BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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.	DOCKET NO. 090478-WS DATED: JULY 2, 2010

SKYLAND'S RESPONSE TO PASCO COUNTY'S MOTION TO STRIKE

Skyland Utilities, LLC, by and through its undersigned attorneys, files its response to Pasco County's Motion to Strike (the "Motion") pursuant to Rule 28-106.204, F.A.C., and responds as follows:

1. On June 25, 2010, Pasco County filed a Motion to strike certain portions of the direct testimony of Gerald Hartman and certain exhibits sponsored by Mr. Hartman.[1]

2. The Motion is, in effect, two motions: a motion to strike portions of Hartman's prefiled direct testimony and an objection to the admittance of critical portions of Skyland's application into the record. Reduced to its essence, the Motion is intended to deliver a fatal blow, based upon an indefensibly narrow construction of the (inapplicable) rules of evidence, to Skyland's application by effectively preventing its full consideration by the Commission. The Motion attempts to accomplish this by moving to strike the portions of Hartman's testimony which address certain portions of Skyland's application, and thereafter the commensurate portions of the application itself. The Motion essentially speaks, categorically, to three subjects: the service request letters; the funding agreement; and Skyland's continued use of land.

3. The Motion must fail on each critical premise upon which it rests -- the failure of either premise being sufficient such that the Motion should be denied. The first premise is that the testimony of Hartman is, to use a broad phrase, "incompetent" because he lacks some

[1] Hernando County joined in this Motion at the Pre-Hearing Conference.

requisite "personal knowledge" for particular aspects of his testimony which the Motion seeks to separate from his opinions.[2] Pasco County then, assuming the success of its motion to strike potions of Hartman's testimony, seeks to strike certain documents which Pasco County asserts that testimony supports or sponsors because without the testimony (under Pasco County's theory) those exhibits are inadmissible hearsay.

4. Pasco County's theory, and thus the Motion, is wrong in two critical and fundamental respects: the testimony of Hartman is not incompetent and the documents at issue are not hearsay and, *even if they were* hearsay (in whole or in part) that fact would not render them inadmissible.

5. Any resolution of the Motion must rest upon the clear legislative directive, embodied in the Administrative Procedure Act in §120.569(2)(g), which establishes the nature of the evidence upon which the Commission may rely. That subsection states:

> All irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but **all** other evidence of the type commonly relied upon by reasonably prudent persons in the conduct of their affairs **shall** be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida. (emphasis added)

6. Importantly, the Motion makes no argument that either the testimony which it seeks to strike, or the documents which it seeks to exclude are either "irrelevant", "immaterial", or "unduly repetitious". Neither does the Motion argue that the documents themselves are anything other than the type of evidence "commonly relied upon by reasonably prudent persons in the conduct of their affairs". The Motion's convenient failure to address, much less establish, these threshold considerations should, alone, cause it to be denied.

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[2] This attempted separation is critical to the Motion's cause. The determination that any of this testimony is part, parcel, or somehow connected to the rendering of Hartman's opinions would make Pasco's burden much more difficult because, as the Motion acknowledges, an expert can rely upon hearsay evidence to formulate an opinion if it is of the type commonly relied upon by like experts. Thus, Pasco County's effort to claim certain testimony is "fact" (rather than part of Mr. Hartman's opinions as a whole) is essential to its theory.

7. Two concepts are implicated by the Motion. The first is an issue of admissibility (*See* §120.569(2)(g), *Florida Statutes*) and the second is an issue of, for lack of a better phrase, reliability (*See* §120.57(1)(c), *Florida Statutes*). It is the position of Skyland that measured against the clear language of §120.569(2)(g), *Florida Statutes*, all of the testimony and documents sought to be excluded in the Motion should be admitted. Even assuming, *arguendo*, that some part of the contested evidence is determined to be hearsay, it should still be admitted but with the clear understanding that to rely solely upon hearsay evidence insufficient in and of itself to support a finding (unless it would be admissible over objection in civil actions) would be contrary to §120.57(1)(c), *Florida Statutes*.

