Diamond Williams 090478-WS

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Sent: Friday, October 15, 2010 3:30 PM

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Subject: Docket 090478-WS; Skyland

Attachments: Skyland Brief.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: 45 pages
e. A brief but complete description of each attached document: Post Hearing Memorandum

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 090478-WS

POST HEARING MEMORANDUM FILED ON BEHALF OF
SKYLAND UTILITIES, LLC

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INTRODUCTION AND BACKGROUND

The ownership, for half a century, of the lands at issue in this proceeding by Evans Properties, Inc. ("Evans Properties") and the proposal of its related party, Skyland Utilities, LLC, ("Skyland") are inextricably intertwined. Evans Properties is the polar opposite of the landowner in Florida who has purchased and/or intends to develop property in order to profit and move on. Evans Properties' enduring ownership of the lands which Skyland seeks to certificate is the binding tie between this case and the other cases the Commission has decided involving large landowners whose long-term ownership of the land demonstrates, in and of itself, that they are unlikely to form a related party utility, and to seek certification of the lands which they own, in a fashion or form which is exploitive, damaging, ill-conceived or otherwise not in the public interest. In those cases, some of which are discussed herein and all of which are known to the Commission, the relationship between the property owners and the utilities they have caused to be formed is unique, binding, and particularly consistent with the public interest. The same is true in this case. Evans Properties has owned this land long before local government officials achieved their respective offices and will likely continue to do so as the natural shifts which occur in the economy, the housing market, the demand and opportunities for the provision of water and wastewater, and the state, local, and federal regulations which apply to both utilities and to landowners, change and evolve.

The record is replete with evidence of Evans Properties' commitment to the land, of Evans Properties' willingness (and thus, Skyland's willingness) to grow, adapt, evolve, and work cooperatively with state and local government, and of the technical, financial, and operational ability that Evans Properties will bring to bear in the creation and operation of Skyland Utilities. The record could not be more clear that Evans Properties is the opposite of the fly by night

developer or the corporate entity who forms a utility only to sell or transfer it. Nor is Evans Properties the type of landowner who would allow exploitation of its lands in a way that would result in the adverse growth about which local government expressed such concern in this proceeding.

Innovation, the willingness to work cooperatively with government to manage and conserve resources, and the willingness and vision to evolve in business practices and attitudes, should be rewarded rather than discouraged. Nothing in the nature of the Commission's statutory authority or purpose mandates or compels that it must rigidly apply its authority to those who propose to be certificated in a manner that discourages, rather than promotes, a healthy juxtaposition of private enterprise, landowners, utility owners, and government to address the opportunities and challenges in Florida's ever-hanging political, environmental, and development landscape. While the evidence revealed that the Intervenor local governments, at least as controlled by the elected officials of the moment, were unwilling to work with Evans Properties and Skyland, the evidence was equally clear that Evans Properties and Skyland are, and intend to continue to be, willing to work with state and local government in every form and fashion in a way that promotes the public interest.

The unsubstantiated and unrealized fears of local government planners (to the effect that the existence of the Growth Management Act is not sufficient to regulate growth and that the ability to influence development within their respective political boundaries will somehow be lost to them) and the proprietary desire by local government to capture services and "customers" for their own governmental utilities are, of course, legitimate matters of consideration for the Commission in its selective determinations of the public interest. However, under the facts and circumstances of this case neither of these "concerns" should form the basis for denying a

property owner the authority to manage resources and to efficiently plan for and serve the water and wastewater needs within its own properties. There is no evidence in this proceeding, nor any fact or issue which presented itself or arose in this proceeding, that the labyrinth of growth management regulations which exist under current Florida law require supplementation by the exercise of Commission authority which, *de facto*, provides an additional growth management tool to local government. There is no precedent or purpose for the Commission to adopt a policy that growth management concerns should be paramount or primary in the exercise of the Commission's authority and discretion. Yet, stripped to its essence, that is precisely what the Intervenors request the Commission do in this case. Local comprehensive plans, the Department of Community Affairs ("DCA"), and the myriad of administrative and circuit court proceedings one may initiate are adequate and in place to address what was clearly the primary concern of the political bodies opposing Skyland's application. The granting of the certificate in this case will change none of that, as the Intervenors ostensibly fear. The Commission's decision should not be based upon those unsubstantiated and unrealized concerns. Rather, the Commission should consider these straw arguments. The Intervenors' real concern was turf protection by public utilities to the detriment of the public health and contrary to the public interest.

The evidence is clear that the primary concerns of local government in this case were about the potentiality of sprawling growth or the exportation of bulk water, yet the only evidence of either were the verbalization by the witnesses of Hernando County and Pasco County of the concerns themselves. No credible evidence to support those assertions, or the fear which underlies the concerns, was offered.

DISCUSSION OF ISSUES

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?

*Yes, Skyland has presented evidence sufficient to invoke such exclusive jurisdiction and the Commission has exclusive jurisdiction under the provisions of Chapter 367, *F.S.*, and any attempts by local government to assert jurisdiction over those issues, is contrary to law and ineffectual.*

Under §367.021 (12), *F.S.*, Skyland is a utility, plain and simple. Skyland proposes the construction and operation of a system which will provide water or wastewater service to the public for compensation. Under §367.171(7), *F.S.*, the Commission has "exclusive jurisdiction" over all "utility" systems whose service transverses county boundaries. Thus, the only remaining viable question is whether Skyland's service will transverse the county boundary which lies between Hernando and Pasco Counties.

In *Hernando County v. Florida Public Service Commission*, 685 So.2d 48 (Fla. 1st DCA 1996), the Commission found that certain facilities in separate counties were "functionally related", thus rendering the utility jurisdictional as one transversing county boundaries. In that case:

> . . . the PSC relied primarily upon centralized organization out of the utility's Apopka office, as well as regional management, to provide the basis for its decision that these various facilities constitute a single system providing service which transverses county boundaries.

Hernando County, at 50.

The *Hernando* court concluded that:

> The relevant inquiry when determining the existence of jurisdiction under §367.171(7) is the actual inter-relationship of two or more facilities providing utility services in a particular geographic area. . .

Hernando County, Id, at 52.

The Court held that the conclusion that the correct focus is on the relationship between the particular identified facilities (rather than the general corporate structure of the utility) is supported by the use of the word "transverses" in the statute, which indicates legislative intent

that the facilities and land forming a system must exist in close geographical proximity across the county boundary. In essence, all the court substantively found was that jurisdiction under §367.171(7), *F.S.*, cannot be exclusively founded upon evidence that the company utilizes an umbrella organizational structure, or the central hub of remote management offices as described in that particular case.

In this case, Skyland proposes facilities upon land forming a system which will exist in close geographical proximity across a county boundary. Physical service will cross county boundaries (although such is not a "be all and end all" fact in the determination of whether service "transverses" county boundaries for the purpose of the statute) and the rates, charges, administration, personnel, and all the other accoutrements of the service and on-going operations of the utility will be operated on-site, in the service area, and physically located in both Hernando and Pasco Counties.

In Order No. PSC-07-0717-FOF-WS, *In re: Application for certificates to provide water and wastewater service in Glades County and water service in Highlands County by Silver Lake Utilities, Inc.*, the Commission found that although Silver Lake intended ultimately to provide wastewater service in Highlands County, initially it would only be providing wastewater service in Glades County, a non-jurisdictional county. Nonetheless, the Commission determined that the jurisdiction over one service that crosses county boundaries also involves jurisdiction over the other service, even when the other service does not initially transverse county boundaries (Silver Lake did intend to immediately provide water service in both counties). Likewise, in Order No. PSC-08-0540-PAA-WS, *In re: Application for Certificates to provide water and wastewater service in Hardee and Polk Counties by TBBT Utility, LLC*, the Commission found that although the proposed utility system would be designed so that the

developments in Polk and Hardee Counties would have "separate distribution, collection, and treatment facilities", the proposed utility was still jurisdictional under §367.171(7), *F.S.*, because its systems were to be "located relatively close to one another" and "all administrative, billing, collection, accounting, maintenance, testing, permitting, and functions of every type would be housed within the same offices and utilized the same personnel, tools, and equipment". There is no such nuance in the case of Skyland (as there was in these two orders) as to the application of §367.171(7), *F.S.*. Skyland proposes the operation of a utility which will physically and operationally and administratively transverse county boundaries.

