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090478-WS

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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:

Hernando County, Hernando County Water and Sewer District, and Hernando County Utilities Regulatory Authority

d. The total number of pages in each attached document: 36 pages

e. A brief but complete description of each attached document: Post Hearing Statement of the Issues and Positions and Post Hearing Brief

<<Hernando-PostHearing-Brief-SkylandUtilites-101510.pdf>>

STATE OF FLORIDA
PUBLIC SERVICE COMMISSION

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

Case No.: 090478-WS

_____/

POST HEARING STATEMENT OF THE ISSUES AND POSITIONS AND POST HEARING BRIEF OF HERNANDO COUNTY, HERNANDO COUNTY WATER AND SEWER DISTRICT AND HERNANDO COUNTY UTILITY REGULATORY AUTHORITY

Hernando County, a political subdivision of the State of Florida, Hernando County Water and Sewer District, a body politic of the State of Florida, and Hernando County Utility Regulatory Authority, a body politic of the State of Florida (collectively Hernando), through counsel and pursuant to Order No. PSC-10-0422-PHO-WS, jointly file this Post Hearing Statement of the Issues and Positions and Post Hearing Brief: This Brief includes Hernando's proposed findings of fact and conclusions of law pursuant to Rule 28-106.215, F.A.C.

I. QUESTIONS PRESENTED

Does the Public Service Commission (Commission or PSC) have subject matter jurisdiction over Hernando pursuant to Section 367.171(7), Florida Statutes. If the Commission has jurisdiction, should the Application filed by Skyland Utilities, LLC (Skyland) be denied, as requested by Hernando, Pasco County and the City of Brooksville?

II. CASE BACKGROUND

On October 16, 2009, Skyland filed an application for original certificates to operate a water and wastewater utility in Hernando and Pasco Counties and for approval of initial rates and charges (Application). On November 13, 2009, Hernando, Pasco County, and the City of Brooksville each filed a protest to Skyland's Application. On June 16, 2010, the Office of Public Counsel intervened in this case (see Order No. PSC-10-0387-PCO-WS, issued June 16, 2010).

By Order No. PSC-10-0105-PCO-WS (Order Establishing Procedure), issued February 24, 2010, the Application was scheduled for administrative hearing to be held on July 7 – 8, 2010. A Prehearing Conference was held on June 28, 2010. On July 1, 2010, the Prehearing Officer issued Order No. PSC-10-0422-PHO-WS (Prehearing Order) establishing the parameters of the formal hearing. The formal hearing occurred on July 7, 8 and September 23, 2010.

The first portion of the formal hearing was the 'service hearing' wherein public comment was received. Richard Riley, Virginia Blake, Jill Velverton, Judith Geiger, Richard Radacky and Nancy Hazelwood testified during the service hearing. The second portion of the hearing was the 'technical hearing.' During the technical hearing, Skyland presented one direct witness, Gerald Hartman, and two rebuttal witnesses, Daniel DeLisi and Ronald Edwards. The PSC had two direct witnesses, Daniel Evans and Paul Williams. Pasco had two direct witnesses, Bruce Kennedy and Richard Gehring with Mr. Kennedy giving surrebuttal testimony. Hernando had two direct/surrebuttal witnesses, Joseph Stapf and Ronald Pianta.

III. CONDUCT OF PROCEEDINGS

Prior to the formal hearing, Hernando requested that the Commission change its post hearing procedures and require that all of the parties – including the PSC staff – file Proposed Final Orders at the same time, citing to the Florida Administrative Procedures Act as contained within Chapter 120, Florida Statutes. Hernando's request was denied pursuant to Order No. PSC 10-0433-PCO-WS, issued July 6, 2010 (PSC Doc. # 05497-10).

IV. JURISDICTION

Hernando filed a Motion to Dismiss on October 13, 2009 asserting that the Commission did not have subject matter jurisdiction over Hernando pursuant to Section 367.171, Florida Statutes. Hernando's motion was denied per Order No. PSC 10-0123-FOF-WS, issued March 1,

2010. Following the denial, Hernando filed a *Petition for Writ of Quo Warranto*, dated April 8, 2010, with the First District Court of Appeal. By Order of the Court dated May 4, 2010, Hernando's Petition was deemed a *Petition for Writ of Prohibition.* The same day, the First District issued a Per Curiam Opinion denying Hernando's Petition. The First District's summary disposition of Hernando's Petition does not constitute an adjudication on the merits. Hernando has reiterated its objection to the Commission's exercise of subject matter jurisdiction in its Prehearing Statement filed June 14, 2010 (PSC Doc. # 04951-10) and during the formal hearing.

V. TRANSCRIPTS, EXHIBITS AND WITNESSES

The transcript of the technical portion of the formal hearing will be referred to as "Tr. __" (followed by the page(s) referenced and line numbers as appropriate). The transcript of the service hearing will be referred to as "Service Hearing Tr. __" (followed by the appropriate references). Exhibits admitted into evidence will be referred to as "Ex. __."

Skyland's Application, inclusive of all exhibits and appendices, is Ex. 2 in the record and will be referred to as "App. __" (followed by the page number, exhibit number, appendix section, or other identifying description as appropriate).

Witnesses will be referred to by their last name.

Where Hernando has added emphasis to testimony or text will be denoted by "(e.s.)."

VI. ISSUES AND POSITIONS

The issues numbered 1 - 14 below correspond to the fourteen issues set forth in the Prehearing Order. Factual assertions below should be treated as Hernando's proposed findings of fact where appropriate. Similarly, legal argument below should be treated as Hernando's proposed conclusions of law.

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?

*No. See discussion throughout this Brief.

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

*No. Skyland failed to present competent substantial evidence that it satisfies this definition: that it would be serving the "public" (where it would actually be serving one house and one shop/barn on property owned by its ultimate parent company) for "compensation" (merely shifting money among related or affiliated entities).

Chapter 367 defines 'Utility' to mean "a water or wastewater utility . . . who is providing, or proposes to provide, water or wastewater service to **the *public* for *compensation*.**" Section 367.021, Florida Statutes (e.s.). Skyland does not satisfy this definition.

Skyland is a wholly owned subsidiary of Skyland Utilities, Inc. (Skyland Utilities), which is wholly owned by Evans Properties, Inc. (Evans Properties) of which Ronald Edwards (Edwards) is the President and/or Manager of all entities (Edwards, Tr. 826 ln. 9 - Tr. 827 ln. 12).

Here, there were only two requests for service in Skyland's Application and both were from Evans Properties. One was signed by Ronald Edwards as President of Evans Properties and the other was signed by J. Emmet Evans, III, as Vice President of Evans Properties (App. Appendix I; App. Exhibit A ¶ 2). Gerald Hartman (Hartman), the consultant who prepared Skyland's Application (Hartman, Tr. 76 ln. 3 - ln. 7), testified that the requests for service are to serve one house and one shop/barn owned by Evans Properties (Tr. 97 ln. 22 - ln. 25 and Tr. 616 ln. 20 - Tr. 617 ln. 2). When asked "have there been any formal demands for service made to Evans Properties or Skyland Utilities other than the demand or request for service for the existing residence and a shop?" Mr. Edwards answered "no" (Edwards, Tr. 832 ln. 13 - ln. 17).

Conversely, no record evidence has been introduced that any person or entity not related to Skyland had made any formal demand or request for service.

In sum, the only record evidence is that Skyland will be providing water and wastewater service to Evans Properties, its ultimate parent company, based upon the two requests for service. Based upon the definition of 'utility,' the phrase "the public" should envision something broader than serving oneself – or a closely related/affiliated entity or *alter ego* of oneself (see Tr. 826, ln. 9 - Tr. 827 ln. 12) – and the phrase "for compensation" should envision something broader than merely shifting balance sheets among related/affiliated entities or *alter egos* considering the close and familiar inter-relationships between Evans Properties, Evans Utilities, and Syland. Therefore, the Commission should find that Skyland cannot meet the definition of a "utility."

