ORIGINAL

State of Florida

Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: 08/27/01

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: DIVISION OF LEGAL SERVICES (CHRISTENSEN)
DIVISION OF REGULATORY OVERSIGHT (REDEMANN, MESSER)

RE: DOCKET NO. 991666-WU - APPLICATION FOR AMENDMENT OF CERTIFICATE NO. 106-W TO ADD TERRITORY IN LAKE COUNTY BY FLORIDA WATER SERVICES CORPORATION.

AGENDA: 09/04/01 - REGULAR AGENDA - POST HEARING DECISION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\991666.RCM

CASE BACKGROUND

On November 3, 1999, Florida Water Services Corporation (FWSC or utility) filed an application for amendment of Certificate No. 106-W to add territory in Lake County. FWSC is a Class A utility.

The City of Groveland (City) timely filed a protest to the application on November 24, 1999. By Order No. PSC-00-0623-PCO-WU (Order Establishing Procedure), issued April 3, 2000, this matter was scheduled for an administrative hearing on December 11 and 12, 2000.

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On October 27, 2000, the parties filed a Joint Motion for Extension of Time to File Rebuttal Testimony and Joint Motion for Continuance of the hearing dates. By Order No. PSC-00-2096-PCO-WU, issued November 6, 2000, the hearing dates were changed to March 13 and 14, 2001, the prehearing date was changed to March 1, 2001, and other key activity dates were consequently changed. By Order No.

PSC-01-0279-PCO-WU, issued January 31, 2001, the hearing dates were changed to March 15 and 16, 2001. Pursuant to Order No. PSC-01-0395-PCO-WU, issued February 16, 2001, the prehearing conference and hearing dates were changed to June 25, 2001, and July 11 and 12, 2001, respectively. In addition, by Order No. PSC-01-0395-PCO-WU, the discovery cutoff date was changed to June 18, 2001. By Order No. PSC-01-1287-PCO-WU, issued June 13, 2001, the prehearing conference date was changed to June 26, 2001, and the discovery cutoff date was extended to July 3, 2001.

On May 10, 2001, FWSC filed its Motion for Summary Final Order. On May 17, 2001, the City filed its Response in Opposition to Motion for Summary Final Order. On May 17, 2001, the City also filed a Motion Requesting Oral Argument on the Motion for Summary Final Order. By Order No. PSC-01-1478-FOF-WU, issued July 16, 2001, FWSC's Motion for Summary Final Order was denied. Thus, the matter proceeded to administrative hearing on July 11 and 12, 2001.

At the hearing, the City of Groveland made an *ore tenus* Motion to Strike the testimony of Mr. John L. Tillman. Further, the City requested that Mr. Mittauer be tendered as an expert in the field of water and wastewater utility design, construction and permitting. The Commission directed the parties to brief two additional issues related to the City's Motion: 1) should Mr. Tillman and Mr. Mittauer be tendered as expert witnesses, and if so, in what areas? and 2) should the City's Motion to Strike those portions of Mr. Tillman's testimony and exhibits identified at the July 11th hearing be granted? On August 13, 2001, the City filed its Brief on Motions to Strike and To Reject or Accept Expert Witnesses of the City of Groveland, Florida. On August 13, 2001, FWSC filed its brief entitled Florida Water Service Corporation's Legal Memorandum on Issues A and B. This recommendation addresses these two issues.

The Commission has jurisdiction pursuant to Sections 367.045 120.569, and 120.57, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should Mr. Tillman and Mr. Mittauer be tendered as expert witnesses, and if so, in what areas?

RECOMMENDATION: Staff recommends that the Commission accept Mr. Tillman as an expert in the area of water and wastewater utility management. In Commission practice, a witness' professional and educational qualifications are set forth in his or her prefiled testimony and are accepted unless that witness' expertise is challenged. Thus, the City's additional proffer at the hearing that Mr. Mittauer be accepted as an expert in the field of engineering is unnecessary since his engineering expertise was not challenged. It is clear that based on his education and experience, Mr. Mittauer is a water and wastewater utility engineering expert. **(CHRISTENSEN)**

POSITION OF THE PARTIES:

CITY OF GROVELAND: Given the nature of the testimony presented by both Mr. Mittauer and Mr. Tillman, it is necessary that both witnesses be tendered and qualified as experts in the areas of water and wastewater utility design, construction and permitting.

FWSC: It is not necessary to qualify Mr. Tillman or Mr. Mittauer as experts. Nonetheless, it is clear that Mr. Tillman is an expert in water and wastewater utility management.

STAFF ANALYSIS: As stated in the Case Background, at the administrative hearing held July 11 and 12, 2001, the City made an *ore tenus* Motion to Strike certain portion of the testimony and exhibits of Mr. Tillman. Further, the City requested that Mr. Mittauer be tendered as an expert in the field of water and wastewater utility design, construction and permitting. The crux of this issue is whether Mr. Tillman an Mr. Mittauer should be tendered as expert witnesses, and if so, in what areas. At the hearing, the City conducted *voir dire* of Mr. Tillman and requested that his testimonies and exhibits be stricken based on his lack of expertise in the area of utility construction, operation, maintenance or design and his lack of personal knowledge. Section 90.702, Florida Statutes, states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the

evidence or in determining a fact in issue, a witness qualified as an expert may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

Arguments

City

In its brief, the City argues that in every certificate amendment case, two fundamental questions must be addressed. (City BR at p. 8) The City contends that the first question is whether there is a need for service and in what amount and the second question is how will the applicant meet the identified need. (City BR at p. 8) The City asserts that answers to both of these questions necessarily require that an engineer, or someone with specialized engineering training or experience address the questions. (City BR at p. 8) The City contends that the two most basic facts upon which the Commission bases its decision, the amount of "need" and the ability to meet the "need", are ". . . by their very nature facts which require the witness to form an 'opinion'". (City BR at p. 9) The City further contends that the plant capacity and forecasted water demand for the Summit ". . . is 'beyond the common understanding of the average layman' and requires that application of a 'special knowledge, skill, experience or training.'" (City BR at p. 9) The City concludes that these opinions are absolutely necessary for the trier of fact to determine if FWSC has the ability to serve the Summit. (City BR at p. 9) The City concludes that pursuant to Section 90.702, Florida Statutes, this type of testimony is, by definition, expert testimony. (City BR at p. 9-10)

The City cites Jones v. State[1] for the proposition that under Florida law, "'before expert testimony is admitted the trial court must make the following determinations: "First, the subject must be beyond the common understanding of the average layman. Second, the witness must have such knowledge as 'will probably aid the trier of facts in its search for truth.'" (City BR at p. 10) The City contends that in the instant case, both Mr. Tillman and Mr. Mittauer must be qualified as experts in the field of water and

[1]Jones v. State, 748 So.2d 1012, 1025 (Fla. 1999), reh. den., (Jan. 12, 2000), U.S. cert. den., 120 S.Ct. 2666 (2000)

wastewater utility design, construction and permitting based on the nature of their testimonies tendered on those points. (City BR at p. 10) The City concludes that absent the qualification and acceptance by the Commission, it is reversible error for the Commission to allow the witnesses to continue. (City BR at p. 10) The City asserts that this type of evidence must be in the record, the parties must be able to *voir dire* the witnesses regarding their expertise and develop this point for the appeal record. (City BR at p. 10)

The City argues that the distinction between an expert and a layperson is an important one because a lay witness is required to confine his testimony to facts that are know to him, and is not permitted to give his opinions and conclusions. (City BR at pp. 10-11) The City cites Howland v. Cates[2] for the proposition that "[t]he Court found no reversible error where the trial court did not allow the lay witness to 'express a personal opinion on one of the material issues of fact presented by the pleadings and evidence, after the witness has already clearly and fully and as definitely as he knew, stated the facts with respect to the accident'". The City also cites to Thomas v. State[3].