8. The Commission has an established procedure and method for its administrative hearings which favors the creation of the most complete record possible, consistent with the Administrative Procedure Act and the due process to which the parties are entitled. The Commission's administrative process in that regard is both time and appellate court tested. In this case, the Motion hardly bothers to allege any actual injury or prejudice by the admittance of the contested evidence, other than the loss of the strategic benefit that the Motion hopes to achieve by stripping the record of facts and evidence which should rightly be a considered by the Commission.

The testimony of Hartman is admissible

9. The applicant (Skyland) and its ultimate parent entity (Evans Properties) are corporations which can only speak through the collective voices of their officers, agents, and authorized representatives. In this case, Skyland, for purposes of Mr. Hartman's testimony and the application, speaks through the voice of Mr. Hartman. There can be no genuine question that

Mr. Hartman is and has been authorized to speak on behalf of Skyland.[3] The idea that it is necessary to call every individual who has done every single thing on behalf of a corporation to testify on the level of "personal knowledge" as claimed by the Motion is absurd to the extreme in the administrative context. Mr. Hartman has relied upon the same information in his testimony and in the creation of the application that the Commission may rely upon in its decision herein: the type of evidence that reasonably prudent persons in the conduct of their affairs would normally and typically rely upon. He has dealt extensively with the representatives and corporate officials of Skyland and Evans Properties. He has assembled an application, and reviewed its contents, on behalf of Skyland, who is his client and for whom he is the authorized agent. It is fully understood by Mr. Hartman (and by Skyland) that if Mr. Hartman says something that the Commission considers "damaging" on cross-examination, that statement may and will be properly used against Skyland, because Mr. Hartman is the embodiment of the corporate entity that is Skyland for the purpose of the proceeding.

10. A notable parallel to the positions taken in the Motion occurred in the case of *In re: Application of East Central Florida Services, Inc. for an original certificate in Brevard, Orange and Osceola Counties*, Docket No. 910114-WU, Order No. PSC-92-0104-FOF-WU (1992). In that case (as here), a large land owner applied for a certificate to encompass its lands. That applicant was represented by the same law firm that now represents Skyland and by Mr. Hartman himself. Therein, the City of Cocoa argued that there was no written agreement between the applicant and its parent, and that Mr. Hartman's testimony (that the applicant's parent would provide funding) was not upon personal knowledge.[4] The Commission determined that "both of these arguments are without merit". The Commission specifically noted

[3] And on behalf of Skyland's ultimate parent, Evans Properties. If there is such a question, Mr. Ron Edwards, Skyland's President, and Evans Properties' President and CEO, is also a witness in this proceeding and he can reaffirm Mr. Hartman's authority.

[4] In that case, notably, there was no funding agreement as there is in this case.

in the Final Order that "we reaffirm the ruling we made at the hearing that, as a consultant to and agent of ECFS, Mr. Hartman was qualified to testify on behalf of ECFS". In this case, Mr. Hartman (just as he was for ECFS) is a consultant to and agent of Skyland. Notably, that same Order noted that "since most of the entities involved in ECFS' proposal are related, it seems to us that everyone involved has an interest in keeping ECFS financially healthy". Again this parallels the relationship between Skyland and Evans Properties in this case. This is just a part of the evidence which the Motion asserts should be barred from the record.

11. In this case, the record is rife with examples of corporate or governmental entities speaking through the voice of their agents and representatives (and properly so). For instance, Mr. Stapf, the utility director of the Hernando County Utility Department, states on page 7, line 6 of his prefiled testimony that "the lack of accountability presented by a private utility provider was a major factor in the County's acquisition of the Florida Water System in 2004". In deposition, when asked about that exact statement, Mr. Stapf acknowledged that he was not with the County in 2004, but that this was his understanding. Should Skyland seize upon this fact to move to strike that part of Mr. Stapf's testimony? Should Hernando County have called a separate witness to make that single point? No. The fact is that Mr. Stapf represents the County, he is testifying as a representative of the County, and he is testifying as to what he has learned about the County's collective perception toward that particular utility. This testimony, even though it relates to events which occurred prior to the time he came to work for the County, is based upon what he knows. This is typical of the kind of information that reasonably prudent persons in the conduct of their affairs commonly rely upon.

