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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

Docket No. 090478-WS

COMMISSION
CLERK

**SKYLAND UTILITIES, LLC'S RESPONSE
TO HERNANDO COUNTY'S MOTION TO DISQUALIFY
APPLICANT'S COUNSEL**

SKYLAND UTILITIES, LLC (Skyland), by and through its undersigned counsel, Rose, Sundstrom & Bentley, LLP, hereby files this Response to Hernando County's Motion to Disqualify Applicant's Counsel (the "Motion"), and would state and allege as follows:

1. On November 13, 2009, Hernando County filed its protest. On December 2, 2009, RSB entered its appearance. On December 18, 2009, Hernando County filed the Motion. By agreement of the parties, the response to said Motion was set for January 8, 2010.

2. That the law firm of Rose, Sundstrom & Bentley is qualified to handle this litigation and to represent the interests of citizen, corporate, and public clients in matters involving the Public Service Commission is self apparent by the fact that the firm has a 30 year history of doing exactly that.² That the Public Service Commission will address the issues in this case, process this application, and adjudicate any proper issues raised by the protestants in this proceeding is equally self apparent. While the Commission's authority to address the Motion may be somewhat less settled (after all, the Commission only has those powers granted unto it by statute, see *In Re: Petition for Increase in Rates by Florida Power & Light Company*, Order No. PSC-09-0569A-CFO-EI (2009)), this Response does not address that particular issue.³ The

² That 30 years includes the firm's predecessor. Rose, Sundstrom & Bentley has existed as a distinct entity since 1987.
³ Nothing in this Response should be read by the Commission as either taking a position on its power to rule upon the Motion or as encouraging the Commission to do so.

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Commission will, as it always does, address and determine the scope and parameters of its own authority.

3. Neither will this Response seek to attack or criticize Hernando County for the filing of the Motion. Rose, Sundstrom & Bentley was honored to represent Hernando County in its acquisition of certain local assets of Florida Water Services in 2003-2004, and no criticism of the County for the purposes of responding to this Motion, or even in the adjudication of this case, is necessary or appropriate. That is because this case is about the application of Skyland Utilities. If the application of Skyland Utilities is consistent with, and fairly meets, the requirements of the rules, statutes, and applicable and appropriate Commission policies, that application should be granted. If it cannot satisfy the applicable criteria, the application will be denied. That, as always, will be equally true whether the Motion is granted or not.

4. The comment to Rule 4-1.7, *Rules Regulating The Florida Bar*, provides that:

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation.

Rose, Sundstrom & Bentley accepted, reviewed, and processed the Motion and Hernando County's demand letter (attached to the Motion) as a very serious matter. Hernando County's position was subjected to an internal review (by counsel within the firm) and to an external review (by outside counsel with experience in such matters retained by the firm). The opinion of outside counsel is attached hereto as Exhibit A and incorporated herein by this reference.⁴ The internal review and external review reached a consistent conclusion that there is no basis for the disqualification of Rose, Sundstrom & Bentley and that the firm should continue in its role as counsel for Skyland.

⁴ None of the costs or expenses related to this particular effort will be passed on to the client and therefore no such costs and expenses will be proffered as an allowable cost or return on investment by Skyland.

5. Throughout its existence, Rose, Sundstrom & Bentley has offered two broad categories of utility related expertise: the representation of utilities, the public, and/or public entities in matters related to utility certification, service, or operation; and the representation of utilities or public entities in matters involving the acquisition, sale, finance, or funding of the same. It is not the purpose of this Response to “convince” or “persuade” the Commission that the Motion should be denied, at least not in the classic and typical sense. Whether the Motion is fairly grounded, and whether RSB can continue to represent Skyland in a way that is consistent with the interests of the client, the Commission and the regulated public, (and which upholds public confidence in the quasi-judicial process in which counsel and the Commission play such a vital role) will ultimately be up to the sound determination of the Commission (should the Commission determine it should act upon the Motion). However, several critical points and inferences in Hernando County’s Motion require response so that the Commission will have a fairly presented and fully balanced perspective of Rose Sundstrom & Bentley’s prior representation of the County.

6. Rule 4-1.9, *Rules Regulating The Florida Bar*, essentially speaks to two issues: The first is whether a lawyer is representing another person in the same or substantially related matter in which that person’s interests are materially adverse to the interests of the former client; the second prohibits the lawyer from using information relating to the representation to the disadvantage of the former client. As to the second point, the representation of Hernando County was a transaction in the sunshine, on behalf of a public entity, and the Motion alleges no specific information in the possession of Rose, Sundstrom & Bentley which it could “use” to place Hernando County at a disadvantage in this particular proceeding. Rather, Hernando County relies upon a “presumption” that confidences were disclosed. The first point, whether

this matter is “the same or substantially related” is a point discussed elsewhere herein and in the attached letter.

