Diamond Williams

From: Geoffrey Kirk [gkirk@co.hernando.fl.us]
Sent: Monday, June 14, 2010 4:42 PM
To: Filings@psc.state.fl.us
Cc: Geoffrey Kirk
Subject: RE: Electronic filing in Case No. 090478-WS
Attachments: Hernando-Preheaing-Statement-061410.pdf

Case No. 090478 - WS

In re Application of Skyline Utilities, LLC

Attached for filing is Hernando's *Prehearing Statement*

<<Hernando-Preheaing-Statement-061410.pdf>>

Respectfully submitted,

s/Geoffrey T. Kirk

Geoffrey T. Kirk, Esq.

Assistant County Attorney

Hernando County

(352) 754-4122

STATE OF FLORIDA
PUBLIC SERVICE COMMISSION

IN RE: APPLICATION OF SKYLAND UTILITIES, LLC, TO OPERATE A WATER AND WASTEWATER UTILITY IN HERNANDO AND PASCO COUNTIES, FLORIDA

Case No.: 090478-WS

/

PREHEARING STATEMENT OF HERNANDO COUNTY, HERNANDO COUNTY WATER AND SEWER DISTRICT AND HERNANDO COUNTY UTILITY REGULATORY AUTHORITY

Hernando County, a political subdivision of the State of Florida, Hernando County Water and Sewer District, a body politic of the State of Florida, and Hernando County Utility Regulatory Authority, a body politic of the State of Florida (collectively shall be referred to as "Hernando")[1] hereby files and serves its Prehearing Statement in this matter pursuant to the *Order Establishing Procedure* dated February 24, 2010 as entered by Nathan A. Skop, Commissioner and Prehearing Officer. The Applicant, Skyland Utilities, LLC, shall be referred to as the "Applicant" or "Skyland" and the Florida Public Service Commission shall be referred as the "PSC".

(1) HERNANDO'S PREFILED DIRECT TESTIMONY AND WITNESSES

a. Joseph Stapf, Utilities Director
Hernando County Utilities Department
21030 Cortez Blvd, Brooksville, FL 34601
Direct testimony included current and future plans for the Hernando County Utility System; concerns and objections regarding Skyland's proposed water and sewer utility; Hernando County Utility Regulatory Authority as a utility regulator; concerns and objections regarding water draw-down in Southeastern Hernando County; to the extent not previously covered, those concerns and objections identified in those documents filed by Hernando on November 13, 2009 with the PSC in this matter.

b. Ronald Pianta, AICP, Planning Director
20 N. Main Street, 2nd Floor, Brooksville, FL 34601
Direct testimony included the applicability of Hernando County's adopted Comprehensive Plan and land development regulation to Skyland's proposed water and sewer utility; urban sprawl; and, to the extent not previously covered, those concerns and objections identified in those

[1]/ Hernando County, Hernando County Water and Sewer District and Hernando County Utility Regulatory Authority jointly file this Prehearing Statement.

documents filed by Hernando on November 13, 2009 with the PSC in this matter.

c. Paul Wieczorek, AICP, Senior Planner [***if Ronald Pianta is unavailable***]
20 N. Main Street, 2nd Floor, Brooksville, FL 34601
Direct testimony mirrored that of Ronald Pianta, AICP, above.

d. Dan Evans or another representative of the Florida Department of Community Affairs most knowledgeable about the review of Hernando County's adopted Comprehensive Plan that was performed at the request of the PSC in connection with the Application of Skyland Utilities, LLC.
Florida Department of Community Affairs
2555 Shumard Oaks Blvd., Tallahassee, FL 32399-2100
Direct testimony [of Dan Evans] included that Skyland's proposed water and sewer utility is NOT "consistent" with Hernando County's adopted Comprehensive Plan AND that Skyland's proposed water and sewer utility is NOT "consistent" with Pasco County's adopted Comprehensive Plan.

e. Paul Williams or another representative of the Southwest Florida Water Management District ("SWFWMD") most knowledgeable about water supply in the Southeastern region of Hernando County.
2379 Broad Street, Brooksville, FL 34604
Direct testimony [of Paul Williams] included a discussion of available water and water supply in the Southeastern region of Hernando County and SWFWMD permitting procedures.

f. All witnesses of Pasco County that provided prefiled testimony.

g, Any or all witnesses of Applicant Skyland that provided prefiled testimony and which testimony was not otherwise struck or excluded from the record.

