

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

090478-WS

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

Docket No. 040478-WS

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

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

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

- COM \_\_\_\_\_
- APA \_\_\_\_\_
- ECR \_\_\_\_\_
- GCL \_\_\_\_\_
- RAO \_\_\_\_\_
- SSC \_\_\_\_\_
- ADM \_\_\_\_\_
- OPC \_\_\_\_\_
- CLK \_\_\_\_\_

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

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

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

### ***The Statute***

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

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

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

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

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

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

*The Hernando County Case*

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

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

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

*Hernando County*, at 50.

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

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

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

*Id.*, at 51.

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

The *Hernando* court concluded that:

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

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

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

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

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

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

***The Practical Result of the County’s Theory, If Adopted***

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

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

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



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



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**CERTIFICATE OF SERVICE**

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

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