The City contends that Mr. Tillman in this case admits that he is recounting the conclusions that other persons at FWSC have made. (City BR at p. 11) The City asserts that in some cases, Mr. Tillman requested others to calculate data, such as the average daily demand, and in other cases, unnamed persons have exercised their own judgement in developing the data. (City BR at p. 11) The City argues that Mr. Tillman has no personal knowledge of the data, the underlying calculations used to produce the data, or the underlying facts which were used in the calculations. (City BR at p. 11)

The City disagrees with the Commission staff recommendation made at hearing that Mr. Tillman can be tendered as an expert in water and wastewater utility management systems for several reasons. (City BR at p. 11) The City asserts that a utility systems management expertise is irrelevant to the engineering expertise at issue with regard to specific engineering

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[2]Howland v. Cates, 43 So.2d 848, 851 (Fla. 1949)

[3]Thomas v. State, 317 So. 2d 450, 451-2 (Fla. 3d DCA 1975), cert. den., 333 So.2d 465 (Fla. 1975)

calculations of plant capacity, average daily demand, maximum daily demand, fire flow capacity, etc. (City BR at pp. 11-12) Second, the City contends that "[s]taff seems to be under the impression that Mr. Tillman can acquire engineering expertise himself simply by supervising engineers." Third, the City asserts that "[s]taff seems to be under the impression that the improper admittance of such evidence can be remedied by simply giving the engineering testimony 'the weight that it deserves.'" (City BR at p. 12) The City argues that the proper predicates must by laid for expert testimony, and if not present, the testimony is improper and that only testimony which is properly in the record can be "weighed" by the trier of fact. (City BR at p. 12).

Finally, the City argues that it does not have to raise the issue of Mr. Tillman's expertise prior to the hearing. (City BR at p. 12) The City contends that voir dire on Mr. Tillman is appropriate at the hearing and is within the accepted scope of cross examination under Section 90.705(2), Florida Statutes, and Order No. PSC-01-1448-PHO-WU, issued July 6, 2001 at 5 "('All testimony remains subject to appropriate objections.')." (City BR at p.12) Thus, the City concludes that Mr. Tillman and Mr. Mittauer must be tendered and qualified as experts in the areas of water and wastewater utility design, construction and permitting. (City BR at p. 12)

FWSC

In its Brief, FWSC states that the pertinent provision is Section 90.702, Florida Statutes, governing the testimony of expert witnesses. (FWSC BR at p. 1) FWSC cites Professor Ehrhardt's treatise on Florida Evidence on this section for the proposition that

> this section 'provides that an expert witness may testify in the form of an opinion. An expert is permitted to express an opinion on matters in which the witness has expertise when the opinion is based upon facts which the expert personally knows, is in response to a hypothetical question or is in response to facts disclosed to the expert out of or before the trial.'[4] [emphasis added]

[4]Ehrhardt, Florida Evidence (2001 Ed.), Section 702.1, pp. 571-572.

(FWSC BR at p. 2) FWSC asserts that this provision is only relevant when opinion testimony is sought. (FWSC BR at p. 2) FWSC contends that technical and scientific matters do not always involve opinions. As noted by Professor Ehrhardt, "'when the witness is testifying to facts, it is immaterial whether the witness has been qualified as an expert'".[5] (FWSC BR at p. 2)

Thus, FWSC asserts that as a preliminarily matter with respect to whether Mr. Tillman or Mr. Mittauer should be accepted as experts, the Commission should first determine whether any of the testimony these witnesses offered is opinion as opposed to factual testimony. (FWSC BR at p. 2) FWSC contends that almost all of Mr. Tillman's challenged testimony addresses factual issues rather than opinion testimony. (FWSC BR at p. 2) FWSC states that Mr. Tillman as a senior executive officer of the company has sponsored the Application and confirmed that it was prepared through an interdepartmental effort of FWSC employees. (FWSC BR at p. 2) FWSC asserts that in Mr. Tillman's testimony he states that he now supervises the department responsible for the Application preparation and discussed the Application with the staff responsible for preparing it. (FWSC BR at p. 2) FWSC contends that "while the Application contains technical information from the business records of the company, such information is necessarily produced and maintained as part of the utility's operations." (FWSC BR at p. 2) FWSC asserts that technical testimony is not required to verify the rated capacity of the wells or the average daily flows of the plant. (FWSC BR at p. 2) FWSC states that the City is attempting to divert attention from the merits of the Application by erroneously claiming that technical information maintained in the ordinary course of business can only be sponsored by a technical expert. (FWSC BR at p. 2) FWSC contends that the City's suggestion is simply wrong. (FWSC BR at p. 2) FWSC cites Bluegrass Shows, Inc. v. Collins[6], for the proposition that the "testimony of a paramedic concerning the 'mechanism of injury' to a plaintiff was factual in nature so it was not necessary to lay a foundation of the paramedic's expertise." (FWSC BR at pp. 2-3)

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[5]Id. at p. 572.

[6]Bluegrass Shows, Inc. v. Collins, 614 So.2d 626 (Fla. 1st DCA 1993)

FWSC contends that it is not necessary for either Mr. Tillman or Mr. Mittauer to be accepted as expert witnesses to address the issues that are in dispute in this docket as framed by the City's Objection or its Prehearing Statement. (FWSC BR at p. 3) FWSC asserts that neither the City's Objection nor its Prehearing Statement challenged the capacity or actual flow from the Palisades plant. (FWSC BR at p. 3)

FWSC states that in any event, Mr. Tillman is an expert in the area of water and wastewater utility management. (FWSC BR at p 3) FWSC asserts that Mr. Tillman is a senior vice president of one of the largest investor-owned water and wastewater utilities in the state. (FWSC BR at p. 3) FWSC contends that Mr. Tillman's job responsibilities include all business development related activities for the company which includes the development of new systems. (FWSC BR at p. 3). FWSC asserts that Mr. Tillman supervises the staff which determines available capacity and performs water demand projects and works closely with developers, engineers and other applicants to provide service to new residential and commercial construction. (FWSC BR at p. 3) FWSC contends that Mr. Tillman clearly has expertise regarding the manner and cost of providing water and wastewater service. (FWSC BR at p. 3)

FWSC states that with respect to Mr. Mittauer, FWSC objects to the City's attempt to supplement his prefiled testimony subsequent to its filing. (FWSC BR at p. 3) FWSC contends that if the City had wished to formally proffer Mr. Mittauer as an expert, an unnecessary exercise, it should have done so in its prefiled testimony. (FWSC BR at p. 3-4) FWSC asserts that to allow the City to supplement Mr. Mittauer's testimony to tender him as an expert witness at the hearing is an academic exercise that wastes the resources of the parties and the Commission. (FWSC BR at p. 4) FWSC states that to the extent that Mr. Mittauer's testimony does not contain opinion testimony, no formal proffer is required by counsel which is consistent with Commission practice. (FWSC BR at p. 4) FWSC cites Ehrhardt, Florida Evidence, and Chambliss v. White Motor Corporation[7], for the proposition that "'it is not necessary for counsel to formally proffer a witness as an expert to the

[7] Florida Evidence at p. 577; Chambliss v. White Motor Corporation, 481 So.2d 6, 8(Fla 1st DCA 1985), rev. den'd., 491 So. 2d 278 (Fla. 1986).

court.'" (FWSC BR at p. 4) FWSC also cites Berry v. City of Detroit[8], noting that one Federal Court stated:

> A judicial ruling that a proffered expert is 'qualified' prior to the time that counsel has posed a precise question soliciting expert testimony is premature and - unless an objection is interposed - unnecessary.

FWSC concludes that the Commission can evaluate the background and expertise of the witness as it relates to any opinions contained in the testimony and consider the testimony as it deems appropriate without the need for a formal proffer by counsel. (FWSC BR at p. 4) FWSC asserts that to the extent Mr. Mittauer seeks to offer opinions as to the effect or scope of the City's Utilities District, those opinions should be rejected as beyond the scope of any expertise he possesses.

Analysis

Staff agrees with FWSC that the preliminary determination which the Commission must make is whether the testimony being offered requires the witness to be tendered as an expert. An expert witness may offer both factual testimony, if personally known, or opinion testimony, based upon the witness' personal knowledge or facts provided to the witness provided those facts are of a type reasonably relied upon by other experts in that field. Section 90.704, Florida Statutes. Staff believes that the parties do not dispute that Mr. Tillman can testify to facts of which he has personal knowledge.

In Kelly v. Kinsey, the First District Court of Appeal found that "In order to qualify as an expert in a given area, a witness must show that he has acquired special knowledge of the subject matter by either education, training, or experience."[9] The Florida

[8]Berry v. City of Detroit, 25 F.3d 1342, 1351 (6th Cir. 1994).