12. One cannot overemphasize the fact that the Motion is predicated upon an arcane interpretation, and an impermissible broadening of the application, of the rules of evidence supplied to gain a strategic advantage in this proceeding. No party to this proceeding has

presented, nor could they present, one shred of evidence that Skyland does not have access to the financial resources it will need to effectuate its application; nor that the service request letters are not exactly as they purport to be; nor that Skyland will not have the continued use of the land as represented in the application. The attempt to exclude this proof cannot be sustained consistent with the Administrative Procedure Act.

The documents are admissible

13. As argued elsewhere herein, any genuine concern as to the authenticity of these documents (should such a genuine concern ever be raised) or the reliability of their content can ultimately be resolved based on the record as a whole and/or through the cross-examination of Mr. Hartman. Additionally, Mr. Ron Edwards, the President of Skyland and the President and CEO of Evans Properties, is a witness in this proceeding and stands ready to address these issues should the Commission deem it desirable or appropriate that he do so.

14. In essence, the Motion relies upon a classic misinterpretation of the Administrative Procedure Act as it relates to the admissibility of hearsay. Section 120.57(1)(c), never cited in the Motion, provides that:

> Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection and civil actions.

15. This provision of the Administrative Procedure Act is often misunderstood and argued to mean that hearsay evidence is "inadmissible". To the contrary, this subsection makes clear that hearsay evidence (assuming, *arguendo*, that any particular part of the evidence at issue in the motion is ultimately determined to be hearsay) is admissible. It is only after the close of the record, and based on the totality of the evidence in whatever form, by whatever party, and however admitted or introduced, that the Commission can then make a determination whether a

particular piece of evidence (if ultimately deemed hearsay) can be appropriately used for the purpose of "supplementing or explaining other evidence".[5] The Commission should not properly cut this evidence off at the pass, excluding it only to be faced with an argument, *ex post facto*, that it is supplementation to, or an explanation of, other evidence which comes in at a later time in the proceeding. The very fact that the Motion asserts that, for each document it seeks to strike, Mr. Hartman has in fact also testified about the subject matter of that document (as an agent or representative of the corporation), shows in and of itself that the evidence in the document is not the only evidence in the record.

16. In the complete absence of any claim that this evidence is irrelevant, immaterial and unduly repetitious[6], the Commission should not, and for all practical purposes cannot, make a preliminary determination whether any particular material finding of fact can only be made resting solely upon that evidence. That is because the issue of whether the evidence stands alone (as the sole support for any such critical finding of fact) can only be made after the completion of this record, which at the time of this writing is incomplete and, in fact, subject to significant and substantial additions (including but not limited to, deposition transcripts, the exhibits thereto, and the documents staff proposes to move into evidence).

17. Additionally, a common sense application of these three subjects to the language of §120.569(2)(g) is warranted. As opposed to addressing the ultimate determination of whether a particular piece of evidence may be used for the establishment of a particular finding of fact, §120.569(2)(g) speaks to admissibility. Here, we have the funding agreement (and ultimately the financial statements, which will surely be subjected to this same argument at the time of hearing); the request for service from the landowners to the utility; and the lease whereby the

[5] This is particularly true in Commission proceedings, where the record is comprised of evidence from so many sources.

[6] It is not. In fact it is critical evidence. That is exactly why the Motion seeks to prevent its admittance into the record.

landowner has pledged that it will provide the utility the land that it needs to satisfy the applicable criteria for certification. The facts will be unchallenged that before the Commission is a landowner who has owned and controlled the lands involved for over 50 years, who has formed an applicant corporation (Skyland), who entirely owns and controls that applicant, and who has the same individual as the highest officer in each corporation who will appear as a witness. In each case one must ask oneself: is the evidence presented about the lease, the funding agreement, etc. the type of evidence commonly relied on by reasonably prudent persons in the conduct of their affairs? If it is, it is admissible without exception. None of these documents are truly controversial. None of them are inherently suspicious or unreliable. None of them can credibly be argued to be anything other than the type of evidence commonly relied upon by reasonably prudent persons in the conduct of their affairs.