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

*No. Skyland has no infrastructure which transverses county boundaries; therefore, Commission lacks subject matter jurisdiction. Alternatively, Commission should deny certification because Skyland's attempt to bring this matter under its jurisdiction is based on speculation and hyperbole as to when Skyland would have infrastructure in the ground which transverses county boundaries.

The controlling law on whether the Commission may exercise jurisdiction over Hernando County, a non-jurisdictional county, is Section 367.171(7) which states that "the commission shall have exclusive jurisdiction over all utility systems whose ***service transverses*** county boundaries, whether the counties involved are jurisdictional or nonjurisdictional . . . ." (e.s.).

The record evidence is absolute that Skyland has no pipes or infrastructure in the ground which transverse Hernando and Pasco boundaries. Skland's Application stated that "physical interconnections ***will occur that traverse county lines*** [between Hernando and Pasco Counties] ***during future phases***" (App. Exhibit C at p. 2, last sentence) (e.s.). Gerald Hartman, the

consultant for Skyland who prepared its Application (Tr.76), confirmed that Skyland has no physical pipes or infrastructure in the ground which transverse Hernando and Pasco Counties (Tr. 81 ln. 18 - Tr. 82 ln. 24).

Accordingly, since the established record evidence clearly indicate that Skyland currently has no pipes or infrastructure which physically transverse county boundaries, the legal question becomes whether the Commission may continue to exercise subject matter jurisdiction over Hernando. E.g., Klonis v. Department of Revenue, 766 So.2d 1186, 1189 (Fla. 1st DCA 2000) (the defense of lack of subject matter jurisdiction may be raised at any time in the proceeding).

The cardinal rule of statutory construction is to give the words used their plain meaning.

> "Legislative intent is primarily discerned from the language of the statute. Miele v. Prudential-Bache Securities, Inc., 656 So.2d 470, 471 (Fla.1995). "The cardinal rule of statutory construction is that the courts will give a statute its plain and ordinary meaning." Weber v. Dobbins, 616 So.2d 956, 958 (Fla.1993). The plain ordinary meaning of words may be ascertained by reference to a dictionary. Green v. State, 604 So.2d 471, 473 (Fla.1992). **The word "transverse" means: "situated or lying across."** THE AMERICAN HERITAGE COLLEGE DICTIONARY 1438 (3d ed.1993). We conclude that the requirements of this statute can only be satisfied by evidence that the facilities forming the asserted "system" ***exist*** in contiguous counties across which the service travels. See Board of County Commissioners of St. Johns County v. Beard, 601 So.2d at 593."

Hernando County v. Public Service Commission, 685 So.2d 48, 52 (Fla. 1st DCA 1996) (e.s.).

Another fundamental principle of statutory construction is that a specific statute will trump a general statute. School Board of Palm Beach County v. Survivors Charter Schools, Inc., 3 So.3d 1220, 1233 (Fla. 2009) ("principle that specific statutes covering a particular subject area will control over a statute covering the same subject in general terms"); Murray v. Mariner Health, 994 So.2d 1051, 1061 (Fla. 2008) ("where two statutory provisions are in conflict, the specific provision controls the general provision"). Here, the general definition of 'utility' contained in

Section 367.021(12) is trumped by the more specific requirement contained in Section 367.171(7) which mandates that the service must transverse county boundaries as a prerequisite to the Commission obtaining exclusive jurisdiction. In this context, "transverse" is an active verb. Conversely, if the Florida Legislature had intended that the mere proposal to cross county boundaries at some point in the future was sufficient it would not have used the active phrase "whose service transverses" county boundaries. See Hernando, supra, 685 So.2d at 51-52.

Third, Section 367.171(7) should be read *in para materia* with the other subsections of Section 367.171 which recognize the rights of counties to self-govern water and sewer utilities within their boundaries. Thus, at the time Skyland has pipes in the ground which cross county boundaries, then giving the Commission jurisdiction to set common rates makes rational sense. To find otherwise would render the rights given to counties pursuant to Section 367.171 illusory, and would reach an absurd result if a utility can simply avoid local jurisdiction by *merely promising to provide cross-county service* – at *some undefined point in the future* [as Skyland has done here] – and thereby defeat counties from exercising self-governance over local water and sewer utilities as the Florida Legislature intended. See Hernando, supra, 685 So.2d at 51 (e.s.):

> "If the legislature had intended the administrative and operational functions of a company to satisfy the cross-county activity necessary to support PSC jurisdiction under section 367.171(7), it could have simply used the word "system" instead of also referring to "service." In other words, the legislature could have provided that the commission shall have exclusive jurisdiction over all utility systems which transverse county boundaries, or, even more expansively, which operate in multiple counties. **We must presume that these limiting terms were deliberately included to restrict the exercise of PSC jurisdiction over utilities in nonjurisdictional counties.**"

Based upon the foregoing and the established record here, the Commission does not have subject matter jurisdiction over Hernando. Section 367.171(7), Florida Statutes; Hernando, supra.

In the Alternative

Even assuming – for sake of argument and notwithstanding the foregoing arguments of law – that physical interconnection across county boundaries was not required for a start-up water/wastewater utility at the time of startup, the established record does not justify the Commission granting jurisdiction over Skyland because Skyland is unable to state when physical interconnection will occur – if at all. Skyland stated in its Application that: "Future phases will begin upon the completion of Phase 1. . . . Phases II through V have not been conceptually designed at this time . . ." (App. Exhibit D at ¶ 2). The Application further stated that "physical interconnections will occur that ***traverse county lines*** [between Hernando and Pasco] **during future phases.**" (App. Exhibit C at ¶ 1, last sentence) (e.s.). Similarly, the *Cost of Service Study*, which is a portion of the Application, stated:

> "It is anticipated that the future phases will be utilized in the order indicated on the proposed service area map in Appendix I and as discussed in more detail in Exhibit A. **There have been no conceptual plans developed as of this time for future development phases.** Where units and/or consumption have been assumed in future phases in this filing, the maximum permitted dwelling units have been used without consideration of any restrictive issues."

(App. Appendix VIII – *Cost of Service Study* at p. 1) (e.s.). Further, when Mr. Hartman was asked, on cross-examination, what he understood the term "transverse" means, he replied "**goes across**" (Hartman, Tr. 105 ln. 11 - ln. 18) (e.s.).

Here, Skyland admitted in its Application, and during the formal hearing, that no planning, design or exact timing has been planned for future phases, and admitted that any transversing of county boundaries will not occur until some future phase. Accordingly, the record evidence establishes that the actual transversing of county boundaries by Skyland is extremely speculative,

including when and how it might occur, and which was succinctly illustrated by Commissioner Nathan Skop's cross-examinations during the technical hearing:

> "COMMISSIONER SKOP: Okay. Given that the contiguous parcels previously identified on Figure 3A as ID 10 and ID 6 will not be developed in Phase I of the proposed development, and that these parcels provide the basis for the Commission's subject matter jurisdiction in this instance, in your opinion is it reasonable to expect that the intervenors in this case might conclude that the respective comprehensive use plans of their counties and interlocal agreements are effectively being circumvented by this petition?
>
> THE WITNESS [GERALD HARTMAN]: I don't believe -- well, first, it's may (sic) relative to those parcels, and I don't think there is any circumvention. It's the desire of the property owner to have one -- to serve the public and to have his own utility corporation to do so.
>
> COMMISSIONER SKOP: So if I understand your testimony correctly, **you are asserting that you can essentially put a placeholder in place in the specter of future development to circumvent local comprehensive use plans that would otherwise prevent you from proceeding with the Phase I development that would be marked as, for example, ID 2**?
>
> THE WITNESS [HARTMAN]: I have not rendered any opinion about circumvention of anything, and later on I think Dan DeLisi can answer your questions real well on those types of issues.
>
> COMMISSIONER SKOP: All right. Thank you, Madam Chair."

