

Diamond Williams

From: Barbara G. Sanders [barbaras@penningtonlaw.com]
Sent: Monday, June 14, 2010 4:51 PM
To: Filings@psc.state.fl.us
Attachments: motion to strike.Edwards.Hartman.6.14.2010.Final.pdf

In accordance with the electronic filing procedures of the Florida Public Service Commission, the following filing is made:

a. The name, address, telephone number and e-mail for the person responsible for the filing is:

William H. Hollimon
Pennington, Moore, Wilkinson, Bell & Dunbar, P.A.
215 South Monroe Street, Second Floor (32301)
Post Office Box 10095
Tallahassee, Florida 32302
(850) 222-3533
bhollimon@penningtonlaw.com

- b. This filing is made in Docket No. 090478-WS, In re: Application for original certificates for proposed water and wastewater system, in Hernando and Pasco Counties, and request for initial rates and charges, by Skyland Utilities, LLC.
- c. The document is filed on behalf of Pasco County.
- d. The total pages in the document are 14 pages.
- e. The attached document is Pasco County's Motion to Strike (Testimony of Gerald C. Hartman and Ronald Edwards)

6/14/2010

DOCUMENT NUMBER-DATE
04952 JUN 14 09
FPSC-COMMISSION CLERK

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

MOTION TO STRIKE

Pasco County (“Pasco”) and Hernando County (“Hernando”), political subdivisions of the State of Florida, hereby move to strike portions of the rebuttal testimony of Gerald Hartman (“Hartman”) filed by Skyland Utilities, LLC (“Skyland”) on June 7, 2010. In support of their motion Pasco and Hernando state:

Background

1. On February 24, 2010, the Commission entered its Order Establishing Procedure, Order No. PSC-10-0105-PCO-WS (“Order”), in this proceeding.
2. Pursuant to the Order, Skyland was required to file its direct testimony on or before April 2, 2010. On that day, Skyland filed its direct testimony – which, in its entirety, was provided by one witness, Gerald Hartman. Mr. Hartman’s testimony consisted of six pages of text and three exhibits: 1) his resume; 2) two PSC orders related to rates; and 3) Skyland’s application.
3. Pursuant to the Order, on May 3, 2010, Pasco filed the direct testimony of Richard Gehring and Bruce Kennedy.
4. Mr. Gehring’s testimony is directed solely to the issue of whether Skyland’s application to provide water and wastewater services in Pasco County is consistent with the Pasco County Comprehensive Plan.

5. Mr. Kennedy's testimony is directed to: 1) a description of Pasco's water and wastewater systems; 2) a discussion of why Pasco is not serving the areas sought to be certificated; 3) an opinion that there is no current need for service in the proposed service territory; and 4) a discussion of whether Skyland's proposed system would duplicate, or be in competition with, another system.

6. On May 3, 2010, Hernando filed the direct testimony of Joseph Staph, Paul Wiczorek, and Ronald Pianta.

7. Mr. Staph's testimony is directed to: 1) requests for services from the proposed service territory; 2) the scope of Hernando's service territory; and 3) the impact of certification on Hernando's outstanding bonds and its ability to repay those bonds.

8. Mr. Pianta and Mr. Wiczorek's testimony is directed solely to the issue of whether Skyland's application to provide water and wastewater services in Hernando County is consistent with the Hernando County Comprehensive Plan.

9. Pursuant to the Order, on May 24, 2010, Staff filed the direct testimony of Daniel Evans and Paul Williams.

10. Mr. Evans testimony is directed solely to the issue of whether Skyland's application is consistent with the Pasco comprehensive plan and the Hernando comprehensive plan.

11. Mr. Williams' testimony is directed to local water use and supply issues, as well as SWFWMD permitting procedures relating to the proposed service territory.

12. Skyland, pursuant to the Order, was required to file any rebuttal testimony on or before June 7, 2010. On that date, Skyland filed the rebuttal testimony of three witnesses: 1) Daniel DeLisi; 2) Gerald Hartman; and 3) Ronald Edwards.

