

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
ORDER NO. PSC-10-0732-PCO-WS
ISSUED: December 15, 2010

ORDER GRANTING MOTIONS TO STRIKE
SKYLAND UTILITY LLC'S
EMERGENCY MOTION TO DEFER

On October 16, 2009, Skyland Utilities, LLC (Skyland or Utility) 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 County, Hernando County Water and Sewer District, and Hernando County Utility Regulatory Authority (collectively Hernando), Pasco County (Pasco), and the City of Brooksville (Brooksville) each timely filed a protest to the Utility's Application. On June 16, 2010, the Office of Public Counsel (OPC) intervened in this case.¹

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, with a Prehearing Conference scheduled for June 28, 2010. The administrative hearing was continued to September 23, 2010. The parties filed their respective post-hearing briefs on October 15, 2010. Commission staff's post hearing recommendation was filed on December 2, 2010, for consideration by the Commission at its December 14, 2010, Commission Conference.

On December 9, 2010, the Utility filed its Emergency Motion to Defer (Motion). On the same day Hernando filed its Motion to Strike Skyland Utilities, LLC's Emergency Motion to Defer. On December 10, 2010, Pasco filed its Response to Skyland's Emergency Motion to Defer and Motion to Strike and OPC filed its Response to Skyland Utilities, LLC's Emergency Motion to Defer.

In its Motion Skyland put forth several substantive arguments regarding issues and positions contained in staff's recommendation. Skyland also asserted that 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." Skyland argued that the deferral of this matter will provide for a consistency in the process and will allow reconsideration, if any, to be held in front of the same panel of Commissioners. For the foregoing reasons and because "this case has significant implications for other pending dockets

¹ See Order No. PSC-10-0387-PCO-WS, issued June 16, 2010, in 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.

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and for large land holders in the State of Florida in the future,” Skyland requested that the Commission defer final consideration of this matter until January 25, 2011, and direct the parties to appear before the Commission to present final arguments on their positions and the staff recommendation. Skyland itself characterized the opportunity to address the Commission prior to any vote on the staff recommendation as an extraordinary remedy. Although Skyland presented no rule, statute or authority in support of this extraordinary request, it specified that there was nothing that would prevent the implementation of such a process and that no member of the public would be prejudiced by such a brief delay.

In Hernando’s Motion to Strike Skyland Utilities, LLC’s Emergency Motion to Defer, it asserted that Skyland’s Motion violates both the Order Establishing Procedure and the provisions of Order No. PSC-10-0433-PCO-WS issued on July 6, 2010, in Docket No. 090478-WS. Hernando asserted that both orders provide that after the record is closed, and the briefs filed, the Commission in rendering its opinion shall consider the hearing record, briefs, and staff’s recommendation. Hernando asserted that because Skyland’s Motion contains substantive arguments it is in direct contravention of both the Order Establishing Procedure and Order No. PSC-10-0433-PCO-WS.

Hernando further argued that guised as a motion to defer, Skyland makes substantive arguments in an attempt to discredit and argue against Commission staff’s recommendation. Because of the timing of this motion, Hernando asserted that it is an attempt to influence the Commissioners deciding this case, and therefore Skyland’s Motion constitutes an impermissible ex parte communication in violation of Jennings v. Dade County, 589 So.2d 1337 (Fla. 3rd DCA 1991). rev. denied, 598 So.2d 75 (Fla. 1992) and its progeny. For the above-referenced reasons, Hernando requests the entry of an order by the Commission striking Skyland’s Motion.

In its Response to Skyland’s Emergency Motion to Defer and Motion to Strike, Pasco similarly argued that Skyland’s Motion is in actuality an improper attempt to reargue issues raised by Skyland in its brief, improperly rebut staff’s recommendation, make an untimely request to modify the Order Establishing Procedure, and engage in the administrative equivalent of judge (fact finder) shopping. Pasco thus requests that Skyland’s Motion should be stricken as a “sham pleading,” in order to preclude the Utility from unilaterally addressing the Commission in contravention of the established process in this proceeding.

In OPC’s Response to Skyland’s Motion, it objected to the Commission considering or even seeing the Motion on the grounds that it 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, F.S. OPC further asserted that the Motion constituted an attack on the Commission’s ability to manage the normal, inevitable, and constant change that has been a routine part of the Commission’s history. For these reasons, OPC requested that the Skyland Motion be rejected and that any consideration by the Commission of this matter should be based upon the representations of staff that do not disclose improper post-hearing argument and which do not disadvantage the other parties who have not engaged in misconduct.

Rule 28-106.215, Florida Administrative Code (F.A.C.), the Order Establishing Procedure, and the Prehearing Order² issued in this matter provide that once the record has been closed following the hearing, the sole opportunity for communications with the tribunal on the merits of the case is through the parties' post hearing briefs.³ This process protects the sanctity of the closed record and affords due process to all of the parties by ensuring that no supplemental arguments are advanced, no new facts are introduced outside of the record, and that no further rebuttal of the parties or the staff are permitted. In its Motion, Skyland advanced several substantive arguments on the merits of this proceeding which are wholly unrelated to deferral. Because of the procedural posture of this case, the other parties are not afforded with any mechanism for response to Skyland's arguments. In light of the potential prejudice to other parties resulting from this pleading, I hereby grant Hernando and Pasco County's Motions to Strike to the extent that Skyland Utility LLC's Emergency Motion to Defer shall be stricken.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Hernando County's Motion to Strike Skyland Utilities, LLC's Emergency Motion to Defer and Pasco County's Response to Skyland's Emergency Motion to Defer and Motion to Strike are hereby granted to the extent that Skyland Utility LLC's Emergency Motion to Defer shall be stricken.

By ORDER of Chairman Art Graham, as Presiding Officer, this 15th day of December, 2010.



ART GRAHAM
Chairman and Presiding Officer

(S E A L)

CMK

² Issued July 1, 2010, in 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.

³ See also Rule 25-22.0021(6), F.A.C. ("Informal participation, except by non-testifying staff, is not permitted when the Commission considers a post-hearing recommendation on the merits of a case after the close of the record.") and Rule 25-22.022(5), F.A.C. ("Oral argument will not be entertained on a post-hearing recommendation on the merits of the case . . .").

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.