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090478-WS

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Subject: Docket Filing - Docket No. 090478-WS
Attachments: motion to compel.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:

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- 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. There are a total number of 11 pages in the document.
- e. The attached document is Pasco County's Motion to Compel.

6/25/2010

DOCUMENT NUMBER DATE

15289 JUN 25 2010

FPSC-COMMUNICATIONS CLEAR

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 COMPEL

Pasco County ("Pasco"), a political subdivision of the State of Florida, pursuant to Rule 1.380, Florida Rules of Civil Procedure, hereby moves to compel Skyland Utilities, LLC ("Skyland") to provide full and complete responses to discovery. In support of its motion Pasco states:

Background

1. On May 25, 2010, Pasco served discovery upon Skyland. This discovery consisted of Interrogatories (No.'s 1-12), Requests for Admission (No.'s 1-38), and Requests for Production of Documents (No.'s 1-12). A copy of this discovery is attached as Exhibit A.
2. On June 14, 2010, Skyland filed its objections to Pasco's discovery ("Objections"). A copy of the Objections is attached as Exhibit B.
3. On June 23, 2010, Skyland filed its response to Pasco's discovery ("Response"). A copy of the Response is attached as Exhibit C.
4. As discussed in detail below, Pasco asserts that Skyland's Objections are without merit and that Skyland's Responses are incomplete and evasive. Accordingly, Pasco hereby moves for an order: a) Compelling Skyland to provide complete, non-

evasive discovery responses; and, 2) pursuant to Rule 1.380(a)(4), Fla.R.Civ.P., granting Pasco its reasonable costs associated with bringing this action.

5. Pursuant to Rule 1.380(a)(2), Fla.R.Civ.P., the undersigned certifies that he has conferred with Skyland's counsel in an attempt to obtain the information without requiring Commission action, but no agreement between the parties was reached.

Argument

I. Skyland's Objections to Pasco's Requests for Admission are Without Merit

Skyland objected to Request for Admissions 11 and 13 – 28. Generally, these requests relate to the "Water Lease Agreement" included by Skyland in its application for certification. Apparently, Skyland included this agreement to satisfy the requirements of Rule 25-30.033(1)(j), which requires the applicant to demonstrate either ownership of, or long term control over, the land where utility facilities are or will be located.

Request for Admission 11 states:

Admit that Water Lease Agreement grants Skyland legal control over water withdrawals from the identified "Leased Premises."

Skyland's Objection to this Request states:

Objection. Any Request whether Skyland has legal control over any particular water withdrawals seeks discovery on a matter not reasonably calculated to lead to the discovery of admissible evidence. The Request calls for a legal conclusion, is irrelevant, and is not materially related to any legitimate issue in this administrative proceeding including, but not limited to, whether Skyland's application meets the applicable criteria such that it should be approved by the Commission.

Under the Florida Rules of Civil Procedure, the scope of discovery is broad. Rule 1.280(b)(1), Fla. R. Civ. P., provides that a party may obtain discovery regarding any matter relevant to the subject matter of the pending action. The Commission has broad discretion in resolving discovery disputes. In making a determination whether to allow discovery, the Commission generally balances the right to pursue full discovery with the right to be protected from oppressive or unduly burdensome discovery. Rule 28-106.211, Florida Administrative Code, grants broad authority to “issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case.”

Here, Skyland put the contents of the Water Lease Agreement at issue by including it in its application, and relying upon it to meet the requirements of certification (see Exhibit H to Application). Pasco is certainly entitled to explore the scope and effects of such a document. Further, Exhibit C to Skyland’s Application discusses Phase 1 development and identifies that for Parcels ID 1 and ID 2, potable water will come from “existing well[s].” However, Exhibit C does not address the source of potable water for the other Phase I parcels (ID 3 and ID 4). Thus, this discovery is intended to flush out the scope of rights purportedly granted to Skyland via the Water Lease Agreement.

Finally, Skyland witness Hartman, in his direct testimony, page 5, lines 1 -4, is asked:

Q. Does Skyland have an adequate water supply to provide utility service in the proposed service territory?

A. Yes. Evans Properties, Inc., has existing wells that they will transfer to Skyland which will provide an adequate supply of water.

