STATE OF FLORIDA
PUBLIC SERVICE COMMISSION

IN RE:	)	
	)	
Application of Farmton Water Resources,	)	
LLC for Original Water Certificate in Volusia	)	DOCKET NO. 021256-WU
and Brevard Counties, Florida	)	
	)	

CITY OF TITUSVILLE'S PROPOSED RECOMMENDED ORDER

Pursuant to Section 120.57(1)(b), Florida Statutes, and Florida Administrative Code Rule 28-106.215, Objector, City of Titusville ("Titusville") submits the following Findings of Facts, Conclusions of Law, and Proposed Recommended Order.

RECOMMENDED ORDER

On June 22 through June 23, 2004, a final administrative hearing was held in this case in Tallahassee, Florida before Commissioners Deason, Jaber, and Bradley.

I. STATEMENT OF THE ISSUE

The issue is whether Farmton Water Resources, LLC., (the "Applicant") is entitled to an original water certificate from the Florida Public Service Commission ("PSC") to operate a water utility in Volusia and Brevard Counties pursuant to Sections 367.031 and 367.045, Florida Statutes, and Administrative Code Rules 25-30.030 and 25-30.033.

II. PRELIMINARY STATEMENT

On December 20, 2002, the Applicant filed its Application for Original Water Certificate to provide water services in undeveloped areas in Volusia and Brevard Counties. On January 17, 2002, Brevard County and Volusia County each filed objections to the application and petitions for formal administrative hearings. On January 23, 2003, the City of Titusville filed its Objection and Petition for formal Administrative Hearing.

An evidentiary hearing was held on June 22, 2004 through June 23, 2004, at which the Applicant submitted evidence in support of its certificate application. Titusville, Brevard County, Volusia County, and PSC Staff submitted evidence in opposition to the Applicant's certificate.

At the hearing the Applicant failed to prove through competent substantial evidence that the proposed water service merits PSC regulation. Each type of service proposed by the Applicant is either intended to serve only the Applicant, its parent companies, and/or their lessees, or it is otherwise exempt from PSC regulation.

The Applicant also failed to prove through competent substantial evidence that it met the requirements for issuance of an original water certificate as outlined in Section 367.045, Florida Statutes, and PSC Rule 25-30.033, Florida Administrative Code. First, the Applicant failed to demonstrate a need for water service in the service area. Second, the applicant failed to prove it has financial, technical, and managerial ability to provide safe and reliable water service. Third, the Applicant failed to prove that the requested service area is consistent with the applicable local government comprehensive plans or otherwise in the public interest. Finally, the Applicant failed to demonstrate that when considered as a whole, granting the requested original certificate is in the public interest.

III. FINDINGS OF FACT

A. THE PARTIES

1. Farmton Water Resources, LLC (the "Applicant") is a Limited Liability Corporation incorporated in Delaware on February 26, 2002 and registered to do business in the State of Florida on March 20, 2002. (Exh. 3, p. 2).

2. The City of Titusville is a Municipal Corporation of the State of Florida.

3. Brevard County is a political subdivision of the State of Florida operating under a charter pursuant to Article III, Section 1 of the Florida Constitution.

4. Volusia County is a political subdivision of the State of Florida operating under a charter pursuant to Article III, Section 1 of the Florida Constitution.

B. APPLICATION FOR CERTIFICATION

(1) General

5. To qualify for an original certificate to operate a water utility within the proposed service area, the Applicant must comply with all of the requirements of Sections 367.031 and 367.045, Florida Statutes, PSC Rule 25-30.030 and PSC Rule 25-30.033, Florida Administrative Code, and demonstrate that granting the original certificate is in the public interest.

(2) Applicant's Proposed Service Area

6. The proposed service area covers approximately 53,000 acres across southeastern Volusia and northeastern Brevard Counties and is described in Exh. 42. (Exh. 3, p. 26)(T-38, 51-52). All the land in the proposed service area, with the exception of the East Central Florida Railroad right of way, is owned by the Miami Corporation (T-51-52, 159). The land within the proposed service area is presently undeveloped, and the evidence presented at the hearing demonstrates no additional development is proposed or anticipated by the property owner or the Applicant. (T-107-189).

7. The existing locations within the proposed service area where retail potable water service is to be provided are limited to the Miami Corporation's office and an adjacent caretaker residence, three game and wildlife check stations, two hunting camps and a cattle house (i.e., residence)(T-177, 179-181, 185)(Exh. 3, p. 2-5). The Miami Corporation has five employees who work in the office, and one of those employees, the Miami Corporation caretaker, lives in

the adjacent residence (T-179-180). The hunting camps and the check stations are operated by the Miami Tract Hunt Club, Inc, which leases the land from the Miami Corporation (Exh. 38). The Miami Tract Hunt Club contemplates constructing two additional hunting camps. (Exh. 3, p. 38)(T-185). Each of the two existing and two proposed hunt camps are estimated to serve twenty-five (25) campers per site. (T-186). No evidence of other existing or proposed customers within the proposed service area was submitted by the Applicant. (T-48-49, 181).

(3) Proposed Water Services

8. The Applicant proposes to provide three types of water service: (1) Potable retail water service; (2) fire protection water service; and (3) bulk raw water service (Exh. 3, p. 38). The only customers identified for the potable retail water service are the Miami Corporation and its lessees identified in section ii, above. (T-181). The Applicant failed to identify any customers for the bulk water service within the proposed service area. (Exh. 3)(T-50, 147). The application simply states "It is anticipated that nearby water utilities will be in need of additional bulk raw water." (Exh. 3, p. 34). Fire protection service for the Miami Corporation is proposed from two existing wells and 10 proposed additional wells. (T-51).

