

STATE OF FLORIDA
PUBLIC SERVICE COMMISSION

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

Case No.: 090478-WS

**HERNANDO COUNTY'S MOTION TO DISMISS APPLICATION OF
SKYLAND UTILITIES, LLC., FOR LACK OF JURISDICTION
WITH INCORPORATED MEMORANDUM OF LAW**

Objector¹, HERNANDO COUNTY ("the COUNTY"), by and through undersigned counsel, hereby moves to dismiss the *Application for Original Certificates for Proposed Water and Wastewater System and Request for Initial Rates and Charges* ("the Application") filed with the Public Service Commission by Applicant, SKYLAND UTILITIES, LLC. ("SKYLAND"). As grounds therefore, the COUNTY states that the Public Service Commission lacks jurisdiction to grant the *Application*.

I. Question Presented

In a "non-jurisdictional" county, the Public Service Commission only possesses the authority to regulate water and wastewater utilities whose **existing** facilities cross the county's boundaries. SKYLAND has applied to the Public Service Commission for permission to operate an integrated water and wastewater utility system in Pasco and Hernando Counties. SKYLAND, however, does not actually own, control, or operate any facilities in Pasco or Hernando Counties, nevertheless any

COM ~~infra~~ infrastructure that traverses the border between those counties.

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The COUNTY will file its *Objection to the Application of Skyland Utilities, LLC., and Request for Formal Administrative Hearing* contemporaneously with the filing of the instant motion with the Public Service Commission. All factual allegations and legal arguments that are contained in the COUNTY's *Objection* are hereby incorporated herein by reference.

The Florida Supreme Court has held that the Public Service Commission should resolve all doubts about its jurisdiction **against** the exercise thereof. In light of that standard, does the Public Service Commission have the power to grant certificates of authority to SKYLAND to operate a water and wastewater utility in Hernando County, even though no infrastructure of SKYLAND currently traverses any of Hernando County's geographic boundaries?

II. Preliminary Statement

The COUNTY is aware that the argument made in this motion contradicts the Public Service Commission's decision in *In Re: Application for Certificates to Operate a Water and Wastewater Utility in Duval and St. Johns Counties by Intercoastal Utilities, Inc.*, 2000 WL 1092990 (Fla. P.S.C. July 11, 2000) ("*Intercoastal Utilities*").

The COUNTY presents the arguments made in this motion as a good faith argument for the extension, modification, revised interpretation, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success. Specifically, the COUNTY asks the Public Service Commission to either overrule the above-referenced order or to limit its scope. If unsuccessful, the COUNTY intends to seek similar relief in the appropriate appellate court.

III. Factual and Procedural Background

While the *Application* states that SKYLAND intends to establish a new water and wastewater utility in various locations in Pasco and Hernando Counties, the *Application* explicitly states that no facilities currently traverse the borders of Hernando County. In fact, the *Application* indicates that SKYLAND plans to build an entirely new system from scratch.²

²*Application*, passim. All factual allegations and assertions that are contained in the *Application* are hereby incorporated herein by reference.

IV. Legal Argument

As explained herein, the Public Service Commission lacks jurisdiction to grant the relief requested in SKLYAND's *Application*. No infrastructure owned or controlled by SKYLAND currently traverses a boarder of the COUNTY. The actual existence of such infrastructure is a prerequisite to the exercise of jurisdiction by the Public Service Commission over a water or wastewater utility situated in a non-jurisdictional county. Accordingly, the Public Service Commission lacks the necessary jurisdiction to grant SKYLAND's application.

The COUNTY respectfully suggests that to the extent that the Public Service Commission held otherwise in *Intercoastal Utilities*, that decision was in error. That being said, the COUNTY believes that *Intercoastal Utilities* can be distinguished via the facts presented in the instant case.

A. All Doubts Regarding the Public Service Commission's Jurisdiction to Regulate a Water and Wastewater Utility must be Resolved Against the Existence of Jurisdiction.

In *City of Cape Coral v. GAC Utilities, Inc.*, the Florida Supreme Court held that "[a]ny reasonable doubt as to the lawful existence of a particular power that is being exercised by the [Public Service Commission] must be resolved against the exercise thereof, and the further exercise of the power should be arrested."³

³*City of Cape Coral v. GAC Utilities, Inc.*, 281 So.2d 493, 496 (Fla.1973).

