

Marguerite McLean

090478-WS

From: WOODS.MONICA [WOODS.MONICA@leg.state.fl.us]
Sent: Friday, December 10, 2010 1:07 PM
To: Filings@psc.state.fl.us
Cc: Caroline Klancke; Lisa Bennett; Derrill McAteer; F. Marshall Deterding; Garth Coller; Geoffrey Kirk; John Jouben; John L. Wharton; Joseph Richards; Michael Minton; Ronald Edwards; William Hollimon
Subject: Office of Public Counsel's Response to Skyland's Emergency Motion to Defer
Attachments: OPC's Response to Skyland's Emergency Motion to Defer.pdf

Electronic Filing

a. Person responsible for this electronic filing:

Charles J. Rehwinkel, Associate Public Counsel
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, FL 32399-1400
(850) 488-9330
REHWINKEL.CHARLES@leg.state.fl.us

b. Docket No. 090478-WS

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

c. Documents being filed on behalf of Office of Public Counsel

d. There are a total of 7 pages.

e. The document attached for electronic filing is (**Office of Public Counsel's Response to Skyland's Emergency Motion to Defer**).

Thank you for your attention and cooperation to this request.

Monica R. Woods
Administrative Assistant to Charles J. Rehwinkel
Office of Public Counsel
Phone #: 488-9330
Fax# :487-6419

DOCUMENT NUMBER: 090478-WS
09866 DEC 10 e
FPSC-COMMISSIONER'S OFFICE

12/10/2010

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

DOCKET NO.: 090478-WS

FILED: December 10, 2010

OFFICE OF PUBLIC COUNSEL'S RESPONSE TO SKYLAND'S EMERGENCY MOTION TO DEFER

The Office of Public Counsel (OPC), by and through undersigned counsel files this response to Skyland Utilities, LLC's Emergency Motion to Defer ("Motion") and states its grave concerns and objections and requests that the Commission disregard the Motion in its entirety as follows:

In the time practically available to respond to the emergency Motion, the OPC finds that it is unable to effectively marshal all of the concerns that such an unprecedented, improper Motion presents. Rather, in objecting, in the strongest possible terms, to the Commissioners considering or even seeing the Motion, the OPC makes two observations: (1) The Motion is a prohibited post-hearing communication and contrary to the basic guarantees of due process and the intent of the provisions of Sections 120.66 and 350.042, Florida Statutes. The Motion is furthermore an improper attempt at communication with Staff by virtue of a startling, direct and strident attack on the very substance of Staff's

recommendation¹. (2) The Motion is also a misguided attack on the core, fundamental ability of Florida Public Service Commission and the Commissioners to individually and collectively manage the normal, inevitable and constant change that has been a routine part of the Commission's history.

The keystone principle of substantive and procedural due process in contested hearings before the Commission is that, once the record has closed, the only opportunity for communications with the tribunal (including the Staff and Commissioners) on the merits is through the post hearing brief. When briefs were filed on October 15, 2010, all parties had the legally protected right to expect that their due process rights would be protected by no other party having a further opportunity to make prohibited communications on the merits with the Commission. Such prohibited communications include attempting to advance or supplement arguments, introducing new facts into the record, and generally seeking to rebut other parties or the Staff. Skyland seeks to do all of these through the subterfuge of a Motion to Defer.

Skyland's Motion violates the very core of the procedural protections which parties are entitled to rely upon in litigation before the Commission. In lodging its objections, the OPC refuses to lower itself to the level of the Motion and engage in

¹ The Emergency Stipulated Motion for Abatement filed in Dockets No. 090445-WS and 090459-WS, is also an impermissible attempt to communicate with the Commissioners and Staff. As such, that Motion should not be shared with the Commissioners nor should it be reviewed or considered in any way by advisory Staff in this docket.

any substantive response on the merits. It is sufficient for these purposes to state that Paragraphs 3 and 4 expressly argue the merits of the case and seek to directly rebut the Staff's recommendation. This is outrageous at best.

The OPC objects to any consideration of the Motion in the strongest possible terms. We request that the pleading be stricken for this reason and that the Commissioners not be provided the Motions, but instead that the Staff makes appropriate, verifiable representations about the nature of the Motion – especially paragraphs 3 and 4 – in the event that the Commissioners need to understand in order to adjudicate the Motion².

For the Commission to not strike and to not completely disregard the Motion would violate the due process of the other parties, including OPC, in the instant case. More troubling to the OPC is that anything short of total disregard of the Motion would create a highly destructive and poisonous precedent if Skyland were to receive, or even be perceived to receive, any benefit from its misconduct.