C. REQUIREMENTS FOR ISSUANCE OF THE CERTIFICATE

(1) Applicant Has Failed to Demonstrate a Need for Service

9. There is no need for a water utility within the proposed service area. (T-233, 277-278, 387-388). As Brevard County's Director of Water Resources testified, "I don't think the need for an individual self-service potable water supply well in itself generates the need for a utility." (T-278).

10. The proposed potable retail water service is not of sufficient quantity to justify or require PSC regulation, and most of the proposed service falls within exemptions from PSC

jurisdiction. (T-51-53) The fire protection service proposed by the Applicant does not need to be provided as a public service. (T-51-53) The Applicant has failed to prove that potable retail water demand is for more than 100 people, which is required by Section 367.022, Florida Statutes, to invoke PSC jurisdiction. The bulk raw water service proposed by the Applicant is for an undefined and speculative demand, and the only potential customers identified by the Applicant are local governments. (T-50, 147). Provision of bulk water services to government utilities is exempt from PSC regulation. (T-50-51).

a. Insufficient Need for Retail Potable Water Service

11. The only customers identified for proposed retail potable water service within the proposed 53,000 acre service area are the Miami Corporation office and an adjacent caretaker residence, three game and wildlife check stations, two hunting camps and a cattle house (i.e., residence). (Exh. 3, p. 38)(T-177, 179-181, 185).

12. The proposed retail potable water supply utility is to serve three customers, the Miami Corporation and its lessees, the Miami Tract Hunt Club and the Clark Cattle House. (Exh. 3, p. 38)(T-179-181). The Applicant failed to demonstrate that these demands for potable water create sufficient need to justify or require PSC regulation.

13. While testimony was provided that the Miami Tract Hunt Club has approximately 261 member families, these are transient, seasonal customers who are not permanent residents within the service area. (T-44-45, 184-187). In fact, Mr. Underhill testified that at the time of the hearing and the preceding weekend, he believed there were no club members at the camp sites. (T-184). The Miami Tract Hunt Club has only proposed to have a total of 4 hunt camps with only 25 campers per camp site. (Exh. 3, p. 38 and 133)(T-186). The Miami Tract Hunt

Club has no existing or planned toilets, showers, or other sanitary facilities at the campsites. (T-187). No electricity is provided at the camp sites. (T-184).

14. The Applicant failed to prove that there is a potable demand in excess of 10,000 gallons per day. No metering or other quantification of the present or historic use within the service area has been presented by the Applicant. (T-42-43, 150-151). The Applicant's expert witness tasked with determining water demand testified:

> Q In preparing your opinions in this case, you did not conduct any study of the actual water usage by the Miami Tract Hunt Club; isn't that correct?
> A We don't have any records of how much water has been used historically.
> Q You did not install any meters on their existing wells to determine how much water they were using; correct?
> A No, we didn't.
> Q You did not personally conduct any interviews of the Miami Tract Hunt Club representatives to determine how much water they were using; correct?
> A That's correct. My discussions were mostly with Mr. Underhill.
> * * *
> Q And did he give you any specific references as to how much water the Miami Tract Hunt Club was using from the two existing wells?
> A No, just the number of people.

(T-150-151).

15. The Applicant's utility consultants, Hartman & Associates, were paid in excess of $200,000 to prepare and support the application. (T 57-58, 155). They provide "assumed" Equivalent Residential Connections ("ERC") in the engineering report submitted with the application and in their direct testimony. (Exh. 3, p. 38 and 39). However, they had no factual basis or foundation for these estimates. (Exh. 3)(T-150-151). The testimony of the Applicant's experts regarding the ERC estimates is not credible. The Applicant and its consultants did not put forth any effort to properly quantify the retail potable retail water demand, although the ability to do so particularly within their control. This omission should be considered an adverse inference against the Applicant.

16. PSC Rule 25-30.055, Florida Administrative Code, requires system capacity be determined based on ERC values assigned to certain meter sizes, and provides in pertinent part:

> a water or waste water system may be exempt under Section 367.022(6), Florida Statutes, if its current or proposed water ... facilities and distribution... have and will have a capacity, excluding fire flow capacity, of no greater than 10,000 gallons per day or if the entire system is designed to serve no greater than 40 equivalent residential connections (ERCs). For purposes of this rule only, one ERC equals 250 gallons per day.
>
> (a) Unless the Commission determines that valid local statistical data should be used, ERCs for residential use are as follows:
>
Single family detached dwellings	1 ERC per unit
Multiple family dwellings	.8 ERC per unit
Mobile homes	.8 ERC per unit

> (b) ERCs for nonresidential use shall be based on meter size and type as follows:
> 2" Displacement, Compound or Turbine 8.0
>
> 1. For water systems

Meter Size	Meter Type	ERCs
5/8"	Displacement	1.0
* * *		
2"	Displacement, Compound or Turbine	8.0

17. No additional development of residential units is proposed by the Applicant (T-147, 189). Therefore, the additional ERC's for undeveloped lands provided for in PSC Rule 25-30.055(c), Florida Administrative Code, are not applicable.