18. Notably, neither Pasco County nor Hernando County produced a shred of evidence which has cast doubt upon the finances of Evans Properties, the commitment embodied in the funding agreement, the truth or veracity of the service letters, or the representations contained in the lease. Just as a singular example, Hernando County (who now joins in the Motion) indicated in a response to a Request for Production served upon it by Skyland that "*of the numerous and serious objections raised by Hernando, the financial ability or inability of Skyland was not previously raised in any pleading*". In response to Interrogatories served upon it by Skyland, the County indicated "*this response does not allege whether Skyland has or does not have the financial ability to run a water and sewer utility and in as much as such allegations were not contained in Hernando's objections*". And yet, here we are! Hernando has joined with Pasco in an attempt to convince the Commission that evidence regarding Skyland's financial ability to run a water and sewer utility *should not be admitted.* This is one of only innumerable examples. Pasco, in response to an interrogatory served upon it by Skyland which requested that

Pasco state the basis "with specificity and particularity for its position that Skyland does not have the technical, financial, and operational ability and/or expertise to implement its proposed activities" simply answered that "*Skyland's application and its prefiled testimony provide no information demonstrating, evidencing, or implying that Skyland has any technical, financial, or operational ability and/or expertise in developing and operating a water and/or wastewater utility*". If this is the case, then why is Pasco making such an effort now to make sure that parts of that application and a portion of that prefiled testimony do not come into the record? Pasco and Hernando have chosen to lay low rather than put their best evidentiary foot forward (as they admitted in discussing the "strategic decision" they made with regard to their prefiled testimony in their previous Motion to Strike). They now ask the Commission to support this cause and decide this case on something other than the merits and a full record.

19. The Commission implements this provision of the Administrative Procedure Act in a very straightforward manner. The Commission has previously held that:

> Hearsay is admissible in administrative proceedings and only irrelevant, immaterial, and unduly repetitive evidence should be excluded. OPC's motion to strike and motion in limine does not show that the information is irrelevant, immaterial, and unduly repetitious.

In re: Review of Coal Costs for Progress Energy Florida's Crystal River Units 4 and 5, Docket No. 070703-EI, Order No. PSC-09-0226-PCO-EI (2009). Likewise, in this case, no such showing has been made.

20. The Commission has also recognized, in the face of a claim that particular evidence was "rank hearsay", that hearsay evidence (whether received in evidence over objection or not) may be used to supplement or explain other evidence, and noted that:

> Consequently, (we) do not find it necessary to make a determination as to whether (the evidence) is hearsay. Clearly, Rule 28-106.213(3), F.A.C. provides that AT&T may submit

> hearsay testimony for the purposes of supplementing or explaining other evidence in the record, and the Commission shall afford it the weight it is due.

In Re: Compliance Investigation of IXC Registration No. TI292, et al. Docket No. 070422-PI, et al; Order No. PSC-97-0884-CFO-EI (2007).

21. The truism being so well established that hearsay evidence is admissible and is an important consideration upon an appropriate record in administrative proceedings that scant argument will be made here that these matters at issue are not in fact and in any case, hearsay. However, in point of fact, none of these documents are hearsay, because they are not statements made by an out of court declarant. Each are, in effect, statements of Skyland and/or its ultimate parent entity, Evans Properties, and Mr. Hartman, the agent of Skyland and Evans Properties for the purposes of this proceeding, and Mr. Edwards, the President of Skyland and the President and CEO of Evans Properties, will both be testifying at hearing and either may be questioned or cross-examined about the documents as appropriate.

WHEREFORE, and in consideration of the above, the Motion to Strike should be denied.

Respectfully submitted this 2nd day of July, 2010, by:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Skyland Utilities, LLC Response to Pasco County's Motion to Strike has been served by electronic mail this 2nd day of July, 2010, to:

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