The Commission's jurisdiction under §367.021(12), *F.S.*, is invoked when an applicant demonstrates that it proposes to provide water and wastewater service to the public for compensation which transverses county boundaries. Upon such a demonstration, the Commission's jurisdiction is not only invoked, it is exclusive. In this case, the record demonstrates that such service is proposed in a means, manner, and method which physically, operationally, and administratively will transverse county boundaries.

Mr. Gerry Hartman is a registered professional engineer in multiple states, an accredited senior appraiser, a board certified engineer, and an individual who has been accepted by the Commission as an expert in utility management, rate settings, and engineering issues numerous times in the past (Tr. 75, Ex. 4). Mr. Hartman is also an expert in utility planning (Tr. 137). Mr. Hartman testified that he was familiar with the documents and that the matters contained in the application and supporting documentation were true, accurate and an appropriate representation to his knowledge and his opinion (Tr. 76). Mr. Hartman testified that his firm, GAI, prepared the engineering, accounting, and utility management aspects of the application on behalf of Skyland (Tr.76).

Mr. Hartman testified that Evans Properties owns all of the land within Skyland's proposed service territory and that it was anticipated that development would occur in five separate phases (Tr. 77). The near-term need for water and wastewater services for Skyland are several existing properties, intensified agribusiness, and the residential development as detailed in the application (Tr. 77). Skyland proposes service which traverses county boundaries (Tr. 77). Mr. Hartman addressed the fact that based on his experience as an expert before the PSC it was his opinion that Evans Properties' proposed activities would traverse county boundaries as described in the statute (Tr. 162-163). It was his opinion that whether or not there was a physical crossing of the county boundary in the immediate future, everything Skyland was proposing would be functional as one utility system (Tr. 735).

It was Mr. Hartman's opinion that with regard to the two particular parcels which straddled the respective county boundaries, service could "happen at any time", and that to some extent the timing was dependent on the market. He noted that there were some scenarios where development of these parcels could occur in the short term (Tr. 737).

At the hearing, there was a discussion about the development phases as represented in Skyland's application within the context of whether and when Skyland's proposed service would physically transverse county boundaries. The record evidence established that, just as with any large certificated territory which may experience a diverse and emerging base of customers who require and demand water and wastewater service, the lands of Evans Properties will experience growth based upon demand, need, market conditions, and a variety of other factors discussed within the course of the hearing or set forth in Skyland's application (Tr. 737). The phases may develop in that order conceptually laid out in the application and at that intensity, or it is possible that based upon the regulatory and market vagaries which exist at the time, the properties could

develop in a different sequence, intensity, or order (Tr. 735-737). Mr. Hartman testified that the application's descriptions and the layout of the facilities needed to serve Skyland's anticipated customers were conceptual (Tr. 79; Tr. 139) as were the order and timing of phases and development activity. Mr. Hartman testified that in addition to the immediate need for services outlined in the application, the Phase I facilities provided for the provision of service to meet a need for retail use (Tr. 98). Mr. Hartman testified that service would begin, as necessary, after design, permit, and other regulatory requirements were met (Tr. 106).

Whether or not Skyland should be certificated is a determination the Commission will make based on the application in this case and the record evidence, with due deference to the Commission's policies, precedents, and authority. However, if the determination is made that Skyland should be certificated in both Pasco and Hernando Counties, then the fact that its system, service, operation, certificate territory, billing rates and practices, and each and every facet of its operational existence, will transverse the county boundaries of Hernando and Pasco is hardly at issue.

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

Yes, there is an immediate need for potable water and wastewater services throughout the proposed service territory and additional needs are anticipated in the near future.

The concept of need should be viewed and determined in the particular context of Skyland's application. Normally, a utility which proposes the creation of a certificated area indicates need by the demand for its service now and (more commonly in original certificate cases) in the future. The actual persons, parties, or entities which will require that service are rarely before the Commission. In this instance, because Skyland and Evans Properties are related, both parties are effectively "before" the Commission. The record evidence establishes

the rare instance where not only is the utility indicating a present and future demand for its water and wastewater services, but the owner of 100% of the lands to be certificated is also indicating such a need. Yet, despite the consistent and uniform indication of need from both the utility and the owners of the land to be certificated, the Intervenors in this case (who have manifested no present or planned desire to provide service to meet these demands by and through their own governmental utilities) are attempting to veto the desires of the very landowner who indicates the need exists. One might logically conclude that a proposed utility's indication that need exists and demand will grow, in concert with the landowner of the very lands proposed to be served, on lands local government utilities have no present or tangible plans to serve, would not result in a contested need determination. However, the clear agenda of local government in this case is to use the Commission's authority as an extension of their alleged growth management policies, and their policy of effectively banning the existence of private utilities within their boundaries. It was obviously more important in this case to the Intervenors to push their agenda of no growth upon the lands owned by Evans Properties, and of no new private utilities in Pasco and Hernando Counties, than it was to explore the present and future needs, and potentialities for service from the water and wastewater system Skyland proposes and how the public interest could be met by the creation of Skyland.

As discussed in more detail hereinbelow, there is a need for service in the proposed service territory, as established by Skyland's application and the evidence in this proceeding. That need is manifested in the existing need on the property; the residential densities which allow development on the property; the possibility of increasing those residential densities subject to the approval of the county and DCA; and a myriad of other potentialities which range from the cutting edge to the most basic demand any central water utility can fill – the provision

of central water to those whose on-site facilities are contaminated.

Mr. Ron Edwards has been CEO of Evans Properties for approximately 17 years (Tr. 876). Most of the lands which Skyland seeks to certificate have been owned by Evans Properties for over 50 years (Tr. 812-814). Mr. Edwards explained that Evans Properties has also caused the application of Grove Land Utilities and Bluefield Utilities, to certificate other lands owned by Evans Properties, to be pending before the Commission (Tr. 813). Mr. Edwards explained that the applications were generally filed for the purposes of insuring that the current and future needs for water and wastewater service within those lands would be met, and opined that in order to do the long range planning necessary to insure the effective, efficient and timely provision of needed services to all of the lands, it was imperative to begin the planning process now, which includes certification of the utility to allow for that detailed and timely planning (Tr. 814).

In response to questions from Commissioner Graham, Mr. Edwards stated that the affliction to the citrus he had testified about, sometimes referred to in the hearing as "greening", was definitely adversely affecting Evans Properties (Tr. 885-886) and that the economic slowdown had also affected Evans Properties as it had all similarly situated entities (Tr. 886). In response to Commissioner Graham's queries about whether part of the application was intended to open options for Evans Properties in the future, Mr. Evans replied "absolutely" and stated that "we have 43,000 acres of land in Florida, and a great deal of it has been, for 50 years, dedicated to the production of citrus. And we are now, along with a lot of other people, looking for an option for other things that we can do" (Tr. 886).

Mr. Edwards addressed both the existing residence and shop that have a need for central services, as well as the other demands outlined in the application (Tr. 814). Evans Properties proposes to utilize the utility services for a variety of ventures, and the testimony in

the proceeding supported Mr. Edwards' testimony that Skyland would be open to meeting the future needs for services in a way that could be accomplished cooperatively with local government, adjacent landowners, and the water management district (Tr. 814).