18. The initial application indicated retail potable water service would have 6 connections with 5/8 inch meters. (Exh. 3, p. 44). This equals 6 ERCs according to PSC Rule 25-30.055(1)(b)1, Florida Administrative Code.

19. According to Exh. 38, and the testimony of the Applicant's engineer, the Applicant revised its proposal so the proposed service area will have a total of 7 or 8 retail potable water connections. (T-40-41, 145). Four connections will have two inch meters, and

three or four will have 5/8 inch meters. (Exh. 38)(T-41, 145). According to PSC Rule 25-30.055(1)(b)1, each two inch meter is equivalent to 8 ERCs and each 5/8 inch meter is equal to 1.0 ERC. Four connections with two inch meters, at 8 ERCs each, equals 32 ERC, and three to four connections with 5/8 inch meters equal 3 to 4 ERCs, for a total of 35 or 36 ERCs.

20. Farmton Water Resources, LLC is already providing water service within the proposed service area. (Exh. 3, p. 8)(T-201-202). Mr. Underhill testified that the water service was provided using facilities that were already in place and that Farmton Water Resources was not billing its customers separately for the service. Id. The tenants on the Miami Corporation property, primarily the Miami Tract Hunt Club, are paying to use the property and the facilities on the property, including water service. (Exh. 39). Provision of water service in this manner is specifically exempted from PSC regulation, pursuant to Section 367.022(5), Florida Statutes, which exempts from PSC regulation all "Landlords providing service to their tenants without specific compensation for the service."

b. The Proposed Fire Protection Does Not Serve Public.

21. A property owner's installation of fire protection wells does not subject the property owner to the jurisdiction of the PSC. (T-53, 147-149, 188-189). The case before the PSC presents the unique situation of a property owner creating a utility to seek PSC regulation of its efforts to install fire protection on its own property. (T-147-148)

22. The Miami Corporation is the sole owner of the property within the proposed service area, except for the Florida East Coast Railroad right of way through the property. (T-51-52,159).

23. The Miami Corporation is the sole owner of Farmton Resource Management, LLC, and Farmton Resource Management, LLC is the sole owner of the Applicant. (Exh. 3, p.67)(T-190).

24. Witnesses presented by the Applicant testified that the Miami Corporation has in the past provided fire protection facilities for its property without PSC regulation, and can continue to do so. (T-51-52, 147-149, 188-189).

25. It is not in the public interest to use the limited resources of the PSC to regulate what the land owner (through a subsidiary) will charge itself for fire protection service.

c. Proposed Bulk Water Service is Exempt From Regulation

26. No evidence was presented by the Applicant regarding bulk raw water demands which the Applicant intends to serve. There are no bulk water demands identified within the service area, and the bulk raw water demands outside the service area are speculative. (T-147, 187)(Exh. 3, p. 58). The Applicant has secured no contracts or other agreements for supply of bulk water. (T-50-51, 147).

27. Moreover, the applicant has failed to identify any non-governmental bulk water customers. Section 367.022(12), Florida Statutes, specifically exempts from PSC regulation "The sale for resale of bulk supplies of water . . . to a governmental authority or to a utility regulated pursuant to this chapter either by the commission or the county." When asked about prospective bulk water clients, the Applicant's Vice President for Operations testified:

> Q And in the past there have been some discussions with the City of Titusville and possibly with WAV, which is the Water Authority of Volusia; correct?
> A Yes.
> Q But as far as you know, there have been no discussions between Farmton Water Resources and any nongovernmental entity to provide bulk water services; correct?

A That I know of. I don't know of any others besides those two you just mentioned.

(T-147).

28. Even if provision of bulk water service to the governmental entities was within PSC jurisdiction, the testimony of the utility directors from Volusia County, Brevard County, and Titusville, indicates that there is no reasonably anticipated additional wholesale raw water demand in the region. (Prefiled testimony of Raynetta Curry Grant, p. 2; Richard H. Martens, p. 9; and Gloria Warwick, p. 3)

(2) The Applicant Has Failed To Demonstrate Ability to Provide Service

a. The Applicant Has Failed To Demonstrate the Financial Ability to Provide Service.

29. The Applicant has not demonstrated the financial ability to provide safe and reliable potable water service to the customers within the proposed service area. The PSC has adopted rules specifically outlining requirements to demonstrate the financial capability of a utility. PSC Rule 25-30.033(r), requires ***the Applicant*** to provide:

> a detailed financial statement (balance sheet and income statement), certified, if available, of the financial condition of the Applicant, that shows all assets and liabilities of every kind in character. The income statement shall be for the preceding calendar or fiscal year. If an applicant has not operated for a full year, then the income statement shall be for the lesser period. The financial statement shall be prepared in accordance with Rule 25-30.115, Florida Administrative Code. If available, a statement of the source and application of funds shall also be provided;

30. No financial statement of any kind was submitted for Farmton Water Resources, LLC. (T-190, 215).

31. The Applicant has not claimed that it has the financial capacity to operate a safe and reliable water utility. Upon cross examination by PSC staff, the Applicant's Vice President

for Operations testified that the Applicant only has the financial capacity to operate the proposed utilities through the financial resources of the Miami Corporation. (T-194).

32. Farmton Water Resources has operated since 2002. (Exh. 3, p. 2). As of the date of the hearing, at least one fiscal year has passed since Farmton Water Resources, LLC was incorporated. Consequently, at least one year of financial statements should be available to the PSC. Even if Farmton Water Resources, LLC has not operated for a full year, PSC Rule 25-30.033(r) requires that an income statement be provided for the lesser period. Again, these requirements are not optional or on an as available basis.

