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-10-0431-PCO-WS ISSUED: July 6, 2010

ORDER DENYING PASCO COUNTY'S MOTION TO STRIKE PORTIONS OF THE DIRECT TESTIMONY OF WITNESS GERALD HARTMAN

Background

On October 16, 2009, Skyland Utilities, LLC (Skyland) filed an application for original certificates for water and wastewater to serve properties in both Pasco and Hernando Counties. On October 29, 2009, Skyland supplemented its application. On November 13, 2009, Hernando County, Hernando County Water and Sewer District, and Hernando County Utility Regulatory Authority (referred to jointly as Hernando County) filed a Motion to Dismiss the application and an objection to the certificates. Hernando County requested a hearing pursuant to Sections 120.569 and 120.57, Florida Statutes (F.S.). On November 13, 2009, Pasco County and the City of Brooksville also filed objections to the certificates and requested a hearing.

On February 24, 2010, Order No. PSC-10-0105-PCO-EI was issued establishing the procedural milestones and requirements of this proceeding. On April 2, 2010, Skyland filed the testimony and exhibits of witness Hartman, including a copy of Skyland's application contained in Exhibit GCH-1. On May 3, 2010, Pasco County filed the direct testimony of witnesses Gehring and Kennedy, and Hernando County filed the direct testimony of witnesses Stapf, Pianta, and Wieczorek. On May 24, 2010, Commission staff filed the testimony of witnesses Williams and Evans. On June 7, 2010, Skyland filed rebuttal testimony of witnesses Hartman, Edwards, and De Lisi. On July 2, 2010, Pasco County filed surrebuttal testimony of witness Kennedy, and Hernando County filed surrebuttal testimony of witnesses Pianta, and Stapf.

On June 14, 2010, Pasco and Hernando Counties filed a joint motion to strike all of rebuttal witness Edwards's testimony and portions of rebuttal witness Hartman's testimony. That motion was denied at the Prehearing Conference on June 28, 2010 and memorialized by Order No. PSC-10-0426-PCO-WS, issued July 2, 2010. On June 25, 2010, Pasco County filed a Motion to Strike a portion of the direct testimony of Skyland witness Hartman and portions of witness Hartman's prefiled Exhibit GCH-1. At the Prehearing Conference, Hernando County joined in Pasco's Motion to Strike.

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Pasco County's Motion

Pasco County asks that the testimony of Skyland's witness Hartman be stricken as it relates to Skyland's financial ability, Skyland's use of the land for water and wastewater purposes, and the need for service in the proposed territory. Pasco County argues that the service request letters in Appendix I of Skyland's application, the Water and Wastewater Leases in Appendices IV and VI of Skyland's Application, and the funding agreement found in Appendix VII of the Application should be stricken. Pasco County argues that these documents were not prepared by witness Hartman and are therefore hearsay, and not admissible under any exception to the hearsay rule. Pasco County asserts that witness Hartman's testimony is lay witness testimony as it relates to the application because his testimony regarding the application is a recitation of the facts contained in the application. Pasco County concludes that because witness Hartman is a fact witness regarding Skyland's application, and because Hartman does not have personal knowledge of the service application letters, the lease agreements, or the financial agreements, documents and the testimony regarding those documents must be stricken.

Pasco County's legal reasoning behind the conclusion that witness Hartman is a lay witness is predicated on the Florida Evidentiary Code Chapter 90, F.S. Pasco County states that for administrative proceedings, the fundamental evidentiary standards established by the Administrative Procedures Act found in Section 120.569(2)(g), F.S., states

> [i]rrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida. Any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath.

Pasco County asserts that while this section of the statutes does not make reference to it, the Florida Evidence Code provides guidance as to the type of evidence relied upon by reasonably prudent persons. Pasco County then proceeds to describe the use of expert witnesses under Section 90.704, F.S., to support its position that an expert may not be used as a conduit to introduce inadmissible hearsay evidence. Pasco County also contends that expert testimony is not always required under Section 90.702, F.S., but is only necessary if the trier of fact needs direction. Pasco County concludes that the Commission should be guided by the Florida Evidentiary Code and conclude that as to the application of Skyland, witness Hartman is a lay witness and does not have the requisite personal knowledge to address the need for service, the utility's legal agreement with the property owner to use the property for water and wastewater service, and the financial agreement.

