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Subject: Docket No. 090478-WS
Attachments: Skyland Emergency M to Defer.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: 7
- e. A brief but complete description of each attached document: Emergency Motion to Defer.

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for original certificates for proposed water and wastewater system, in Hernando and Pasco Counties, and request for initial rates and charges, by Skyland Utilities, LLC.

DOCKET NO. 090478-WS

DATED: DECEMBER 9, 2010

**SKYLAND UTILITIES, LLC.'S
EMERGENCY MOTION TO DEFER**

Skyland Utilities, LLC, by and through its undersigned counsel, hereby files this Emergency Motion to Defer and would state and allege as follows:

1. This application was filed in October, 2009. The initial phase of the formal proceeding herein was heard before a Commission panel on July 7 and 8, 2010. The second and final phase of the litigation was heard by a reconstituted Commission panel on October 13, 2010. The staff recommendation in this case was issued on December 2, 2010. That recommendation is scheduled to be heard by a (further reconstituted) Commission panel at agenda on December 14, 2010.

2. For each of the following reasons, Skyland respectfully requests that this matter be deferred until the Agenda Conference scheduled for January 25, 2011.

Staff recommendation, if accepted by the Commission, is a significant departure from Commission precedent and has far reaching implications.

3. The staff recommendation, if accepted by the Commission, will not just constitute a sea-change, it will effectively reverse 20 years of Commission precedent regarding certificate applications filed by large landowners. The staff recommendation repeatedly references the "immediate need" for service (p. 18, 23, 24); that Skyland has not "formed a plan for cluster development" (p. 24); that there is no "requested approval of same" (p.24); that there is no demonstration how the local requirements for "an employment center development" would be met (p. 24); that no "timeline for service to an employment center" was offered (p.24); etc.

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 *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), a large landowner formed a utility to provide service to approximately 50,000 acres of land owned by that entity. In that case, the representative of the applicant specifically noted that there was no need to apply for water management district permits until such time as construction of the water facilities would be needed, and that there was "absolutely no current plan by the landowner for further development". Further testimony was to the effect that Farmton was 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. The Order noted that it was unclear what the future needs would be within the territory. Despite this, the Commission certificated the territory there at issue noting that certification was in the public interest.

4. 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.

The about-face which the staff recommendation represents, with regard to the planning, resource management, and public interest basis for certificating large territories (even though need is not yet quantified or immediate at the time of application or only exists in a fraction of the territory applied for) would be a significant shift in Commission law and policy. If the staff recommendation is accepted, a large landowner will be faced with a multi-year delay (for gaining a certificate from the PSC in the face of significantly funded opposition, as was the case in Farmton, ECFS, and here) after it decides the exact nature of its proposed develop, amends the comprehensive plan, obtains a consumptive use permit, seeks approval of a cluster development, etc. This is not a decision nor an interpretation which promotes the public interest particularly when the Florida economy is suffering from such adverse effects and jobs and growth are at a premium. The staff recommendation, if accepted by the Commission, represents a hurdle to large landowners attempting to proactively plan the management of their land and resources, whereas previous Commission decisions on large landowner applications encouraged and facilitated such planning.

The Commission should implement an extraordinary process for final consideration of this matter in recognition of the implications of this decision and the procedurally extraordinary history of this litigation.

5. The undersigned left his position as staff counsel for the Public Service Commission in 1987 to accept a position at his present law firm. To the observation of the undersigned, the last 18 to 24 months have been perhaps the most tumultuous (at the Commission level) in those 23 years.

6. Perhaps no pending matter has been as substantially affected by the transitions and transformations which have occurred and are occurring at the Commission as this case. In point of fact,

perhaps no applicant before the Commission has ever been confronted with a similar circumstance. The ultimate parent of the applicant filed three similar applications at the Public Service Commission for original certificates on three very large land holdings. This application, and the Skyland proposal, were intentionally filed, upon due consideration by Evans Properties, later than the two prior-filed applications. Before any of the three applications had been set for hearing, the matter appeared before the Commission on a Hernando County motion (based on a legal theory which the staff recommendation refutes for the fourth time, including an order from the District Court of Appeal) and at that agenda Commissioner Skop, the Pre-Hearing Officer in Skyland, directed staff to expedite the hearing. Thus, this docket proceeded on an expedited basis. In July, the matter went to hearing in front of Argenziano, Edgar, and Skop. In October, after Commissioner Argenziano had quit, the hearing completed in front of Edgar, Graham, Brise, and Skop. The matter is now set to be decided on December 14 in front of Balbis, Graham, Edgar, Brise, and Skop. Even if each and every Commissioner retains his appointment under the incoming administration, reconsideration of the any Commission action taken on the 14th would not involve Commissioner Skop. It is important to emphasize that this is not merely a "pending matter". This extraordinary transition has occurred in the case of a highly controversial, highly contested, and extremely expensive *formal administrative proceeding*.

7. As referenced hereinabove the staff recommendation, if accepted, will represent a major shift in the Commission's receptiveness to the certificate of lands owned by large property owners in the State of Florida. If the staff recommendation is reduced to a Commission order, then a landowner that owns thousands of acres and desires to avail itself of whatever public-private options exist with regard to the use of the property in the near term and long term and which has been found to have the operational, financial, and technical ability to operate a utility will be denied the opportunity to become certificated because the need is not "immediate". Such a change, if made now, would be imposed by a Commission which is, at best, in transition.

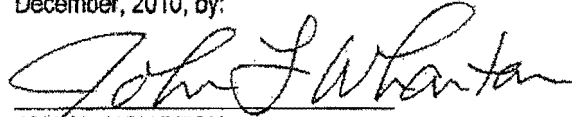
8. It is not in the public interest for a Commission in transition to vote upon this matter, given its significance and importance, rather than to defer the matter for a brief time such that it will become more clear and certain which Commission members will actually constitute the panel. This will provide for a consistency in the process (those eventual Commissioners will assumably continue to preside as Commissioners for a normal length of time, a scarce situation at the Commission as of late) and will allow reconsideration, if any, to be held in front of the same panel, so that such an important decision will not be made in the vortex of the tumultuous situation in which the Commission finds itself (particularly as to Commissioner Skop).

9. Because this case has significant implications for other pending dockets and for large land holders in the State of Florida in the future; because this case has experienced such an extraordinary transition and transformation of the Commission panel presiding over this formal litigation; because the change in administration has at least some (at this point unquantifiable) potential to change the membership of the Commission even further; and because the staff recommendation represents a major departure from the Commission's treatments of such large landowner applications in the past, the Commission should defer final consideration of this matter as requested hereinbelow and direct the parties to appear before the Commission to present final arguments on their positions and the staff recommendation, the same to be confined to the record. There is no rule, Commission statute, nor provision of the Administrative Procedure Act which would prevent the implementation of such a process. No member of the public would be prejudiced by such a brief delay. Conversely, the implementation of this process will allow the final decision in this case to be made in such a fashion as to promote consistency, continuity, a complete and thorough understanding of the record and position of the parties, and confidence in the Commission's ultimate determination.

10. The undersigned conferred with counsel for OPC, Hernando, Pasco, and Brooksville prior to the filing of this Motion. Hernando, Pasco and Brooksville oppose the Motion. OPC could not agree to support the Motion.

WHEREFORE, and in consideration of the above, Skyland respectfully requests this matter be deferred to the agenda conference scheduled for January 25, 2011. Skyland additionally requests the extraordinary remedy that the parties further be allowed to address the Commission prior to any vote on the staff recommendation at that agenda.

Respectfully submitted this 9th day of
December, 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 this 9th day of December, 2010, to the following:

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