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Subject: Skyland Utilities, LLC 090478-WS
Attachments: Skyland Response to HC Motion for Stay.pdf

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- b. The docket number and title if filed in an existing docket:
 - 090478-WS, Skyland Utilities, LLC
- c. The name of the party on whose behalf the document is filed:
 - Skyland Utilities, LLC
- d. The total number of pages in each attached document. 7 total pages
- e. A brief but complete description of each attached document. Response To Hernando County's Motion for Stay of Proceedings Pending Judicial Review

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

Docket No. 090478-WS

**SKYLAND UTILITIES, LLC'S RESPONSE
TO HERNANDO COUNTY'S MOTION FOR STAY
OF PROCEEDINGS PENDING JUDICIAL REVIEW**

SKYLAND UTILITIES, LLC (Skyland), by and through its undersigned counsel and pursuant to Rule 28-106.204(1), F.A.C., hereby files this Response to Hernando County's Motion for Stay of Proceedings Pending Judicial Review (the Motion) and would state and allege as follows:

1. Proper context to the Motion requires consideration of a few pertinent dates:

- *On November 13, 2009*, Hernando County (on behalf of itself and two alter egos) filed its objection to Skyland's Application at the PSC. On that same day, Hernando County filed its Motion to Dismiss Application of Skyland Utilities, LLC. For Lack of Jurisdiction.

- *On February 9, 2010*, the Commission denied Hernando County's Motion to Dismiss at its regularly scheduled agenda.

- *On April 8, 2010*, Hernando County filed its Petition for Writ of Quo Warranto at the First District Court of Appeal.
- *On April 16, 2010*, Hernando County filed a Notice of Automatic Stay.
- *On April 20, 2010*, Hernando County rescinded that Notice of Automatic Stay and filed the Motion.² Per the Order Establishing Procedure, the prefiled testimony of Hernando County and the other intervenors in this litigation is due to be filed May 3, 2010.

2. The Motion states that it is filed pursuant to Rule 25-22.061(2), F.A.C, candidly acknowledged as only applicable to "a party seeking to stay a final or non-final order of the Commission." The Motion itself makes clear (in the request for relief therein) that it is the proceeding, and not any particular order of the Commission, which Hernando County actually seeks to "stay". The Motion acknowledges that while the County 's appellate petition is an appeal to review a "amendatory order rendered by the Florida Public Service Commission", the Motion is a motion to "stay" this multi-party proceeding "in its entirety". Such a requested (*de facto*) continuance or abatement of this administrative proceeding is neither an intended result nor a proper application of Rule 25-22.061(2), F.A.C.

²Hernando County should have consulted with Skyland prior to the filing of the Motion per Rule 28-106.204, F.A.C. However, Skyland does not seek delay or denial of the motion on that basis.

3. In the Motion, the County endeavors to address the three prongs set forth in the Administrative Code Rule.³ While the County argues that Skyland will not suffer substantial harm, it conversely argues that the County will suffer such harm (without ever actually using the phrase "irreparable", which is the nomenclature of the rule). The asserted harm which the County will suffer is that **it will have to expend public dollars, resources, and staff time preparing and filing Prehearing testimony and preparing for hearing** (bold in original). It is well-settled that the time and expense of trial which may ultimately prove to be unnecessary do not satisfy an "irreparable harm" test. See, e.g., *Florida Fish and Wildlife Commission v Crum*, 770 So.2d 696, 697 (1st DCA 2000). The Commission has accepted and followed this line of cases. In Docket No. 950110-EI (Order No. PSC-96-0274-FOF-EI, 1996), the Commission noted initially that the party requesting a stay ("Panda") was unlikely to succeed "with its petition for certiorari at this point in the proceedings" because it was doubtful that the appellate court would grant the Petition and issue an extraordinary writ ordering that the case be dismissed, because Panda "has a perfectly adequate opportunity to raise the issue of subject matter jurisdiction in a regular appeal, once we have decided the issues". In this case, as in that docket, Hernando County's appellate petition challenges the subject matter jurisdiction of the Commission. In this case, as in

³ Skyland's response to that argument in no way concedes the applicability of the Administrative Code Rule, as referenced hereinabove. Skyland's position is to the contrary.

that docket, Hernando County would have a "perfectly adequate opportunity" to raise the issue of subject matter jurisdiction on a regular appeal, once the issues are decided. In Order No. PSC-96-0274-FOF-EI, the Commission also agreed with the general propositions that the denial of a motion to dismiss for lack of subject matter jurisdiction is not considered a material injury, and that the "expenditure of time and money to participate in a judicial or administrative proceeding does not constitute sufficient harm to stay the course of the proceeding". Id, at p.8.

4. Hernando County has every right to file the proceeding it has filed in the Court of Appeal, to request a stay of these proceedings, or to take such other actions as it sees fit in this quasi-judicial litigation. What it does not have the right or privilege to do is to time those actions such that they create an ostensible reason for a delay of the administrative proceeding which would result in a strategic advantage to Hernando County while at the same time increasing the expense, inconvenience, and delay to the applicant (above and beyond that which normally and necessarily results from all administrative proceedings). As early as November, 2009, Hernando County knew that the Commission was asserting the subject matter jurisdiction which it now attacks. For whatever reason, the County chose not to file its Motion for Stay of Proceedings Pending Judicial Review until 127 days after the filing of its Petition and its Motion to Dismiss and 70 days after

the Commission's vote denying the County's Motion to Dismiss (yet a mere 13 days before its prefiled case was due).

5. The parties now find themselves poised, a mere 7 days before the prefiled testimonies of Hernando County (and the other intervenors) are due (a) with no proper Motion to Continue pending; (b) addressing a Motion for Stay of Proceeding Pending Judicial Review which relies upon a rule intended to be applied only when a party seeks to stay a final or non-final order; and (c) with no credible cause having been shown why the proceeding should not go forward. At this point, it is not even known whether the First District Court of Appeal will issue a show cause order requiring a response from the Commission.⁴ The issuance of that order might have some affect on the dynamic of going forward. However, as the case sits today, there has been no demonstration of good cause to stay or abate this proceeding.

6. Hernando County could have filed its pending quo warranto petition long before it chose to do so. While Hernando County's decision to oppose Skyland's application in this administrative proceeding (by and through itself and two alter egos) certainly results in an expenditure of public dollars, resources and staff time, Hernando County is hardly in the position to claim surprise as to the

⁴ And it is Skyland's position that the same would also require, or at a minimum allow, a response from Skyland, due to its improper omission as a party.

same nor to essentially assert that its offensive position in this proceeding now represents an inconvenience to itself.

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

Respectfully submitted this 27th day of
April, 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 electronic mail and U.S. Mail on this 27th day of April, 2010, to:

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