33. The Applicant's Original Water Certificate Application indicates that it believes a "financial statement" for its parent corporation, Farmton Management, LLC is sufficient to meet the requirements of Rule 25-30.033(r). (Exh. 3, p. 12). However, the rule specifies that a detailed financial statement, including balance sheet and income statement, is required. No such documents were submitted by the Applicant for either the Applicant or Farmton Management, LLC.

34. Assuming, *arguendo*, that the financial statement for Farmton Management, LLC can take the place of the financial statement for Farmton Water Resources, LLC then the financial statement must comply with the requirements of both PSC Rule 25-30.033(r), and PSC Rule 25-30.115, Florida Administrative Code.

35. The financial statement for Farmton Management, LLC is not a detailed financial statement and does not include a balance sheet and income statements. (Exh. 3, p. 135). The financial statement does not comply with the 1996 NARUC Uniform System of Accounts adopted by the National Association of Regulatory Utility Commissioners, which is required by Rule 25-30.115, Florida Administrative Code.

36. PSC Rule 25-30.033(s) requires:

> a list of all entities, including affiliates, upon which the Applicant is relying to provide funding to the utility, and an explanation of the manner and amount of such funding which will include their financial statements and copies of any financial agreements with utility. This requirement shall not apply to any person or entity holding less than 10% ownership interest in utility.

37. The Applicant has admitted that it only has the financial capacity to operate the proposed utility with the assistance of the Miami Corporation. (T-194). However, no agreement exists between the Applicant and Farmton Management, LLC or the Miami Corporation providing "an explanation of the manner and amount of such funding." (T-55-56, 90, 215).

38. Moreover, while the Applicant's Vice President for Operations was confident that the Applicant did not have the financial capacity to operate the proposed utility without the assistance of the Miami Corporation (T-194), he testified that he did not know whether the Miami Corporation or Farmton Management, LLC owns the Applicant. (T-190-191).

39. The only suggestion of financial assistance from either the Miami Corporation or Farmton Management, LLC is affidavits filed by the Applicant. An affidavit purportedly by a person associated with Farmton Management, LLC states the company would

> assist Farmton Water Resources, LLC on securing necessary funding to meet all reasonable capital needs and any operating deficits of the Utility . . . Such funding will be provided on an as and when needed basis.

(Exh. 3, p. 136). An affidavit by a person purportedly associated with the Miami Corporation was also offered by the Applicant, and it is virtually identical to the Farmton Management, LLC affidavit. (Exh. 40).

40. No indication is made in either affidavit as to funding amounts, schedules, or any method of repayment by the Applicant after any funding is made. Neither affidavit is written

using terms that create a binding obligation, but only in terms that make clear financial support is conditional.

41. The affidavits purportedly from Farmton Management, LLC and the Miami Corporation are not competent evidence of a commitment to provide financial support to the Applicant. The affidavit by Charles E. Schroeder, the purported president of Farmton Management, LLC (Exh. 3, p. 136) and the affidavit by Christine Long, the purported "Executive VP and CFO" of the Miami Corporation (Exh. 40) are hearsay under the Florida Evidence Code and cannot be used as evidence of the matters asserted in the documents. Both affidavits are by individuals that were never identified by Farmton as a witness in this case, did not testify, and were not subject to cross-examination.

42. No non-hearsay evidence of financial commitments by Farmton Management, LLC or the Miami Corporation was offered by the Applicant. Mr. Underhill, for example, offered a non-expert opinion that the Miami Corporation had the capacity to provide financial support, but he did not provide any evidence, other than his knowledge of the affidavits, that the Miami Corporation had in fact agreed to provide financial support. (T-194, 203). Ms. Hollis also testified regarding the affidavits, but she did not provide direct non-hearsay evidence that the Miami Corporation had agreed to provide financial support to the Applicant, only her knowledge of the affidavits. (T-217-218).

43. Financial ability is an essential requirement of a PSC original water certificate. If a utility is under funded and ultimately fails, the burden will likely fall to the local government where the utility is located to take over the water system to ensure that a safe and reliable source of water is provided. (Prefiled Testimony of Gloria Martens, p. 4-5) (T-370, 380-381).

Allowing a utility to operate that has not fully complied with PSC Rule 25-30.033(r) and (s), would be contrary to the public interest.

b. The Applicant Has Failed To Demonstrate the Technical Ability to Provide Service

44. The Applicant does not have the technical ability to provide water service to the proposed service area. The Applicant presented no evidence of past experience operating a public water utility or of any contracts with consultants with demonstrated competence in operating a public water utility. (T-190).

45. Earl Underhill, Vice President of Operations for Farmton Water Resources, testified that he would be the individual managing the water utility it if were certificated. (T-189 -190). Mr. Underhill testified that he has no personal experience in operating a water utility. (T-190). It is not in the public interest to certificate a water utility without any experience in cost effectively providing safe and reliable water service.

c. The Applicant Has Failed To Demonstrate The Managerial Ability to Provide Service

46. The Applicant presented no evidence regarding its ability to provide adequate management of the proposed utility. Earl Underhill, Vice President of Operations for Farmton Water Resources, testified that he would be the individual managing the water utility it if were certificated. **(T-189-190).** Mr. Underhill testified that he has no personal experience in managing a water utility. (T-190). Moreover, the Applicant has not provided proof of any other employees or consultants with utility management experience who will be utilized to manage the water services if certificated.