(Tr. 141 ln. 3 - Tr. 142 ln. 5) (e.s.) and later during the hearing:

> "COMMISSIONER SKOP: . . . But right now the Parcel 10A and 10B and Parcel ID 6, [App. Appendix I, Figure 3(a)] it's not known when Skyland would provide service to those two contiguous parcels that would cross the county line, is that correct?
>
> THE WITNESS [HARTMAN]: Well, it could happen at any time. **It *could* happen – it depends on the market**. If an agribusiness wants to locate in that area, it could be short-term."

(Tr. 737 ln. 10 - ln. 18) (e.s.).

For the reasons stated, the Commission should not grant jurisdiction to Skyland based upon the mere recitation of words in Skyland's Application that ***it intends to*** transverse County lines at some point in time after 2015 as part of a Phase not yet planned or designed and for which the number of users or capacity demands are not known.

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

*No. The request for service in the record is for Skyland to serve one house and one shop/barn owned by Skyland's parent company, Evans Properties. Accordingly, the preponderance of evidence in the record does not support a "need" for service.

Lack of Need

The only requests for service in this record are to serve (1) a house and (2) a shop/barn, both owned by Evans Properties, Skyland's ultimate parent company. (Hartman, Tr. 616 ln. 20 - Tr. 617 ln. 2; Edwards, Tr. 832 ln. 13 - ln. 17).

No one from the public spoke in favor of Skyland's Application during the service portion of the formal hearing; however, six persons testified in opposition to Skyland's Application (Service Hearing Tr. 12 - Tr. 50). The absence of any public support whatsoever clearly goes to the issue of whether there is public "need" for a utility in the area being proposed by Skyland

Joseph Stapf (Stapf), Utilities Director for Hernando County, testified, that in the area that Skyland is seeking to serve "[t]here have been some isolated inquiries for service over the past several years. **During this time we have received no petitions or organized requests for water supply system installation in this area**" (Stapf, Tr. 232 ln. 8 - ln. 17) (e.s.).

Bruce Kennedy (Kennedy), Assistant County Administrator, Utilities Services, for Pasco County, was asked why Pasco County was not currently providing water or wastewater services in the area Skyland proposes to serve in Pasco. Mr. Kennedy testified: "There are numerous reasons

why we are not serving this area. **We have not received any requests for service.** The area is adequately and appropriately served by private water wells and individual septic tanks . . . " (Kennedy, Tr. 335 ln. 4 - ln. 6) (e.s.).

The issue of need was also evaluated by the Florida Department of Community Affairs (DCA) pursuant to a Memorandum of Understanding between the PSC and the DCA, wherein the DCA reviews for the PSC, among other things, "***the need for services in the application area***" (Daniel Evans, DCA, Tr. 178 ln. 24 - Tr. 179 ln. 2) (e.s.). Daniel Evans, Principal Planner and Assistant Administrator of the Central Florida Region with DCA (Tr. 176 ln. 18 - ln. 25) was admitted as an expert in land use planning in this proceeding (Tr. 182 ln. 19 - Tr. 183 ln. 9). In connection with his expert testimony, Mr. Evans stated that he reviewed the proposed service area and proceeded to list several areas of concerns to the DCA (Tr. 183). Mr. Evans testified:

> "Another thing that we [DCA] were concerned about in the application is the fact that **there did not seem to be a demonstrated need for the application as very few people actually live in the parcels that are actually involved.**"

(Daniel Evans, Tr. 184 ln. 11 - ln. 15) (e.s.).

Finally, the area being proposed for development in Phase 1 (App. Exhibit C, Exhibit D, and *Cost of Service Study*) can be adequately served by the existing permitting policies for private wells, septic tanks, and package treatment facilities (Staff's Ex. 16).

Contaminated Wells Issue

The so called 'contaminated wells issue' – referred to by Mr. Hartman in his rebuttal testimony – does not solve Skyland's problem of demonstrating need. It was not until his rebuttal testimony that Mr. Hartman first brought up "an email dated November 20, 2009, Mr. Charles Coultas with the DEP stated that DEP was dealing with some 200 or so contaminated potable private wells south of Brooksville" (Tr. 580 ln. 1 - ln. 3). Mr. Hartman discussed these so called

wells during his rebuttal testimony. The referenced email is Ex. 45 [the contents of which Hernando objects to as hearsay[1]].

Mr. Hartman admitted that there is no reference to these wells anywhere in Skyland's Application (Tr. 639 ln. 2 - ln. 6), and further admitted that he obtained the referenced email from Skyland's corporate counsel (Tr. 743 ln. 13 - ln. 25 and see Ex. 45). Moreover, on the issue of whether Skyland had obtained any actual requests from any of owners of the wells:

> "COMMISSIONER SKOP: . . . However, there is nothing in the record to indicate a specific request by any of the landowners with a contaminated well that they would like to have service, is that correct?"
>
> THE WITNESS [HARTMAN]: That's correct. . . ."

(Hartman, Tr. 751 ln. 3 - ln. 7).

Further, Skyland's attempt to use the so called contaminated wells to bootstrap demonstration of need is contradicted by Mr. Hartman's own testimony. Mr. Hartman testified that there are four components of a "request for service" to a utility: (1) a potential customer (2) ***that is located within the area proposed for certification*** (3) who communicates to the proposed utility (4) a need and a request for service. (Ex. 15 at pp. 86 - 87). Here, none of properties containing the so called contaminated wells are within Skyland's proposed service area and thus cannot

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[1]/ Prior to the commencement of the technical portion of the formal hearing, counsel for the PSC advised that "[n]o ruling with regard to those hearsay objections will be made at that time [evidence is admitted], but rather the parties will be afforded the ability to make those particular hearsay objections in their briefs." (Tr. 6 ln. 22 - ln. 25). At the formal hearing, the purported author of this email (Ex. 45) did not testify, nor did the first intended recipient testify. Instead, what was admitted was a daisy chain email – which may or may not have been altered along its route. Accordingly, the contents of this email and Mr. Hartman's discussion about this email (Hartman, Tr. 625 - Tr. 630; Tr. 742 - 750; should be **excluded** or **stricken** as hearsay (not otherwise satisfying any of the listed exceptions) under the Florida Rules of Evidence. See Section 90.801, Florida Statutes. Similarly, Mr. Hartman's testimony regarding his purported conversation with someone from DEP (specifically, Tr. 749 ln. 17 - Tr. 50 ln. 2) should be **excluded** or **stricken** as hearsay. Id.

constitute a 'request for service' even assuming, for sake of argument, that such request had been made.

Finally, Mr. Stapf, Utilities Director for Hernando County, confirmed the foregoing when he testified that "there was absolutely no demand or outcry from the residents of the properties which purportedly had said contaminated wells" (Stapf, Tr. 931 ln. 20 - ln. 22).

In sum, the issue of the so called contaminated wells was simply a **red herring** in a last minute effort by Skyland to demonstrate "need."

Summary – Record does Not Support the Need for Service

Based upon the unrebutted expert testimony of Daniel Evans on the issue of need, plus eight other witnesses who gave testimony that there was no need for service – versus the testimony of Skyland's two lay witnesses who rely upon the two self-serving service letters from Evans Properties (Skyland's ultimate parent company) – the preponderance of the evidence is that Skyland has failed to demonstrate "need" for service in the area it has proposed for certification as required under Section 367.045(1)(b) & (5)(a), Florida Statutes, and Rule 25-30.033(1)(b), F.A.C.

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

*Yes. The preponderance of the competent substantial record evidence is that locating a water and wastewater utility in the area that Skyland is seeking to serve in Hernando County would violate Hernando County's Comprehensive Plan.