Argument

It is well settled that “rebuttal testimony should be limited in its response to issues brought out by the opposing party’s direct case” *In re: Joint Petition of TDS Telecom, et al.*, Docket No. 050119-TP, Order No. PSC-06-0261-PCO-TP. Moreover, as stated in *Driscoll v. Morris*, 114 So. 2d 314, 315 (Fla. 3d DCA 1959)

[g]enerally speaking, rebuttal testimony which is offered by the plaintiff is directed to new matter brought out by evidence of the defendant and does not consist of testimony which should have been properly submitted by the plaintiff in his case-in-chief. It is not the purpose of rebuttal to add additional facts to those submitted by the plaintiff in his case-in-chief unless such facts are required by the new matter developed by defendant.

Thus, the Commission’s practice is consistent with the well settled rule that the purpose of rebuttal evidence is to “explain, repel, counteract, or disprove the evidence of the adverse party.” *United States v. Delk*, 586 F.2d 513, 516 (5th Cir. 1978). Further, rebuttal testimony is properly excluded where it could have been presented in the party’s case-in-chief. *Laurent v. Uniroyal, Inc.*, 515 So. 2d 1050, 1051 (Fla. 3d DCA 1987).

Applying this standard, Skyland’s rebuttal testimony should be limited to rebutting the issues actually raised and discussed by the Pasco witnesses, the Hernando witnesses, and Staff’s witnesses. However, as discussed in detail below, Skyland has filed “rebuttal” testimony that significantly deviates from this standard in a bald attempt to use rebuttal testimony to buttress its case-in-chief.¹

¹ Skyland’s direct testimony consists of six pages of text from a single witness – its rebuttal testimony consists of 85 pages of text from three witnesses.

I. Motion to Strike Edwards’ Testimony in its Entirety and to Exclude Edwards as a Witness in this Proceeding

Simply put, Edwards’ testimony is not rebuttal. In fact, this testimony, except for the caption identifying it as the “Rebuttal Testimony of Ron Edwards,” is nothing more than case-in-chief testimony filed as rebuttal. The various aspects of Edwards’ testimony are discussed in detail below.

1. Introductory Issues

Edwards testimony, from its beginning up to page 3, line 22, basically provides an identification of the witness. Notably, there is no testimony establishing Edwards’ qualifications to testify as an expert witness. Thus, to the extent Edwards is allowed to testify, he should not be allowed to provide expert opinion testimony in this proceeding.

2. The Need for Service “Rebuttal”

The only non-Skyland witness that directly addressed the need for service was Bruce Kennedy.² On page 5, line 23, of his testimony, Mr. Kennedy is asked “[i]n your opinion, is there a current need for water/wastewater service in the proposed Skyland service territory?” On page 6, lines 2 – 12, Mr. Kennedy concludes there is not a need because: 1) there have been no requests for service in the area, or nearby the area, proposed for certification; 2) the existing buildings and land uses are adequately served by individual wells and septic tanks; 3) Skyland does not identify any specific need and all references to future development or bulk sales are speculative; 4) approved, nearby

² As discussed earlier, Hernando County witness Staph testified that Hernando County had not received a request for service from the area sought to be certificated.

developments are all on individual well and septic systems; and 5) the proposed service are would encircle property owners that have not requested central service.

Edward's testimony purports to address the need for service issue beginning on page 3, line 24 and continuing through page 7, line 19. However, none of this testimony "explains, repels, counteracts, or disproves" Mr. Kennedy's testimony. Edwards does not testify: 1) that there have been requests for service made to Pasco County; 2) that the "existing residence and a shop" (page 4, line 12) do not have adequate service; 3) that there are definite plans for development; 4) that nearby developments are not on individual well and septic; or 5) that property owner's that would be encircled have requested service.

