delineate its challenges in its Objection and its Prehearing Statement.

FWSC cites to ITT Real Estate Equities, Inc. v. Chancellor Insurance Agency, Inc.[24], to assert that contrary to the City's suggestion, it is not necessary to produce a witness to swear to every aspect of a written document such as the application in this case. FWSC argues that "Evidence is authenticated when prima facie

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[24]ITT Real Estate Equities, Inc. v. Chancellor Insurance Agency, Inc., 617 So.2d 750(4th DCA 1993).

evidence is introduced to prove that the proffered evidence is authentic."[25] FWSC also cites to Kuklis v. Hancock[26], for the proposition that "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." FWSC states that thus the senior executive of a company is the appropriate witness to authenticate business records even if he did not prepare them, citing to In re: the National Trust Group, Inc.[27]

FWSC asserts that Mr. Tillman, as a senior executive of FWSC, is the person who oversees the assembling of the application, and can authenticate the application. FWSC states that even though Mr. Sweat oversaw the department when this application was prepared, Mr. Tillman assumed his job responsibilities. FWSC states that Mr. Tillman testified that the application was an interdepartmental effort within FWSC. FWSC asserts that Mr. Tillman testified that he has confirmed that the information in the application was accurate and correct with the appropriate team of qualified individuals who assembled the application.

FWSC contends that the City's main argument to strike Mr. Tillman's testimony is that he lacks the expertise ". . . to express the opinions set forth in the testimony he was adopting." However, FWSC argues that most of the testimony the City is seeking to strike is not opinion testimony, but rather facts. Again, FWSC maintains that the capacity of the wells and daily capacity of the plant, for example, are information utilized daily in the operations of the utility and are maintained in the ordinary course of business. FWSC contends that perhaps if the City had raised the method of calculating flow as an issue, expert opinion testimony may have been necessary, but the City did not do so. FWSC asserts that the fact Mr. Tillman does not regularly calculate average

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[25]Id.

[26]Kuklis v. Hancock, 428 F.2d. 608 (5th Cir 1970); FWSC also cites to Nordyne, Inc. v. Florida Mobile Home Supply, 625 So.2d 1283 (Fla. 1st DCA 1983) and Ehrhart, Florida Evidence, (2001 Ed.), Section 901.2, p. 861.

[27]In re: the National Trust Group, Inc., 27 Fed. R.E.S., 804; and 98 B.R. 90 (U.S. Bankruptcy Crt. M.D. Florida, 1989).

daily flows or actually fill out the MORs is simply of no consequence. FWSC contends that as a senior executive, Mr. Tillman would not be involved in making such measurements of flows at any particular facility, but would be regularly and normally provided such information by his staff. FWSC concludes that as a senior executive of the company, Mr. Tillman is qualified to confirm the facts reported to him by his employees with respect to these types of issues.

FWSC states that the other portions of the testimony which the City seeks to strike relate to the benefits that would accrue to FWSC if the application is granted. FWSC states the while some portion of this testimony could be categorized as opinion, it relates to anticipated impact on FWSC and is within the purview of Mr. Tillman's job responsibilities as the senior executive in charge of developer relations and business development.

FWSC states that the 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. FWSC contends that to establish such a requirement could arguably require rulemaking and would guarantee lengthy and protracted proceedings. FWSC argues that as recognized in the Woodholly case, an applicant presents a *prima facie* case in administrative proceedings by presenting its application. FWSC asserts that it is up to the challenger to frame the issues, at which point the parties present evidence to the appropriate tribunal. Thus, FWSC states that we should deny any attempt to defeat the application based on matters not clearly identified prior to the commencement of the hearing.

Analysis

We are concerned that the City's Motion to Strike Mr. Tillman's prefiled direct testimony was not raised until the time of the hearing. We note that it is this Commission's procedure to require witnesses to prefile their direct testimony, including their qualifications, well in advance of the hearing. We believe that the City had ample opportunity to raise its concerns regarding the matters contained in the application and in prefiled testimony in advance of the hearing, thereby avoiding trial by surprise. Moreover, we note that generally *voir dire* of a witness is

conducted prior to the witness' direct testimony being inserted into the record at the hearing and then the appropriate objection is raised, if any. However, in the instant case the City did not raise its objection when the direct prefiled testimony was entered into the record. The City raised its objection after it had conducted *voir dire* at the beginning of its cross-examination. We believe that the City should have at the very least raised its objection upon the insertion of the testimony into the record.

We believe that underlying the City's motion is the question regarding Mr. Tillman's ability to testify as an expert. We have previously addressed the issue of whether Mr. Tillman should be tendered as an expert witness. For the reasons stated therein, we find it appropriate to accept Mr. Tillman as an expert in water and wastewater utility management. Therefore, we find that Mr. Tillman may offer opinion testimony or conclusions based on facts within the record. As previously noted, the exact definition of water and wastewater utility management expert was not stated at the hearing. However, we find that as a water and wastewater utility management expert, Mr. Tillman has expertise regarding FWSC's applications processes including the supervision of his staff. Further, we find that Mr. Tillman has expertise regarding FWSC's development of new systems and customers.