The Florida Legislature has chosen to designate the Florida Department of Community Affairs (DCA) as the 'state land planning agency.' Section 163.3164(20), Florida Statutes. At the request of Caroline Klancke, the PSC's trial counsel, Daniel Evans, Principal Planner and Assistant Administrator of the Central Florida Region with DCA (Tr. 176 ln. 18 - ln. 25) was admitted as an expert in land use planning in this proceeding (Tr. 182 ln. 19 - Tr. 183 ln. 9). Mr. Evans testified that pursuant to a Memorandum of Understanding between the PSC and the DCA, the DCA

reviews applications for, among other things, consistency with the affected local government's comprehensive plan (Daniel Evans, Tr. 178 ln. 24 - Tr. 179 ln. 2). In connection with his expert testimony, Mr. Evans stated that he reviewed Skyland's Application and the relevant portions of the Hernando County's Comprehensive Plan (Tr. 179 ln. 3 - ln. 6). When asked if Skyland's Application was consistent with Hernando County's Comprehensive Plan, Mr. Evans testified:

> "The application is **inconsistent** with objectives and policies in the Hernando County Comprehensive Plan which discourage the use of public facilities in the Rural Land Use Category, discourage urban sprawl, require the provision of infrastructure in accordance with the long range plans of the County, and encourage the consolidation of wastewater and potable water services within the County."

(Daniel Evans, Tr. 179 ln. 21 - ln. 25 and see Ex. 7 (letter from the DCA)) (e.s.).

Ronald Pianta (Pianta), Planning Director for Hernando County (Tr. 286 ln. 22 - ln. 25) testified that locating a water and wastewater utility in the area proposed by Skyland would violate Hernando County's Comprehensive Plan (Pianta, Tr. 289 ln. 18 - Tr. 290 ln. 18; Tr. 294).

[–CONTINUED ON NEXT PAGE–]

Conversely, Skyland's rebuttal witness, Daniel DeLisi (DeLisi), did not specifically rebut any of the prefiled or live testimony of Daniel Evans, DCA (see DeLisi, Tr. 759 - Tr. 804). Moreover, at no point during the proceeding was Mr. DeLisi ever tendered or accepted as an "expert[2]" in land use planning (see Tr. 759 - 804; but compare Tr. 182).

Accordingly, based upon the unrebutted expert testimony of Daniel Evans, Skyland fails to satisfy Section 367.045(5), Florida Statutes, and Rule 25-30.033(1)(f), F.A.C., regarding consistency with the Hernando County Comprehensive Plan.

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

*Yes. The preponderance of the competent substantial record evidence is that locating a water and wastewater utility in the area that Skyland is seeking to serve in Pasco County would violate Pasco County's Comprehensive Plan.

The Florida Legislature has designated the DCA as the 'state land planning agency.' Section 163.3164(20), Florida Statutes. Daniel Evans, Principal Planner and Assistant Administrator of the Central Florida Region with DCA (Tr. 176 ln. 18 - ln. 25) was admitted as an expert in land use planning in this proceeding (Tr. 182 ln. 19 - Tr. 183 ln. 9). Mr. Evans testified

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[2]/ Both the Order Establishing Procedure and the Prehearing Order are silent as to whether the witnesses listed therein would be providing lay testimony, expert testimony or both. In the instant proceeding, there was **no** pretrial stipulation – either pre-filed or stipulated to at the beginning of the formal hearing (compare Tr. 10 - 13) – as to granting "expert" status to any given witness for a particular field or fields. Moreover, the Prehearing Order, at Section X. PROPOSED STIPULATIONS stated: "There are no proposed stipulations at this time." Clearly if the expert status of those witnesses seeking to offer expert testimony had been stipulated to, then Caroline Klancke, trial counsel for the PSC, would not have had to state: "***As a predicate determination, I would like to request that this Commission make a ruling that this witness [Daniel Evans] is an expert in the area of land use planning and that he is a skilled witness representing the Department of Community Affairs.***" (Klancke, Tr. 182 ln. 19 - 23) (e.s.). In this proceeding, the burden of proof and going forward is on the Petitioner, Skyland. It is up to the Petitioner to insure that it lays the proper predicate for any expert testimony it seeks to have as part of the record. However, for reasons unknown to the undersigned, counsel for Skyland failed, neglected, or declined not to have any of their witnesses accepted by the Commission as an expert for a particular field or fields in connection with the technical hearing. See generally Section 90.702, Florida Statutes (Testimony by experts).

that pursuant to a Memorandum of Understanding between the PSC and the DCA, the DCA reviews applications for, among other things, consistency with the affected local government's comprehensive plan (Evans, Tr. 178 ln. 24 - Tr. 179 ln. 2). In connection with his expert testimony, Mr. Evans stated that he reviewed Skyland's Application and relevant portions of the Pasco County's Comprehensive Plan (Tr. 179 ln. 3 - ln. 6). When asked if Skyland's Application was consistent with Pasco County's Comprehensive Plan, Mr. Evans testified:

> "The application is **inconsistent** with objectives and policies of the Pasco County Comprehensive Plan which limits the extension of public facilities in agricultural and rural land areas, encourage the conversion of private utilities to publicly operated utilities, and encourage the replacement of package treatment plants with regional wastewater plants. In particular, Policy SEW 3.2.6 of the Infrastructure Element of the Pasco County Comprehensive Plan[] prohibits the extension of central water and sewer services within the Northeast Pasco Rural Area (most of the proposed service area within Pasco County is located within the Northeast Pasco Rural Area), except under very limited circumstances, which the application does not meet."

(Evans, Tr. 179 ln. 10 - ln. 18; and see Ex. 7 (letter from the DCA)).

Richard Gehring, Planning and Growth Management Administrator for Pasco County, testified that the provision of utility service in the area of Pasco County proposed by Skyland would violate Pasco County's Comprehensive Plan (Gehring, Tr. 419 ln. 1 - Tr. 420 ln. 10).

Conversely, Skyland's rebuttal witness, Daniel DeLisi (DeLisi), did not specifically rebut any of the prefiled or live testimony of Daniel Evans, DCA (see DeLisi, Tr. 759 - 804). Moreover, at no point during the proceeding was Mr. DeLisi ever tendered or accepted as an "expert" [see Footnote 2] in land use planning (Tr. 759 - Tr. 804; but compare Tr. 182).

Accordingly, based upon the unrebutted expert testimony of Daniel Evans, Skyland fails to satisfy Section 367.045(5), Florida Statutes, and Rule 25-30.033(1)(f), F.A.C., regarding consistency with the Pasco County Comprehensive Plan.

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

*Yes. The area that Skyland proposes for certification within Hernando County is currently within the service area of the Hernando County Utilities Department and the area that Skyland proposes for certification within Pasco County is currently within the service area of the Pasco County Utilities Department.

The preponderance of evidence in the record establishes that the area Skyland seeks to serve within Hernando County is presently within the Hernando County Utilities Department's service area (Stapf, Tr. 233 ln. 14 - ln. 20 and Tr. 235 ln. 10 - ln. 18).

The preponderance of evidence in the record further establishes that the area Skyland seeks to serve within Pasco County is currently within the Pasco County Utilities Department's service area (Kennedy, Tr. 337 ln. 13 - Tr. 337 ln. 2).

Based upon the foregoing, Skyland's proposed utility will be in competition with, or in duplication of, the public water and wastewater service areas of Hernando County Utilities, as to within Hernando County, and the Pasco County Utilities Department, as within Pasco County. See Section 367.045(1)(b) & (5)(a), Florida Statutes, and Rule 25-30.033, F.A.C.

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

*No. Skyland has no assets. Skyland is dependent upon funding from Evans Properties, its parent company. The Funding Agreement, which Skyland relies upon, may be unilaterally modified or terminated by Evans Properties; moreover, the Funding Agreement is not enforceable because it lacks essential terms.

Skyland is required to establish that it has the financial ability to operate its proposed utility as one the prerequisite elements it must prove under Section 367.045(1)(b), Florida Statutes, and Rule 25-30.033(1)(e) & (r), F.A.C.

Hernando stipulates that Evans Properties has the financial ability to operate a water and wastewater utility; however, this proceeding is not about Evans Properties. This proceeding is

about Skyland. Skyland does not own the land it proposes to operate the utility on, nor does it own any of the wells or consumptive use permits because the land, the wells and permits are owned by Evans Properties (Hartman, Tr. 615 - 617; Tr. 713 ln. 11 - ln. 14). Skyland will be leasing the land from Evans Properties (App. Appendix IV; Ex. 46).

