ORIGINAL

de la PARTE & GILBERT
PROFESSIONAL ASSOCIATION
ATTORNEYS AT LAW

VIVIAN ARENAS
DAVID M. CALDEVILLA*
RONALD A. CHRISTALDI*
TRAVIS J. COY
EDWARD P. de la PARTE, JR.
L. DAVID de la PARTE
DAVID D. DICKEY
CHARLES R. FLETCHER
RICHARD A. GILBERT†*
DANIEL J. McBREEN
PATRICK J. McNAMARA
NICOLAS Q. PORTER
PATRICIA A. ZAGAMI
K. PRISCILLA ZAHNER
* BOARD CERTIFIED APPELLATE LAWYER
* BOARD CERTIFIED IN BUSINESS LITIGATION LAW
† BOARD CERTIFIED CIVIL TRIAL LAWYER
◆ BOARD CERTIFIED IN HEALTH LAW

101 E. KENNEDY BLVD.
SUITE 3400
POST OFFICE BOX 2350
TAMPA, FLORIDA 33601-2350
(813) 229-2775
FACSIMILE (813) 229-2712

FOUNDER
LOUIS A. de la PARTE, JR.

July 28, 2004

By Federal Express Airbill No. 8464 0354 8642

Blanca Bayo, Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumark Oak Blvd.
Tallahassee, FL 32399-0850

Re: In Re: Application of Farmton Water Resources, LLC for original Water Certificate in Volusia and Brevard Counties, Florida, Docket No. 021256-WU

Dear Ms. Bayo:

I enclose an original and fifteen (15) copies of the following documents:

08222-03 1. City of Titusville's Post-Hearing Statement of Issues and Positions and Brief; and

08223-03 2. City of Titusville's Proposed Recommended Order.

I also enclose an extra copy of each document which I request that you date stamp and return them to me in the self-addressed stamped envelope.

Thank you for your attention to this matter. If you have any questions or comments, please call me.

Sincerely,

de la PARTE & GILBERT, P.A.

Charles R. Fletcher

CMP
COM 3
CTR
ECR
GCL
OPC
MMS
RCA
SCR
SEC 1
OTH

CRF/jwd
Enclosures
cc: Jennifer A. Rodan [By Federal Express]
John L. Wharton [By Federal Express]
Scott L. Knox [By Federal Express]
William J. Bosch, III [By Federal Express]
#165838

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 POST-HEARING STATEMENT OF ISSUES AND POSITIONS AND BRIEF

The City of Titusville ("Titusville") provides its Post-Hearing Statement of Issues and Positions with respect to the Farmton Water Resources, LLC ("Farmton") Application for Original Water Certificate ("Application") and states as follows:

BASIC POSITION

Farmton has failed to meet the requirements for issuance of an original water certificate for reasons including, but not limited to, the following: First, Farmton has failed to establish a need for service in the proposed service area. Second, Farmton has failed to establish that the Application is consistent with local comprehensive plans. Third, Farmton has failed to establish that it has the financial and technical ability to provide service. Fourth, the service Farmton proposes is exempt from PSC regulation. Titusville's position is more fully set forth in: (a) Titusville's Objection to Application for Original Water Certificate and Petition for Final Hearing; and (b) this Post-Hearing Statement. Titusville's Position Summaries for each issue are set out by asterisks.

TITUSVILLE'S ARGUMENT ON BASIC POSITION

The applicant seeking approval has the burden of proof in PSC proceedings. 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 is original water certificate proceeding has burden of proof); 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) (the burden of proof in a PSC proceeding is on the party seeking a change in established rates).

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).

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).

Accordingly, Farmton has the burden of proof to demonstrate through competent substantial evidence that:

(a) Farmton has financial ability to provide safe and reliable service;

(b) Farmton has the technical ability to provide safe and reliable service;

(c) Farmton has managerial ability to provide safe and reliable service;

(d) the need for service; and

(e) the application is in the public interest.