(3) Proposed Service Is Not Consistent With Applicable Comprehensive Plan

47. Titusville adopts by reference the positions of Brevard and Volusia County regarding the Applicant's failure to comply with these local governments' comprehensive plans and incorporates by reference those portions of their proposed recommended orders to the extent not inconsistent with Titusville's Proposed Recommended Order.

(4) The Size of the Requested Service Area Is Not Reasonable

48. The Application proposes a service area of approximately 53,000 acres. (Exh. 3, p. 26). The proposed service to be provided includes only 4 hunting camp sites, 2 or 3 wildlife check stations, the Miami Corporation offices, the Miami Corporation caretaker's residence, and a cattle house (i.e., residence), which in total occupy less than 100 acres. (T-64, 177-178) For example, the Applicant's engineer testified that the hunt camps will only cover a total area of 20 acres. (T-64).

49. The proposed "system" consists of 8 individual wells that are not interconnected, have no transmission pipelines, and only local treatment consisting of a 100-200 gallon hydroneumatic tank. (Exh. 3)(T-47-48, 59, 150-151).

50. Under the circumstances, the request to provide a certificate for 53,000 acres is not reasonable.

51. Assuming, *arguendo*, that any water certificate will be appropriate, it would be appropriate only to certificate those areas located immediately or adjacent to the individual water wells, which will cover less than 100 acres of the proposed 53,000 acre service area. (T-64, 177-178).

(5) Proposed Service Would Duplicate Utility Service

52. The proposed utility service would duplicate available service from Volusia County, Brevard County, and Titusville.

53. Volusia County has already designated the portion of the proposed service area in Volusia County as part of its service area. (T-386-387) Volusia County is capable of providing water service when need for a utility develops. (T-390).

54. Brevard County has already designated the approximately 14,000 acres in Brevard County service area. (Exh. 15)(T-174-175). Brevard County has the ability to provide water service to the proposed service area. Brevard County's Director of Water Resources testified:

> Q So you're saying that a facility two miles east of the property can provide the services proposed at the hunt camps and at the check stations and at the headquarters of the Miami Corporation?
>
> A We certainly have the infrastructure in place to provide that service. What the customer may require to extend service inside the project I think is consistent with everything we've heard today. We have a utility; we have treatment plant capacity. We believe we have a long-term water supply that's independent of the area under discussion today, and we think we can provide service as well.

55. The Applicant's expert witness admitted that the local governments in the vicinity of the proposed service area could provide service, and that any of the landowner's concerns regarding the service could be addressed through an agreement with the local government. (T-146).

56. Many of the wells proposed by the Applicant are in the same location as Titusville's proposed well field. (T-154-155).

57. The Applicant never contacted any of the public utilities identified above to determine if they could provide water service. (T-146).

58. Volusia County and Brevard County can provide water service to provide safe, reliable water service in the proposed service area more reliably that can the applicant. (T-174-175, 233, 277-278, 370-371, 387-388).

(6) Proposed Certificate Not in the Public Interest

59. Public interest considerations in this matter generally focus on four issues: (1) whether there is a need for service ***to the public***; (2) whether the Applicant has financial, technical, and managerial capacity to operate the proposed water systems; (3) whether granting the proposed service area is consistent with the applicable local government comprehensive plans; and (4) whether the requested service area is reasonable considering the level and location of the demand.

60. In light of the finding of fact in paragraphs 1-58, each of these considerations supports a finding that the proposed original certificate is not in the public interest.

61. The Applicant has failed to prove a need for the requested service. See Findings of Fact 9 through 28, supra.

62. The Applicant failed to meet its burden of proof that it has the financial ability to provide safe and reliable water service. See Findings of Fact 29-43, supra. Without a finding of financial ability, the PSC cannot conclude that granting the certificate would be in the public interest.

63. Financial responsibility is an essential requirement of public interest. If a utility is under funded, and ultimately fails, the burden will likely fall to the local government where the utility is located to take over the water system to ensure that a safe and reliable source of water is provided. On numerous occasions Volusia County has been required to take over failing private utilities that were no longer willing or able to maintain their water systems to provide safe and

reliable water to its customers. (Prefiled Testimony of Gloria Martens, p. 4-5)(T-380-381) The Volusia County Director of Water Resource and Utilities testified:

> The county has been appointed by the court as receiver for several systems over the years. These systems were abandoned by the developers and owners because they were in very poor condition. They had compliance issues and much capital needed to be expended to bring them to standards.

(T-370). It is contrary to the public interest to approve an original certificate for a utility that has not fully complied with the PSC rules regarding financial ability to provide safe reliable water service, including PSC Rule 25-30.033(r) and (s), Florida Administrative Code.

64. It is also not in the public interest for the PSC to allow a foreign corporate land owner to form a limited liability corporation (in this case Farmton Management, LLC) which in turn forms a shell limited liability corporation with no assets to run a utility (in this case Farmton Water Resources, LLC) with no revenues or assets, and allow the shell corporation to enable the remote parent corporation (the Miami Corporation) to circumvent the financial responsibility requirements of the PSC rules. Even the Applicant's financial expert testified that the Applicant "will be treated as a disregarded entity." (T-216-217). Allowing this invites applicants to use shell corporations to intentionally circumvent the financial ability requirements.