(2) HERNANDO'S PREFILED EXHIBITS AND OTHER EXHIBITS

a. Any and all document filed to date, and hereinafter filed, with the PSC as such documents may be viewed on the PSC's online docket in this matter to the extent such documents are not struck or excluded from the record.

b. Hernando County's adopted Comprehensive Plan (a copy of which was attached to Skyland's Application as filed with the PSC on October 16, 2009).
[Per Hernando's Response to PSC's Staff First Set of Interrogatories, Hernando confirmed that all of the relevant Goals, Objectives and Policies relative to this proceeding were contained in the version of the Comprehensive Plan that was made a part of Skyland's Application.]

c. Hernando County's land development regulations (as identified in Section 23-229 of the Hernando County Code of Ordinances and which may be viewed online through www.Municode.com).

d. Letter from the Florida Department of Community Affairs ("DCA") dated December 7, 2009 and filed with the PSC in this matter on even date (Bate Stamped Nos. 000639 thru 000640).

e. *Hernando County Utilities Department Final Water Supply Master Plan* (December 2005) (Hernando Exhibits, Bate Stamped Nos. 000704 thru 001035).

f. HCUD *Service Area Map* (as contained in *Hernando County Utilities Department Final Water Supply Master Plan*, above).

g. *West Hernando Sewer Master Plan* (August 2005) (Hernando Exhibits, Bate Stamped Nos. 001036 thru 1353).

h. *Hernando County Utilities Infrastructure Opportunity* (Hernando Exhibits, Bate Stamped Nos. 000666 thru 000697).

i. *Hernando County Utilities Capital Improvement Program / Department Source and Use Report* (Hernando Exhibits, Bate Stamped Nos. 000696 thru 000698).

j. *Hernando County Water and Sewer Revenue Bonds Series 2004* issued June 1, 2004 in the amount of $41,320,000 (as issued by/through Bank of America Securities LLC, Prager Sealy & Co., LLC and Raymond James & Associates, Inc. (Skyland's and PSC's counsel were previously provided electronic copies of these documents).

k. Hernando County Planning Department's file pertaining to the Application that Evans Properties, Inc. made for a Comprehensive Plan Amendment during fall 2009 (Hernando Exhibits, Bate Stamped Nos. 001528 thru 001684).

l. RFP-1 - Resume of Ronald F. Pianta, AICP.

m. JS-1 - Resume of Joseph Stapf.

n. PLW-1 Resume of Paul Wieczorek, AICP (if testifying in lieu of Ronald F. Pianta)

o. To the extent not specifically enumerated above, all documents produced by Hernando in this matter pursuant to a request from Skyland and/or the PSC.

p. Any or all documents offered or tendered by Pasco County.

r. Any or all documents offered or tendered by the City of Brooksville.

s. Any or all documents offered or tendered by the non-governmental objectors in this matter and not otherwise struck or excluded from the record.

t. Any or all documents offered or tendered by Skyland in this matter and not otherwise struck or excluded from the record.

u. Any or all documents formally admitted into evidence in this matter in connection with the formal administrative hearing regarding Skyland's Application or by the Prehearing Officer.

(3) STATEMENT OF HERNANDO'S BASIC POSITION IN THIS PROCEEDING

Specifically, Skyland's application for certification should be **DENIED** by the PSC because: (i) the PSC lacks subject matter jurisdiction; (ii) Skyland has failed to demonstrate that there is a need for the proposed water and wastewater utility in Southeastern Hernando County and Northern Pasco County; (iii) the proposed utility is duplicative of services provided by and/or is available upon demand by Hernando County and Pasco County, respectively; (iv) the proposed utility is not in the public interest and, conversely, the public interest would not be served if the PSC approves the instant request for certifications; (v) the proposed utility is not consistent with the adopted Comprehensive Plan of Hernando County; (vi) the proposed utility is not consistent with the adopted Comprehensive Plan for Pasco County, and for all the reasons stated in the *Objections* (Petitions) filed by Hernando on November 13, 2009 in this proceeding, the *Motion to Dismiss* filed by Hernando on November 13, 2009 in this proceeding; the Objection (Petition) filed by Pasco County on November 13, 2009 in this proceeding (the foregoing filings are incorporated herein by reference and made a part hereof), and set forth below, without limitation.