Instead, Edwards provides a rambling, vague, non-specific narrative that is in no way related to the specific issues raised by the non-Skyland witnesses in their direct testimony. Edwards does not rebut the specific issues raised by Kennedy and this portion of Edwards' testimony could have been offered as direct testimony by Skyland.

3. Cooperation and Proposed Facilities

Beginning on page 7, line 20 through page 9, line 14, Edwards discusses working cooperatively with Pasco and Hernando Counties, and discusses proposed facilities and potential agreements between Pasco and Hernando County. Skyland does not even attempt to characterize this testimony as rebuttal – and because no non-Skyland witness has discussed anything remotely related to this testimony, it clearly is not rebuttal. This testimony could have been offered as direct testimony by Skyland.

4. Urban Sprawl

From page 9, line 15 through page 10, line 15 Edwards opines on urban sprawl. Importantly, all the non-Skyland witnesses opine that the requested utility will promote urban sprawl by encouraging “leap frog” development that is inconsistent with the applicable comprehensive plan. Edwards testimony does not address these opinions; rather, it is simply another rambling discourse on how the property owner is such a good and cooperative citizen. This is not rebuttal. Moreover, as Edwards is not qualified as an expert witness in the area of land use or planning, he is not qualified to opine on the issue of urban sprawl.

5. Technical and Operational Ability of the Skyland Utility

Page 10, line 16 through page 11, line 10 contain a discussion of Skyland’s technical and operational abilities. This testimony does not pretend to be rebuttal – because it is not. No non-Skyland witness provided any testimony regarding these subject areas. This improper rebuttal should be stricken.

6. Financial Ability

On page 11, line 11 through page 13, line 5 (including exhibit RE-1) Edwards discusses Skyland’s financial commitment and its financial abilities. Once again, this testimony does not identify any prior witness’ testimony being rebutted – because it is not possible to do so. Moreover, Exhibit RE-1 is not offered to rebut any testimony provided by a non-Skyland witness. Further, this exhibit is hearsay that is impossible for Pasco and Hernando to cross examine. This testimony is nothing more than a bald attempt to add direct evidence through rebuttal and thereby prevent effective opposition.

II. Motion to Strike Portions of Hartman Rebuttal

Hartman's testimony, unlike Edwards' testimony, contains some testimony that actually is offered in rebuttal to testimony provided by non-Skyland witnesses. However, portions of Hartman's rebuttal testimony are, in fact, not rebuttal, and should be stricken. These portions are identified below.

1. Legal Issues

In various places throughout Mr. Hartman's rebuttal testimony, he addresses legal issues and offers his opinion on these issues. As a preliminary matter, Mr. Hartman is not an attorney and is not qualified to opine on questions of law. Moreover, even if he were qualified, questions of law are not the proper subject of expert testimony. *Edward J. Siebert, AIA Architect and Planners, P.A. v. Bayport Beach and Tennis Club Ass'n, Inc.*, 573 So 2d 889, 891 (Fla. 3d DCA 1990). Moreover, these opinions do not rebut any non-Skyland testimony as no witness (filing direct testimony) has opined on these issues. This testimony should be stricken because it is not proper rebuttal. Specific instances are identified and discussed below.

- a. On page 3, line 1 through page 4, line 7, Hartman opines on FPSC jurisdiction;
- b. On page 6, line 4 through page 11, line 2, Hartman provides his opinion regarding the interpretation and application of section 373.016, Florida Statutes. Further, he uses this discussion to address Hernando and Pasco counties' home rule powers (page 8, lines 14-16), to gratuitously discuss non-related utilities (page 9,

lines 19-22), to gratuitously accuse Pasco and Hernando counties of polluting groundwater (page 10, lines 3-5) and to argue the merits of unrelated projects (page 10, lines 5-12);

- c. On page 19, line 18 through page 20, line 11, Hartman gives a lesson in statutory construction;
- d. On page 40, lines 14 – 18, Mr. Hartman opines on the interpretation of section 367.031, Florida Statutes