Mr. Edwards described those potentialities as the provision of exempt and/or non-exempt bulk water, the need to potentially provide central water and wastewater services to agricultural workers upon the property, the availability of central/regional water to assist the water management district as it engages in water supply planning efforts, and the availability of central wastewater treatment as may be required by recent changes in state and federal law (Tr. 814-815). Mr. Edwards described all these potentialities as being in addition to the need specifically addressed in the application (Tr. 814-815). Mr. Edwards explained it was critical to Evans Properties that it be in the position to adapt and evolve and meet the needs for the types of uses described in the application and in his testimony, as well as needs which might develop or present themselves on a going forward basis (Tr. 815-816). Mr. Edwards opined that it was important for the Commission to understand the larger context and that Evans Properties, by the filing of its application, was in part addressing a corporate intention to evolve as a landowner and prepare itself for the future in a way that both meets its own needs and is consistent with the public interest (Tr. 816). Evans Properties is actively pursuing and turning its attention and resources to a variety of uses for its properties, as described in Mr. Edwards' testimony and in the record of this case (Tr. 816). Mr. Edwards made a particular point of emphasizing Skyland's willingness to work with state and local government on a going-forward basis (Tr. 817-818).

Mr. Edwards stated that the working assumption for the application was that the properties would be developed in accordance with the now existing requirements of the comprehensive plans in Pasco and Hernando Counties (Tr. 835). In response to a question from

Commissioner Graham, Mr. Edwards testified that he presumed that Evans Properties would ultimately come forward with land use changes on certain parcels of these properties, when and where appropriate and subject to county and DCA approval (Tr. 888-889). Thus, increased residential densities, consistent with applicable permitting, regulatory and growth management law in place, is a definite potentiality.

Mr. Edwards candidly acknowledged that he would prefer to be able to see agriculture sustained on the properties, but that depending on the given property and the market at the time, utilizing the property for residential growth could be a top priority (Tr. 836). Mr. Edwards opined that over time residential use may end up being the preferred development form for any of these properties (Tr. 836).

Mr. Edwards, in addressing the issue of bulk water, indicated that bulk water could be sold in a way that would potentially be exempt from PSC oversight, and that bulk water could also be sold in other forms or fashions such that PSC jurisdiction would apply (Tr. 841-842).

Mr. Edwards made clear that while he understood Evans Properties could sell water in bulk to distant entities without a certificate, this was not the intention of the applicant (Tr. 899-900).

Mr. Edwards talked about how the EPA's imposition of the numeric nutrient criteria on the State of Florida might require the provision of, or an opportunity to provide, wastewater services by Skyland (Tr. 901-902). Mr. Edwards opined that Evans Properties, by and through Skyland, was continuing to explore the provision of water and wastewater in both conventional and unconventional ways. One thing Mr. Edwards described was the possibility of the provision of wastewater service to the public for compensation in a way that would not even require a traditional wastewater facility (Tr. 902-903).

Mr. Edwards indicated that many of the activities that Evans Properties are currently considering undertaking on its properties in the future might require the provision of either potable water or wastewater service (Tr. 903-904). Even some of the agricultural activities discussed may involve the need to house workers on the properties who would require central water and wastewater service (Tr. 904-905).

It is the intention of Evans Properties to continue to explore all the potential uses for the properties in addition to the residential and retail uses that were outlined in the application (Tr. 914). Mr. Edwards described a meeting with regard to a proposal to build a reservoir that was on the planning horizon of the water management districts, but which the state is currently unable to fund (Tr. 914-915). Mr. Edwards noted that while this was opportunity does not involve these particular properties, it was a similar project which Evans Properties intended to explore and potentially pursue on a going-forward basis (Tr. 915). Mr. Edwards noted that Evans Properties actually had a meeting with the Southwest Florida Water Management District about the possibilities for water and wastewater systems on these properties (in Hernando and Pasco Counties) at the water management district the day before the hearing had convened (Tr. 915).

Mr. Edwards testified that the application proposes water and wastewater services for allowed residential densities on the property because that was the most quantifiable of the needs for the utility, and because it was Skyland's understanding that that was the norm that the PSC usually reviews in a certification process (Tr. 917). Mr. Edwards testified that if Evans Properties thought that a change in the comprehensive plan, to increase densities, was something that could be done, and that the local comprehensive plan could be amended to accomplish that was supported by DCA and there was a market for it, such an increase in density would

definitely be considered (Tr. 917). Every planner in this proceeding considered clustering a sound planning concept and agreed it could be accomplished upon the lands Skyland seeks to certificate (Tr. 204; Ex. 19, p. 46, 63-64; Ex. 24, p. 62).

Mr. Hartman explained that there were a variety of ways that the certification of Skyland might help address the problem of the contaminated wells which were extensively addressed in the hearing. He discussed various ways, including the provision of water to the border of Skyland's certificated territory in the area adjacent to the wells such that the county or another entity could provide safe drinking water to those with contaminated wells (See, e.g., Tr. 721-723). Mr. Hartman further addressed the need for the utility including the possibility of the production of biofuels, the water and wastewater needs associated with various projects and operations, the water and wastewater needs necessary to provide for the work force having housing and other capabilities on the land, and the other activities that could occur on these 4,000 acres (Tr. 154-155). As to the contaminated wells, Mr. Hartman discussed the e-mail which had originated with DEP inquiring whether central water could be available for the areas which are suffering from the contaminated wells (See, e.g. Tr. 741-751). It was Mr. Hartman's opinion that it would "absolutely not" be cost prohibitive for Skyland to assist with regard to the problem of the contaminated wells (Tr. 751-752). Mr. Hartman indicated Skyland's willingness to work with Hernando County to provide service to as many of the contaminated well owners as possible (Tr. 751-752). The entire issue of the contaminated wells was one which arose after the filing of the application, at least to the knowledge of Skyland (Tr. 754). Mr. Hartman testified that he understood that Hernando County had estimated cost of $10 million or more to run lines to the areas suffering from the contaminated wells, and indicated that Skyland could assist the county in lowering that cost (Tr. 754). This opportunity to help the public by providing safe

drinking water is indicative of one of the unforeseen needs for utility service that frequently arises when a utility company is ready, willing, and able to provide service.

As indicated previously, the application of Skyland is similar to other PSC approved applications filed by large landowners who formed related party utilities which applied for water and wastewater certificates upon their land. These decisions are known to the Commission, and what follows are only selective excerpts from a limited number of those cases. While the attempt was made at hearing to distinguish, upon factors which are not materially relevant, those cases from the present application, the fact is is that the commonalities and similarities between Evans Properties/Skyland and Deseret Ranches/ECFS, Miami Corp/Farmton, etc. are clear.

In *In re: Application of East Central Florida Services, Inc. for an Original Certificate in Brevard, Orange and Osceola Counties*, Order No. PSC-92-0104-FOF-WU ("ECFS"), the Commission noted that:

> Indeed, it is common for this Commission to grant an original water certificate and approve rates for services for which there is no present, quantifiable need, but which may be in demand at a future time.

ECFS, Id at 19.

Addressing the fact that the proposed certificated territory in that case was over 300,000 acres, the Commission noted that:

> Clearly, the need for services is not pervasive throughout the territory. This concern, however, is not cause to deny certification. We do not think it is in the public interest at this time to carve up a vast territory, which is allowed by one entity, so as to certificate only scattered portions thereof.

ECFS, Id at 20.