Here, there is no record evidence that Skyland – as a separate and distinct company from Evans Properties under Florida law – has any assets of its own at this time. Skyland funding will come from Evans Properties pursuant to the Funding Agreement contained in its Application (App. Appendix VII; Ex. 46). The Funding Agreement was signed by Ronald Edwards, as President of Evans Properties, and counter-signed by Ronald Edwards, as Manager of Skyland (App. Appendix VII; Ex. 46; and Edwards, Tr. 868, ln. 14 - ln. 18). This Funding Agreement was provided by Skyland to satisfy the requirement that Skyland has the financial ability to design, construct, and operate a public water and wastewater utility (see Edwards, Tr. 877 - Tr. 879).

The Funding Agreement is deficient in several material ways and it does not establish that Skyland will have a reliable and continued source of funds. First, the Funding Agreement was not derived from an arm's-length transaction since Mr. Edwards signed the Agreement on behalf of ***both*** the ***lender*** and the ***borrower*** (App. Appendix VII; Ex. 46; Edwards, Tr. 868, ln. 14 - ln. 18), essentially he negotiated the Agreement with himself. Second, the Funding Agreement, arguably, lacks "consideration" – an essential element of an enforceable contract. When Mr. Edwards was asked what the term "inducement" meant with respect to the Skyland (Funding Agreement ¶ 4), he stated "that would be the consideration." (Edwards, Tr. 878 ln. 16 - ln. 19). However, Mr. Edwards was unable to state what this consideration was (Tr. 878 ln. 20 - Tr. 879 ln. 9). Third, the Funding Agreement does not have any terms and conditions regarding interest rates or other key provisions such as rate of payback which are essential to an enforceable loan agreement (Edwards,

Tr. 879 ln. 10 - ln. 18; see Ex. 46). Additionally, the Funding Agreement does not have a duration for the pay back of any funds which are borrowed (App. Appendix VII; Ex. 46). The Agreement does not even set forth a principal amount to be borrowed (id.)

Here, Evans Properties and Skyland could simply mutually agree to modify or terminate the Funding Agreement under their present related structure (Tr. 826, ln. 9 - Tr. 827 ln. 12). Skyland would then be at the mercy of its new lender (see Edwards, Tr. 875 ln. 12 - ln. 22). Furthermore, it is ludicrous to think that Skyland (Ronald Edwards, Manager) would ever sue Evans Properties (Ronald Edwards, President) in the event that Evans Properties should breach or fail to perform under the Funding Agreement (see Edwards, Tr. 874 ln. 22 - Tr. 875 ln. 4). Mr. Edwards, on cross-examination, was not even able to answer the question of whether he thought the Funding Agreement was a legally binding document that was enforceable by Skyland against Evans Properties (Edwards, Tr. 876 ln. 15 - Tr. 877 ln. 12).

In sum, the Funding Agreement is illusory because it can be mutually modified or terminated at any time, and it lacks essential terms such as interest rate, rate of payback, and a method of repayment – all of which are necessary elements of a contract. Accordingly, the instant Funding Agreement does not constitute a legally enforceable contract. See Balter v. Pan American Bank of Hialeah, 383 So.2d 256, 257 (Fla. 3rd DCA 1980) ("It is apparent that the essentials of a binding loan agreement were conspicuously absent. There was no understanding as to the exact amount of money, the interest rate or time and method of repayment . . . .").

Based upon the foregoing, Skyland has failed to meet its burden of proof, by a preponderance of evidence, that it has the financial ability to design, construct and operate a water and wastewater utility as required under Section 367.045(1)(b), Florida Statutes, and Rule 25-30.033(1)(e), F.A.C.

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

> *No. The record evidence establishes that Skyland does not currently have the technical ability to run a public utility. Thus the Commission must rely upon Skyland's mere representation that it will hire such technical talent in the future and presupposes that Skyland has the ability to construct the proposed facilities.

Skyland is required to establish that it has the technical ability to serve the requested territory as one of the requisite elements it must prove pursuant to Section 367.045(1)(b), Florida Statutes, and Rule 25-30.033(1)(e), F.A.C.

Hernando stipulates that Skyland's Manager, Mr. Edwards, has extensive experience in the agricultural business (see Edwards, Tr. 809). However, on cross-examination, Mr. Edwards conceded that he has "never worked for a utility in any way or managed a utility in any manner" (Edwards, Tr. 851 ln. 3 - ln. 7) and it reasons, *a fortiori*, that the ability to run an agri-business does not equate to the ability to run a public water/wastewater utility which is different in kind.

Skyland admitted that it is not personally qualified to run a public utility because it stated in its Application that: "Evans will contract the day-to-day operations of the Utility System **to a *qualified* company**." (App. Exhibit I at p. 2) (e.s.). Furthermore, when Mr. Edwards was asked "[h]ow will Skyland insure that it has the technical and operational ability to manage and operate the utility that it proposes to construct?" (Tr. 820 ln. 16 - ln. 18). Mr. Edwards responded:

> "We fully understand that **Skyland *will need to* retain the very best people** to design the facilities; to work with state and local government in the permitting and construction of the facilities; and to operate the facilities thereafter. . . ."

(Edwards, Tr. 820 ln. 19 - ln. 22) (e.s.).

In addition to operating a utility, technical ability presupposes the ability to design and construct the proposed facilities. Here, the parcels upon which Skyland seeks to construct its utility are non-contiguous (App. Appendix I, Figure 3(a) and Ex. 43, first map). Skyland admitted

that it did not own any of the parcels that would be necessary to interconnect its non-contiguous lands (Hartman, Tr. 114 ln. 20 - Tr. 115 ln. 1 and Tr. 653 - 655) and that it might have to rely upon "acquisition through eminent domain" in order to acquire such connections (Hartman, Tr. 655 ln. 10 - ln. 16). Skyland further admitted that none of the costs to interconnect or link the non-contiguous parcels were considered in its *Cost of Rate Study* (Hartman, Tr. 705 ln. 11 - ln. 16). Accordingly, Skyland has not demonstrated, by preponderance of the evidence, the ability to construct infrastructure which would connect its multiple non-contiguous parcels within its proposed service area. This impractability of Skyland acquiring/condemning land that it does not own should weigh heavily on whether Skyland actually has the technical ability to construct all of the infrastructure necessary to connect and serve all of the parcels within its proposed service area.

Consequently, in order for Skyland to establish that it has the requisite technical ability, the Commission – without knowing the identity of any of the people and/or firms that will be designing, constructing, or operating the utility – will simply have to accept Mr. Edward's assertion that he will hire "the very best people" to do so. The Commission will further have to accept that Skyland will be able to acquire/condemn all of the lands necessary to interconnect the multiple non-contiguous parcels within its proposed service area.

Based upon the foregoing, Skyland has failed to meet its burden of proof, by a preponderance of evidence, that it has the requisite technical ability as required under Section 367.045(1)(b), Florida Statutes, and Rule 25-30.033(1)(e), F.A.C.

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

*No. Skyland does not own any land. Skyland is dependent upon leasing its land, wells and permits from Evans Properties, its ultimate parent. The leases which Skyland relies upon may be unilaterally modified or terminated by Evans Properties; moreover the leases are not enforceable because they lack essential terms.

Skyland is required to establish that it has the continued use of the land upon which the utility facilities will be located as one of the prerequisite elements it must prove pursuant to Section 367.045(1)(b), Florida Statutes, and Rule 25-30.033(1)(j), F.A.C.

The property that Skyland proposes to utilize is owned by Evans Properties (App. Exhibit A at ¶ 2; Hartman, Tr. 691 ln. 13- ln. 16). Similarly, the wells and consumptive use permits (CPUs) are also owned by Evans Properties (Hartman, Tr. 615 ln. 7 - Tr. 616 ln. 8; Tr. 713 ln. 11 - ln. 14). There are a total of fourteen wells on the Evans Properties' parcels within the proposed service area of which Evans Properties will retain four wells for itself and eight wells will be available for potential lease to Skyland (Hartman, Tr. 631 ln. 18-24). And of these eight wells, initially only four four-acre well sites will be leased to Skyland (Hartman, Tr. 634 ln. 10 - ln. 20; Tr. 714 ln. 15- ln. 16; Tr. 723 ln. 11 - ln. 17). The other four wells not leased to Skyland at this time and "would be provided as the demand occurs" (Hartman, Tr. 636 ln. 1 - ln. 5).