[9]Kelly v. Kinsey, 362 So.2d 402, 404 (Fla. 1st DCA 1978); See also, Davis v. South Florida Water Management District, 715 So. 2d 996 (Fla. 4th DCA 1998).

Supreme Court stated in Ramirez v. State[10] that "The determination of a witness's qualifications to express an expert opinion is peculiarly within the discretion of the trial judge, whose decision will not be reversed absent a clear showing of error." As noted by Order No. PSC-95-0576-FOF-SU[11], the Commission stated:

> In practice, these witnesses are often not formally tendered as expert witnesses at hearing. For example, at the hearing in this docket neither NFMU's nor OPC's technical witness was formally tendered as an expert. Counsel for OPC explained that it is the Citizens' understanding that during the technical part of a proceeding before the Commission, the opinions of expert witnesses is offered. OPC understood that NFMU's witness was being offered as an expert by virtue of the qualifications that were put in his testimony. OPC did not challenge the expertise of NFMU's witness, or *voir dire* him to claim that he was not an expert . . .

Due to the nature of the Commission's duties and the specialized and unique issues presented in Commission cases, most persons testifying at formal hearing are experts since they have acquired specialized training or education or extensive experience in the area in which they work. In Commission practice, a witness' professional and educational qualifications are set forth in his or her prefiled testimony and are accepted unless that witness' expertise is challenged, which is the case here regarding Mr. Tillman's testimony. Thus, the City's additional proffer at the hearing that Mr. Mittauer be accepted as an expert in the field of engineering is unnecessary since his engineering expertise was not challenged. Based on his education and experience, Mr. Mittauer is a water and wastewater utility engineering expert. (TR 310-311)

As noted above, Mr. Tillman's expertise was challenged. The City argues that in a certificate amendment case, one must necessarily produce an engineering expert to testify to need for service because of the plant capacity and average daily flow issues. The City contends that Mr. Tillman is not an expert in

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[10]Ramirez v. State, 542 So.2d 352 (Fla. 1989).

[11]Order No. PSC-95-0576-FOF-SU, issued May 9, 1995, in Docket No. 940963, In Re: Transfer of Territory from Tamiami Village Utility Inc. to North Fort Myers Utility, Inc.

this area. Staff does not agree with the City's premise that one must necessarily be an engineering expert to testify to need for service issues. As FWSC points out, the Application, Composite Exhibit No. 5 which was admitted into the record with the objection preserved, contains information regarding plant capacity and average daily flows that are required information in such an application. Staff believes that these numbers are factual in nature and do not necessarily require testimony to be given in the form of an opinion. To the extent that the City challenges the factual information and seeks to elicit an expert engineering opinion from Mr. Tillman, Mr. Tillman's own statement, that he is not an engineer. (TR at p. 181) Nevertheless, Mr. Tillman testified that he confirmed with the engineering staff under his supervision that the content of the application is true and accurate. (TR at pp. 397-398)

Staff agrees with FWSC that Mr. Tillman should be accepted as an expert in the area of water and wastewater utility management. Staff believes that Mr. Tillman's experience related to his job responsibilities, including development of new systems and service to developments (TR at p. 160) and supervision of the staff which prepares applications for the Commission regarding new systems and development (TR at pp. 146-7), qualifies him to give opinion testimony regarding the manner and cost of providing water and wastewater service to new developments. Staff notes that the exact definition of water and wastewater utility management expert was not stated at the hearing. However, staff believes that as a water and wastewater utility management expert, Mr. Tillman has expertise regarding FWSC's applications processes, including supervision of his staff. Further, staff believes that Mr. Tillman has expertise regarding FWSC's development of new systems and customers. (TR at 394-398)

Staff notes that the application contains technical information from the business records of the company. Staff agrees with FWSC that "Expert testimony is not required to verify the rated capacity of the wells . . . or the average daily flows . . . " since this is information which the company keeps as part of its ordinary course of business. Staff does not believe that just because there is a conflict in the testimony regarding the information contained in the Application, that this information should be precluded based solely on Mr. Tillman's lack of engineering expertise. This would go to the weight of the testimony on that point. Nevertheless, staff notes that as a water and

wastewater utility management expert, Mr. Tillman could give opinion testimony regarding the application, application process, and development of new systems and customers.

For the foregoing reasons, staff recommends that the Commission accept Mr. Tillman as an expert in the area of water and wastewater utility management. In Commission practice, a witness' professional and educational qualifications are set forth in his or her prefiled testimony and are accepted unless that witness' expertise is challenged. Thus, the City's additional proffer at the hearing that Mr. Mittauer be accepted as an expert in the field of engineering is unnecessary since his engineering expertise was not challenged. It is clear that based on his education and experience, Mr. Mittauer is a water and wastewater utility engineering expert. (TR 310-311)

With respect to the City's argument that it was not required to raise the issue of Mr. Tillman's expertise prior to the hearing, staff agrees that no such requirement was imposed upon the parties in this case. Staff notes that for reasons of administrative efficiency, Orders Establishing Procedure now include boilerplate language requiring parties wishing to challenge a witness's qualifications to testify as an expert to file such objections, in writing, by the time of the Prehearing Conference so that the Commission may schedule adequate time at the hearing for the resolution of such disputes. Staff notes that this new language will be brought to the attention of the Prehearing Officer assigned to the case when an Order Establishing Procedure is to be issued.

ISSUE 2: Should the City's Motion to strike those portions of Mr. Tillman's testimony and exhibits identified at the July 11th hearing be granted?

RECOMMENDATION: No, the City's Motion to Strike certain portions of Mr. Tillman's testimony should be denied in its entirety. **(CHRISTENSEN)**

POSITION OF THE PARTIES:

CITY OF GROVELAND: Yes, for the following reasons: the testimony contains expert opinions in the field of water and wastewater utility design, construction, and permitting which Mr. Tillman is not qualified to give; Mr. Tillman has no personal knowledge of the facts to which he is testifying thus, the facts about which Mr. Tillman is testifying is uncorroborated hearsay; and allowing this testimony in the record is a denial of the City's right to cross examine the person who actually developed the facts on which the application is based with the result that the hearing violates the essential requirements of law.

FWSC: The City's untimely and legally unfounded requests to strike portions of Mr. Tillman's testimony and related exhibits should be denied.

STAFF ANALYSIS: As stated in the Case Background, at the hearing, the City made an *ore tenus* Motion to Strike certain portions of the testimony and exhibits of Mr. Tillman. To the extent that this issue raises the same arguments which were addressed in Issue 1, staff references Issue 1 for a detailed analysis.

Arguments

City

In its brief, the City argues that as discussed in the previous issue, certain portions of Mr. Tillman's testimony should be stricken because of his lack of expertise in engineering matters. (City BR at p. 13) The portions of Mr. Tillman's testimony which the City argues should be stricken are set forth in the hearing transcript, at pages 187-191. The specific language which the City has moved to strike is set forth on Attachment A, attached to this recommendation. The City also objected to Composite Exhibit 5, FWSC's Application and FWSC's Developer

Agreement with the Summit, as well as, Exhibit 6, Mr. Tillman's resume. Staff notes that Mr. Tillman certainly has personal knowledge regarding his resume. Therefore, staff believe that the City's objection regarding Mr. Tillman's resume, Exhibit 6, is without merit.

Specifically, the City contends that the calculations which form the basis for evaluating the system's existing capacity are by their very nature expert opinions. (City BR at p. 13). The City asserts that there is nothing in the record that supports that anyone from FWSC has the expertise to render expert engineering opinions which support the numbers in this case. (City BR at pp. 13-14) The City also contends that the record does not reflect the data upon which the FWSC team relied to form the expert engineering opinions in the application, exhibits and testimony presented by FWSC. (City BR at p. 14)

The City contends that Section 90.705 (1), Florida Statutes, requires that on cross examination the expert shall be required to specify the facts or data upon which his opinions are based. (City BR at p. 14) The City further contends that Section 90.705(2), Florida Statutes, states that:

> If the party [against whom the opinion or inference is offered] establishes prima facie evidence that the expert does not have sufficient basis for the opinion, the opinions and inferences of the expert are inadmissible unless the party offering the testimony establishes the underlying facts or data.