Farmton must demonstrate each of the elements to meet its burden of proof.

Regulation by the PSC is reserved for only those entities that provide necessary services to the public. AS the Fifth DCA wrote in City of Mount Dora, "the term 'public utility' implies a public use." Id. 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).

When viewed without all of the smoke and mirrors included in Farmton's Application and its experts' testimony, it is clear that Farmton is not designed to provide utility service to the public. Farmton's only customers identified in its Application are its parent corporation and its parent corporation's tenants. The evidence makes clear that Farmton's purpose is to attempt to control the water beneath its property. This is not proper basis for PSC certification.

ISSUES AND POSITIONS

ISSUE 1: Does the Commission have exclusive jurisdiction over the certification of private utilities?

TITUSVILLE'S POSITION SUMMARY:

The PSC's jurisdiction and exemptions are provided by Chapter 367, Florida Statutes. However, local governments have jurisdiction over local comprehensive plans (including potable water elements), and local growth. The PSC must balance these interests in granting service areas. Titusville adopts the positions of Volusia and Brevard on this issue.

TITUSVILLE'S ARGUMENT ON ISSUE 1:

Titusville incorporates the arguments of Brevard County and Volusia County. Although Section 367.011, Florida Statutes, provides the PSC with jurisdiction over utilities, Section

367.045(5)(b), Florida Statutes, requires that the PSC consider compliance with local comprehensive plans in granting service areas. Given the nature of Farmton's proposal, the exemptions available, and the local comprehensive plans, the PSC should decline jurisdiction over Farmton.

ISSUE 2: Is the service proposed by Farmton Water Resources LLC exempt from Commission jurisdiction?

TITUSVILLE'S POSITION SUMMARY:

Yes. Farmton seeks to provide limited service within its proposed 53,000 acre territory. Based on meter sizes, Farmton's retail service will have fewer than 40 ERCs and will, therefore, exempt from PSC jurisdiction. Farmton's proposed bulk service has no customers. The Miami Corporation can provide itself fire protection without certification.

TITUSVILLE'S ARGUMENT ON ISSUE 2:

A. Farmton's Proposed Retail Water Service Does Not Meet Threshold for PSC Jurisdiction.

Section 367.022(6), Florida Statutes, specifically exempts "Systems with the capacity or proposed capacity to serve 100 or fewer persons." PSC Rule 25-30.055, Florida Administrative Code, further 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)." Farmton is exempt under this criteria.

Under PSC Rule 25-30.055(B)(1), the PSC must look to the ERCs of the proposed water system. According to Exhibit 38, and the testimony of Farmton's engineer, the proposed service area will have 8 retail potable water connections. Four connections will have two inch meters, and four will have 5/8 inch meters. (Exh. 38, T-41). According to PSC Rule 25-30.055(B)(1), each two inch meter equates to 8.0 ERCs and each 5/8 inch meter equates to 1.0 ERC. Four connections with two inch meters, at 8 ERCs each, equals 32 ERC, and four connections with 5/8 inch meters equal 4 ERCs, for a total of 36 ERCs -- clearly under the threshold for regulation by the PSC.

Farmton's experts 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 interviews or surveys of water users were conducted, and no other data was gathered upon which a reliable estimate of historic, current or future water use could be made. (T-151). This information is peculiarly within the control of Farmton. Its failure to obtain or present evidence should present an adverse inference that if such data was collected, it would not support the need presented by Farmton.