65. The Applicant failed to meet its burden of proving that it has the technical and managerial capacity to provide safe and reliable water service. **See** Findings of Fact 44-46, supra. It has no experience managing a public water system.

66. The expansive 53,000 acre service area proposed by the Applicant is not supported by the proposed water services. The proposed utilities would serve demands localized in a small area, less than 100 acres, of the Miami Corporation property. (Exh. 3, p. 44; Exh. 42)(T-64, 177-178).

67. Even assuming, *arguendo*, that the proposed retail potable water service was of sufficient quantity to require and to justify PSC regulation, the proposed retail potable water utility does not reasonably support a 53,000 acre service area.

68. Section 367.045(1), Florida Statutes, authorizes the PSC to "grant or amend a certificate of authorization, in whole or in part or with modifications in the public interest. . . " If the PSC finds that if the retail potable water service were determined to be within scope of PSC jurisdiction, a service area only in the vicinity of the 7 or 8 proposed metered connections would be justified.

69. The proposed fire protection service is only for the Miami Corporation on its own property. It does not merit PSC regulation. Use of the PSC's limited resources to regulate how much a property owner can charge itself is not an efficient use of public resources, and is not in the public interest.

70. None of the proposed service area is supported by the proposed bulk water service. The identified bulk water customers are speculative and none are located within the proposed service area. Under the circumstances there is no demonstrated bulk water need within the service area.

71. Regarding the issue of consistency with the local government comprehensive plans, we find that granting the proposed service area is not consistent with the applicable comprehensive plans and not otherwise in the public interest. This finding is based on findings of fact on this issue in Brevard County's proposed recommended order in Volusia County's proposed recommended order, which are incorporated by reference in this recommended order.

72. Based on the factual findings contained herein, we find that granting the proposed original certificate is not in the public interest.

IV. CONCLUSIONS OF LAW

A. Burden of Proof

73. The burden of proof in PSC proceedings is always on the applicant seeking approval by the PSC. Florida Power Corp. v. Cresse, 13 So. 2d 1187, 1191 (Fla. 1982) (finding that the burden of proof in a PSC proceeding is always on the party seeking action by the PSC); Sumter Utilities, Inc., Docket No. 930206-WS, Order No. PSC-94-1245-FOF-WS (PSC 1994) (finding applicant in original water certificate proceeding has burden of proof); In Re Utilities, Inc. of Florida, Docket No. 020071-WS PSC-03-1440-FOF-WS 2003 WL 23104447, *17 (PSC 2003); In United Water Florida Inc., Docket No. 980214-WS, PSC-99-0513-FOF-WS, 1999 WL 287712 *24 (PSC 1999) (finding that the burden of proof in a PSC proceeding is on the party seeking a change in established rates).

74. The PSC has found that under Section 367.045, Florida Statutes, the PSC evaluates "a regulated utility's financial, technical, and managerial ability to serve; the need for service; ***and*** whether the [application] is in the public interest." In Re Florida Water Services Corporation, Docket No. 991666-WU, PSC-01-1478-FOF-WU, 2001 WL 878397, *5 (PSC 2001)(emphasis added); In Re Florida Water Services Corporation, Docket No. 991666-WU PSC-01-2501-FOF-WU, 2001 WL 1674035, *52 (PSC 2001).

75. The PSC's decisions that Section 367.045, Florida Statutes, requires findings that the applicant is capable of providing service is consistent with the holding of the Fifth District Court of appeal that:

> The right (franchise) to provide utility services to the public in a franchised territory is inherently subject to, and conditional upon, the ability of the franchise holder to promptly and efficiently meet its duty to provide such services.

City of Mount Dora v. JJ's Mobile Homes, 579 So.2d 219, 225 (Fla. 5th DCA 1991).

76. Accordingly, the Applicant has the burden of proof to demonstrate through competent substantial evidence that:

(a) there is sufficient the need for utility service;

(b) the Applicant has financial capacity to provide safe and reliable service;

(c) the Applicant has technical capacity to provide safe and reliable service;

(d) the Applicant has managerial capacity to provide safe and reliable service; and

(e) the application is in the public interest.

Each of these elements must be independently demonstrated by the Applicant for it to meet its burden of proof under Section 367.045, Florida Statutes.

B. Farmton's Proposed Water Service Does Not Qualify For PSC Regulation

77. Regulation by the PSC is reserved for only those entities that provide necessary services to the public. As the Fifth District Court of Appeal wrote "The term public utility implies a public use." City of Mount Dora, 579 So.2d at 225. This policy is reflected in the statement of legislative intent in Section 367.011(3), Florida Statutes, and in the definition of a "utility" in Section 367.021(12), Florida Statutes. The definition of a utility is particularly instructive in the instant case.

> "Utility" means a water or wastewater utility and, except as provided in s. 367.022, includes every person, lessee, trustee, or receiver owning, operating, managing, or controlling a system, or proposing construction of a system, who is providing, or proposes to provide, water or wastewater service ***to the public*** for compensation.

§ 367.021(12), Fla. Stat. (emphasis added).

78. The deficiency of the Application in this case is that the Applicant is not really proposing to provide service to the public. The Applicant is seeking to provide water to itself,

though a chain of wholly-owned subsidiaries, to its two lessees, and to unknown, speculative customers. This is not the proper basis upon which to grant an original certificate.