(City BR at p. 15) The City asserts that Mr. Tillman did not establish the underlying facts or data on which his opinion was based because he reviewed no data, he formulated no opinion nor did he have the expertise to formulate an opinion. (City BR at p. 15) Thus, the City concludes that on this basis alone, Mr. Tillman's testimony should be stricken. (City BR at p. 15)

Second, the City argues that Mr. Tillman does not have personal knowledge of any of the data submitted. (City BR at p. 15) The City asserts that a lay witness must confine his testimony to the facts on which he has personal knowledge, and is not permitted to give opinions and conclusions. (City BR at p. 15) The City asserts that all expertise and mastery of the facts regarding

the application exist with ". . . faceless, unproduced FWSC 'staff.'" (City BR at p. 15)

The City asserts that all of the information which Mr. Tillman testified to, which the City requests to be stricken, is hearsay. (City BR at p. 15) The City states that this Commission proceeding is subject to the provisions of the Administrative Procedures Act (APA), citing Legal Environmental Assistance Foundation, Inc. v. Clark and ASI, Inc. v. Florida Public Service Commission.[12] (City BR at pp. 15-16) The City states that under Section 120.57(1)(c), Florida Statutes, ". . . hearsay can only substitute for competent substantial evidence on which a factual finding can properly be based if it would be admissible over objection in a civil action". (City BR at p. 16) The City contends that no predicate has been established in the record ". . . which constitutes any exception to the hearsay rule which would allow the data objected to by the City to be admissible." (City BR at p. 16) The City contends that because there is no predicated exception to the hearsay rule this information cannot constitute competent, substantial evidence. (City BR at p. 16) The City cites to Durall v. Unemployment Appeals Comm.[13], for the proposition that

> 'Because the transcript was the only evidence presented of the statements alleged to constitute Durall's misconduct and because no testimony was presented at [the Chapter 120] hearing which could establish the predicate necessary to admit the transcript as an exception to the hearsay rule, we find that the appeals referee's decision was not based on competent substantial evidence.'

(City BR at p. 16) The City also cites Wark v. Home Shopping Club, Inc.[14], for the proposition that the Court rejected summaries of an employee's attendance record as inadmissible because no testimony at the hearing established the predicate necessary to admit the

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[12] Legal Environmental Assistance Foundation, Inc. v. Clark, 668 So.2d 982, 988 ftn.9 (Fla. 1996); and ASI, Inc. v. Florida Public Service Commission, 334 So.2d 594, 595 (Fla. 1976)

[13] Durall v. Unemployment Appeals Comm., 743 So.2d 166, 168 (Fla. 4th DCA 1999)

[14] Wark v. Home Shopping Club, Inc., 715 So.2d 323, 324 (Fla. 2nd DCA 1998)

summaries as a business record exception to the hearsay rule. (City BR at p. 16)

The City also states that under Section 120.57(1)(c), Florida Statutes, hearsay is admissible if used for the purpose of supplementing or explaining other evidence where the other evidence is competent and substantial. (City BR at p. 17). The City asserts that no such other competent and substantial evidence exists in the record because all such evidence relates to the testimony, application, exhibits, and water service agreement about which Mr. Tillman has no personal knowledge. (City BR at p. 17)

The City cites to McDonald v. Department of Banking and Finance[15], stating that in this case the First District Court of Appeal found that one significant statement contained in the final order was based entirely on hearsay testimony which standing alone is incompetent to support the findings. (City BR at p. 18) The City also cites to Pasco County School Board v. Florida Public Employee Relations Comm.(Pasco County)[16], for the proposition that although the Court found that the hearsay testimony was supported by other substantial competent evidence that ". . . '[I]f the entire evidence presented were only hearsay, then clearly we would be required to set aside agency action [as] not supported by competent and substantial evidence'". (City BR at pp. 18-19) The City contends that the data relied on in this case is entirely the expert opinions of unnamed persons not produced at hearing, and is thus a classic case of hearsay. (City BR at p. 19) The City asserts that there is no corroborating admissible evidence available to support the hearsay evidence of Mr. Tillman. (City BR at p. 19)

Finally, the City argues that admission of Mr. Tillman's testimony would violate the essential requirements of law. (City BR at p. 19-20) The City states that the rationale behind the hearsay rule is that if a statement is being offered for its truth, the party should be able to test the reasonableness of the statement by cross examination, citing to Emmco Insurance Co. v.

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[15]McDonald v. Department of Banking and Finance, 346 So.2d 569 (Fla 1st DCA 1977)

[16]Pasco County School Board v. Florida Public Employee Relations Comm., (Pasco County), 353 So.2d 108 (Fla. 1st DCA 1977)

Wallencius Caribean Line, S.A. and Dollar v. State.[17] The City also cites to Section 120.57(1)(b) and Deel Motors, Inc. v. Department of Commerce,[18] for the proposition that the right of cross examination is necessary to meet the essential requirements of law standard in APA proceedings. (City BR at p. 20) The City asserts that Mr. Tillman's lack of personal knowledge denies the City the ability to conduct such an inquiry to adequately test the actual validity of these proffered opinions. The City states that in Jones v. City of Hialeah[19], the Third District Court of Appeal found that the problem of whether or not hearsay is admissible boils down to a question of fundamental fairness. The City contends that it is fundamentally unfair to allow FWSC to be able to admit this information without producing the person who actually calculated the information. (City BR at p. 20) The City cites Spicer v. Metropolitan Dade County[20], in which the Court overturned dismissal of a police officer because the County did not prove that it had taken steps to procure the testimony of a hearsay declarant. (City BR at p. 20)

The City argues that FWSC has the burden of proof to support its application. (City BR at p. 21) The City cites to Florida Department of Transportation v. J.W.C. Co., Inc.[21], for the proposition that the applicant for a licence or permit carries the ultimate burden of persuasion of entitlement though the entire proceeding until final agency action has been taken. (City BR at p. 21) The City asserts that it is not its responsibility to calculate the capacity or the average daily flow or verify if fire

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[17]Emmco Insurance Co. v. Wallencius Caribean Line, S.A., 492 F.2d 508, 511 ftn. 3 (5th Cir 1974); and Dollar v. State, 685 So.2d 901, 903 (Fla. 5th DCA 1996), rev. den., 695 So.2d 701 (Fla. 1997)

[18]Deel Motors, Inc. v. Department of Commerce, 252 So.2d 389, 394 (Fla. 1st DCA 1971)

[19]Jones v. City of Hialeah, 294 So. 2d. 686, 688 (Fla. 3rd DCA 1974)

[20]Spicer v. Metropolitan Dade County, 458 so.2d 792, 794 (Fla. 3rd DCA 1984)

[21]Florida Department of Transportation v. J.W.C. Co., Inc., 396 So.2d 778, 787 (Fla. 1st DCA 1981)

flow is required. That is FWSC's job. (City BR at p. 21) The City also contends that it is not Commission staff's job to substitute its expertise after the fact and outside the record for the missing expertise of Mr. Tillman and that this goes beyond staff's charge to develop the record. (City BR at p. 21). The City asserts that uncorroborated hearsay does not constitute competent substantial evidence and reliance solely on such evidence fails to comply with the essential requirements of law and due process. Campbell v. Vetter[22]. The City concludes that such evidence cannot satisfy FWSC's burden of proof in this case and that therefore its Motion to Strike should be granted. (City BR at p. 22)

FWSC

In its Brief, FWSC states that the City's Motion to Strike should be denied on several equally valid grounds. (FWSC BR at p. 5) First, FWSC contends that virtually all of the testimony the City has requested be stricken does not constitute opinion testimony but fact testimony. (FWSC BR at p. 5) FWSC contends that it is appropriate for a senior vice president to provide factual testimony based on information provided to him by his staff. (FWSC BR at p. 5) Further, FWSC asserts that even if it is opinion testimony, Mr. Tillman is an expert in water and wastewater utility management and is clearly an appropriate witness to sponsor the Application which was assembled by departments which report to him. (FWSC BR at p. 5) Finally, FWSC contends that the Motion should be denied as untimely. (FWSC BR at p. 5)

FWSC cites Woodholly Associates v. Department of Natural Resources[23], to assert that the issues raised in the Motion are easily disposed of based on the First District Court of Appeal's ruling. FWSC states that in that case, the challenger argued that the applicant had not carried its burden of proving the necessity or justification for approval of the development as required by applicable rule. (FWSC BR at pp. 5-6). FWSC cites the Court, which noted:

> . . . [the challenger] contends that it was incumbent upon the [applicant] to present evidence at the hearing

[22]Campbell v. Vetter, 392 So.2d 6, 8 (Fla 4th DCA 1980)

[23]Woodholly Associates v. Department of Natural Resources, 451 So.2d 1002 (1st DCA 1984)

> to show necessity and justification for the project beyond the mere formality of introducing the application into evidence. On the state of the record before us, we find that this contention has no merit. [The challenger's] petition for formal hearing does not challenge the completeness of [the Applicant's] application nor does it contest the adequacy of [the applicant's] explanation of the necessity and justification of the project, either as a matter of fact or as a matter of law. . . . although the applicant for a permit has the burden of proof in hearings where the application is contested, the petitioner challenging the issuance of the permit 'must identify the areas of controversy and allege a factual basis for the contention that the facts relied upon by the application fall short of carrying the . . . burden cast upon the applicant.