Skyland, through its direct testimony, has placed the issue of “adequate water supply” on the table and has itself identified the issue as relevant in this proceeding.

Request for Admission 13 states:

Admit that Skyland obtained legal control over water withdrawals from the “Leased Premises” on October 1, 2009.

Skyland’s Objection to this Request states:

Objection. Any Request whether Skyland has legal control over water withdrawals from the Leased Premises seeks discovery on a matter not reasonably calculated to lead to the discovery of admissible evidence. The Request calls for a legal conclusion, is irrelevant, and is not materially related to any legitimate issue in this administrative proceeding including, but not limited to, whether Skyland’s application meets the applicable criteria such that it should be approved by the Commission.

Again, this Request simply explores the scope and extent of the Water Lease Agreement relied upon by Skyland and the testimony provided by Hartman.

The remaining Requests, that were objected to by Skyland, explore the relationship between the water supply facilities on particular parcels and the water use permits associated with these water supply facilities. Certainly, it is relevant information whether Skyland will be using existing wells or new wells. In fact, Skyland addresses these issues in its application and these requests are simply intended to discover information related to that already disclosed in Skyland’s Application. Further, there are significant public interest considerations associated with the quantity of groundwater Skyland seeks to control. In fact, SWFWMD witness Williams has provided testimony on these issues – testimony that Skyland has not objected to.

Finally, it is in the public interest to know whether Skyland's actions are in compliance with administrative rules adopted by the SWFWMD. For all these reasons, Skyland should be compelled to respond to Pasco's Request for Admissions No.'s 11 and 13-28.

II. Skyland's Objections to Pasco's Request for Production are Without Merit

Pasco's Request for Production No. 9 requests:

Documents evidencing communications between Skyland and any retained expert relating to Skyland's Application.

Skyland's Objection states:

Objection. Most, if not all, communications between Skyland and any retained expert relating to Skyland's Application are work product and/or protected from disclosure by Florida law. Any non-protected and non-privileged documents will be produced.

First, pursuant to Rule 1.280(b)(4), Pasco is entitled to discover facts known and opinions held by testifying experts. To the extent that a testifying expert relied upon any documents (responsive to this request) in formulating an opinion, such documents are discoverable. Second, pursuant to Rule 1.280(b)(5), if Skyland asserts a privilege, and refuses to produce documents pursuant to such a privilege, Skyland is obligated to produce a privilege log containing sufficient detail to allow Pasco to assess the applicability of the claimed privilege. No such privilege log has been provided.

III. Skyland's Objections to Pasco's Interrogatories are Without Merit

Pasco's Interrogatory No. 9 states:

Identify and describe all actions taken by Skyland to obtain control of water supply resources located on site ID 1, ID 1, ID 3, and ID 4.

Skyland's Objection states:

Objection. Any Request to identify and describe actions taken by Skyland to obtain "control" of water supply resources located on site ID 1, ID 2, ID 3, and ID 4 seeks discovery on a matter not reasonably calculated to lead to the discovery of admissible evidence. The Request is irrelevant, overbroad, and is not materially related to any legitimate issue in this administrative proceeding including, but not limited to, whether Skyland's application meets the applicable criteria such that it should be approved by the Commission.

Skyland has proffered evidence through Hartman stating the Skyland has an adequate water supply. This interrogatory merely follows up on an issue put into the proceeding by Skyland. Further, the efficient use of ground water resources is clearly in the public interest. This is why wells must be permitted before they can be constructed and why the withdrawal of groundwater, once a well is constructed, is done pursuant to a water use permit issued by the applicable water management district. Skyland's Application indicates that, over the next five years, it will supply water to approximately 155 ERC's. It has further indicated that, at least for some of these ERC's the water supply will come from existing wells. The requested information is directed to discovering information about Skyland's ability to provide the water it promises, and the sources of such water. This is discoverable information.

III. Skyland's Interrogatory Answers are Evasive or Incomplete

Pursuant to Rule 1.380(a)(3), Fla.R.Civ.P., an evasive or incomplete answer is equivalent to a failure to answer. Here, as identified below, Skyland has provided evasive and/or incomplete answers.

Pasco's Interrogatory No. 1 states:

For each Request for Admission served on you by Pasco County on May 25, 2010, for which your response is anything other than unqualified "admitted," please state the basis for your response.