To camouflage their lack of scientific study or basis, Farmton's experts have concocted a series of confusing assumptions to attempt to create the appearance of need. These assumptions include the assumptions that all of the Miami Tract Hunt Club's 261 member families will use the facilities full time for at least 6 months of the year, that each family will have 2.5 members using the campgrounds, and that each person will use 50 gallons of water per day. (Exh. 3). These assumptions are made despite the fact that Farmton and its engineers did not conduct any study or investigation of past water usage of the Miami Tract Hunt Club or conduct any interviews of the Miami Tract Hunt Club members to determine their needs. In fact, despite the fact that the Miami Tract Hunt Club was the entity that requested the service (See Exh. 3, p. 133), Farmton provided no testimony or other evidence from the Miami Tract Hunt Club. In fact, the evidence presented shows the Miami Tract Hunt Club members are transient seasonal users, (T-184, 186, 187, Exh. 39), only 100 of the member families can use the camp sites at any given time, (T-126), and the water system is provided by individual wells with no connective system to individual camp sites. (Exh. 3). This evidence contradicts the Farmton's experts' assumptions and mandates the assumptions be rejected.

Moreover, Farmton's experts' assumptions need to be viewed with skepticism given the fact that these experts were paid over $200,000.00 for their work, which included no scientific study,

measurement, or other scientific basis. These assumptions are not credible and not supported by substantial credible evidence and should not be accepted by the PSC.

In addition to the Miami Tract Hunt Club members, the only individuals who regularly use the Miami Corporation property are five employees who work in the corporate office, the property manager and a "significant other" who live on the property, and a few individuals who occasionally use the cattle house as a "retreat." (T-180). The evidence presented establishes that this de minimus usage does not create the need for a regulated water utility. (Raynetta Curry Grant Prefiled Testimony p. 4-5).

B. There is No Need for Bulk Water Service.

Farmton has no contracts or commitments from any entity to provide bulk water service. (T-50, 147, 187). The potential customers for bulk water service identified by Farmton are government utilities, including the City of Titusville and the Water Authority of Volusia. (T-147, 181)(Raynetta Curry Grant Prefiled Testimony p. 5).

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 North Fort Myers Utility, Inc., the applicant in that case:

> Consistent with language set forth in our prior orders referenced above, we provide the following guidelines to NFMU. First, for future ratemaking considerations, NFMU'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 NFMU.

Clearly, the same direction should apply to Farmton. Farmton's request for an original certificate and associated rates for the sale of bulk water to governmental authorities, such as Titusville, Brevard County, or Volusia County, should be denied and should not be the basis for determining rates. In the event Farmton identifies a private customer for bulk water service within the scope of PSC jurisdiction, Farmton can apply for a tariff at that time.

C. Fire Service Proposed Does not Serve the Public.

It is not in the public interest for the PSC to use its limited resources regulate a property owner providing fire protection to its own property. It is undisputed that 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). It is also undisputed that the Miami Corporation is the sole owner of Farmton Resource Management, LLC, and that Farmton Resource Management, LLC is the sole owner of Farmton. (Exh. 3).

Farmton's witnesses 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-147-149, 188-189). It is not in the public interest to use the PSC's limited resources to regulate the amount a

landowner will charge itself (through a subsidiary) for fire protection service. The PSC should avoid setting such a precedent.

ISSUE 3: Has Farmton met the filing and noticing requirements pursuant to Rules 25-30.030 and 25-30.033, Florida Administrative Code?

TITUSVILLE'S POSITION SUMMARY:

No. Farmton's application does not meet the requirements of Chapter 25, Florida Administrative Code, and Chapter 373, Florida Statutes. Farmton has failed to provide (a) any credible evidence of need, (b) any Financial Statement, (c) Proof of Financial Ability, (d) Proof of Technical Ability, and (e) Proof of Public Interest.

TITUSVILLE'S ARGUMENT ON ISSUE 3:

Farmton has failed to meet the filing requirements by filing incomplete and incorrect information. In fact, it is difficult to understand what service Farmton currently proposes because although it has prepared many exhibits changing its proposed service, Farmton has never amended its Application. For example, in Exhibit 41, Farmton has changed Supplemental Table D-4 of its Tariff, but has never sought to amend it Application to changes this page. The Application before the PSC is, therefore, de facto incorrect.

Titusville's argument on Farmton's non-compliance is set forth further in other issues.

ISSUE 4: Is there a need for service in Farmton's proposed service territory and, if so, when will service be required?