(4) QUESTIONS OF FACT, QUESTIONS OF LAW AND QUESTIONS OF POLICY THAT ARE AT ISSUE AND HERNANDO'S POSITION ON EACH

Issue 1: Has Skyland presented evidence sufficient to invoke the Commission's exclusive jurisdiction over Skyland's application for original certificates for proposed water and wastewater systems?

Hernando's response to Subparagraphs A and B below are incorporated herein by reference.

A. Did Skyland provide evidence to support that it satisfies the definition of "utility" contained in Section 367.021(12), Florida Statutes?

Hernando's position is that Skyland does not satisfy the definition of a "utility" as contained in § 367.021(12), Fla. Stat., to wit: that it will be serving the "public" for compensation" inasmuch as the only thing that Skyland has established is that it will be providing service to Evans Properties, Inc., its parent company (Skyland is a wholly owned subsidiary of Skyland Utilities, Inc., which is wholly owned by Evans Properties, Inc.). Here, the entity/person requesting the utility service is the same entity which owns the proposed utility, is the same entity proposing to lease the land to Skyland and is the same entity that has proposed to fund Skyland. Chapter 367 defines 'Utility' to mean "a water or wastewater utility . . . who is providing, or proposes to provide, water or wastewater service to the public for compensation." § 367.021, Fla. Stat. (emphasis added). The term "for compensation" also begs the question as to who is paying whom when one examines the inter-relationships between Evans Properties, Inc., Evans Utilities, Inc. and Skyland Utilities, LLC. Accordingly, it is Hernando's position that the term "the public" envisions a broader base than oneself (or a closely related/affiliated entity or, in essence, an ***alter ego*** of oneself) and "for compensation" envisions something more than shifting balance sheets among related/affiliated entities/alter egos.

Moreover, Skyland has not adequately demonstrated that it will be serving the "public" "for compensation" and, therefore, constitute a utility by definition.

B. Did Skyland provide evidence to support that the service proposed by Skyland transverses county boundaries pursuant to Section 367.171(7), Florida Statutes?

Hernando's position is that Skyland has no infrastrure in the ground at this time – either in Hernando County or Pasco County – and that Skyland currently does not have a single physical pipe or any other infrastructure which transverses the Hernando/Pasco boundary. *See* Skyland's Application *and see* Direct Testimony of Gerald C. Hartman, P.E. (Direct Testimony offered by Skyland).

Accordingly, based upon the facts specific to Skyland's Application, it is Hernando's continued position that the PSC does not have subject matter jurisdiction pursuant to § 367.171(7), Fla. Stat., and *Hernando County v. Florida Public Service Commission*, 685 So.2d 48, 50 (Fla. 1st DCA 1996) (the only reported appellate decisional law interpreting said provision). *Compare* Hernando's *Objection* filed on November 13, 2009 and Hernando's *Motion to Dismiss* filed on November 13, 2009 *with* the PSC's Order filed on March 1, 2010 and *Amendatory Order* filed on March 12, 2010 in this proceeding (the foregoing filings are incorporated herein by reference and made a part hereof).[2]

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[2]/ It is not Hernando's current intention to use any time at the formal hearing before the full Public Service Commission on the legal arguments related to **Issue 1**; however, Hernando intends to address – as short as possible – this issue in its written Brief to ensure a factually and fully developed record.

Issue 2: Is there a need for service in Skyland's proposed service territory and, if so, when will service be required?

Hernando's position is that there is **no** need (public demand) for public water and wastewater service in the areas that it is proposing to locate within Hernando and Pasco Counties. *See* Direct Testimony of Joseph Stapf; and Direct Testimony of Bruce Kennedy as filed in this matter; *see also* Water and Wastewater Master Plans of Hernando County (Hernando Exhibits, Bate Stamped Nos. 000704 thru 001035; 001036 thru 1353) and corresponding documents produced by Pasco.