Skyland's Answer states:

Setting aside those Requests for Admission to which there is a pending objection, the basis for Skyland's response to any Request for Admission that is anything other than an unqualified "admitted" is that Skyland deemed the request appropriately denied because the proffered statement therein was not true to the best knowledge and understanding of Skyland.

Skyland's answer is a masterpiece of evasiveness. It states that any Request for Admission that was denied, was denied because the request was not true. It is a perfect tautology. However, Pasco's Interrogatory seeks the basis for the denial – which is exactly the same as seeking the basis for the reason why the underlying request for admission is not true. Skyland's response completely evades this Interrogatory and Skyland should be compelled to provide a complete response.

Pasco's Interrogatory No. 12 states:

Identify each person that you expect to call as an expert witness at hearing and for each such person:

- a. state the subject matter on which the expert is expected to testify;**
- b. state the substance of the fact and opinions to which the expert is expected to testify;**
- c. provide a summary of the grounds for each opinion;**
- d. identify the scope of employment in this case and the compensation for services;**

- e. **provide the expert's general litigation experience, including the amount of work performed for permit applicants and permit granting entities.**

Skyland's Answer states:

The identity and testimony of each witness, expert or otherwise, is set forth with specificity in either the prefiled testimony of Skyland, the staff, Pasco and Hernando Counties, or the deposition transcripts of depositions taken in this case. These matters, including the not limited to the scope of employment in this case, the compensation for services, and the experts' general litigation experience are a matter of deposition record.

Rule 1.280(b)(4)(A)(i), Fla.R.Civ.P., specifically provides the basis for Pasco to seek the information requested in this interrogatory. In fact, the information sought is quoted directly from this section of Rule 1.280. Skyland's answer is evasive and incomplete. Moreover, Skyland's answer is not accurate. For example, Skyland witness Hartman, during his deposition, could not specifically identify either his client or his rate of compensation (below are excerpts from Hartman's deposition).

BY MR. HOLLIMON:

Q. What are the terms of your compensation?

A. Hourly.

Q. What's your hourly rate?

A. I don't know.

Q. You don't know what your hourly rate is?

A. I don't do the billing.

Q. I understand that, but I'm asking, do you know what your hourly rate is?

A. It varies from -- commonly, varies from 200 to \$400 an hour.

Q. You don't know what it is in this proceeding?

A. No.

Q. And you've been engaged to provide testimony in this proceeding. Is that correct?

A. Yes.

Q. And who engaged you?

A. Evans.

Q. Evans Properties, Inc.?

A. Yes. It would be Ron Edwards and their corporation.

Q. So Evans Property, Inc. is your client?

A. Yes.

Q. Okay. And that's whose paying you?

A. Yes.

Q. So you haven't been engaged by Skyland Utilities or Evans Utilities?

A. Well, they're all -- this is a -- I would have to go back and look at the letter of engagement. I don't really know now. Now that you asked that, since they're all three the related parties, the parent is Evans, and -- at least, to me, it is. And so I would -- I would expect it would flow through.

Finally, Pasco is entitled to discover which aspects of the Skyland witnesses' testimony is expert opinion, and which aspects are not. This is important because of the different evidentiary standards applicable to these different types of testimony. Specifically, expert witnesses are allowed to rely upon facts and data of a type reasonably relied upon by like experts in formulating opinions, even though the underlying facts and data themselves may not be admissible. *See* Sec. 90.704, Fla. Stat. On the other hand, lay witnesses (those not supplying opinion testimony) are required to testify from their own personal knowledge. *See* Sec. 90.604, Fla. Stat. Thus, a lay witness' testimony is not competent if it is not based upon that witness' personal knowledge. Because the prefiled testimony in this case does not neatly segregate opinion testimony from non-opinion testimony, a complete response to this interrogatory is essential.

Conclusion

For all the reasons stated above, Pasco moves the Commission for an order Compelling Skyland to provide complete and non-evasive responses to Pasco's discovery and awarding Pasco its reasonable costs associated with bringing this motion.

Submitted this 25th day of June, 2010.

/s/ William H. Hollimon
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 25, 2010, a copy of the foregoing Motion to Strike was served, via e-mail and U.S. Mail, to the following:

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