2. Hartman’s Expert Witness Credentials

Attached to Mr. Hartman’s prefiled, direct testimony as exhibit GCH-3 is his resume. In addition to exhaustively documenting his experience, Mr. Hartman self-identifies his areas of expertise, stating that he “is a qualified expert witness in the areas of: water resources, water supply and treatment, wastewater treatment and effluent disposal, reclaimed water reuse, stormwater reuse, utility system valuation and financing, facility siting, certification/service area/franchises and formation/creation, management and acquisition projects.” Mr. Hartman further states he “is accepted in various Federal Courts, Circuit Courts, Division of Administrative Hearings, Public Service Commission, arbitration, and quasi-judicial hearings conducted by cities and counties, as a technical expert witness in the areas of water supply, certification/service area/franchises, facility planning, water resources, water treatment, water quality engineering, water system design and construction, and utility system valuation.”

In his prefiled direct testimony, page 1, lines 18-22, Hartman states that he has been accepted by the FPSC to “render testimony concerning utility management [and]

rate setting and engineering” in proceedings related to “original water certificates and/or service are modifications.”

Although Mr. Hartman can (and does) claim to be an expert in many areas, he does not claim any expertise in the area of land use planning. He has not demonstrated he is qualified by education, training, or experience to testify as an expert in the area of land use planning. Thus, the portion of Hartman’s rebuttal testimony in which he opines on land use and comprehensive plan issues should be stricken. Specific instances are identified and discussed below.

- a. On page 16, line 8 through page 19 line 2, Hartman rebuts the expert testimony of Hernando County land use planning witness Ronald Pianta;
- b. On page 19, line 3 through page 20, line 133, Hartman rebuts the expert testimony of Hernando County land use planning witness Paul Weiczorek;
- c. On page 36, line 20 through page 39, line 13, Hartman rebuts the expert testimony of Pasco County land use planning witness Richard Gehring;
- d. On page 43, line 6 – 21, Hartman opines about the county utility service areas and comprehensive plan consistency – he also takes the opportunity to gratuitously discuss (while not rebutting any testimony) other utilities that he believes serve the public interest.

3. Hartman's Non-Rebuttal, Rebuttal Testimony

Finally, portions of Hartman's rebuttal testimony should be stricken as not proper rebuttal. These portions contain argument, gratuitous comments, references to incompetent evidence, and otherwise are offered not to rebut evidence presented by a non-Skyland witness, but rather to bolster Skyland's case-in-chief. This is yet another attempt to back door evidence that should have been provided in Skyland's direct testimony. Specific instances are identified and discussed below.

- a. on page 3, line 1 through page 4, line 8 discusses cases unrelated to this docket and not a part of the testimony of any non-Skyland witness;
- b. on page 4, line 12 through page 5 line 12, Hartman responds to testimony provided by Hernando and Pasco Counties' land use planning expert witnesses opining that certification of the requested utility would violate these counties' comprehensive plans related to urban sprawl. Here, Hartman does not offer an opinion rebutting the conclusion reached by these witnesses; instead, he provides random, gratuitous testimony that is completely unrelated to the application or interpretation of either the Hernando County or Pasco County comprehensive plan;
- c. on page 11, line 3 – 17, Hartman rebuts testimony provided in a different proceeding by witnesses from Brevard County and the City of Cocoa;