7. The key issue presented by the Motion is whether an application filed (in 2009) by a land owner to certificate his property (comprised of land in Hernando and Pasco Counties) is the same or a substantially related matter as assisting Hernando County in the acquisition of one of the dozens of systems being spun off around the state (in 2003-2004) by Florida Water Services. Hernando County has made little effort to explain the similarities, the nexus, or the substantial relationship between the two. Hernando County has made no allegation that Rose Sundstrom & Bentley’s representation of Skyland will lead to any practical, measurable, or ascertainable difference in this proceeding compared to Skyland’s representation by other counsel.

8. Distilled to their essence, Hernando County makes four points:

A. Rose Sundstrom represented the COUNTY in expanding the District’s territorial coverage area. Now Rose Sundstrom represents a private utility provider client that seeks to shrink the District’s territorial service area.

Rose, Sundstrom & Bentley did not represent Hernando County in expanding the District’s territorial coverage area. This is not to say that Hernando County did not perceive that the acquisition of some of the assets of a formerly certificated utility in Hernando County would not have that *de facto* effect. Nor does Rose, Sundstrom & Bentley perceive that Skyland seeks to shrink the District’s territorial service area. If Skyland meets the applicable rules and criteria for certification in the judgment of the Commission, then it will be certificated. This is not, under any construction of any applicable law, the “invasion” of Skyland into any recognized Hernando County “service area”.

B. Rose Sundstrom previously represented the COUNTY in eliminating the sole private water and sewer utility then operating in Hernando County. Now Rose Sundstrom

represents a client seeking to add a private water and sewer utility back into the COUNTY's service mix as well as to compete with District as to future customers in the subject service area.

Again, Hernando County's agenda in the acquisition may have been to eliminate private water and sewer utilities from the confines of Hernando County forever, but Rose, Sundstrom & Bentley had no such agenda and undertook no such effort. Rose, Sundstrom & Bentley was tasked to handle the utility asset acquisition for which it had been retained in the most capable fashion and manner possible. Hernando County may have believed that the acquisition would somehow make Hernando County "PSC free" forevermore, but Rose, Sundstrom & Bentley never participated in such an end.

C. Rose Sundstrom provided an opinion letter in support of the COUNTY's issuance of over \$41 million in new bonds. Rose Sundstrom now represents a private utility provider client that seeks to limit the service area of the District, which will inevitably result in the limitation of future revenues from which the District can service the bonds.

Bond revenues to cover the transaction are typically dependent upon the revenues that will be generated or expected to be generated from the asset being acquired (and thus financed with the bonds). Rose, Sundstrom & Bentley is not aware, nor has Hernando County alleged, that any revenues from the properties owned or controlled within the proposed certificated territory of Skyland were assumed or projected to generate any revenues at any future date to help service the bonds. The Commission is requested to take note that while Hernando County suggests in the Motion that the certification of Skyland "will inevitably result in the limitation of future revenues" to the County, Hernando County's own Petition in this matter provides that the proposed certificated territory "is in a rural and largely undeveloped region of the County . . ." and that "the citing of a . . . utility system in this region violates . . ." Hernando County's Comprehensive Plan. The Petition further alleges that "Skyland has not adequately demonstrated that its current needs over the next six year planning horizon . . . could not be

satisfied by (Hernando County) and/or existing permitting policies for private wells, septic and package treatment plant systems”. The allegations in Hernando County’s Petition hardly sound like those of an entity who is counting on the revenues from the properties which Skyland seeks to certificate to finance existing bonds.

D. The primary goal of the COUNTY in acquiring Florida Water’s assets was to ensure that all central water and sewer utility services within unincorporated Hernando County were publically provided, locally operated, and overseen by an elected board of county commissioners – as opposed to the Public Service Commission in Tallahassee. Now, Rose Sundstrom represents a company that seeks to reestablish the Public Service Commission’s jurisdiction over the regulation of water and wastewater services within Hernando County.

Please see the response to Point B. Section 367.171(7) was in place at the time of Rose, Sundstrom & Bentley’s representation of Hernando County in the aforementioned transaction. Rose, Sundstrom & Bentley participated in no effort to permanently eject the Commission, under any and all circumstances, from within the boundaries of Hernando County, and in fact the same could never be accomplished under the laws that existed at that time and now.