In the case of *Farmton*, (*In Re: Application for Certificate to Provide Water Service in Volusia and Brevard by Farmton Water Resources, LLC*, Order No. PSC-04-0980-FOF-WU) where a large landowner formed a utility to provide service to approximately 50,000 acres of land owned by that entity, the Commission noted that "Farmton is seeking the certificate in part

for long-range planning purposes to allow it to be prepared to provide service as and when needed to any residential, commercial, or industrial development in the area". *Farmton, Id* at 7. In that case, the landowner (Miami Corporation) and the utility (Farmton) established that the motivation and desire for Farmton to gain a certificated territory for its proposed utility were in fact very similar to those of Skyland and Evans Properties in this case. See, e.g., *Farmton, Id* at 8.

The Commission, in granting the certificate to Farmton, noted the same was consistent with its practice in dealing with a large service area owned by a single entity, and quoted extensively from the *ECFS* order. The Commission thereafter found, in *Farmton*, that "there appears to be a need, although limited . . . in the proposed service area; however, it is not known when all form of service will be required." *Farmton, Id* at 10. The Commission went on to state:

> . . . though the evidence shows that the need for service is not pervasive throughout the territory . . . Consistent with our finding in East Central, it is not in the public interest to carve up the Farmton territory, which is owned by the utility's parent company, and certificate only a portion of the territory.

Farmton, Id at 10.

Mr. Hartman addressed the similarity between the *Farmton* proposal and the *ECFS* proposal in Skyland's application for a certificate (Tr. 756).

Skyland has established a present, quantifiable need and demand for the services that it proposes to provide; an on-going investigation and development of other uses of the property for which water and wastewater service will likely be required; and a willingness to work on-site and off-site with state and local government to meet emerging, evolving, and developing demands for water and/or wastewater that are both in the interest of the utility and the public.

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

*No, certification of Skyland in the area applied for in its application is consistent with the

comprehensive plan of Hernando County. If the Commission finds such an inconsistency exists under these facts and circumstances, it should grant the certificate to Skyland notwithstanding.*

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

No, certification of Skyland in the area applied for in its application is consistent with the comprehensive plan of Pasco County. If the Commission finds such an inconsistency exists under these facts and circumstances, it should grant the certificate to Skyland notwithstanding.

◊Due to the fact that Issue 3 and Issue 4 are, in many material respects, inextricably intertwined, they will be addressed together herein.

There is no evidence, no testimony, no fact, and no circumstance that would justify or otherwise validate the Commission's adoption of a stance, posture, or policy that it should operate as some sort of a super zoning agency, or an extension of the Growth Management Act, or a backstop to the local governments' comprehensive plans and the DCA, such that the decision whether or not to certificate Skyland is made on the ostensible desire of the local governments to stop or severely restrict growth on these lands. Yet, that is exactly what the Intervenors are asking the Commission to do. The growth management mechanisms in Florida are actually in place to allow growth, and increased densities, and the appropriate use of private property, in an orderly fashion which is consistent with applicable law. They are not, as the Intervenors implicitly suggest, in place to set hurdles so high that increased growth can never occur. Be that as it may, the Commission should decline to, *de facto*, adopt a policy that would effectively add the PSC to the labyrinth of growth management regulations which already exist, nor to require growth at urban densities as a precondition to the extension or establishment of central utility services.

Skyland's application is consistent with the comprehensive plans of Hernando and Pasco Counties (Tr. 761, 768-769, 772). However, to the extent an inconsistency exists, the Commission should elect to exercise that discretion expressly granted unto it by the legislature

such that it is not bound by any such inconsistency. The unsubstantiated and unsupported concerns of the planners of Hernando and Pasco Counties, based upon a speculative future in which some pattern of undesirable growth will somehow be realized by the granting of Skyland's application despite the fact that the application will not erode, modify, or otherwise adversely affect the authority and ability of those local jurisdictions to control such growth to the extent allowed by present law) is insufficient to provide a basis for the denial of Skyland's application. There is a reason the legislature provided that the Commission need not be bound by such local comprehensive plans. That is because the legislature understood that the power and authority that was granted unto the local jurisdictions through the Growth Management Act has its place and purpose and that such power and authority should remain independent of the decisions which the Commission makes. The Commission is not the DCA; it is not the ultimate zoning board, and it is not the proper body to "save" a present county government from a future county government which might choose (under the growth management provisions of existing law) to do something different than current local government officials desire. The concerns of Hernando County and Pasco County based on their respective comprehensive plans were revealed by the record to be nothing but a red herring and a form of growth planning paranoia. Undesirable growth could occur on the lands Skyland seeks to certificate only if local officials allow it, and even in the absence of this utility's certification. Conversely, Skyland's certification will in no way, shape, or form, lead (directly or indirectly) to undesirable growth on those lands unless local government, as it exists at the time, decides to allow that result. Such a tenuous and speculative objection on the basis of those respective comprehensive plans should not form the basis for the denial of Skyland's application.

While inconsistency, in whole or part, with the comprehensive plans of Hernando County and Pasco County is a finding the Commission will make on this record, the more important determination is whether such an inconsistency (if found) should cause this Commission to determine that Skyland's application is insufficient under Chapter 367 and its certification not in the public interest. Pursuant to the policies, principles, and laws which the Commission interprets and implements, Skyland should be certificated in either case.

Section 367.045(5)(b), *F.S.*, provides that "the Commission shall consider, but is not bound by, the local comprehensive plan of the county or municipality". See *City of Oviedo v. Clark*, 699 So.2d 316, 318 (Fla. 1st DCA 1997), where the court held that the PSC was expressly granted discretion on the decision of whether to defer to a given comprehensive plan (for discussion see, *Farmton, Id* at 4-5).

Notably, in the *ECFS* case, the Commission held that the objecting governmental entity which raised the issue of inconsistency with the comprehensive plan had the burden of proof on the issue. *ECFS, Id* at 25. Similarly, the burden of proof should be placed squarely upon the Intervenors in this case as to why the Commission should not exercise its statutory prerogative not to be bound by such plans, even if an inconsistency is found to exist. See, Section 367.045(5)(b), *F.S.* (see, *ECFS, Id* at 25).

In *Farmton*, despite the fact that the Commission found that Farmton's request to provide water service to the proposed service territory was inconsistent with portions of the Brevard County Plan, the Commission found that the planning process does not supersede its authority. *Farmton, Id* at 15-16. The Commission held that:

> The evidence presented clearly shows that a county's control over development is not reduced with the issuance of a certificate. The county's hands are not tied when it comes to enforcement of their own comprehensive plans if and when rezoning is needed. Our certification

> does not deprive the counties of any authority they have to control urban sprawl on the Farmton properties. . . Therefore, we find that the issuance of a PSC certificate does not result in urban sprawl or harm to the environment.

Farmton, Id at 16-17.

While the expert planners in the proceeding did not agree on the consistency of Skyland's certification with the respective comprehensive plans, they did agree upon the most fundamental and important fact which the Commission should consider in its determination as to whether it should be bound by such plans in any case: The planners (even those for Pasco and Hernando Counties) agreed that <u>every</u> single growth management tool which is available to local government now to meet the kinds of concerns expressed by Hernando and Pasco Counties will fully and completely remain in place if Skyland is granted the certificate (Ex. 19, p. 36-43; Ex. 24, p. 24-29; Tr. 197). Granting the certificate to Skyland will not require, compel, guarantee, insure, or otherwise force some sort of undesirable growth result on local government. This concession, by the expert planners for Hernando and Pasco Counties, alone should be sufficient for the Commission to find a failure of burden on the part of the Intervenors' planning-based objections.

Perhaps the only other area on which the planners agreed was that <u>none</u> were aware of a <u>single</u> instance anywhere in the State of Florida where a granting of a PSC Certificate to a utility in a similar circumstance – or even a dissimilar circumstance – has lead to urban sprawl with the sort of growth management concerns that they expressed (Ex.19, p. 34, 70; Ex. 24 p. 24-29; 54, Tr. 191-192). Even if there were such places in Florida where such urban sprawl had occurred, it is because local officials, for whatever reason, decided to let it happen rather than due to the granting of any PSC Certificate (Ex. 19, p. 35, 43; Ex. 24, p. 31, 72).