(Citations omitted) (FWSC BR at p. 6) FWSC asserts that it has satisfied the requirements of a *prima facie* case through the introduction of the application. (FWSC BR at p. 6) FWSC contends that rather than framing the issues appropriately in its Objections and Prehearing Statement, the City waited until Mr. Tillman's testimony was entered into the record to try to defeat the Application "based not on the merits but on some concocted legal technicality." (FWSC BR at p. 6) FWSC asserts that "the Commission should not countenance such a blatant effort at trial by ambush." (FWSC BR at p. 6)

FWSC further contends that the City had ample opportunity to raise and seek resolution of any substantive issues related to the merits of the application. (FWSC BR at p. 6) FWSC contends that by Order No. PSC-00-0623-PCO-WU, issued April 3, 2000 (Order Establishing Procedure), the scope of the proceedings is limited to those issues raised up to the Prehearing Conference unless modified by the Commission. (FWSC BR at p. 7) FWSC asserts that the Order Establishing Procedure requires that the parties file prehearing statements that contain a statement of all pending motions or other matters the parties seek action upon and that except for good cause shown any issue not raised by a party prior to the issuance of the Prehearing Order shall be waived by the parties. (FWSC BR at p. 7) FWSC also states that the Commission procedure to prefile testimony is further effort to require that all issues be identified and framed prior to the hearing. (FWSC BR at p. 7) FWSC contends that neither the Order Establishing Procedure nor the Prehearing Order

authorize a party to make an *ore tenus* motion to strike prefiled testimony during the hearing. FWSC further argues that the City's *ore tenus* motion to strike Mr. Tillman's testimony was made after the testimony was moved into the record without objection from the City, which ". . . contravenes several of the due process requirements and goals of the Order Establishing Procedure. (FWSC BR at p. 7)

FWSC asserts that the City's "11th" hour motion to strike Mr. Tillman's prefiled testimony is contrary to the purpose of requiring prefiled testimony. (FWSC BR at p. 8) FWSC asserts that allowing parties to wait until the hearing ". . . to file a motion to strike will only encourage parties to refrain from fully disclosing their positions in advance of the hearing and will create obstacles to the resolutions based on the merits as opposed to technicalities." FWSC concludes that even if the City had a valid reason to strike Mr. Tillman's testimony, under the Order Establishing Procedure, the City waived its right to raise it. (FWSC BR at p. 8)

FWSC also argues that allowing Mr. Tillman's testimony to be stricken would create a horrendous precedent that would create confusion and uncertainty in future Commission proceedings. (FWSC BR at p. 8) FWSC contends that the City had ample opportunity to conduct discovery with respect to the Application which identifies the staff who assembled the Application. (FWSC BR at p. 8) FWSC asserts that rather than dealing with the Application on its merits, the City ". . . seeks a hyper-technical way to defeat it without having placed the issue before the Commission or alerting the parties prior to the commencement of the hearing." (FWSC BR at pp. 8-9). FWSC states that the City could have and should have raised any concerns regarding Mr. Tillman's adoption of Mr. Sweat's testimony prior to the hearing. (FWSC BR at p. 9)

FWSC argues that Rule 25-30.036, Florida Administrative Code, requires that regulated utilities provide certain relevant information in the application, but does not require the company to retain an engineer to calculate the flow at any particular time or the rated capacity of the wells to provide service. (FWSC BR at p. 9) FWSC contends that the rule simply requires the utility to provide relevant information, which FWSC did in its Application. (FWSC BR at p. 9) FWSC argues that nothing in the Commission rule or the statute requires an applicant to identify or produce the individuals responsible for calculating or reporting the Monthly

Operation Reports (MORs) or permitted capacities, which are reported and contained in the business records of the company. (FWSC BR at p. 9) FWSC states that the Application was properly introduced into evidence and it was incumbent upon the City to specifically delineate its challenges in its Objection and its Prehearing Statement. (FWSC at p. 9)

FWSC cites to ITT Real Estate Equities, Inc. v. Chancellor Insurance Agency, Inc.[24], to assert that contrary to the City's suggestion, it is not necessary to produce a witness to swear to every aspect of a written document such as the application in this case. (FWSC BR at p. 10) FWSC cites that case for the proposition that "'Evidence is authenticated when prima facie evidence is introduced to prove that the proffered evidence is authentic.'" [25] FWSC also cites to Kuklis v. Hancock[26], for the proposition that "'it is not always necessary that the person who made the entry or prepared the document which is sought to be admitted into evidence be called to testify.'" FWSC states that thus the senior executive of a company is the appropriate witness to authenticate business records even if he did not prepare them, citing to In re: the National Trust Group, Inc.[27] (FSWC BR at p. 10)

FWSC asserts that Mr. Tillman, as a senior executive of FWSC, is the person who oversees the assembling of the Application, and can authenticate the Application. (FWSC BR at p. 10). FWSC states that even though Mr. Sweat oversaw the department when this application was prepared, Mr. Tillman assumed his job responsibilities. (FWSC BR at p. 10) FWSC states that Mr. Tillman testify that the application was an interdepartmental effort within FWSC. (FWSC BR at p. 10) FWSC asserts that Mr. Tillman testified that he has confirmed that the information in the Application was

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[24]ITT Real Estate Equities, Inc. v. Chancellor Insurance Agency, Inc., 617 So.2d 750(4th DCA 1993)

[25]Id.

[26]Kuklis v. Hancock, 428 F.2d. 608 (5th Cir 1970); FWSC also cites Nordyne, Inc. v. Florida Mobile Home Supply, 625 So.2d 1283 (Fla. 1st DCA 1983) and Ehrhart, Florida Evidence, (2001 Ed.) Section 901.2, p. 861.

[27]In re: the National Trust Group, Inc., 27 Fed. R.E.S., 804; and 98 B.R. 90 (U.S. Bankruptcy Crt. M.D. Florida, 1989)

accurate and correct with the appropriate team of qualified individuals who assembled the application. (FWSC BR at p. 10)

FWSC contends that the City's main argument to strike Mr. Tillman's testimony is that he lacks the expertise ". . . to express the opinions set forth in the testimony he was adopting." (FWSC BR at p. 11) However, FWSC argues that most of the testimony the City is seeking to strike is not opinion testimony, but rather facts. (FWSC BR at p. 11) Again, FWSC maintains that the capacity of the wells and daily capacity of the plant, for example, are information utilized daily in the operations of the utility and are maintained in the ordinary course of business. (FWSC BR at p. 11) FWSC contends that perhaps if the City had raised the method of calculating flow as an issue, expert opinion testimony may have been necessary, but the City did not do so. (FWSC BR at p. 11) FWSC asserts that the fact Mr. Tillman does not regularly calculate average daily flows or actually fill out the MORs is simply of no consequence. (FWSC BR at p. 11) FWSC contends that as a senior executive, Mr. Tillman would not be involved in making such measurements of flows at any particular facility, but would be regularly and normally provided such information by his staff. (FWSC BR at p. 11) FWSC concludes that as a senior executive of the company, Mr. Tillman is qualified to confirm the facts reported to him by his employees with respect to these types of issues. (FWSC BR at p. 11)

FWSC states that the other portions of the testimony which the City seeks to strike relate to the benefits that would accrue to FWSC if the Application is granted. (FWSC BR at p. 11) FWSC states the while some portion of this testimony could be categorized as opinion, it relates to anticipated impact on FWSC and is within the purview of Mr. Tillman's job responsibilities as the senior executive in charge of developer relations and business development. (FWSC BR at p. 12)