As part of its Application, Skyland provided an executed 'water lease agreement' dated October 1, 2009 between Evans Properties and Skyland (App. Appendix IV; Ex. 46). The lease was signed by Ronald Edwards, as President of Evans Properties, and counter-signed by Ronald Edwards, as Manager of Skyland (id.; see Edwards, Tr. 868, ln. 8 - ln. 10). A similar agreement dated October 9, 2009 was also provided for wastewater facilities (id.). These leases were provided by Skyland to satisfy the requirement that it has the 'continued use of the land upon which the utility was to be operated' (Edwards, Tr. 868 ln. 22 - Tr. 869 ln. 4).

However, the lease agreements are deficient in several material ways and they do not establish that Skyland will have continued use of the necessary land. First, how can Skyland have use of the land that it intends to construct infrastructure on (App. Appendix III, Figures D-1B, D-2B, D-3B, D-4B) if the lease agreements (App. Appendix IV; Ex. 46) do not depict or describe the

land(s) which Skyland seeks to lease from Evans Properties (id.; Hartman, Tr: 638 ln. 11 - ln. 21). Further, on cross-examination, Mr. Hartman stated "[t]here's no legal description attached to the lease that has been submitted in the original application" (Hartman, Tr. 87 ln. 4 - ln. 5). Mr. Hartman later testified that the legal description would not be provided until "following the final design" (Hartman, Tr. 111 ln. 1 - ln. 4). Second, the water lease agreement that is part of Skyland's Application does not even describe which of the four wells are to be included as part of the leased property (id.; see Hartman, Tr. 635 ln. 12 - ln. 25). Third, the lease agreements were not derived from an arm's-length transaction (Edwards, Tr. 869 ln. 22 - ln. 25). Mr. Edwards, on cross-examination, admitted that ***he negotiated the lease agreements with himself*** (Edwards, Tr. 869 ln. 16 - ln. 19). Fourth, the pricing provision of the leases are for only three years, after which time it this provision can be renegotiated (Edwards, Tr. 870, ln. 4 - ln. 13). The pricing provision of the leases can also be renegotiated due to changes in regulations that diminish the value of the land as a result of withdrawal of water, or additional costs imposed as the result of force majeure (Edwards, Tr. 870 ln. 14 - Tr. 871 ln. 12). Fifth, the royalty provisions contained in the leases could also change in the event there is a need to relocate a well (Edwards, Tr. 871 ln. 13 - ln. 18).

As previously stated, Skyland and Evans Properties are related entities with the same President/Manager, Mr. Edwards (Edwards, Tr. 826, ln. 9 - Tr. 827 ln. 12) and with Evans Properties owning 100% of Skyland (Edwards, Tr. 877 ln. 22 - ln. 24). Mr. Edwards signed the lease agreements on behalf of both the landlord and the tenant (App. Appendix IV; Ex. 46; and see Edwards, Tr. 871 ln. 19 - Tr. 872 ln. 20). Consequently, it is absurd to think that Skyland (Ronald Edwards, Manager) might ever sue Evans Properties (Ronald Edwards, President) in the event that Evans Properties should ever fail to perform under these lease agreements. Moreover, when Mr. Edwards was asked what would happen if he attempted to sue himself, albeit through different

companies he controls, he conceded that a court would "**probably not**" allow that (Edwards, Tr. 874 ln. 22 - Tr. 875 ln. 4) (e.s.). Further, when he was asked if Evans Properties could unilaterally abrogate the lease agreements if they wanted to, Mr. Edwards stated:

> "Evans [Properties] couldn't unilaterally, but the two entities could agree, and since they are both controlled by the same one, that would be – **the essence would be that the contract could be changed or canceled.**"

(Edwards, Tr. 875 ln. 5 - ln. 11) (e.s.).

Additionally, under the current land ownership and corporate structures, there is nothing to prevent Evans Properties from selling all or part of its holdings in Hernando and Pasco Counties. This was confirmed by Mr. Edwards during cross-examination:

> ". . . We are looking at a host of ways that we can add value to these properties, or find other uses, and **whether that included if someone wanted to buy one of them for some purpose, that would be something we would consider**. . . . ."

(Edwards, Tr. 854 ln. 9 - ln. 13; accord Hartman, Tr. 699 ln. 6 - ln. 24) (e.s.). Skyland further admitted that if it wanted to divest portions of the water and wastewater service of the land, it could do so (Edwards, Tr. 864 ln. 21 - ln. 25).

Here, Evans Properties and Skyland could simply mutually agree to modify or terminate the water lease agreement and/or the wastewater lease agreement if it was in Evans Properties' interest to do so. Consequently, Skyland would then be at the mercy of the new landowner, and at the risk that the leases might not be assigned in their current form (see Edwards, Tr. 875 ln. 12 - ln. 16).

In sum, the instant lease agreements are illusory in that they can be mutually terminated or modified at any time, and that they lack essential terms thereby rendering them unenforceable. Accordingly, Skyland has failed to adequately demonstrate that it will have continued use of the land as required by Section 367.045(1)(b), Florida Statutes, and Rule 25-30.033(1)(j), F.A.C.

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

*No. The preponderance of competent substantial record evidence indicates that granting Skyland certificates is **not** in the public interest: Skyland would not be cost effective or efficient; would move a valuable resource – water – from public to private control; would promote urban sprawl; and would violate Hernando's and Pasco's Comprehensive Plans.

Cost Effectiveness and Efficiency

Public interest is promoted by cost effective and efficient utility systems.

Here, the water and wastewater utility proposed by Skyland cannot be cost effective or efficient by providing centralized utility service to houses with a density of no less than one unit per ten (10) acres (App. Exhibit B; see Hartman, Tr. 621 - Tr. 623) as scattered among multiple non-contiguous parcels (App. Appendix I, Figure 3(a)). Of the 791 acres in Hernando owned by Evans Properties, Skyland proposes only approximately 155 equivalent residential connections (ERCs) in the first five or six years of operations (App. Exhibit D). For example, in connection with Parcel ID 2 within Hernando (App. Appendix I, Figure 3(a)), Mr. Hartman, testified this parcel is approximately 349 acres and could allow **35** ERCs [houses] (Hartman, Tr. 83 ln. 8 - ln. 16) under existing regulations.

Mr. Kennedy, Assistant County Administrator, Utilities Services for Pasco County testified:

> "[I]t is not efficient, cost effective, good utility practice, or in the public interest to provide central water and sewer to such low density (one unit per 10 [acres]) as is proposed by Skyland. Skyland's proposed water and sewer rates will be substantially higher than those charged by Pasco County Utilities. It is not efficient, cost effective, good utility practice, or in the public interest to provide central water and sewer to such widespread, non-contiguous parcels of property. Generally, density of at least 2 units per acre is necessary for central water and sewer service to be economical."

(Kennedy, Tr. 335 ln. 10 - ln. 17).

Mr. Stapf, Hernando County Utilities Director, provided the following sworn testimony:

> "In my experience, and in my professional opinion, attempting to provide water and wastewater service to such a comparatively small number of customers is difficult at best. There is little opportunity to achieve any significant and meaningful economies of scale. In fact it is quite the opposite. There are few customers over which to spread large infrastructure costs."

(Stapf, Tr. 233 ln. 9 - ln. 13).

Notably, Evans Properties does not own any of the land or easements necessary to connect the multiple non-contiguous parcels within Skyland's proposed service area (Hartman, Tr. 114 ln. 20 - Tr. 115 ln. 1; Tr. 653 - 655) and none of the costs associated with interconnecting the non-contiguous parcels were considered in the *Cost of Service Study* (Hartman, Tr. 705 ln. 11 - ln. 16; and see App. Appendix VIII). Accordingly, at such time Skyland sought to interconnect the multiple non-contiguous parcels located within the proposed service area, Skyland would have to purchase or condemn such land and these costs would inevitably be passed through to all of the customers of the system (cf. Hartman Tr. 705 - 706).