Mr. Dan DeLisi holds a master's degree in city planning from the Massachusetts

Institute of Technology and his graduate work included a series of published articles and written works on topics including environmental dispute resolution with the Harvard Law School Program on Negotiation. Mr. DeLisi's resumé is attached to his testimony (Tr. 765; Ex. 39).

In his review of the comprehensive plans and the testimony of the county planners, Mr. DeLisi pointed out that the assumption of the counties seemed to be that Skyland's application was a development proposal (Tr. 672). It was Mr. DeLisi's observation that to the extent that development has been discussed as part of the application, those levels of development are within the density levels allowed in the existing comprehensive plans of both Hernando and Pasco Counties (Tr. 772). Mr. DeLisi noted that "development" cannot happen if it is inconsistent with the comprehensive plan (Tr. 772). He observed that Hernando County's planner provided no basis for his apparent foregone conclusion that levels of development in excess of that which are currently permitted in the comprehensive plan will somehow follow from certification (Tr. 772-773).

Mr. DeLisi testified that to reach the conclusion that certification of Skyland would lead to urban sprawl is "at a minimum, a huge leap" (Tr. 761). It was Mr. DeLisi's opinion that nothing that had been substantiated by any of the Intervenors could logically lead to that conclusion (Tr. 671). Mr. DeLisi believed that for urban sprawl to occur, the worst case scenario in every review process – and a total disregard for state law – would also need to occur (Tr. 784). Mr. DeLisi noted that in the course of his professional career and in his preparation for his participation in this proceeding, he had never become aware, from any source, of any sprawling development occurring on any property that resulted from the issuance of a PSC certificate (Tr. 789-790). Mr. DeLisi testified he was not aware of any cases where the designation of a utility franchise area had created urban sprawl in the absence of a comprehensive plan already allowing

for that form of development (See, e.g., Tr. 777). Many things would need to occur in order for future development to be "sprawling" in nature (Tr. 783). Most notably the comprehensive plan would need to allow that form of development already, or be amended (Tr. 783).

It was also Mr. DeLisi's opinion that the grating of a PSC certificate does not take away any right that either county, or the DCA, would otherwise have to prevent urban sprawl through appropriate processes (Tr. 791-792). Mr. DeLisi had been involved in comprehensive plan reviews of lands in which the PSC had granted a certificated area and indicated that the review of the comprehensive plan amendment in that case was very, very rigorous and that it lead to a proposal that no one could describe as urban sprawl (Tr. 762).

It was Mr. DeLisi's experience that utilities will create development pressure only if all other services are in place or otherwise planned for, and there is a market for that development (Tr. 773). Mr. DeLisi described the types of things that normally must exist for development to occur, and opined that the existence of a utility, much less a PSC certificate, in and of themselves, changes none of those (Tr. 773-774).

Mr. DeLisi noted that the counties are the implementing agency of their own comprehensive plan and have the sole discretion of the approval of plan amendments (with review by the DCA) and development proposals. That authority is no way being removed, diminished or impeded by this application (Tr. 786-787).

Mr. DeLisi testified that there is no way to develop an excess of what current comprehensive plans allow without doing a comprehensive plan amendment (Tr. 671). He opined that the Intervenors' speculation about increased development was just that, since the possibility of increased development was not "on the table" without a plan amendment (Tr. 671-672). Mr. DeLisi described the comprehensive plan amendment process as containing a "very

rigorous review of urban sprawl" (Tr. 762). He stated that the DCA does not "feel in any way compelled to overlook urban sprawl criteria because an area has a PSC certificate" (Tr. 762).

Mr. DeLisi testified, several times, that he was not aware of any similar cases where the certification of a utility area in a rural area has lead to uncontrolled or sprawling development (See, e.g., Tr. 777). In fact, Mr. DeLisi testified that, in his experience, the existence of a PSC certificate (in the case of Town & Country Utilities) had greatly assisted in the ultimate development plan of 17,000 acres without which the sale of a much larger parcel of pristine lands to the state would not have occurred (Tr. 778-779). As to Town & Country, Mr. DeLisi noted that (1) the existence of the PSC certificate did not in any way create an artificial market for development; (2) having the utility in place at the time of the comprehensive plan amendment and the sale of the preservation area to the state did not in any way limit the state's or the local government's abilities to regulate and impose land use forms that did not allow or constitute "urban sprawl"; and (3) having the utility in place with a plan for the provision of central water and wastewater facilities removed an impediment for the state to achieve a larger land acquisition goal that was unforeseen at the time of PSC designation (Tr. 779).

Mr. DeLisi also related an example involving the certification of Sun River Utilities by the PSC, over opposition by Charlotte County and DeSoto County. Last year a joint public/private planning study that included a portion of the area in Charlotte County was completed. That study concluded that the establishment of the certificated area did not deprive Charlotte County of any existing tool to prevent urban sprawl (Tr. 780). In that case, the existence of the certificated utility in fact provided an opportunity for the Department of Environmental Protection to tie future development to the conversion of leaky septic tanks that are currently leading to the pollution of the Peace River (Tr. 780).

It was Mr. DeLisi's opinion, from his professional and expert perspective, that it was in the public interest for the PSC to grant this certificate (Tr. 789-790).

When comprehensive plans are designed to specifically exclude private utilities (contrary to the legislative intent which permeates Chapter 367) from the boundaries of the counties which implemented those plans, it is difficult to determine "consistency" with those plans. In this case, whether the Commission determines that the application of Skyland is (in whole or in part) consistent or inconsistent with the comprehensive plans of Pasco County and Hernando County (in whole or in part) it should determine that it is not bound by such inconsistency; that the counties retain every growth management tool available to them even in the absence of that determination; and that Skyland should be certificated notwithstanding any such determination.

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 §367.045(5)(a), *F.S.*?

No, there are no other existing utility systems other than those operated by Skyland within the proposed territory or immediately adjacent thereto.

There is no legitimate issue that the creation of Skyland Utilities will be in competition with or a duplication of, any other utility system.

In *ECFS*, the Commission held that it "cannot determine whether a proposed system would be in competition with or a duplication of another system when such other system does not exist". *ECFS, Id* at 22. The Commission further went on to opine that "we do not believe Section 367.045(5)(a), *F.S.*, requires this Commission to hypothesize which of two proposed systems might be in place first and, thus, which would compete with or duplicate the other. Engaging such speculation would be of no use". *ECFS, Id* at 22.

In *Farmton*, in addressing the issue of competition or duplication, the Commission

reaffirmed its decision in *ECFS* that it cannot determine whether a proposed system will be in competition with or a duplication of another system when such other system does not exist. *Farmton, Id* at 20. The Commission concluded that "since the Intervenors have not demonstrated that they have existing facilities in place to serve Farmton, we find that the utility's application complies with §367.045(5)(a), *F.S.*, and that it will not be in competition with, or duplication of any system". *Farmton, Id* at 20.

It was Mr. Hartman's opinion that Skyand would not be in competition with or a duplication of any other system (Tr. 77). His conclusion was based upon his knowledge of Skyland's proposed certification and activities as well as his knowledge and review of the service area and facilities of adjacent, surrounding and nearby utilities (Tr. 77-78). Mr. Hartman noted that neither of the counties in this case had proposed to serve these areas; nor had they proposed rates for service to these areas (Tr. 741); nor had they conducted cost of service studies in order to assess what costs, and what ultimate effect on their own rate payers, would result from service to all or part of the lands Skyland seeks to certificate (Tr. 741).