FWSC states that the contention that an applicant must prove every period and comma in an application through an expert witness with expertise on the exact detail is simply erroneous. (FWSC BR at p. 12) FWSC contends to establish such a requirement could arguably require rulemaking and would guarantee lengthy and protracted proceedings. (FWSC BR at p. 12) FWSC argues that as recognized in the Woodholly case, an applicant presents a *prima facie* case in administrative proceedings by presenting its application. (FWSC BR at p. 12) FWSC asserts that it is up to the

challenger to frame the issues, at which point the parties present evidence to the appropriate tribunal. (FWSC BR at p. 12) Thus, FWSC states that the Commission should deny any attempt to defeat the Application based on matters not clearly identified prior to the commencement of the hearing. (FWSC BR at p. 12)

Analysis

Staff is also concerned that the City's Motion to Strike Mr. Tillman's prefiled direct testimony was not raised until the time of the hearing. Staff notes that it is the Commission's procedure to require witnesses to prefile their direct testimony, including their qualifications, well in advance of the hearing. Staff believes that the City had ample opportunity to raise its concerns regarding the matters contained in the application and in prefiled testimony in advance of the hearing, thereby avoiding trial by surprise. Staff notes that generally voir dire of a witness is conducted prior to the witness' direct testimony being inserted into the record at the hearing and then the appropriate objection is raised, if any. However, in the instant case the City did not raise its objection when the direct prefiled testimony was entered into the record. (TR 141-145) The City raised its objection after it had conducted *voir dire* at the beginning of its cross examination. (TR p. 180-187) Staff believes that the City should have at the very least raised its objection upon the insertion of the testimony into the record. Thus, the timing of the City's Motion with regards to Mr. Tillman's prefiled testimony raises questions in staff's mind relating to its timeliness.

Staff believes that underlying the City's motion is the question regarding Mr. Tillman's ability to testify as an expert. As stated previously, staff's recommendation on Issue 1 addresses the issue of whether Mr. Tillman should be tendered as an expert witness. For the reasons stated in Issue 1, staff believes that Mr. Tillman should be accepted as a expert in water and wastewater utility management. Therefore, staff believes that Mr. Tillman may offer opinion testimony or conclusions based on facts within the record. As staff noted in Issue 1, the exact definition of water and wastewater utility management expert was not stated at the hearing. However, staff believes that as a water and wastewater utility management expert, Mr. Tillman has expertise regarding FWSC's applications processes including supervision of his staff.

Further, staff believes that Mr. Tillman has expertise regarding FWSC's development of new systems and customers. (TR at 394-398)

Second, the City raised the issue that the data contained in Mr. Tillman's testimony is uncorroborated hearsay. (TR at p. 186) Section 90.803(6), Florida Statutes, Hearsay Exceptions; availability of declarant immaterial, except from the hearsay rule:

> (6) Records of regularly conducted business activity.- (a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances show lack of trustworthiness.

Staff believes that Mr. Tillman is an appropriate witness to testify to the Application and the information contained therein. Mr. Tillman is the senior executive in charge of the compilation of the Application and of persons who prepared the Application at FWSC. (TR at pp. 146-147, 150-151) Staff believes that the Application can be properly admitted as a exception to the hearsay rule. In Florida Association of Counties, Inc. v. Department of Administration[28], the First District Court of Appeal found that

> On cross-appeal PBA contends that the trial court erroneously admitted, under the business records exception to the hearsay rule, numerous copies of correspondence received by DOA. . . . Also, reports were submitted in connection with activity of DOA mandated by Florida law. §121.031 (3), Fla. Stat. (1989). They were therefore properly admitted under the business records exception. §90.803(8), Fla. Stat. (1989).

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[28]Florida Association of Counties, Inc. v. Department of Administration, 580 So.2d 641, 646-647 (1st DCA 1991), approved 595 So.2d 42 (Fla. 1992).

In this case, staff notes that FWSC is required by Section 367.045, Florida Statutes, and Rule 25-30.036, Florida Administrative Code, to submit certain information to the Commission in the form of an application.

Professor Erhardt, Florida Evidence[29], states that "Not only are records which are routinely and frequently made by the business admissible under [S]ection 90.803(6), the exception also includes non-routine records which are infrequently made but which are made by the business whenever an event occurs." Thus, staff believes that the Application, itself, is a business record exception to the hearsay rule. Staff notes that the merits of the Application and the information contained therein will be addressed in the post hearing recommendation.

The City argues that the data contained in Mr. Tillman's testimony is uncorroborated hearsay. (TR at p. 186) The City argued at hearing that it is FWSC's burden ". . . to put up a witness who is competent to support the numbers in the application . . ." (TR at p. 186) FWSC responded that Mr. Tillman as a senior executive oversees the departments and that the people who perform these services report to him on a daily basis. (TR at p. 185) FWSC further stated that these persons' jobs depend on their ability to accurately and correctly perform their job duties. (TR 185). Staff notes that FWSC asserts that the numbers contained in its application are kept in the ordinary course of its business practice. Staff agrees. We note that the City sponsored FWSC's MORs which contain the data for the maximum daily capacity of the plant. (TR at pp. 217-218, Ex. 7) The City also sponsored the DEP Application for the Summit which contains the data for the permitted maximum day capacity of the plant and maximum day flow as recorded in the MORs for the last 12 months. (TR at p. 226, Ex. 11)

Staff believes that the data contained in FWSC's application, is admissible for two equally valid reasons. First, staff believes that the data regarding permitted capacity of the system and maximum day flow, which the City objected to in the application, are kept by FWSC in it ordinary course of business as evidenced by the MORs. Thus, the data is a business record exception to the hearsay rule and, admissible as evidence over hearsay objection.

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[29]Erhardt, Florida Evidence, (2001 Ed.) Section 803.6, p. 728.

Staff also believes that FWSC's developer agreement with the Summit, part of Composite Exhibit 5, is a business record exception to the hearsay rule.

Second, even if Mr. Tillman's testimony regarding the data in the application is hearsay, it can be corroborated by Exhibits 7 and 11 which were sponsored by the City and moved into the record. (TR at p. 411) Section 120.57 (c), states:

> 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.

Moreover, staff notes Mr. Tillman testified that even if the capacity of the system is insufficient, FWSC has a third well which can be brought on line in a matter of months. (TR at pp. 293-294) Staff believes that this information is fact evidence which was not called into question by the City's objection. In fact, staff notes that this information was elicited by the City on cross examination and was not objected to by the City. (TR at pp 293-294)

The last argument the City raises is that to permit Mr. Tillman's testimony into the record would violate the essential requirements of law because the City has a right to cross examine the persons responsible for the preparation of the testimony. (City BR at p. 13) Staff agrees with FWSC that the City had ample opportunity to conduct discovery in this matter and depose any witness from FWSC. As stated above, staff believes that the portions of Mr. Tillman's testimony which the City requested be stricken are subject to a hearsay exception or are otherwise admissible as evidence. Therefore, staff believes that the City's contention that permitting Mr. Tillman's testimony into the record violates the essential requirements of law is unfounded.

For the foregoing reasons, staff recommends that the City's Motion to Strike certain portions of Mr. Tillman's testimony should be denied in its entirety. (TR 187-191)

ISSUE 3: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open pending the final resolution of the merits of this matter.

STAFF ANALYSIS: As noted in the Case Background, an administrative hearing was held on July 11 and 12, 2001. At the hearing, the parties were required to brief the two additional evidentiary issues set forth in this recommendation to be ruled upon prior to staff's filing a post hearing recommendation on the merits of the case. Therefore, this docket should remain open pending the final resolution of this matter. A subsequent recommendation on the merits is currently scheduled to be filed for the October 2, 2001, Agenda Conference.

ATTACHMENT A

provide service to this area, Florida Water owns and operates an existing water treatment plant which includes two water supply wells at a rated capacity of 800 gallons per minutes each. The plant has been permitted to supply a maximum daily demand of 1,152,000 gallons per day. The most recent figures indicate that the average daily flow of Florida Water's existing plant which provides service to the neighboring Palisades development is approximately 319,000 gallons per day.

Motion to strike

Q. CAN YOU IDENTIFY THE DOCUMENT LABELED EXHIBIT (_) CLS-1?

A. Yes. It is the application filed with the Commission by Florida Water for an extension of Florida Water's service area in Lake County (the "Application").