Furthermore, Hernando submits that Skyland is unable to meet the requirements contained in § 367.045(1)(b) & (5)(a), Fla. Stat., and Rule 25-30.033(1)(b), Fla. Admin. Code, as to this issue.

Issue 3: Is Skyland's application inconsistent with Hernando County's comprehensive plan?

Hernando's position is that Skyland's Application is "***Inconsistent***" with Hernando County's adopted Comprehensive Plan (pertinent provisions included as part of Skyland's Application). Hernando's position is supported by the Letter from the Florida Department of Community Affairs ("DCA") dated December 7, 2009 and filed with the PSC in this matter on even date (Hernando Exhibits, Bate Stamped Nos. 000639 thru 000640); Direct Testimony of Ronald Pianta, AICP; and Direct testimony of Dan Evans, DCA Planner as filed in this proceeding.

Furthermore, Hernando submits that Skyland is unable to meet the requirements contained in § 367.045(5), Fla. Stat., and Rule 25-30.033(1)(f), Fla. Admin. Code, as to this issue.

Issue 4: Is Skyland's application inconsistent with Pasco County's comprehensive plan?

Hernando's position is that Skyland's Application is "***Inconsistent***" with Pasco County's adopted Comprehensive Plan (pertinent provisions included as part of Skyland's Application). Hernando's position is supported by a the above-referenced Letter from DCA regarding its review of the Pasco County Comprehensive Plan in connection with Skyland's Application; Direct Testimony of Richard E. Gehring; and Direct Testimony of Dan Evans.

Furthermore, Hernando submits that Skyland is unable to meet the requirements contained in § 367.045(5), Fla. Stat., and Rule 25-30.033(1)(f), Fla. Admin. Code, as to this issue.

Issue 5: Will the certification of Skyland result in the creation of a utility which will be in competition with, or duplication of, any other system pursuant to Section 367.045(5)(a), Florida Statutes?

Hernando's position is that Skyland's proposed utility will be in competition with, or duplication of, the public water and wastewater utilities of Hernando County's Water and Sewer District as within Hernando County, of Pasco County's water and wastewater utilities as within Pasco County, and of the City of Brooksville as within the City's right to serve area as applicable.

Hernando relies, in part, on the Direct Testimony of Joseph Staph and its Water and Wastewater Master Plans as produced in this matter, as to Hernando County; and the Direct Testimony of Bruce Kennedy and Pasco's produced documents as to Pasco County.

Furthermore, Hernando submits that Skyland is unable to meet the requirements contained in § 367.045(1)(b) & (5)(a), Fla. Stat., and Rule 25-30.033, Fla. Admin. Code, as to this issue.

Issue 6: Does Skyland have the financial ability to serve the requested territory?

Hernando's position is that Skyland is required to establish that it has the financial ability to operate its proposed utility as one the prerequisite elements it must prove under § 367.045(1)(b), Fla. Stat., and Rule 25-30.033(1)(e) & (r), Fla. Admin. Code, and that this is a viable issue. However, Hernando will be unable to determine if Skyland has met these requirements until such time as the formal hearing is concluded and the record is closed in this matter. At such time, Hernando will either argue this issue in its brief or stipulate to this issue, as may be appropriate.

Issue 7: Does Skyland have the technical ability to serve the requested territory?

Hernando's position is that Skyland is required to establish that it has the technical ability to serve the requested territory as one of the requisite elements it must prove pursuant to § 367.045(1)(b), Fla. Stat., and Rule 25-30.033(1)(e), Fla. Admin. Code, and Skyland has failed to adequately demonstrate that it can satisfy this requirement.

Issue 8: Has Skyland provided evidence that it has continued use of the land upon which the utility treatment facilities are or will be located?

Hernando's position is that Skyland is required to establish that it has the continued use of the land upon which the utility facilities will be located as one of the prerequisite elements it must prove pursuant to § 367.045(1)(b), Fla. Stat., and Rule 25-30.033(1)(j), Fla. Admin. Code, and that Skyland has failed to adequately demonstrate that it can satisfy this requirement.

Issue 9: Is it in the public interest for Skyland to be granted water and wastewater certificates for the territory proposed in its application?