- d. on page 11, line 18 through page 16, line 15, Hartman provides an epic discourse that is completely unrelated (except at the most general level) to any testimony provided by a non-Skyland witness. Rather, this “testimony” is legal argument that should be saved for Skyland’s post hearing brief. To the extent this section is not making legal arguments, it gratuitously includes information that rebuts nothing, is of dubious competency, and could have been presented in Skyland’s direct testimony (*e.g.*, page 14, line 1 – 6, discussing third party emails and discussions; page 16, lines 11-15, purporting to speak for the intervenors);
- e. on page 29, line 24 through page 30, line 7, Hartman discusses third party emails and discussions;
- f. on page 40, line 6 through page 43, line 5, Hartman “rebutts” the testimony of SWFWMD witness Paul Williams – Mr. Hartman testifies that he basically agrees (page 40, line 13) with Williams’ testimony. Thus, he admits that this portion of his testimony is not rebuttal; rather, this is just another opportunity to provide testimony that could have been filed on direct. Clearly, testimony that agrees with, then expands upon, another witness’ testimony is not rebuttal.

Rule 28-106.303(2) Conference Statement

Counsel for Pasco conferred with counsel for Skyland regarding the relief requested in this motion. Counsel for Pasco is authorized to represent that Skyland objects to the relief requested herein.

Conclusion

Skyland has the burden of proof in this proceeding. This necessarily entails that Skyland has the burden of developing a record containing competent evidence demonstrating a basis for the Commission to award the requested certificate of authority. Skyland chose to prefile the direct testimony of one witness – Gerald Hartman. Mr. Hartman is a consultant and is not directly employed by Skyland, Evans Utilities, or Evans Properties. Skyland freely made the strategic decision to limit its prefiled, direct testimony to only that of Mr. Hartman.

Pasco and Hernando also made a strategic decision. Recognizing that Skyland bears the burden of proof, and that Skyland should only be able to supplement the record with proper rebuttal testimony, Pasco and Hernando consciously limited their direct testimony so as not to open the door for Skyland to put forward its case-in-chief on rebuttal.

Allowing Skyland to supplement the record through improper rebuttal testimony subverts the process in several ways. First, it prejudices the other parties by limiting their ability to respond to such new evidence through direct testimony. Second, it constitutes

trial by surprise instead of on the merits. Third, if fundamentally subverts the evidentiary process laid out in the Prehearing Order.

Prayer for Relief

For all the reasons stated above, Pasco and Hernando hereby move for entry or an order striking the testimony, *in toto*, filed by Ronald Edwards, excluding Edwards from participating as a witness in this proceeding, and striking the portions of the rebuttal testimony of Gerald Hartman identified above. Pasco and Hernando submit that these actions are required to preserve the integrity of the process established by the Prehearing Order.

Submitted this 14th day of June, 2010.

/s/ William H. Hollimon
WILLIAM H. HOLLIMON
Florida Bar No. 0104868
PENNINGTON MOORE WILKINSON
BELL & DUNBAR, P.A.
215 South Monroe Street, 2nd Floor (32301)
Post Office Box 10095
Tallahassee, Florida 32302-2095
Telephone: (850) 222-3533
Facsimile: (850) 222-2126
bhollimon@penningtonlaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 14, 2010, a copy of the foregoing Motion to Strike was served, via e-mail and U.S. Mail, to the following:

Caroline Klancke, Esquire
Office of the General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Darrill Lee McAteer, Esquire
City Attorney
20 South Broad Street
Brooksville, Florida 34601

Geoffrey Kirk, Esquire
Jon Jouben, Esquire
Garth Coller, Esquire
20 North Main Street, Suite 462
Brooksville, Florida 34601

Ronald Edwards, Manager
660 Beachland Boulevard, Suite 301
Vero Beach, Florida 32963-1708

John L. Wharton, Esquire
Rose Sundstrom & Bentley, LLP
2548 Blairstone Pines Drive
Tallahassee, Florida 32301

Frederick T. Reeves, Esquire
Frederick T. Reeves, P.A.
5709 Tidalwave Drive
New Port Richey, Florida 34652

Michael Minton, Esquire
1903 South 25th Street, Suite 200
Fort Pierce, Florida 34947

Joseph Richards, Esquire
West Pasco County Government Center
7530 Little Road, Suite 34
New Port Richey, Florida 34654

/s/ William H. Hollimon