Hernando County’s acquisition of the assets of the former Florida Water Services entity revolved around the County’s acquisition of a then existing regulated utility with a service area of less than 10,000 acres. There are over 300,000 acres of land within the confines of Hernando County. Thus, the territory acquired by the County in that transaction was less than 5% of the surface area of Hernando County, which lends context to the County’s current assertion that the acquisition was designed to forever oust future private utilities from the County. Rose, Sundstrom & Bentley’s entrance into its representation of Hernando County occurred well after the County had instituted eminent domain proceedings to acquire the assets of the subject Florida Water Services entity. Rose, Sundstrom & Bentley’s role was limited to consummating the transaction, in lieu of eminent domain, previously instituted by Hernando County utilizing its own legal team.

9. The Commission is requested to consider the Motion in the context of the reality of the modern law firm. Some law firms in the state of Florida have hundreds of lawyers (even in excess of 1,000 lawyers), offices in dozens of cities, and a presence in multiple nations. These firms maintain the integrity of the legal profession in our judicial system every day despite the labyrinth of arguable conflicts which can occur when so many lawyers represent so many clients in so many matters over time. To construe a scenario such as that presented by Hernando County to mandate the disqualification of Rose, Sundstrom & Bentley under these facts and circumstances would invite motions to disqualify which are not well grounded, would be disruptive to the operations of law firms in the representations of their clients, and could at times deprive participants in judicial and quasi-judicial proceedings the ability to be represented by counsel of their choice.

10. Rose, Sundstrom & Bentley submits that it may continue the representation of Skyland in a manner and means that will allow Skyland to effectively be represented, and the quasi-judicial process at the Commission to maintain its integrity, without harm, or prejudice to Hernando County.

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

[Signature on next page]

Respectfully submitted this 8th day of
January, 2010, 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 8th day of January, 2010, to:

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JOHN L. WHARTON

December 15, 2009

John L. Wharton, Esq.
Rose, Sundstrom & Bentley, LLP
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RE: Application of Skyland Utilities, LLC
PSC Docket No. 040478-WS
Hernando County Bd. of County Commissioners

Dear Mr. Wharton:

By letter of December 7, 2009 the County Attorney, Hernando County, declared that your firm's representation of Skyland Utilities in its application to the Public Service Commission constitutes a prohibited "conflict of interest" as contemplated by Rule 4-19, Rules Regulating The Florida Bar.

This letter is an analysis of that allegation and of the status, in respect of said allegation, of the Rose, Sundstrom & Bentley law firm.

In year 2003 your law firm was retained by Hernando County for legal services in acquiring the Hernando County assets of Florida Water Services Corporation.

To that end your firm agreed to negotiate the acquisition, draft documents, coordinate hearings, review contracts-permits-documents, undertake real estate due diligence, prepare closing documents, coordinate financing team functions and review bonding documents, and work with the seller in the regulatory approval process. Which terms Hernando County accepted.

Adjunctive to this sale and purchase, and in explicit compliance with Rule 4-1.7, Rules Regulating The Florida Bar, Hernando County waived any conflict of interest concerns respecting your firm's retention by other governmental entities (the "Acquisition Group" so-called) as "lead negotiator" for Hernando County and that Acquisition Group in the acquisition of Florida Water Services Corporation assets – denominated as the "In particular" concern.

And, compliant with the terms of that legal representation, *supra*, your firm provided an opinion letter (March 11, 2004) "Re: \$41,045,000 Hernando County, Florida Water and Sewer Revenue Bonds, Series 2004" treating "only with the specific legal issues explicitly addressed herein and do not address any other matters..." No issue of revenues was therein addressed, of course.

At this time, then, the County Attorney of and for Hernando County has alleged that the Rose, Sundstrom & Bentley law firm is barred by Rule 4-1.9, Rules Regulating The Florida Bar, from representing Skyland Utilities, LLC in its Public Service Commission application process (initiated October 16, 2009) for certificates for a proposed system in Pasco and Hernando counties, sited in an unincorporated area not serviced by Hernando County and which is extraneous to its Comprehensive Plan.

Rule 4-1.9, Rules Regulating The Florida Bar, prohibits a lawyer who has formerly represented a client in a matter from thereafter representing another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client (unless the former client gives informed consent). Nor may the lawyer use information relating to the representation to the disadvantage of the former client (except as permitted by Rule 4-1.6, or when such information has become generally known).