In *ECFS*, the Commission considered an argument by the South Brevard Water Authority that it had promulgated a service area which would overlap with that requested by the applicant. The Commission, rejecting the argument as unpersuasive, noted that:

> SBWA offers no cogent legal or policy grounds for excluding the overlapping area from ECFS's proposed territory. Just because SBWA was statutorily created does not mean that the preservation of its territory is any more in the public interest than granting ECFS the same territory, even though ECFS was not similarly created.

ECFS, Id at 23.

At best, any claim that there is a competition between, or a duplication of, systems in this case would have to be predicated upon the counties' ostensible promulgation of "service territories" to their respective county boundaries. No existing facilities are in place and no plans

(even in the form of master planning) exists to extend those facilities (other than Mr. Kennedy's 11th hour epiphany in his surrebuttal testimony that Pasco might be willing to serve one parcel of the properties of Evans Properties after initially testifying that the county had no such plans (compare Tr. 362 to Kennedy's surrebuttal summary, delivered in the last hour of hearing, at Tr. 968).

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

Yes, Skyland has demonstrated the financial ability to serve the requested territory.

Skyland has clearly demonstrated the financial ability to operate its proposed utility and to serve the requested territory. Initially, the evidence clearly established that Skyland's parent entity is Evans Utilities and the parent entity of Evans Utilities is Evans Properties (Tr. 826-827).

Mr. Edwards addressed the financial commitment of the utility and its ultimate parent entity to the sound and efficient construction and operation of the utility on a going-forward basis (Tr. 821-823). Evans Properties owns and controls 43,000 acres of real property in Florida, free and clear of debt, on which it conducts substantial commercial activities (Tr. 822). The utility, through funding from its parent company, has ample access to capital through infusion of debt or equity to fund any of the capital needs projected for the utility (Tr. 822; Ex. RE-1). The application included a funding agreement found at Appendix VII, and Mr. Edwards expressed Evans Properties' continued ability to fulfill its commitments therein (Tr. 822-823). On cross-examination from OPC, Mr. Edwards revealed that for the sale of 1700 acres in 2008 to the South Florida Water Management District, Evans Properties received over $52 million (Tr. 863-864).

Mr. Edwards indicated that Skyland's application fairly represents the capabilities and

commitments of Evans Properties and Evans Utilities and Skyland Utilities (Tr. 912-913) and testified that whether or not the funding agreement was enforceable in a court of law, it embodied the commitment of Evans Properties, Evans Utilities, and Skyland Utilities (Tr. 909).

Mr. Hartman made clear that he had personal knowledge of Evans Properties' finances (Tr. 99-100). Mr. Hartman was also of the opinion, given his review of the operations, land holdings, and financial and operational information made available to him, that Skyland has the financial ability to serve the requested territory (Tr. 78).

There was no real effort by any Intervenor in the case to establish that Skyland will not have the financial ability to serve the requested territory, other than by and through an attempt on the part of Hernando County and (primarily) Pasco County to bar the admission of all evidence on the point by a restrictive and arcane interpretation of the Rules of Evidence, which as argued elsewhere herein do not even apply to this proceeding.

In the past, in a situation very similar to that presented by this application, the Commission had found that since the utility's parent, the owner of the land to be certificated, had testified (by and through Mr. Hartman) that it would provide funding, such testimony was sufficient assurance even without a written agreement. See, *ECFS*, supra, at 18. In this case, a funding agreement exists which documents that commitment.

In the *ECFS* case, Mr. Hartman testified that the parent organization of ECFS would provide funding, and Mr. Baker, a member of the Board of Directors of ECFS, and a parent company, testified that the utility's parent company would provide funding whenever funds were needed. The Commission rejected a suggestion that Mr. Hartman's testimony was hearsay, noting that not only was Mr. Hartman qualified to testify on behalf of ECFS (just as he is qualified to testify on behalf of Evans Properties in this case), but that the testimony of Mr.

Baker supplemented the testimony of Mr. Hartman (just as the other evidence, including the testimony of Mr. Edwards, supplements that of Mr. Hartman in this case). See, e.g., *ECFS, Id*, at 18. Just as in that case, where the Commission noted that "since most of the entities involved in ECFS's proposal are related, it seems to us that everyone involved has an interest in keeping ECFS financially healthy", the entities involved in the present application are similarly related, and each has an interest in keeping Skyland financially healthy. (See, *ECFS, Id*, at 19).

The Commission has previously noted that, with respect to the substitution of a parent's financial statement for that of the utility, it had been the Commission's practice to accept the statement of the parent's financial ability in original certificate cases where the utility has not yet established financial history. *Farmton, Id* at 22. The Commission further opined that it has traditionally recognized the vested interest of a parent for the financial stability of the utility. *Farmton, Id* at 22. Just as in the *Farmton* case, Evans Properties has a vested interest in the financial stability of Skyland.

Skyland has demonstrated it has the financial ability to effectuate its application.

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

Yes, Skyland has the necessary technical ability. Skyland is currently operating the water systems within the proposed territory and has retained and will retain additionally qualified individuals and/or entities to assist in the operation of the utility as additional needs arise.

Skyland has demonstrated that it both possesses and will retain and obtain all of the technical personnel and expertise necessary in order to effectuate its application.

Mr. Edwards expressed the understanding that Skyland will retain the very best people to design these facilities, to work with state and local government in the permitting and construction of the facilities, and to operate the facilities thereafter (Tr. 820). Mr. Edwards testified that Skyland would retain the experts and the employees that it needs to operate as and when needed if it received the certificate (Tr. 901). Mr. Edwards indicated that Skyland would

contract or employ the best, as it was doing now in the certification process, such as those that have the skills and the experience to manage and operate the utility (Tr. 901). One of the reasons Mr. Hartman was hired was that he has extensive expertise in water and wastewater matters (Tr. 901). Mr. Hartman's credentials are beyond challenge, as he is surely one of the most experienced individuals in all matters related to the certification, creation, design, permitting, and operation of public and private utilities in Florida. (See Ex. 4).

In response to a question from Commissioner Brisé, Mr. Edwards indicated that Evans Properties has about 120 year-round employees and employs up to 600 seasonal employees during the harvest period. Mr. Edwards provided that Skyland would staff appropriately for the size and complexity of the utility operation (Tr. 890).

Mr. Edwards indicated that Skyland's application fairly represents the capabilities and commitments of Evans Properties and Evans Utilities and Skyland Utilities (Tr. 912-913).

In *Farmton*, the Commission noted that the utility had represented that it would employ competent, experienced persons for the technical purposes of operating a utility. The Commission noted that with the continued services of Hartman and Associates, coupled with the existing experience of the Farmton employees, the Commission had no indication that a high level of technical ability cannot be and would not be maintained by the utility. *Farmton, Id* at 24. Just as was the case in *Farmton*, Evans Properties and Skyland are committed to employ competent and experienced persons for the technical purposes of operating the utility.

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?

Yes, Skyland has provided leases between the utility and the landowner. These leases will allow Skyland the use of lands throughout the territory as and when needed on a long term basis. The landowner will continue to work with Skyland as to the continued use of the land.

Skyland has provided sufficient evidence that it will have continued use of the land

where the utility facilities will be located. Skyland has provided leases between the utility and the landowner, which have been executed by the utility and the landowner. These leases will allow Skyland the use of lands throughout the proposed territory as and when needed on a long term basis for utility treatment facilities. Evans Properties is fully committed to Skyland's operation and will continue to work with Skyland as to the utility's need for the continued use of the land.

Mr. Edwards testified that although there had been several questions about particular forms in the application, such as the lease and the funding agreement that in fact Skyland had met with the staff and had attempted to use forms acceptable to the Commission (Tr. 908-909). Skyland indicated that it was willing to increase the leases in length and/or time frame such that they are acceptable to the staff if in fact the utility is certificated (Tr. 909). Mr. Edwards also indicated that the entities which had entered into the leases stand by their commitments (Tr. 909). Mr. Hartman testified that he had been authorized by Evans Properties to state that such changes as needed would be made to the leases after working with Commission staff (See, e.g. Tr. 147-148).