Skyland's Response

Skyland asserts that the Motion to Strike is in effect two motions, a motion to strike a portion of witness Hartman's pre-filed direct testimony, and an objection to the admittance of portions of Skyland's application into the record. Skyland also relies upon Section

120.569(2)(g), F.S. of the Administrative Procedures Act to support its position. According to Skyland, only "irrelevant, immaterial, or unduly repetitious evidence" should be excluded. Skyland re-iterates that the standard for admissibility of evidence is whether it is a type "commonly relied upon by reasonably prudent persons in the conduct of their affairs." Skyland also states that even hearsay evidence is admissible pursuant to Section 120.57(1)(c), F.S.:

> Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

In applying these two sections of the Administrative Procedures Act to witness Hartman's testimony and exhibits, Skyland concludes that witness Hartman's testimony and exhibits are the type of evidence a reasonably prudent person would rely upon. To support its argument, Skyland states that Skyland and its parent entity, Evans Properties, are corporations that can speak only through the voices of their officers, agents, and authorized representatives. Skyland states that for purposes of the application, witness Hartman speaks for Skyland. Skyland states that there can be no question that witness Hartman is and has been authorized to speak on behalf of Skyland. Skyland argues that it is not necessary to call every individual who has done every single thing on behalf of the corporation in its application. Skyland references an order in a docket with similar facts, Order No. PSC-92-0104-FOF-WU, issued March 27, 1992, in Docket No. 910114-WU, In re: Application of East Central Florida Service, Inc. for an original certificate in Brevard, Orange, and Osceola Counties (East Central) to support its position. According to Skyland, in the East Central docket, one of the objecting parties argued that the expert witness did not have personal knowledge of the parent funding arrangements and the Commission found that argument to be without merit.

Skyland also argues that the documents in question should be admissible pursuant to Section 120.57(1)(c), F.S. Skyland contends that it is only after the close of the record, and based on the totality of the evidence in whatever form, by whatever party, and however admitted or introduced, that the Commission makes a determination of whether a particular piece of evidence (if deemed hearsay) can be appropriately used. Skyland argues that the Commission should not properly cut this evidence off at the pass, excluding it only to be faced with an after the fact argument that the evidence was not the only evidence in the record regarding that fact.

Analysis and Ruling

Sections 120.569(2)(g) and 120.57(1)(c), F.S., govern the admissibility of evidence in this proceeding. These sections are much broader than the Florida Evidence Code, and as such even evidence not admissible under the Florida Evidentiary Code, would still be admissible in a proceeding before the Commission. Section 120.569(2)(g), F.S., provides that all evidence upon which a reasonably prudent person would rely is admissible. Even hearsay evidence is admissible in Chapter 120 proceedings. Only "irrelevant, immaterial, or unduly repetitious material" is inadmissible. In Order No. PSC-01-1919-PCO-WU, issued September 24, 2001, in Docket No. 991666-WU, In re: Application for amendment of Certificate No. 106-W to add territory in Lake County by Florida Water Services Corporation, the Commission found that the

expert on water and wastewater management was the appropriate witness to sponsor the application and the information contained therein. In Order No. PSC-92-0104-FOF-WU, issued March 27, 1992, in Docket No. 910114-WU, the Commission found that the objectors' arguments that the utility's witness testimony was hearsay and not in itself sufficient to support a finding was without merit, in part, because the testimony was supplemented by other record testimony and in part because the sponsoring witness was qualified as an expert to testify on behalf of the utility.

Based on the foregoing, the Motion to Strike is denied. The denial of the Motion to Strike does not remove from the Commission its authority to weigh the credibility of the witness, to determine whether the evidence is hearsay and if hearsay, whether it falls within an exception to the hearsay rule, and to determine if hearsay evidence supplements other record evidence.

Based on the foregoing, it is

ORDERED that Pasco County's June 25, 2010, Motion to Strike is denied. This denial does not preclude parties from cross-examining witnesses or raising contemporaneous objections to witness testimony or exhibits. Moreover, the denial of the Motion to Strike does not remove from the Commission its authority to weigh the credibility of the witness, to determine whether the evidence is hearsay and if hearsay, whether it falls within an exception to the hearsay rule, and to determine if hearsay evidence supplements other record evidence.

By ORDER of Commissioner Nathan A. Skop, as Prehearing Officer, this 6th day of July, 2010.

NATHAN A. SKOP
Commissioner and Prehearing Officer

(S E A L)

LCB

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.