Q. ARE YOU FAMILIAR WITH THE APPLICATION?

A. Yes. The application was prepared under the supervision of Charles Sweat and was filed with the Commission.

ATTACHMENT A

would point out that the Application represents an interdepartmental effort. For example, the maps were prepared by the Engineering Department, the legal descriptions and certain other documents were prepared by the Legal Department, and so on. After preparation of the Application, ~~I thoroughly reviewed it and signed it on behalf of Florida Water~~ The application was signed by my predecessor, Charles Sweat, on behalf of Florida Water. It should be noted that the territory and system maps (Appendix M to the original Application) and the tariff pages submitted with the Application are not included in Exhibit (____) CLS-1. However, two sets of those maps and the tariff pages were filed with the original Application as required by the Commission's rules.

Q. IS THE INFORMATION IN EXHIBIT (___) CLS-1 ACCURATE AND CORRECT?

A. Yes, to the best of my knowledge it is. I would note that, since the filing of the Application, we have received more specific information regarding the developer's plans and needs. The updated

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information is included in the Water Service Agreement discussed below. In addition, the average flow from Florida Water's Palisades plant has ~~increased~~ decreased since the filing of the Application, ~~but~~ and there is ~~still adequate~~ additional capacity for the additional territory requested.

Q. ARE YOU FAMILIAR WITH THE ADDITIONAL SERVICE AREA SOUGHT BY FLORIDA WATER IN THIS DOCKET (THE "REQUESTED AREA")?

A. Yes. The Requested Area is located in Lake County, Florida.

Q. IS THE REQUESTED AREA LOCATED NEAR FLORIDA WATER'S CURRENT CERTIFICATED AREA?

A. Yes. The Requested Area immediately adjoins Florida Water's existing certificated service area in Lake County. The northwest corner of the existing certificated area lies at the southeast corner of the Requested Area.

Q. IS THERE ANY CONNECTION OR AFFILIATION BETWEEN THE PALISADES, WHICH IS INCLUDED IN FLORIDA WATER'S

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Q. **IS THERE A NEED FOR SERVICE IN THE REQUESTED AREA?**

A. Yes. As reflected by Exhibit C to the Water Service Agreement, Florida Water has received an application from the developer of the Summit indicating there is an immediate need for potable water service to the Requested Area.

Q. **DOES FLORIDA WATER HAVE THE CAPACITY TO SERVE THE REQUESTED AREA?**

A. Yes. The most recent figures available indicate the average daily flow from the Palisades water treatment plant is currently flowing at approximately 319,000 gallons ~~treatment plant is approximately 395,000 gallons per day~~. The permitted capacity of the plant is 1,152,000 gallons per day. Under the Water Service Agreement, Florida Water has reserved 38,400 gallons per day of water capacity for the Summit. Thus, there is more than enough existing capacity at the Palisades plant to provide service to the Requested Area.

Motion to Strike

Q. **CAN THE REQUESTED AREA BY EASILY CONNECTED TO THE PALISADES TREATMENT PLANT?**

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Q. DOES FLORIDA WATER HAVE THE FINANCIAL AND TECHNICAL ABILITY TO PROVIDE WATER SERVICE TO THE REQUESTED AREA?

A. Yes. Florida Water has the financial and technical ability to provide service to the territory it has requested. Florida Water is the largest and one of the most experienced investor-owned water and wastewater utilities in the state. Florida Water has an excellent and long history of providing quality service to its customers. As reflected in its 1999 Audited Financial Statements, Florida Water's total net utility assets exceed $373 million, its total equity capital exceeds $105 million, and its net utility operating income was over $19 million. Florida Water has a staff of licensed operators, engineers, accountants, and professionals qualified to provide the technical expertise necessary to support safe, adequate and reliable service to our customers. Expanding its service area to include the Requested Area is a

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prudent business move that will allow Florida Water to more fully utilize existing facilities. Granting Florida Water's Application to serve the Requested Area will enable the Company to expand its customer base, spread its costs, and continue to grow and operate its utility system in a planned, orderly manner consistent with its long term corporate strategy. Expansion of Florida Water's existing territory in Lake County, under the jurisdiction and oversight of the Commission, will be an orderly and efficient way to provide service to the Requested Area, and will promote the continuing improvement of Florida Water's economies of scale. Florida Water has the qualifications, experience, capabilities and resources to provide excellent and reliable service to the Requested Area and is willing to assume those responsibilities.

Q. IS IT IN THE PUBLIC INTEREST FOR THE COMMISSION TO GRANT FLORIDA WATER'S APPLICATION AS REQUESTED IN EXHIBIT (____) CLS-1?

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A. Yes. Granting the Application will allow for extension of water service to the Requested Area in a timely, economical manner. Florida Water has the plant capacity to serve the immediate need for service in the Requested Area in accordance with the developer's plans. There will be positive effects on Florida Water's existing and future customers and for the community as a whole. Florida Water's provision of services will be in compliance with environmental regulations and will allow for the development of the property in a cost-efficient, timely manner. Florida Water is a good corporate citizen dedicated to serving the community. Florida Water generates funds for governmental entities through the payment of regulatory fees and taxes. Granting the Requested Area to Florida Water will eliminate the need for the expenditure of public funds to service the Requested Area. The owners and future customers in the area will have available to them the protection

Motion to Strike

ATTACHMENT A

Water and the City to provide water service to the Summit development and to respond to Mr. Yarborough's inaccurate conclusion that customers in the Summit development would have lower rates and connection charges if water service were provided by the City.

Q. HAVE YOU REVIEWED THE TESTIMONY OF MESSRS. YARBOROUGH AND MITTAUER REGARDING THE CITY'S READINESS TO PROVIDE WATER SERVICE TO THE SUMMIT DEVELOPMENT?

A. Yes, I have.

Q. DO YOU HAVE ANY COMMENTS CONCERNING THE CITY'S READINESS TO SERVE?

motion to strike

A. Yes. At the time I prepared the rebuttal testimony, our investigation ~~Yes, I do. On page 4, line 17, through page 5, line 10, of his testimony, Mr.~~ revealed that the City had not begun any construction on the line extensions ~~Mittauer discusses the City's need to construct a 12-inch water line along~~ from then terminus of the system which was approximately five miles from ~~State Road 19 and Cherry Lake Road/CR 478 to provide water service to the~~ the Summit. During the proceedings, it now appears that the City has ~~Summit. Mr. Mittauer states that the City is currently constructing this line,~~ begun construction to provide service to the Garden City subdivision which is ~~He then turns around and concedes that this water line project is currently in~~ approximately two and a half miles up State Route 19 and then along ~~the bid process and will be released for construction bids "as soon as the~~ Cherry Lake Road/County Road 478. ~~permitting is secure." Due to the conflicting nature of Mr. Mittauer's~~ ~~testimony, Florida Water investigated the status of construction of the line~~ ~~and determined that as of the date of the filing of this testimony, construction~~ ~~had not yet begun on the first line extension of approximately 2.5 miles up~~ ~~State Road 19 to Cherry Lake Road/CR 478.~~

Q. DO YOU CONCUR WITH MR. MITTAUER'S REPRESENTATION IN HIS TESTIMONY THAT THE INITIAL CONSTRUCTION OF

which is approximately 1.25 miles. This extension is at no cost to Florida Water. As I previously stated, if the City were to provide water service to the Summit, it would need to build roughly five miles of line to reach the Summit property.

Q. CAN YOU COMMENT ON FLORIDA WATER'S AND THE CITY'S INCREMENTAL COST TO PROVIDE WATER SERVICE TO THE SUMMIT?

A. Yes. As stated previously, the extension to the Summit development will be at no additional cost to Florida Water since the developer is contributing it. Because Florida Water's facilities are located immediately adjacent to the Summit, our incremental cost to provide service would be de minimus. The City, on the other hand, would incur substantial costs for the design, permitting and construction of the line required to bring the City's water service to the property. Mr. Mittauer states that the cost for the second two and a half mile extension of the line to the Summit property will be approximately $275,000. While I do not have any information at this time to dispute that number, I question how the cost could be estimated when Mr. Mittauer has already stated that the construction bidding process has not yet been completed. Florida Water intends to investigate that cost estimate prior to the hearing as well as potential costs of additional water facilities which would appear to be necessary to bring water service over this five mile line extension with adequate water pressure. In that regard, Mr. Mittauer's testimony also is unclear as to whether the $275,000 estimate that he uses includes only the cost of construction or all costs that would be incurred in connection with the design, permitting and construction of the second

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approximate two and a half mile extension from the Garden City Subdivision to the Summit development. Finally, I would emphasize that neither Mr. Mittauer nor Mr. Yarborough included a cost estimate for the initial two and a half mile extension of the 12-inch line along Cherry Lake Road/CR 478 from the initial tie-in point to the Garden City Subdivision. The initial two and a half mile extension is an incremental cost to serve that the City will incur to provide service to the Summit. Indeed, if construction were to stop after the initial two and a half mile extension, there is virtually no development or request for service for which the 12-inch water line would be utilized.