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

Yes, there is a need for service. No other entity has facilities to provide the service efficiently and effectively. Skyland is in the best position to provide the services and to operate those facilities in a manner which will best utilize and preserve available resources for customers within the territory.

The public entities which are the Intervenors in this case do not merit particular deference as to the public interest merely because they are, in fact, public entities. On the one hand, the Commission should give due consideration to the fact that (in stark contrast to the longevity of Evans Properties with regard to its ownership of the parcels here in question) the public entities are merely adopting the position of the officials who govern them at this particular

point in time. Additionally, the preeminent public interest in this case is that of the landowner, who has requested this service, who supports Skyland's certification, and who has set forth the need and demand for service (both present and future). The only public interest that the Intervenors relied upon was that ostensibly promoted if the Commission would agree to, in effect, act as the growth management agency of first resort and to preemptively deny the application in the hope that it would suppress growth on the lands of Evans Properties in the future. This the Commission should decline to do. A legitimate public interest consideration for these Intervenors would have been the effect on their respective rate payers of either rendering, or being unable to render, service upon these properties. On this point the Intervenors introduced absolutely no credible evidence. There was no cost of service study. There was no quantification of any supposed affect on their rate payers. There was no alleged disruption of their future master plans. There was no evidence of interference with existing or future debt instruments, the ability to expand and operate their utilities, or other operational, technical, financial, or regulatory adverse effects on their ongoing operations.

The record established that it is in the public interest to grant Skyland's application for a variety of reasons including, but not limited to, the need for service, the potential utilization of the utility in the future, the fact that the lands Skyland seeks to certificate are owned and have been owned for a lengthy period by a related party who desires service from Skyland, and Skyland's willingness to construct and operate the utility in a way that is flexible, cooperative, and innovative. Skyland is also apparently the only entity willing to serve the densities currently permitted to be developed upon these lands.

Mr. Edwards testified, upon cross-examination by Pasco County's counsel, that Evans Properties had met with representatives of Pasco County in an attempt to work cooperatively

with them (Tr. 837-838). Mr. Edwards indicated that similar discussions had occurred between Evans Properties and Hernando County, particularly as it relates to the contaminated wells which were discussed at length in the hearing (Tr. 838-839). Mr. Edwards directed individuals on behalf of Evans Properties to initiate discussions about the possibility of settlement with Hernando and Brooksville, in between the time the trial recessed and reconvened. Those efforts were unsuccessful (Tr. 910). Neither Hernando County, Pasco County, nor Brooksville were willing to work with either Evans Properties or Skyland in this regard. Despite this, the record is clear that Evans Properties and Skyland continue, and intend to continue, to be willing to work cooperatively with those public entities.

Mr. Edwards talked about how, before the hearing reconvened, Evans Properties had had a meeting with the South Florida Water Management District and the St. Johns Water Management District to explore cooperative ways that Evans Properties and its related utilities could be utilized in concert with local government in the public interest (Tr. 847-850). Mr. Edwards discussed the willingness of Evans Properties and Skyland to engage Pasco County and Hernando County as to how water which lies beneath the lands owned by Evans Properties might be utilized in the public interest, in an attempt to assuage local government's fears that Evans Properties wanted to pump water and send it to remote locations (Tr. 849-850).

Mr. Edwards testified that Evans Properties continues to be concerned about preserving the land, having owned it for over 50 years, and that it would want to continue to take care of the land in whatever it does into the future (Tr. 859). Despite a drawn out attempt by OPC, whose apparent point was that Evans Properties might sell the utility, or divest itself of the land, the testimony and record was clear that no such present intention exists (see, e.g., Tr. 859-862). Mr. Edwards reiterated that there was no present intention by Skyland to sell the utility

after certification or by Evans Properties to divest itself of ownership of the utility, to transfer the utility, or to abandon any part of it (Tr. 907-908).

Mr. Edwards, in response to a question from Commissioner Graham, opined about the possibilities, both as they exist and as they continue to evolve, for the lands owned by Evans Properties and the utilities which Evans Properties proposes to certificate (Tr. 886-888).

Commissioner Brisé, following up on a line of questions from OPC, inquired whether there would be an opportunity for real negotiations between the two entities (Skyland and Evans Properties) in the future. Mr. Edwards opined that Evans Properties felt that regulation by the PSC was the ultimate protection for the rate payer and the ultimate safeguard given the fact that these are related parties (Tr. 891-892).

Referring to Exhibit 42, Mr. Edwards opined that while there had been several questions about property being "carved up" or the "checkerboard" pattern of Evans Properties, that an examination of the utility service areas of Hernando County, Pasco County, and Dade City Utilities, as well as Brooksville Utilities, certainly revealed a checkerboard pattern, as that phrase had been used in this proceeding, and would appear to dispel the very concerns about property being "carved up" for utility services, as had been discussed. See, e.g., Tr. 906-907. It was Mr. Hartman's opinion that utilities with noncontiguous service areas could be served efficiently and effectively (Tr. 755).

Mr. Edwards indicated that based on his knowledge of the limits of the Commission's jurisdiction that Skyland intends to engage in a mixture of activities which are both jurisdictional and non-jurisdictional (Tr. 912). He indicated that the creation of Skyland, such that it would be in a position to engage in those activities, would be in the public interest (Tr. 912). Skyland several times indicated its willingness to work with local government and/or landowners to assist

in a solution to the contaminated well problem (Tr. 914). Mr. Hartman also testified that the creation and operation of Skyland would be in the public interest. Contrary to the county testimony that these areas would be better served by private wells and on-site septic systems, Mr. Hartman testified that service by a regulated and responsible utility was in the best interest of the public health and safety (Tr. 564).

For all of the reasons set forth within this brief and in the record in this proceeding, certification of Skyland is in the public interest.

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

The appropriate return on equity for Skyland is the return on equity yielded by the most current leverage formula order in effect at the time the Commission issues its Final Order in this proceeding.

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?

The appropriate potable water and wastewater rates are those proposed by Skyland in its application.

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

The appropriate service availability charges for Skyland are those as proposed by Skyland in its application.

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?

The appropriate Allowance for Funds Used During Construction (AFUDC) rate for Skyland is that yielded by use of the leverage formula in effect at the time the Commission issues its Final Order in this proceeding and the cost of debt as outlined in the application of Skyland.

Issue 14: Should this docket be closed?

Upon issuance of the certificates requested, this docket should be closed.

HEARSAY ISSUES

At the commencement of the proceeding, staff counsel stated for the record that, as to objections based on the ground that evidence contains or is comprised entirely of hearsay, parties should make the objection on the record, and that no ruling on hearsay objections would be made at the hearing, but that the parties would rather be afforded the ability to address those particular hearsay arguments in their briefs.

Setting aside for a moment some of the specific points addressed below (the lack of specificity of the objection, the fact that the only exhibit which is clearly hearsay has been repetitiously corroborated, etc.), three points are paramount in any discussion of this issue. The first is that the challenged statements are not hearsay. The second is that the challenged statements are clearly admissible (and in fact have already been admitted), even if determined to be hearsay. The third is that each of the challenged documents or statements are sufficiently corroborated such that they can and should support findings of fact on the subject matters which they address.

The challenged statements are not hearsay.

Mr. Ronald Edwards is the President and Chief Executive Officer of Evans Properties, Inc., Skyland's ultimate parent entity, and the Manager of Skyland Utilities, LLC, the applicant in this case (Tr. 811). Mr. Edwards is testifying on behalf of Skyland Utilities and Evans Properties, Inc. (Tr. 811).