Hernando's position is that it is **not in the public interest** to grant Skyland water and wastewater certificates in connection with its proposed operations in Hernando and Pasco Counties. *See, e.g.*, Direct Testimony of Ronald Pianta, AICP; Direct Testimony of Joseph Staph; Direct Testimony of Richard E. Gehring; Direct Testimony of Bruce Kennedy; and Direct Testimony of Dan Evans as filed in this matter together with the prefiled exhibits supporting such testimony.

Specifically, Hernando asserts the following sub-issues/sub-positions:

A. First, just based on the four corners of Skyland's Application, the proposed utility cannot be cost effective or efficient by providing centralized utility service to houses with a

density of no less than one unit per ten (10) acres and to non-contiguous parcels. Of the 791 acres in Hernando owned by Evans, Skyland proposes only approximately 155 connections in the first five or six years of operations. *See* Skyland's Application. Public interest is promoted by cost effective and efficient utility systems. Public interest is not served if persons residing in a certain geographic area of the county, *i.e.* southeastern Hernando County, who are subjected to the future jurisdiction of the proposed Utility must pay higher water and wastewater rates due to lack of cost effectiveness, inefficiency, lack of economies of scale and/or the inexperience of the owner.

B. Second, the geographic area within Hernando County that Skyland is proposing to serve is within the Hernando County Water and Sewer District's service area and the Pasco County utilities' service area, as to within each county's respective borders. Accordingly, it is not in the public interest to duplicate or overlap utility service providers.

C. Third, it is not in the public interest to violate the goals, objectives and policies of the county's (Hernando's and Pasco's, respectively) adopted comprehensive plan.

D. Fourth, it is not in the public interest to promote "urban sprawl" by encouraging new development and growth to occur prematurely in an area that is presently rural and largely undeveloped and without proper planning and infrastructure in place including roads, utility network, urbanized services and adequate electric power, without limitation. The presence of centralized water and sewer would encourage other development to occur in a leap frog and unplanned manner.

E. Fifth, it is not in the public interest to delete or reduce the service territory of the Hernando County Water and Sewer District if the geographic area being deleted was contemplated as being served in connection with present and/or future bonds and the potential impact to the such bondholders resulting from the diminution of secured interests.

F. Sixth, the public is currently served by an elected group of public officials who oversee the Hernando County Water and Sewer District and the Pasco County utility system, respectfully, so that the public has local input into rates and regulations. It is not in the public interest to reassign rural geographic segment of Hernando County and Pasco County to a private utility – with no known utility experience – to provide service. Especially since there has been no public outcry for such service in either Hernando County or Pasco County.

G. Lastly, adequate potable water supply is an important and valuable commodity to Hernando County and its residents and Pasco County and its residents. The possibility of this commodity being sold in bulk and pumped out of Hernando County elsewhere or pumped out of Pasco County elsewhere is not in the public interests of Hernando and Pasco counties and its residents and also violates the water management policy of "*local sources first.*".

Issue 10: If the certificates for the proposed water and wastewater system are granted, what is the appropriate return on equity for Skyland?

It is Hernando's position that the Skyland should not be certificated by the PSC and, therefore, the PSC should not need to decide issues related to rate making and rates.

Furthermore, it is Hernando's position that Skyland's proposed utility cannot be efficient, in part, due to is small number of anticipated customers over the Skyland's submitted planning horizon and based on principles of economies of scale. *See* Direct Testimony of Joseph Staph and Direct Testimony of Bruce Kennedy as filed in this matter.

Issue 11: If the certificates for the proposed water and wastewater system are granted, what are the appropriate potable water and wastewater rates for Skyland?

Hernando reiterates its position as stated under Issue 10 above.

Issue 12: If the certificates for the proposed water and wastewater system are granted, what are the appropriate service availability charges for Skyland?

Hernando reiterates its position as stated under Issue 10 above.

Issue 13: If the certificates for the proposed water and wastewater system are granted, what is the appropriate Allowance for Funds Used During Construction (AFUDC) rate for Skyland?

Hernando reiterates its position as stated under Issue 10 above.

Issue 14: Should this docket be closed?