The City raised the issue that the data contained in Mr. Tillman's testimony is uncorroborated hearsay. Section 90.803(6), Florida Statutes, Hearsay Exceptions; availability of declarant immaterial, excepts from the hearsay rule:

> Records of regularly conducted business activity.-
> (a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances show lack of trustworthiness.

We find that Mr. Tillman is an appropriate witness to testify to the application and the information contained therein. Mr. Tillman is the senior executive in charge of the compilation of the application and of persons who prepared the application at FWSC. We find that the application can be properly admitted as a exception to the hearsay rule. In Florida Association of Counties, Inc. v. Department of Administration[28], the First District Court of Appeal found that

> On cross-appeal PBA contends that the trial court erroneously admitted, under the business records exception to the hearsay rule, numerous copies of correspondence received by DOA. . . . Also, reports were submitted in connection with activity of DOA mandated by Florida law. §121.031 (3), Fla. Stat. (1989). They were therefore properly admitted under the business records exception. §90.803(8), Fla. Stat. (1989).

In this case, we note that FWSC is required by Section 367.045, Florida Statutes, and Rule 25-30.036, Florida Administrative Code, to submit certain information to this Commission in the form of an application.

Professor Ehrhardt, Florida Evidence[29], states that "Not only are records which are routinely and frequently made by the business admissible under [S]ection 90.803(6), the exception also includes non-routine records which are infrequently made but which are made by the business whenever an event occurs." Thus, we find that the application itself is a business record exception to the hearsay rule. We note that the merits of the application and the information contained therein will be addressed later in our final Order.

The City argues that the data contained in Mr. Tillman's testimony is uncorroborated hearsay. The City argued at hearing

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[28]Florida Association of Counties, Inc. v. Department of Administration, 580 So.2d 641, 646-647 (1st DCA 1991), aff'd 595 So.2d 42 (Fla. 1992).

[29]Erhardt, Florida Evidence, (2001 Ed.) Section 803.6, p. 728.

that it is FWSC's burden ". . . to put up a witness who is competent to support the numbers in the application . . ." FWSC responded that Mr. Tillman as a senior executive oversees the departments and that the people who perform these services report to him on a daily basis. FWSC further stated that these persons' jobs depend on their ability to accurately and correctly perform their job duties. We note that FWSC asserts that the numbers contained in its application are kept in the ordinary course of its business practice. We agree. We note that the City sponsored FWSC's MORs which contain the data for the maximum daily capacity of the plant. The City also sponsored the Department of Environmental Protection application for the Summit which contains the data for the permitted maximum day capacity of the plant and maximum day flow as recorded in the MORs for the last 12 months.

We find that the data contained in FWSC's application is admissible for two reasons. First, we find that the data regarding permitted capacity of the system and maximum day flow, which the City objected to in the application, are kept by FWSC in it ordinary course of business as evidenced by the MORs. Thus, the data is a business record exception to the hearsay rule and, as such, is admissible as evidence over hearsay objection. We also find that FWSC's developer agreement with the Summit, part of Composite Exhibit 5, is a business record exception to the hearsay rule.

Second, even if Mr. Tillman's testimony regarding the data in the application is hearsay, it can be corroborated by Exhibits 7 and 11 which were sponsored by the City and moved into the record. (TR at p. 411) Section 120.57 (c), states that "[H]earsay 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."

Moreover, we note Mr. Tillman testified that even if the capacity of the system is insufficient, FWSC has a third well which can be brought on line in a matter of months. We find that this information is fact evidence which was not called into question by the City's objection. In fact, we note that this information was elicited by the City on cross examination and was not objected to by the City.

The last argument the City raises is that to permit Mr. Tillman's testimony into the record would violate the essential requirements of law because the City has a right to cross examine the persons responsible for the preparation of the testimony. We agree with FWSC that the City had ample opportunity to conduct discovery in this matter and depose any witness from FWSC. As stated above, we find that the portions of Mr. Tillman's testimony which the City requested be stricken are subject to a hearsay exception or are otherwise admissible as evidence. Therefore, we find that the City's contention that permitting Mr. Tillman's testimony into the record violates the essential requirements of law is unfounded.

For the foregoing reasons, the City's Motion to Strike certain portions of Mr. Tillman's testimony is denied in its entirety, and the objection to Composite Exhibit 5 is overruled.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Mr. Tillman is accepted as an expert in water and wastewater utility management. It is further

ORDERED that the City of Groveland's Motion to Strike certain portions of Mr. Tillman's testimony is denied in its entirety, and the objection to Composite Exhibit No. 5 is overruled. It is further

ORDERED that Attachment A, attached to this Order, is hereby incorporated herein by reference. It is further

ORDERED that this docket shall remain open pending the final resolution of the merits of this matter.

By ORDER of the Florida Public Service Commission this 24th day of September, 2001.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

(S E A L)

PAC

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, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) 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 Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, 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.

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 Lines 11-12	Strike from line 3 "in" through line 6 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 Page 168	Lines 11-24 Lines 1-2	Strike from line 11 "The" through line 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.

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