Furthermore, Skyland – if approved – would duplicate service by overlapping the established service areas of Hernando County Utilities (e.g., Stapf, Tr. 233 ln. 14 - ln. 20 and Tr. 235 ln. 10 - ln. 19) and Pasco County Utilities (e.g., Kennedy, Tr. 337 ln. 13 - Tr. 338 ln. 2).

In sum, the public interest is not served if persons residing in southeastern Hernando County and northeastern Pasco County – subjected to the future jurisdiction of Skyland – must pay higher water and wastewater rates due to lack of cost effectiveness, inefficiency, and the lack of economies of scale.

Sale of Bulk Water

Here, Skyland clearly has a 'business plan' that includes the sale of bulk water. On the form application for original certificate, which comprises the front of Skyland's Application, at

Part III A) (3), the PSC asked for: "*Description of the types of customers anticipated (i.e. single family, mobile homes, clubhouse, commercial, etc.*):" Skyland answered: "The Applicant currently is proposing to serve general service, residential and **exempt and non-exempt bulk service** customers." (App. p. 3) (e.s.). Skyland's Manager, when asked if he would change this statement, responded "no" (Edwards, Tr. 840 ln. 15 - Tr. 841 ln. 1; see also Tr. 857 ln. 13 - ln. 16). Mr. Edwards further admitted that he listed similar descriptions of proposed users in the two other applications for original certificates that he had filed for Bluefield Utilities and Groveland Utilities (Tr. 841 ln. 2 - ln. 8). The following cross-examinations of Mr. Edwards are illustrative of Skyland's 'real' business plan to turn water into a business asset:

"Q. [KIRK] **Do you consider water an asset?**

A. [EDWARDS] **Yes, I do.**"

(Edwards, Tr. 842 ln. 4 - ln. 5) (e.s.).

"Q. [McATEER] Do you consider water a crop?

A. [EDWARDS] It could be."

(Edwards, Tr. 845 ln. 3 - ln. 4).

Q. [McATEER] "**. . . does Evans Property intend to sell water as a crop?**

A. [EDWARDS] **We do intend to see if there is a way. That's why we are doing the certificates with the utility and we are looking at different alternatives on how that may be done.** Most of the likely things that we see are in the other two areas that we are certificating where we may build reservoirs or water cleaning reservoirs and that's possibly appropriate here, too, but it is probably a more difficult thing to actually do here."

(Edwards, Tr. 845 ln. 16 - ln. 25) (e.s.).

> COMMISSIONER SKOP: ". . . . With respect to the sale of bulk water, would you agree that if you were selling bulk water to a governmental entity, such as Hernando County or Pasco County, that you would not need to have a utility to do so according to exemption –
>
> THE WITNESS [RONALD EDWARDS]: ". . . . **However, <u>being a utility is part of the reason that we would be able to sell water like that</u>**."

(Edwards, Tr. 895 ln. 13 - Tr. 896 ln. 2) (e.s.).

The above are just a couple of examples, in this very extensive record, which evidence that part of the business plan of Evans Properties is TO CONTROL AND SELL WATER.

Mr. Stapf, Hernando County Utilities Director, testified that the bulk sale of water is not in the public interest of Hernando County and its residents:

> "In either scenario – the banking of water rights or the sale of bulk water by Skyland – should Hernando County need consumptive use permits to draw water in the area being proposed by Skyland and such water supply has already been committed by SWFWMD to Skyland, then Hernando would have to look elsewhere for its water supply and possibly to more expensive water from alternative sources. **If Hernando had to buy more expensive water because Skyland is banking water rights and/or exporting this water supply source for bulk sale or bottling, then this would clearly be <u>against the public interest</u> of Hernando County and the residents and businesses within Hernando County**. Moreover, any export of water by Skyland would violate – not promote – the water supply policy of 'local sources first.'
>
> Finally, such additional consumptive use of the water supply in this area could put Hernando County at risk of meeting the "minimum flow" regulations of the SWFWMD and, again, this would be contrary to the public interest of Hernando County and its residents and local businesses."

(Stapf, Tr. 929 ln. 24 - Tr. 930 ln. 11) (e.s.).

In sum, the control and sale of water, with the potential for outside export, is clearly not in the public interest and Skyland's request for certification should be denied.

Urban Sprawl

It is well established that any development which causes urban sprawl is contrary to the public interest. See, e.g., Rule 9J-5.006(5), F.A.C. (rule by state land planning agency that all comprehensive plans and plan amendments shall discourage urban sprawl).

Daniel Evans, Principal Planner with the DCA (Tr. 176 ln. 18 - ln. 25) was admitted as an expert in land use planning in this proceeding (Tr. 182 ln. 19 - Tr. 183 ln. 9). Mr. Evans testified that pursuant to a Memorandum of Understanding between the PSC and the DCA, the DCA reviews applications for, among other things, consistency with the affected local government's comprehensive plan (Evans, Tr. 178 ln. 24 - Tr. 179 ln. 2). Based upon his review of the Application and the Comprehensive Plans for Pasco and Hernando Counties (Tr. 179 ln. 3 - ln. 6):

> "We [DCA] are also concerned with the fact that **the proposed utility service area would promote a land use pattern that is inconsistent with the *discouragement of urban sprawl*** and it did not promote energy efficient land use patterns and would help to reduce greenhouse gas emissions. The patterns we saw was just an inefficient land use pattern.
>
> The first phase of the proposed application had four parcels which were scattered across two counties that did not appear to us to be connected to one another. It was difficult to see to us how this would help to maximize the use of existing public facilities."

(Daniel Evans, Tr. 183 ln. 23 - Tr. 184 ln. 10).

Mr. Pianta, Planning Director for Hernando County, testified:

> "Q. Briefly describe Urban Sprawl.
>
> A. Urban sprawl generally leads to an inefficient and unwanted development pattern. Urban sprawl is characterized by leap frog development not contiguous to existing urban development, linear development that expands along a major roadway beyond the existing limits of developed and planned infrastructure, tends to be single dimensional in nature, is premature and lacking the necessary facilities and services,

and tends to inhibit infill development and the redevelopment of existing developed areas.

Q. In your professional opinion, if Skyland Utility begins a water/wastewater utility operation at the location proposed on the Evans property, would this constitute or promote urban sprawl.

A. Yes.

Q. How?

A. The provision of water and wastewater facilities and services in a rural area will encourage development that is not compatible with existing land uses in terms of density, intensity and land use type.

Q. If a development promotes Urban Sprawl, what types of effects can be expected?

A. The premature conversion of agricultural and rural land to suburban and urban uses, thus negatively impacting the character of the area and lifestyle of existing residents.

Q. Are there any public policy implications if property develops in a manner that constitutes Urban Sprawl and, if so, can you briefly describe them.

A. **Yes, scattered development patterns are expensive to serve with the necessary public services and facilities. The demand for services to support these populations tend to be costly to the public and inefficient from a service delivery standpoint.**"

(Pianta, Tr. 292 ln. 25 - Tr. 293 ln. 22) (e.s.).

Mr. Richard Gehring, Planning and Growth Management Coordinator for Pasco County, gave the following sworn testimony:

> This private utility, if established, will promote 'urban sprawl' by encouraging new development and growth to occur prematurely in an area that is presently rural and largely undeveloped and without proper planning and infrastructure in place including roads, utility network, urbanized services and adequate electric power. The

> presence of centralized water and sewer would encourage other development to occur in a leap frog and unplanned manner.
> . . . . .
> Additionally, the issues of leap frog development are not solely related to the initial provision of infrastructure, in this case water and sewer. Rather, inefficient development require on-going expenditures for both capital and operations of the myriad of service provided by the public including: schools, parks, libraries, fire, emergency medical services and sheriff operations. These costs would be ongoing burdens to the taxpayers . . . . ***In these times of limited fiscal resources, it would be irresponsible to place this burden on Pasco [and Hernando] County taxpayers solely to address the speculative desires of one property owner.***"

(Gehring, Tr. 423 ln. 10 - ln. 15 and Tr. 427 ln. 17 - ln. 24) (e.s.).