Although Hernando remains steadfast in its position that the PSC lacks subject matter jurisdiction in this matter regarding the specific facts applicable to Skyland's Application in this matter; the current posture of the PSC appears to be to keep the instant docket open until such time as the PSC issues its Final Order in this cause.

(5) STATEMENT OF ISSUES THAT HERNANDO HAS STIPULATED TO (AT THIS TIME)

Hernando will make a determination following the formal hearing and close of the record in this proceeding as to those issues it can stipulate to based upon the totality of evidence in the record.. Hernando asserts that as to those issues it is able to stipulate to in its brief, it will do so.

(6) PENDING MOTIONS AND OTHER MATTERS THAT HERNANDO SEEKS ACTION UPON

Pasco County's and Hernando County's *Motion to Strike* dated June 14, 2010.

See Hernando's response to Paragraph 9 below which could be construed as a matter seeking action by the Prehearing Officer.

(7) STATEMENT IDENTIFYING HERNANDO'S PENDING REQUESTS OR CLAIMS FOR CONFIDENTIALITY

This was covered in paragraph (6) above. Hernando has no claim for confidentiality.

(8) OBJECTIONS TO OTHER PARTY'S EXPERTS

See paragraph (6) above – as to pending Motion to Strike dated June 14, 2010.

(9) STATEMENT AS TO ANY REQUIREMENT IN THE *ORDER ESTABLISHING PROCEDURE* THAT HERNANDO CANNOT COMPLY WITH

As presently entered, the *Order Establishing Procedure* provides for the parties to file post-hearing Briefs and that such Briefs shall be filed on or before Jule 30, 2010. This Order is silent as to procedure or process following each party submitting their respective Briefs.

However, it is Hernando's understanding that between the time that the parties file their respective Briefs and the time the matter is put on the PSC's agenda for final agency action, the PSC Staff prepares a "Proposed Final Order" or similar memorandum for the full Public Service Commission to consider. In addition, it is Hernando's understanding that the parties (objectors) are not permitted to file any response or objection to whatever PSC Staff may prepare and put before the full Public Service Commission.

Consequently, if Hernando's understanding of agency "practice" is correct, then Hernando objects to the this [anticipated] intermittent action by PSC Staff. The reasons for the objection is that such intermittent involvement by agency staff violates the letter and spirit of the Florida Administrative Procedures Act, specifically § 120.57(1), Fla. Stat. In a typical administrative proceeding (other than PSC):

(a) a formal hearing before Administrative Law Judge (ALJ) [who is not employed by the affected agency] takes place;

(b) the parties are allowed to submit proposed Recommended Orders to the ALJ;

(c) the ALJ enters a Recommended Order;

(d) the Recommended Order goes to the affected agency for final agency action;

(e) the parties may submit exceptions to the ALJ's Recommended Order; and,

(f) the affected agency enters a Final Order (however, § 120.57(1), Fla. Stat., severely limits the ability of an agency to modify the ALJ's Recommended Findings of Fact and limits its ability to modify Conclusions of Law).

§§ 120.569 and 120.57(1), Fla. Stat., and the administrative rules thereunder.

Here, the parties should be allowed to prepare Proposed Final Orders which are submitted directly to the full Public Service Commission for final agency action instead of allowing PSC Staff

the potential ability to "*Cherry-Pick*" the record – if they so choose – and, thus having the potential ability to unduly influence or sway the outcome of this matter.

Accordingly, since § 367.045, Fla. Stat., provides objectors which are governmental authorities "**a proceeding pursuant to ss. 120.569 and 120.57**", Hernando requests that the procedures and safeguards afforded under these statutory provisions be strictly adhered. In this regard, Hernando specifically requests that the Prehearing Officer enter an order detailing post-hearing procedures and that such order provides that ALL of the parties (including PSC Staff) are allowed to submit proposed final orders to the full Public Service Commission by a date certain thereby putting everyone on the same playing field.

Dated: June 14, 2010.

Respectfully submitted,

s/Geoffrey T. Kirk

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, this 14th day of June, 2010, a true and correct copy of the foregoing Notice has been filed electronically with the Clerk for the PSC and was sent, by U.S. Mail, to all other persons listed below.

s/Geoffrey T. Kirk

Geoffrey T. Kirk, Esq.

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