(1) Retail Water Service Proposed Does Not Meet Threshold for PSC Jurisdiction

79. Section 367.022(6), Florida Statutes, specifically exempts "Systems with the capacity or proposed capacity to serve 100 or fewer persons." Farmton's proposed retail water service will have capacity "to serve 100 or fewer persons" as this term is defined by PSC rules.

80. PSC Rule 25-30.055, Florida Administrative Code, defines service of 100 or fewer persons as "a capacity, excluding fire flow capacity, of no greater than 10,000 gallons per day or if the entire system is designed to serve no greater than 40 equivalent residential connections (ERCs)." The Applicant's expert witnesses admitted under cross examination that no attempts were made to gather information regarding historic or current water use within the proposed service area. No metering was done, no surveys of water users were completed, and no other data was gathered upon which a reliable estimate of historic, current of future water use could be made. (T-151). Without reliable estimates of water use, the PSC must look to the ERCs of the proposed water system as defined in PSC Rule 25-30.055(1)(b)1.

81. Based on ERCs assigned to the proposed service in Rule 25-30.055(1)(b)1, the proposed retail potable service has capacity to serve less than 100 people, and is exempt pursuant to Section 367.022(6), Florida Statutes as it equates to at most 36 ERCs. See Finding of Fact 19, supra.

(2) Bulk Water Service to Governments Is Exempt

82. The only potential customers for bulk water service identified by the Applicant are publicly owned utilities, including the City of Titusville and the Water Authority of Volusia.

(T-147) The Applicant admits it has no contract with these governmental entities and has not identified any customers for bulk water that are not governmental entities. Id.

83. Section 367.022(12), Florida Statutes, exempts from PSC regulation "The sale for resale of bulk supplies of water . . . to a governmental authority." When recently applying this exemption to the sale of bulk water by a utility regulated pursuant to Chapter 367, Florida Statutes, to the PSC held:

> [T]he contemplated sale of bulk wastewater service by NFMU to the City of Cape Coral, a governmental authority, is exempt from this Commission's regulation.
>
> This Commission has previously recognized this exemption. In Order No. PSC-00-1238-FOF-WS, issued July 10, 2000, in Docket No. 000315-WS, In re: Application by United Water Florida, Inc., for Approval of Tariff Sheets for Wholesale Water and Wastewater Service in St. Johns County, we declined to rule upon United Water Florida's application for approval of tariff sheets for wholesale water and wastewater service. The contemplated sale of those services was to a utility regulated by a county and, thus, was exempt from Commission regulation by Section 367.022(12), Florida Statutes.

In Re: Application for Approval of New Rate for Bulk Wastewater Service Agreement with City of Cape Coral in Lee County, by North Fort Myers Utility, Inc., Docket No. 030517-SU, Order No. PSC-04-0199-FOF-SU (PSC 2004). The PSC went on to provide the following direction to the applicant in that case:

> Consistent with language set forth in our prior orders referenced above, we provide the following guidelines to [Applicant]. First, for future ratemaking considerations, [Applicant's] cost of providing bulk wastewater service to the City, including interconnection costs, shall not be subsidized by its jurisdictional customers. Second, the revenues generated from the provision of bulk wastewater service to the City shall not be considered in any proceedings before this Commission involving the [Applicant].

Clearly, the same direction should apply to the Applicant in this case. The Applicant's request for an original certificate and associated rates for the sale of bulk water to governmental authorities, such as Titusville and the Volusia Water Authority is exempt from regulation.

(3) Fire Service Proposed Does Not Serve the Public.

84. A necessary precondition of PSC regulation is service to the public. See City of Mount Dora, 579 So.2d at 225; §§ 367.001(3) and 367.021(12), Florida Statutes. As we demonstrated above, the Applicant does not propose to provide fire protection service to the public, but only to its parent company, the property owner. See Findings of Fact 21-25, supra.

85. It is not in the public interest to use the limited resources of the PSC to regulate what the land owner (through a subsidiary) will charge itself for fire protection service. The PSC should avoid setting such a precedent.

C. Applicant has not demonstrated that granting the certificate is in the Public Interest

(1) Applicant Has Not Demonstrated Financial Capacity to Provide Safe and Reliable Water Service

86. The Applicant has not met its burden of proof that it has the financial capacity to operate the proposed water utility. No financial statements for the Applicant were offered into evidence. PSC Rule 25-30.033(r), requires the Applicant to provide:

> a detailed financial statement (balance sheet and income statement), certified, if available, of the financial condition of the Applicant, that shows all assets and liabilities of every kind in character. The income statement shall be for the preceding calendar or fiscal year. ***If an applicant has not operated for a full year, then the income statement shall be for the lesser period.*** The financial statement shall be prepared in accordance with Rule 25-30.115, Florida Administrative Code. If available, a statement of the source and application of funds shall also be provided;

(Emphasis added).

87. The application indicates that the Applicant believes a "financial statement" for its parent corporation, Farmton Management, LLC is sufficient to meet the requirements of Rule 25-30.033(r). However, the rule specifies that a detailed financial statement, including balance

sheet and income statement, is required ***for the Applicant***. The rule does not authorize substitution by a related corporation.