Mr. Edwards explained that Skyland Utilities is a single member LLC that is owned by Evans Utilities and Evans Utilities is wholly owned by Evans Properties. His testimony was on behalf of all three of those entities (Tr. 826-827). Mr. Edwards is the President of all three entities (Tr. 827). Mr. Edwards opined that Mr. Hartman is an agent for all three Evans (Evans

Properties, Evans Utilities, and Skyland) entities (Tr. 830) and indicated that Mr. Hartman was authorized to speak on behalf of Evans Properties, Skyland Utilities and Evans Utilities (Tr. 913). Mr. Edwards indicated that he had heard Mr. Hartman's testimony in the trial and that he affirmed Mr. Hartman's testimony and had no concerns with it (Tr. 913-914).

Mr. Hartman indicated that he had been authorized by Evans Properties to speak on their financial abilities, the need for service, and their other capabilities (see, e.g., Tr. 157-158) and that the application had been put together by him or those working under his control (Tr. 75-76).

With two possible exceptions, the challenged statements, and the application in and of itself, are not hearsay because the very rule of evidence (which does not apply in any case) upon which Pasco and Hernando Counties rely provides that "hearsay" is a statement *other than one made by the declarant while testifying at the trial or hearing* offered in evidence to prove the truth of the matter asserted. §90.801(1)(c), Florida Evidence Code. In this *de novo* proceeding, each of the challenged statements, with the exception of perhaps staff Exhibit 14 and Skyland Exhibit 40, were made anew, or at a minimum reaffirmed, by declarants while testifying.

Mr. Edwards was clear that he speaks for Skyland. Mr. Hartman testified that he speaks for Skyland. Mr. Edwards agreed that Mr. Hartman speaks for Skyland. Mr. Edwards made clear that Skyland and Evans Properties, by and through Mr. Edwards' voice, affirmed Mr. Hartman's testimony. The funding agreement, the lease agreements, the representations of Skyland, the financial statement, and the application itself, were all reaffirmed, adopted, addressed, and affirmatively put forth, such that they could be subject to cross examination and such that they would and could be (and were) subject to discovery (the lack of which is the very concern the hearsay rule is intended to address).

The challenged statements are clearly admissible (and in fact have already been admitted), even if determined to be hearsay.

The clear legislative directive embodied in the Administrative Procedure Act in §120.569(2)(g) 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)

At this point, all objections having been made and contemporaneously ruled upon (and denied) at the hearing, there is no argument that any of the challenged exhibits are either "irrelevant", "immaterial", or "unduly repetitious".

In that regard, several matters are important to consider. While the only hearsay objections clearly made on the record appeared to relate to Exhibits 2, 4, and 14 (Tr. 168), Exhibits 2 and 4 (Tr. 170) and Exhibit 14 (Tr. 171) were all admitted into the record. It is assumed it was not the intention of the Commission, by implementation of the procedure outlined above, to subsequently "unadmit" any exhibit, but rather to allow the parties the opportunity to determine whether the facts set forth in the exhibit as admitted are sufficient on which to base a finding of fact, as addressed below. The objection of Pasco's counsel that "the whole application is hearsay" is not sufficiently stated to thrust the burden upon either Skyland, nor the staff, nor this Commission to sort through and devine the specific objection to each page of the voluminous application that is Exhibit 2. In that regard, while the argument below applies equally to any hearsay argument, the specific hearsay objections set forth on the record were to the water lease and wastewater lease agreement, the funding agreement, and staff Exhibit 14.

The Intervenors continuing objection relies upon a classic misinterpretation of the

Administrative Procedure Act as it relates to the admissibility of hearsay. Section 120.57(1)(c), *F.S.*, 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 in civil actions.

This provision of the APA 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".

The very fact that the Intervenors persist in any hearsay objection, to the extent it relates to admissibility, belies the purpose and nature of an administrative proceeding in Florida. In this very case, the Pre-Hearing Officer has issued an Order denying Pasco County's Motion to Strike which order contains a clear and appropriate discussion of the nature of hearsay evidence. See, *Order Denying Pasco County's Motion to Strike Portions of the Direct Testimony of Witness Gerald Hartman* (Order No. PSC-10-0431-PCO-WS, July 6, 2010). Hearsay evidence is admissible in Chapter 120 proceedings, and only "irrelevant, immaterial or unduly repetitious material is inadmissible". *Id* at 3. The provisions of the APA are much broader than the Evidence Code and, as such, even evidence not admissible under the Evidence Code would still be admissible in a proceeding before the Commission. *Id* at 3.

Even if hearsay, each of the challenged documents or statements are sufficiently corroborated such that they can and should support findings of fact on the subject matters which they address.

No credible argument can be made with regard to admissibility, given the fact that the documents have already been admitted. To essentially retract their admission into the record at this point would be unduly prejudicial to Skyland, as Skyland would have conducted its activities in the proceeding thereafter differently if in fact the documents had not been admitted.

The water lease and wastewater lease agreements were specifically objected to on the basis of hearsay (Tr. 163). The funding agreement was specifically objected to on the basis of hearsay (Tr. 163). Staff Exhibit 14 was specifically objected to on the basis of hearsay (Tr. 163). The lease agreements, the funding agreement, and staff Exhibit 14 are all discussed elsewhere within this brief. Each is either not hearsay, because the content was sworn to or affirmed by an in-court-declarant, or are corroborative (such as in the case of staff Exhibit 14) of a plethora of evidence. The lease agreements, their origins, their drafting, and Skyland's willingness to modify and adjust them on a going forward basis were discussed. The funding agreement was reaffirmed by Mr. Hartman and Mr. Edwards, and represents just one part of the body of financial ability evidence put forth by the applicant and Evans Properties. Similarly, staff Exhibit 14 is collaborative of evidence of financial ability which, while perhaps open to a charge of redundancy, cannot be questioned to establish that such financial ability exists.

Exhibit 40, the June 7, 2010 letter from SunTrust, which was an exhibit to Mr. Edwards' testimony, also clearly fits the classic (and inapplicable for our purposes) definition of "hearsay", but is admissible nonetheless because it is the type of evidence commonly relied upon by reasonably prudent persons in the conduct of their affairs. More to the point though, Exhibit 40 is evidence which should be considered in any determination of Skyland's financial ability to serve the requested territory because it is (redundantly) supplemental to or explained by other evidence including, but not limited to, the testimony of Mr. Edwards, the testimony of Mr.

Hartman, the funding agreement, and the confidential financial information set forth in staff Exhibit 14.

The objections to the admissibility of documents which demonstrate Skyland has the financial ability to serve the requested territory are but a tactic (rather than the analysis of a legitimate issue) and a red herring. The Commission should determine that the exhibits admitted into the record are all either admissible under the APA for all purposes and/or sufficient to rely upon for a finding of fact because they corroborate other evidence such that this proceeding may be adjudicated fully on its evidentiary merits.

CONCLUSION

Skyland has demonstrated through its application and the evidence presented at hearing, that there is both a present and a future need for a variety of jurisdictional water and wastewater services within its proposed service territory and that it has the ability, both financial and technical, to provide the service in that proposed territory. In addition, Skyland has presented ample evidence to demonstrate that the certification of the utility by the Florida Public Service Commission is in the public interest and that Skyland is by far in the best position to provide those needed services. For all of these reasons, the Commission should grant the request for certification of the applied for properties to Skyland.

Respectfully submitted this 15th day of October, 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 on this 15th day of October, 2010, to:

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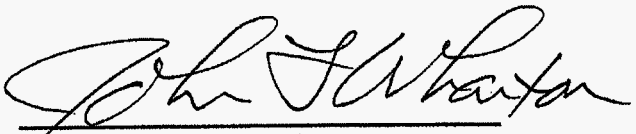

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