The "comment" to Rule 4-1.9 clarifies the terms "in a matter" and "substantially related" by commonsensically observing that the definition of "matter" is fact-dependent, may be a "question of degree," and would not preclude the lawyer from subsequent representation of a different client with a wholly distinct problem (even if adverse to the prior client). The dispositive question is: Has the lawyer changed sides in the matter in question? Here, clearly not, for the Rose, Sundstrom & Bentley law firm never represented Hernando County in respect of the matter now before the Public Service Commission.

Are the matters, then, "substantially related?" They do not "involve the same transaction or legal dispute," nor do they require your law firm to attack the work which your firm performed for Hernando County – to employ the tests suggested by the "Comment" to the Rule.

Nor, although of course your firm is bound by the commands of attorney-client confidentiality, is your firm precluded from using generally known information in the current representation. [That "confidential" informational relationship did obtain, is presumed by Florida law; but that datum does not *per se* determine the disqualifiability of the challenged law firm.] The prior representation of the Rose, Sundstrom & Bentley firm was, of course, in the sunshine.

The burden, obviously, is upon the party alleging the disqualification: must prove the existence of the prior attorney-client relationship [here, obvious], and that the subsequent representation of another client is adverse to the former client or is substantially related to that prior representation [here, obviously not so]:

I have plumbed the case law, and I find no pertinent decisional law disqualifying of the Rose, Sundstrom & Bentley law firm under circumstance similar to the case at hand.

John L. Wharton, Esquire
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By way of the merest exemplification of the governing criteria, the following Rule 4-1.9 decisions.

In Health Care & Retirement Corp. of America, Inc. v. Bradley, 961 So.2d 1071 (Fla. 4th DCA 2007), attorney Fisher had represented the petitioning corporation in negligence cases during the period 2001-2004. In 2005 Fisher joined a new firm which sued the said corporation in negligence. The appellate court, on certiorari, enunciated the governing criteria. Rule 4-1.9 is not to be broadly applied to require disqualification of attorneys. At 1073. Moreover, the definition of “substantially related” [as would restrict counsel’s subsequent representations] was narrowed in 2006. ibid. And finally, each case of alleged disqualification turns on its own facts; and herein the new suit against the petitioning corporation was on a negligence count different from the ones previously defended by Fisher. Thus, this case is a “wholly distinct-problem of that type.” At 1074.

Frank, Weinberg & Black, P.A. v. Effman, 916 So.2d 810 (Fla. 4th DCA 2005) found disqualification of firm’s former attorney now representing plaintiff against the firm, inappropriate Accords with Health Care case, *op. cit.*

In Estright v. Bay Point Improvement Assn, Inc., 921 So.2d 810 (Fla. 1st DCA 2006) the appellate court described the other end of the continuum of “degrees” (as the Rule Comment would have it). A lawyer was disqualified from representing plaintiff against defendant association on the association’s lien and plaintiff’s counterclaim challenging the association’s lien authority – where that lawyer had drafted the documents which authorized the assertion of lien and which was the underlying basis for suit. Held, a substantially related matter.

SUMMARY

Hernando County now argues that the Rose, Sundstrom & Bentley law firm ought to be disqualified from representation before the Public Service Commission of Skyland Utilities, LLC to operate a water and wastewater utility in Hernando and Pasco counties. And, unlike the firm’s prior lawyering for Hernando County in acquisition of assets un-related to this current case, it is a PSC matter precisely because the service would cross county lines. See, §367.171 (7), F.S.

No such service to the subject inter-county area is provided by Hernando County. Nor does the Hernando County Comprehensive Plan contemplate such.

The law firm, unblinkably, has never represented Hernando County in this matter, nor in any substantially related matter (as that term has been defined in and by the “Comment” to Rule 4-1.9 on the decisional law).

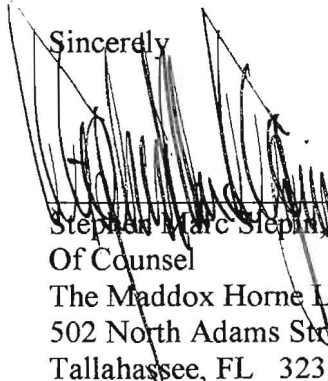
John L. Wharton, Esquire
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It is my opinion that the objection expressed by Hernando County by its County Attorney (letter of 12-7-09) as to an asserted "prohibited conflict-of-interest in violation of Rule 4-1.9, Rules Regulating the Florida Bar" is without merit.

Although your firm has the right to request an ethics opinion of The Florida Bar – which I should be pleased to request on your behalf if you so elect – I do not believe that the assertions of Hernando County in support of its opinion are, where even tangentially relevant, weighty or serious enough to require such a request of The Florida Bar.

Please allow me to know if I may be of further service.

Sincerely



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Of Counsel

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