B. Fla. Stat. Ch. 367 Limits the Jurisdiction of the Public Service Commission to Regulate Water and Wastewater Utilities in “Non-Jurisdictional” Counties.

The Florida Legislature established a two-tiered regulatory scheme for water utilities in this state by enacting the “Water and Wastewater System Regulatory Law” (the “Water Regulatory Act”).⁴ As the first tier, the Legislature has granted the Public Service Commission the exclusive jurisdiction to regulate “all utility systems whose service transverses county boundaries.”⁵ The Public Service Commission therefore has “exclusive jurisdiction over each utility [that it regulates] with respect to its authority, service, and rates.”⁶

The second tier consists of intra-county utility systems, which can be regulated either by the applicable county or the Public Service Commission. Under the Water Regulatory Act, “the various counties of Florida retain jurisdiction to regulate water and wastewater utilities providing service to customers within the boundaries of each county.”⁷ Each county, however, has the option to cede its regulatory authority to the Public Service Commission by passing a resolution declaring that the county has voluntarily subjected itself to the Water Regulatory Act.⁸ Otherwise, each county retains the authority to regulate all water and wastewater “utilities in that county which would otherwise be subject to regulation by the [Public Service Commission].”⁹

⁴The Water and Wastewater System Regulatory Law, Fla. Stat. Ch. 367.

⁵Fla. Stat. § 367.171(7).

⁶Fla. Stat. § 367.011(2).

⁷*Hernando County v. Florida Public Service Commission*, 685 So.2d 48, 50 (Fla. 1st DCA 1996).

⁸Fla. Stat. § 367.171(1).

⁹Fla. Stat. § 367.171(8).

Hernando County is a non-jurisdictional county for the purposes of the Water Regulatory Act.¹⁰

C. The Public Service Commission Only Possesses Jurisdiction to Regulate Water and Wastewater Utilities in Non-Jurisdictional Counties when a Utility's Service Traverses a County Border.

In an Order dated June 6, 1994, the Public Service Commission initiated an investigation to determine whether it retained jurisdiction to regulate the operations of Southern States Utilities, a water and wastewater utility then operating in Hernando County.¹¹ Specifically, the Public Service Commission decided to investigate whether Southern States Utilities' operations in Hillsborough, Polk, and Hernando Counties constituted a single, inter-county utility system. If so, the Public Service Commission would have exclusive jurisdiction to regulate Southern States Utilities' operations. If not, the individual counties would have regulatory jurisdiction.

In an Order dated July 21, 1995, the Public Service Commission found that Southern States Utilities' operations constituted a single, inter-county system.¹² On that basis, the Public Service Commission held that it, not the COUNTY, possessed exclusive jurisdiction to regulate Southern States Utilities' operations.¹³

¹⁰See *In re: Request for Acknowledgment of Resolution Rescinding Florida Public Service Commission Jurisdiction Over Private Water and Wastewater Utilities in Hernando County*, 1994 WL 269812 (Fla. P.S.C. June 9, 1994).

¹¹See *In re: Southern States Utilities, Inc.'s Petition for Declaratory Statement Regarding Commission Jurisdiction Over Its Water and Wastewater Facilities in Hillsborough and Polk Counties*, 1994 WL 328024 (Fla. P.S.C. June 6, 1994).

¹²See *In re: Investigation Into Florida Public Service Commission Jurisdiction Over Southern States Utilities, Inc., in Florida*, 1995 WL 466804 (Fla. P.S.C. July 21, 1995).

¹³*Id.*

The COUNTY promptly appealed the Public Service Commission's order to the First District Court of Appeal.

On December 12, 1996, the First District Court of Appeal reversed the Public Service Commission's determination that it held exclusive regulatory jurisdiction over Southern States Utilities' operations in Hernando County.¹⁴ The court held that the Public Service Commission's jurisdiction pursuant to Fla. Stat. § 367.171(7) depends upon the **actual existence** of operationally integrated water and/or wastewater facilities that traverse a county boundary.¹⁵ "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.**"¹⁶

D. The Public Service Commission Lacks Jurisdiction to Consider the *Application* Because No Water or Wastewater Facilities Currently Exist or Traverse Hernando County's Borders.

As discussed supra, SKYLAND does not currently provide service in either Pasco County or Hernando County. SKYLAND possesses no infrastructure or equipment in either county. SKYLAND explicitly states in the *Application* that it intends to build its entire utility system from scratch sometime in the future.