Here, in the event that Skyland pursues residential development within the area it is proposing for certification (cf. Edwards, Tr. 836 ln. 8 - ln. 13) – and not necessarily exclusive of bulk water sales since the eight primary well sites take up only 32 acres – such development would constitute urban sprawl (Daniel Evans, Tr. 183 ln. 23 - Tr. 184 ln. 4; Pianta, Tr. 293 ln. 7 - ln. 10 and Tr. 961 ln. 24 - Tr. 962 ln. 2; Gehring, Tr. 423 ln. 10 - ln. 15).

In sum, locating Skyland's utility where proposed in Hernando and Pasco Counties would promote urban sprawl contrary to the public interest.

Violation of Local Government's Comprehensive Plans

It is not in the public interest to violate the goals, objectives and policies of the adopted Comprehensive Plans of Hernando and Pasco Counties.

As previously established under Issues # 3 and 4 above, the locating of Skyland's utility where proposed would violate the Comprehensive Plans of Hernando and Pasco Counties (Ex. 7; Daniel Evans, Tr. 179 ln. 8 - ln. 25; Pianta, Tr. 289 ln. 18 - Tr. 290 ln. 18); Gehring, Tr. 419 ln. 16 - Tr. 420 ln. 10), and thereby violate Section 163.3194(1)(a), Florida Statutes, and Florida decisional law.

Summary: Certification of Skyland is Not in the Public Interest

Based on the preponderance of competent substantial evidence in the record, the requested certification of Skyland is NOT in the public interest and should be denied.

ISSUE 10: If the certificates for the proposed water and wastewater systems are granted, what is the appropriate return on equity for Skyland?
*N/A. The certificates should not be granted for the reasons stated herein; therefore, the Commission should not have to determine this issue.

ISSUE 11: If the certificates for the proposed water and wastewater systems are granted, what are the appropriate potable water and wastewater rates for Skyland?
*N/A. The certificates should not be granted for the reasons stated herein; therefore, the Commission should not have to determine this issue.

ISSUE 12: If the certificates for the proposed water and wastewater systems are granted, what are the appropriate service availability charges for Skyland?
*N/A. The certificates should not be granted for the reasons stated herein; therefore, the Commission should not have to determine this issue.

ISSUE 13: If the certificates for the proposed water and wastewater systems are granted, what is the appropriate Allowance for Funds Used During Construction (AFUDC) rate for Skyland?
*N/A. The certificates should not be granted for the reasons stated herein; therefore, the Commission should not have to determine this issue.

ISSUE 14: Should this docket be closed?
*This matter should be dismissed for lack of subject matter jurisdiction pursuant to Section 367.171(7), Florida Statutes, or alternatively, the Commission should enter a Final Order denying the requested certificates.

VII. CONCLUSIONS

1. Skyland, as the Petitioner, has the burden of proof in this administrative action.

See, e.g., Grabau v. Department of Health, Board of Psychology, 816 So.2d 701, 705 (Fla. 1st DCA 2002); Asphalt Pavers v. Department of Transportation, 602 So.2d 558, 560 (Fla. 1st DCA 1992).

2. Findings of fact shall be based upon a preponderance of the evidence. Section 120.57(1)(j), Florida Statutes. The evidence must be competent and substantial. Section 120.57(1)(l), Florida Statutes.

3. Skyland provided prefiled and live testimony of three lay witnesses. Skyland provided no expert testimony inasmuch as Skyland failed to tender, or have accepted as expert, any of its three witnesses (see Footnote 2). Accordingly, the testimony of Skyland's witnesses is limited to the facts upon which they have personal knowledge. See Section 90.701, Florida Statutes. This goes to the competency of Skyland's evidence.

4. In support of need, Skyland had two letters in its Application requesting service. One was signed by Ronald Edwards as President of Evans Properties, Skyland's ultimate parent company. The other letter was signed by J. Emmett Evans III as Vice-President of Evans Properties. At the hearing, Skyland produced two lay witnesses who testified to need: Mr. Edwards, Skyland's Manager, and Mr. Hartman who prepared Skyland's Application. On the other hand, eight persons provided testimony that there was no need for this utility. Furthermore, the PSC's witness, Daniel Evans with the DCA, provided expert testimony that there was no need for this utility. It is hereby concluded, based on the preponderance of the record evidence, that there is no "need" for service in Skyland's proposed service area. See Section 367.045(1)(b) & (5)(a), Florida Statutes, and Rule 25-30.033(1)(b), F.A.C.

5. The preponderance of competent substantial evidence in the record establishes that locating Skyland's utility, as proposed, would violate the Comprehensive Plans of Hernando and Pasco Counties (Ex. 7; Daniel Evans, Tr. 179 ln. 8 - ln. 25; Pianta, Tr. 289 ln. 18 - Tr. 290 ln. 18; Gehring, Tr. 419 ln. 16 - Tr. 420 ln. 10), and thereby violate Section 163.3194(1)(a), Florida Statutes (After a comprehensive plan has been adopted, "all development undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by such plan or element shall be consistent with such plan or element as adopted."). See Lake

Rosa v. Board of County Commissioners, 911 So.2d 206, 209 (Fla. 5th DCA 2005) (compliance with an adopted comprehensive plan is mandatory), rev. denied, 928 So.2d 334 (Fla. 2006).

6. Skyland has no assets of its own and must rely upon funding from Evans Properties, which owns 100% of Skyland. Here, the Funding Agreement – which Skyland relies upon to establish its financial ability – may be modified or terminated at the will of Evans Properties. Moreover, the Funding Agreement does not constitute a legally enforceable contract. With the failure of the Funding Agreement, Skyland has failed to meet its burden of proof, by a preponderance of evidence, that it has the financial ability to design, construct and operate a utility. See Section 367.045(1)(b), Florida Statutes, and Rule 25-30.033(1)(e), F.A.C.

7. In order for Skyland to establish that it has the technical ability, the Commission will simply have to accept Mr. Edward's assertion that he will hire "the very best people" to design, construct, and operate the proposed utility, and will have to accept that Skyland will be able to acquire/condemn all of the lands necessary so that Skyland can interconnect the multiple non-contiguous parcels within its proposed service area. The burden is on Skyland to establish that it can do this. Skyland has failed to meet its burden of proof, by a preponderance of evidence, that it has the requisite technical ability. See Section 367.045(1)(b), Florida Statutes, and Rule 25-30.033(1)(e), F.A.C.

8. The lease agreements provided by Skyland do not confer any meaningful rights in the land to Skyland because the landowner can freely modify or terminate them. Moreover, the leases contained in Skyland's Application lack essential terms such as the description of the land to be leased. See 52 *Corpus Juris Secundum* Landlord & Tenant § 341 ("Generally, with respect to requisites of a lease, the essentials of a contract must be present. A real property lease must be sufficiently clear, definite, and complete to be enforceable."). It is hereby concluded that Skyland

has failed to meet its burden of proof, by a preponderance of the evidence, that it will have continued use of the land. See Section 367.045(1)(b), Florida Statutes, and Rule 25-30.033(1)(j), F.A.C.

9. The preponderance of competent substantial evidence in the record supports Hernando's and Pasco's contention that the requested certification of Skyland is **not** in the public interest. See Section 367.045(5)(a), Florida Statutes, and Rule 25-30.033(1)(f), F.A.C.

WHEREFORE, it is respectfully requested that the Commission enter a Final Order dismissing this matter for lack of subject matter jurisdiction or, in the alternative, deny Skyland's request for certification, and enter any other order that may be necessary.

Respectfully submitted this 15th day of October, 2010.

s/Geoffrey T. Kirk

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, this 15th day of October, 2010, a true and correct copy of the foregoing has been filed electronically with the Clerk for the PSC and was sent, by U.S. Mail, to all other persons listed below.

s/Geoffrey T. Kirk

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