Q. AT PAGE 5, LINES 13-15 OF MR. YARBOROUGH'S TESTIMONY, HE STATES THAT "[U]NLIKE FLORIDA WATER, THE CITY WOULD NOT HAVE TO PERMIT OTHER WELLS WITHIN THREE YEARS TO MEET THE PROJECTED NEEDS OF THE SUMMIT DEVELOPMENT." WILL FLORIDA WATER BE REQUIRED TO PERMIT OTHER WELLS WITHIN THREE YEARS TO MEET THE PROJECTED NEEDS OF THE SUMMIT DEVELOPMENT?

Motion to Strike

A. No, we will not. Florida Water has more than sufficient capacity currently available from the water supply and treatment facilities used to provide service to the existing Palisades development to meet the projected needs of the Summit development over the next three years. Florida Water may decide to build an on-site well to provide redundant capacity for the Palisades development, additional capacity for future development in surrounding areas, and to replace the use of an existing pond for purposes of meeting fire flow requirements for the anticipated country club. I would add that the

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developer's plans for the planned unit development which were approved by the county include the use of the existing on-site pond to meet fire flow requirements for the anticipated county club.

Q. HAVE YOU REVIEWED MR. YARBOROUGH'S TESTIMONY COMPARING THE RATES AND CHARGES OF THE CITY AND FLORIDA WATER?

A. Yes, I have.

Q. DO YOU AGREE WITH THE FIGURES THAT HE HAS USED ON PAGE 8 OF HIS TESTIMONY AND HIS CONCLUSION THAT CUSTOMERS OF THE SUMMIT WILL ENJOY LOWER RATES IF WATER SERVICES WERE PROVIDED BY THE CITY?

A. No, I do not. On pages 7 and 8 of Mr. Yarborough's testimony, he states that a customer using 5,000 gallons of water per month through a 5/8 inch x 3/4 inch meter would have rates that are 15.8% lower if the customer were a customer of the City rather than Florida Water. Mr. Yarborough goes on to state on page 8 of his testimony that the City's current connection charges are 7.3% less than Florida Water's connection charges for a customer who will take service in the Summit development. Finally, Mr. Yarborough adds that the City expects to increase its service availability charges effective October 1, 2000, making the alleged difference between the City's connection charges and Florida Water's connection charges approximately 3.4% lower than the City.

Q. HAS MR. YARBOROUGH USED ACCURATE RATES AND CHARGES IN REACHING HIS CONCLUSIONS?

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A. No, he has not. Speaking first to water rates, the customers of the Summit development would receive water service from Florida Water under the rates applicable to Florida Water's Palisades' customers. Customers of the Palisades system pay a base facility charge of $9.42 and a gallonage charge of $2.04 per 1,000 gallons. At 10,000 gallons of consumption per month, the monthly bill of a Palisades' customer is $29.82. Using the City's rates applicable to customers situated outside the corporate limits (as would be the case with the Summit development) which would consist of a base facility charge of $13.13 and a gallonage charge of $3.44 per 1,000 gallons, the City's bill for 10,000 gallons of consumption would be $33.77 - - $3.95 or 13.25% higher than the Florida Water bill. The Commission should keep in mind that the average monthly consumption for the Palisades customers is 22,660 gallons per month. Using the average monthly consumption of 22,660 gallons per month experienced by the Palisades customers, and making the reasonably conservative assumption that similar consumption would be experienced in the Summit development, Florida Water's rates would save customers $21.67 per month. In other words, applying the average monthly consumption of the Palisades customers to the Summit, the monthly water bill for a Florida Water customer would be nearly 40% less than the monthly bill if the Summit customer were to receive water service from the City. I would add that the savings with Florida Water are conservative estimates as the 135 lots to be developed in the Summit are larger than those in the Palisades development and I would expect that average monthly consumption for the Summit would be higher than that

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experienced for the Palisades system due to anticipated increased usage of water for irrigation purposes.

Q. CAN YOU ALSO ADDRESS MR. YOUNG'S STATEMENTS THAT SERVICE AVAILABILITY AND CONNECTION CHARGES FOR THE SUMMIT CUSTOMERS WOULD BE LOWER WITH THE CITY?

A. Again, I must disagree. Our review of the current water service availability and connection charges for the City indicate that there would be a plant capacity charge of $695.00, a main extension charge of $300.00, a meter installation charge of $500.00, a deposit of $75.00 and a service installation charge of $10.00, for a total amount of $1,580.00 for service availability and connection charges. A Florida Water customer receiving water service in the Summit development would pay a $700.00 water plant charge, a $90.00 meter installation charge, a $15.00 service plant charge, and a $41.00 deposit, for a total amount of $846.00. Please note that previous information provided to the Commission was for a typical Palisades customer. The fact that the Summit will not be charged the main extension, AFPI transmission/distribution and service installation charges per Florida Water's agreement with the developer was inadvertently overlooked in responding to Staff Interrogatory No. 7. This reduction in service availability charges is customary due to the fact that the developer is installing all lines back to the plant and all service taps. Based on these applicable charges, Florida Water's total service availability and connection charges for water service to the Summit property are approximately $734.00 less than those of the City.

Q. DOES THAT CONCLUDE YOUR REBUTTAL TESTIMONY?

knowledge, there is no government mandate prohibiting or limiting the developer's planned use of septic tanks for the development. Florida Water's application seeks authorization to provide the only service needed in the requested area.

Q. COULD FLORIDA WATER PROVIDE WASTEWATER SERVICE TO THE REQUESTED TERRITORY?

A. Yes. If the developer of the Summit requested Florida Water to provide wastewater service, there are several possible options. Without a specific request, it is speculative as to what the best method of providing wastewater service would be. However, based upon the number of units and the projected water flows, one feasible approach would be to install a package plant capable of providing reuse quality water. Florida Water would be able to install such a plant in close proximity to the existing Florida Water facilities and could meet the projected wastewater needs of the Summit at a cost of approximately $500,000. By placing the facility close to the development, we would significantly minimize the piping costs.

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Q. HAVE YOU REVIEWED THE CITY OF GROVELAND'S ESTIMATED COST TO PROVIDE WASTEWATER SERVICE TO THE SUMMIT?

A. Yes. Mr. Mittauer, the Intervenor's engineer, states that the cost for the Intervenor to provide wastewater service to the Summit would be approximately $500,000. This figure appears to be significantly understated. From the testimony, it appears that the Intervenor would have to extend its lines an additional 2.5 miles to provide wastewater service to the Summit. The 2.5 mile route would include bridge crossings and other difficult and

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costly placements. Even at a conservative cost of $25 a square foot for piping alone, Mr. Mittauer's estimate seems low. In addition to the piping cost, there would likely be additional costs involved with respect to lift stations as well as significant engineering and permitting costs. These figures do not appear to be included in Mr. Mittauer's estimate.

Q. WOULD FLORIDA WATER BE ABLE TO PROVIDE WASTEWATER SERVICE TO THE SUMMIT AT A LOWER COST THAN THE CITY OF GROVELAND?

A. Yes. There is no feasible way for the City to provide comparable wastewater service to the Summit with 2.5 mile extensions at a cost that would be lower than what Florida Water could provide.

Q. ARE THERE ANY OTHER ISSUES WITH RESPECT TO THE CITY'S PROPOSED WASTEWATER SERVICE?

A. Yes. From the information available to us, it does not appear that the City of Groveland would be able to provide reuse capability to the Summit. By contrast, if Florida Water were to provide wastewater service, we would be able to implement a system that would be able to provide reuse water to the development.

Q. DOES THAT CONCLUDE YOUR SUPPLEMENTAL REBUTTAL TESTIMONY?

A. Yes.

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