Since the facilities forming SKYLAND's proposed system **do not exist and do not provide service across the border of Pasco and Hernando Counties**, the Public Service Commission does not have jurisdiction to grant SKYLAND's *Application*.

¹⁴*Hernando County v. Florida Public Service Commission*, 685 So.2d 48, 52 (Fla. 1st DCA 1996).

¹⁵*Id* at 52.

¹⁶*Id.* (Emphasis Added)

E. The Public Service Commission Must Reverse its Decision in *Intercoastal Utilities*.

In *Intercoastal Utilities*, the Public Service Commission considered two applications that proposed to construct trans-county water and wastewater systems in the future. The Commission overruled objections by several counties that the existence of physical infrastructure was a prerequisite to the exercise of jurisdiction by the Commission pursuant to *Hernando County*. In doing so, the Public Service Commission distinguished *Hernando County* as follows:

- The Commission reasoned that Fla. Stat. § 367.021(12) defines “utility” to include “every person . . . proposing construction of a system, who is providing, or proposes to provide, water or wastewater service to the public for compensation.”¹⁷
- The Commission then maintained that *Hernando County* was not applicable to its consideration because that case did not reach the issue of whether the existence of inter-county facilities is a prerequisite to the existence of Commission jurisdiction pursuant to Fla. Stat. § 367.171(7). Instead, the Commission concluded that the First DCA merely held that the fact that a utility operates within multiple counties cannot give rise to Commission jurisdiction.
- Thus, the Commission held that it had jurisdiction to consider the applications “because each [applicant] is proposing to construct a utility system whose service would transverse county boundaries, thus causing the applications to fall within our exclusive jurisdiction.”¹⁸

¹⁷2000 WL 1092990, *20 (Fla. P.S.C. 2000).

¹⁸*Id.* (Internal Quotations Omitted)

The COUNTY respectfully suggests that the Public Service Commission's decision in *Interlocal Utilities* must be reversed because it artificially distinguished *Hernando County*. The First DCA actually held in *Hernando County* that the Public Service Commission's jurisdiction pursuant to Fla. Stat. § 367.171(7) depends upon the **actual existence** of operationally integrated water and/or wastewater facilities that traverse a county boundary.¹⁹ The opinion specifically "conclude[d] 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.**"²⁰

Since the Public Service Commission's decision in *Interlocal Utilities* is directly and fatally undermined by the First DCA's decision in *Hernando County*, the Commission must reverse *Interlocal Utilities*.

G. Even if the Public Service Commission Does Not Reverse Its Decision in *Intercoastal Utilities*, That Order Is Based Upon Facts That Are Distinguishable From the Instant Facts.

In *Interlocal Utilities*, the Public Service Commission considered applications by two utilities that sought original certificates to provide water and wastewater services to the residents of Nocatee, a master-planned community in St. Johns County and the extreme southeast corner of Duval County. At the time of the applications, Nocatee had already been approved as a Development of Regional Impact (DRI) as a mixed-use development on approximately 13,323 acres. Thus, the Public Service Commission was not being speculative when it found that whichever utility was selected to service Nocatee, the provision of service would span two adjacent counties.

¹⁹*Id* at 52.

²⁰*Id.* (Emphasis Added)

In this case, SKYLAND's proposed provision of inter-county water and wastewater services is purely speculative at best. SKYLAND admits in its *Application* that no planning, design, or exact timing has been planned for future phases.²¹ In fact, the traversing of county boundaries will not occur until some future phase.²² Thus, SKYLAND's *Application* clearly demonstrates that the company has no present intention of providing inter-county service in the foreseeable future.

Should the Public Service Commission not wish to readdress *Interlocal Utilities* at this time, it should find that SKYLAND's plan for inter-county service is simply too speculative at this time to invoke the Commission's jurisdiction under Fla. Stat. § 367.171(7).

V. Prayer For Relief

WHEREFORE, Objector, HERNANDO COUNTY, prays for the entry of an Order dismissing SKYLAND UTILITIES' *Application for Original Certificates for Proposed Water and Wastewater System and Request for Initial Rates and Charges*, and granting such other and further relief as the Public Service Commission deems just and proper.

²¹ *Application* at Section I.D.

²² *Id.*

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail to all persons listed on the attached service list on this 13th day of November, 2009.



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