The Commission should assiduously insure that Skyland receives no benefit from filing the Motion. This means that the Commission should insure that no part of the deliberations is influenced by the contents of the Motion in ANY way. Ideally this would mean that the Commissioners do not read the Motion, but instead base

² The OPC is very concerned that just the fact of *filing* such an improper Motion improperly conveys Skyland's desperate dissatisfaction with the recommendation -- enough so to cause extra attention to be given in deliberations. This alone is inappropriate and we urge Staff to act accordingly in counseling the Commission.

their ruling on representations by the Staff as to the propriety or lack thereof of the Motion. Anything else which might create the perception that the deliberations were influenced would send a strong signal to other future litigants that dissatisfaction with a recommendation could be dealt with by a similar subterfuge that could benefit that litigant by providing unequal and illegal access to the decisionmakers.

The OPC also strenuously rejects and objects to the proposed “extraordinary process” that Skyland proposes. Such a contorted and ad hoc “solution” to what is merely a case of unhappiness with the potential outcome of the case is not warranted. It is patently obvious that Skyland would not be seeking to implement such an ill-conceived *ad hoc* solution if they were happy with the Staff recommendation. Not a peep would be heard. The vote could occur on December 14th with whatever panel existed. The panel constitution issue is a red herring that is offered up as a convenient way to get a third post-brief opportunity to improperly address the Commission.

It is disingenuous at best to suggest that the Commission, the Commissioners and the Staff are not competent enough to handle changes in the Commissioner positions. Over the years, Commissioners have left for a variety of reasons including death, resignation or the operation of law. In each instance, the Commission has been able to make its decisions in an orderly manner based on the provisions of Section 350.01, Florida Statutes. Skyland has not cited any infirmity in the statute or

precedent that gives rise to a need to abandon the due process protections of the other parties and scuttle the value of the entire hearing just so it can get its way by attacking the Staff recommendation a third time in an oral presentation.

The OPC has confidence that the Commission has the resources and the expertise to handle the conclusion of this case. This is not an unusual case. The existing Commissioners are duly appointed and expected by law to discharge their sworn duties. No party has an expectation to have a decision rendered by a certain Commissioner or group of Commissioners. There is no legally cognizable standard that a certain panel is deficient because it is in "transition." Such a concept is absurd and merely an artifice advanced here in order to try to game the process. The vagaries of life, politics and the timing of expiration of terms can always make the panels seem transitory. This, of course, is an illusion. The people of the State of Florida have an expectation that the Public Service Commission - however constituted - will decide cases before it as they come. There is no expectation or prohibition that any given panel will be "transitory" or not.

The OPC suggests that it is arrogant for Skyland to suggest that their issue is any more important than the other 21 cases on the December 14th agenda. Taken to its logical conclusion, the Motion would call for that entire agenda to be cancelled so all parties can have decisions made by a panel that is not in "transition." This notion is, of course, absurd and the Commission should dismiss it out of hand.

For the above reasons, the OPC requests that Skyland's Motion to Defer be rejected and that any consideration by the Commission should be made based on representations by Staff that do not disclose improper post brief argument or fact introduction and which do not disadvantage the other parties who have not engaged in misconduct.

Respectfully submitted,

J.R. KELLY
Public Counsel

A handwritten signature in black ink, appearing to read 'CJ Rehwinkel', written over a horizontal line.

Charles J. Rehwinkel
Associate Public Counsel
Florida Bar No. 0527599

Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street
Room 812
Tallahassee, FL 32399

(850) 488-9330

Attorneys for the Citizens
of the State of Florida

CERTIFICATE OF SERVICE
Dkt No. 090478-WS

I HEREBY CERTIFY that a true and foregoing copy of **OFFICE OF PUBLIC COUNSEL'S RESPONSE TO SKYLAND'S EMERGENCY MOTION TO DEFER** has been furnished by electronic mail on this 10th day of December, 2010, to the following:

Derrill Lee McAteer
c/o Hogan Law Firm
City of Brooksville
20 South Broad Street
Brooksville, FL 34601

William H. Holliman
Hollimon P.A.
118 N. Gadsden Street
Tallahassee, FL 32301

Ronald Edwards, Manager
Skyland Utilities, LLC
660 Beachland Blvd, Suite 301
Vero Beach, FL 32963-1708

Michael Minton
Dean Law Firm
1903 South 25th Street, Suite
200
Fort Pierce, FL 34947

Joseph Richards
Pasco County
West Pasco Government Center
7530 Little Road, Suite
340
New Port Richey 34654

Goeffrey Kirk, Jon Jouben,
Garth Coller
Hernando County Utility
Regulation Authority
20 N. Main Street, Suite 462
Brooksville, FL 34601

Ronald Edwards, Manager
Skyland Utilities, LLC
660 Beachland Blvd, Suite
301
Vero Beach, FL 32963-1708

F. Marshall Deterding/
John L. Wharton
2548 Blairstone Pines
Drive
Tallahassee, FL 32301

Lisa Bennett/Caroline Klancke
Public Service Commission
2540 Shumard Oak Blvd
Tallahassee, FL 32399-0850



Charles J. Rehwinkel
Associate Public Counsel