88. The PSC review of the financial ability of a water utility must be based on more detailed information than has been provided by the Applicant in this case. For example, when reviewing the Little Gasparilla Water Utility, Inc., the PSC conducted a detailed review of a recent tax return, a balance sheet and a profit and loss statement. In Re Little Gasparilla Water Utility, Inc., Docket No. 001049-WU, PSC-01-0992-PAA-WU (FPSC 2001); see also, In Re North Sumter Utility Company, L.L.C., Docket No. 010859-WS, PSC-02-0179-FOF-WS (FPSC 2002)(relying on two years of combined financial statements of utility developer). In the case at bar, the Applicant has only submitted a one page-summary of the assets and liabilities of the Applicant's purported parent company. This is not sufficient for the PSC to determine whether the Applicant has the financial ability to operate safe reliable water systems as proposed in the application.

89. Affidavits of the Applicant's parent companies are not competent evidence of a commitment to provide financial support to the applicant and are unenforceable by the PSC. The affidavit by Charles E. Schroeder, the purported president of Farmton Management, LLC (Exh. 3, p. 136) and the affidavit by Christine Long, the purported "Executive VP and CFO" of the Miami Corporation (Exh. 40) are hearsay and cannot be used as evidence of the matters asserted in the documents.

90. **While the rules of evidence do not strictly apply to administrative proceedings** pursuant Chapter 120, Florida Statutes, and the Uniform Rules of Procedure in Chapter 28-106, Florida Administrative Code, Florida law is quite clear that hearsay evidence is not competent

evidence, and cannot be considered except to corroborate other non-hearsay evidence. Section 120.120.57(c), Florida Statutes, 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.

Both the affidavits are clearly hearsay under the Florida Evidence Code. Section 90.801(c), Florida Statutes, defines hearsay as "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Both affidavits were by individuals that were never identified by Applicant as a witness in this case, did not testify, and were not subject to cross-examination.

91. No non-hearsay evidence of financial commitments by Farmton Management, LLC or the Miami Corporation was offered by the Applicant. See Findings of Fact 39-42, supra.

92. Florida law is clear that that hearsay evidence cannot be the sole basis for a finding of fact or other determination, and such a finding is reversible error. Doran v. Dept. of Health and Rehabilitative Services, 558 So.2d 87 (Fla. 1st DCA 1990).

93. PSC Rule 25-30.033(s) suggests that agreements to provide financial support are necessary for a third party, such as a developer or a parent company, to provide the financial capacity necessary to construct and operate a water utility. PSC Rule 25-30.033(s) requires:

> a list of all entities, including affiliates, upon which the applicant is relying to provide funding to the utility, and an explanation of the manner and amount of such funding, which shall include their financial statements ***and copies of any financial agreements with the utility.***

Even if the affidavits were competent evidence upon which the PSC could find that a commitment had been made to provide financial support to the applicant, the affidavits are not financial agreements or otherwise enforceable obligations.

94. It is important to note that the PSC would not have any recourse against the Miami Corporation or Farmton Management, LLC, if it chose not to honor the statements made in the affidavits, and did not adequately support the Applicant. Failure to perform a promise, such as Miami Corporation's promise to fund the Applicant, is not a fraudulent misrepresentation actionable by the PSC or the Applicant's customers, if any, unless the Miami Corporation ***never intended*** to fulfill the promise to pay. Hamlen v. Fairchild Industries, Inc., 413 So.2d 800 (Fla. 1st DCA 1982). The Miami Corporation is legally free to change its mind.

95. No competent evidence is in the record to support a finding that the Applicant has the financial ability to provide service. No financial statements for the Applicant were submitted into evidence. No non-hearsay evidence of any other entity's commitment to provide financial support was admitted into evidence.

(2) Applicant Has Not Demonstrated Technical Capacity to Provide Safe and Reliable Water Service

96. The PSC has in the past found an applicant meets the technical capacity requirement in PSC Rule 25-30.033 only because "the applicant has retained licensed professionals for construction, operation, and regulation of the utility systems." In Re North Sumter Utility Company, L.L.C., Docket No. 010859-WS, PSC-02-0179-FOF-WS, 2002 WL 253726 (FPSC 2002). In the case at bar, the applicant has not retained any licensed professionals to handle "construction, operation, and regulation of the utility systems." This must be a minimum requirement for demonstration of technical capacity.

97. According to the evidence offered at hearing, the Applicant's only water management experience is with agricultural operations. The Applicant has no experience with the types of potable facilities identified in the application. The Applicant has no experience meeting drinking water quality standards or with chlorination. Without at least retaining licensed

professionals to operate and regulate the proposed utilities there can be no assurance that the proposed utilities will be operated in a manner that will provide safe and reliable water service.

(3) The Application is Inconsistent with the Applicable Comprehensive Plans

98. Titusville adopts by reference the positions of Brevard and Volusia County regarding the Applicant's failure to comply with these local governments' comprehensive plans and incorporates by reference those portions of their proposed recommended orders to the extent not inconsistent with Titusville's Proposed Recommended Order.

V. CONCLUSION

The PSC should deny Farmton Water Resources, LLC's Application for an original water certificate. If the PSC believes regulation is necessary for the protection of the Miami Tract Hunt Club, the PSC should certificate the 20 acres surrounding each of the wells at the proposed camp sites. Certification of the entire 53,000 acre territory is unnecessary, improper, and not in the public interest.

VI. RECOMMENDATION

We hereby recommend denial of the Applicant's request for an original certificate for water service in Volusia and Brevard Counties.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by **Federal Express** to the following on July 28th, 2004:

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