TITUSVILLE'S POSITION SUMMARY:

No. Farmton has failed to prove need. Farmton provided no reliable study of water needs. Farmton has no bulk customers. The Miami Corporation provides its own fire protection and can continue such protection. Volusia's and Brevard's comprehensive plans do not include land uses in the territory that support a need.

TITUSVILLE'S ARGUMENT ON ISSUE 4:

See Titusville's Argument on Issue 2.

ISSUE 5: **Is Farmton's application inconsistent with Brevard County's or Volusia County's comprehensive plans?**

TITUSVILLE'S POSITION SUMMARY:

Yes. The Brevard and Volusia comprehensive plans do not contemplate development that would require water utility service as set forth in Farmton's Application. Titusville adopts the position of Brevard County and Volusia County on the issue of the inconsistencies of the Application with their comprehensive plans.

TITUSVILLE'S ARGUMENT ON ISSUE 5:

The local comprehensive plans of Brevard and Volusia do not allow for development that would require water services. The only credible evidence in the record is the testimony of Mel Scott and John Thomson testified that the Application is inconsistent with the Brevard and Volusia comprehensive plans. (See Direct Testimony of Mel Scott and John Thomson).

Farmton has provided no credible evidence on this issues. The PSC should reject Howard Landers' testimony as he conceded that under his interpretation, a PSC application could never be inconsistent with a comprehensive plan. (T-123-127). Mr. Landers' opinion would render statutory regulation meaningless. His opinion should be rejected.

There is no public interest that requires that Farmton's Application be granted despite the inconsistent comprehensive plans. Moreover, Section 367.022, Florida Statutes, provides that certain services are exempt from PSC jurisdiction. As water services proposed by Farmton can be provided under exemptions, the PSC should decline jurisdiction.

See Titusville's Argument on Issue 1. Further, Titusville adopts and incorporates the arguments of Brevard and Volusia that Farmton's Application is inconsistent with these local governments' comprehensive plans.

ISSUE 6: **Will the certification of Farmton result in the creation of a utility which will be in competition with, or duplication of, any other system?**

TITUSVILLE'S POSITION SUMMARY:

Yes. Local governments in the vicinity of Farmton's proposed territory could provide retail service in the proposed territory, if needed, which it is not. Farmton's proposed bulk water supply has no customers and is duplicative of local governments existing and planned facilities.

TITUSVILLE'S ARGUMENT ON ISSUE 6:

Farmton admitted that it never requested service from any of the surrounding local governmental entities. (T-146). Farmton's expert, Charles Drake, further admitted that these local governmental utilities could provide the same service that Farmton proposes. (T-146). Under the circumstances, the proposed retail service (if even necessary) should be deemed duplicative.

Farmton's proposed bulk service is unnecessary. This is established by the fact that Farmton has no bulk customers or contracts supporting Farmton's Application. On the subject of bulk service, the lack of requests for service shows that service is not needed, and can only lead to the conclusion that bulk facilities will be duplicative of existing water supplies.

Moreover, Farmton's witness, Charles Drake, admitted that Farmton's proposed bulk water supply wells were in substantially the same location as wells for which Titusville has a pending application for a water use permit. (T-154). Titusville's witness, Raynetta Curry Grant, confirmed this fact and explained Titusville's concerns over this duplication of facilities. (T-239-241).

ISSUE 7: **Does Farmton have the financial ability to serve the requested territory?**

TITUSVILLE'S POSITION SUMMARY:

No. Farmton is a limited liability company with no directors or officers. Farmton has produced no financial statements, tax returns, or documents evidencing that is has enforceable financial backing. Farmton has failed to prove it has the financial ability to provide service.

TITUSVILLE'S ARGUMENT ON ISSUE 7:

Farmton has not met its burden of proof that it has the financial ability to operate the proposed water utility. No financial statements for Farmton were offered into evidence. Witnesses for Farmton admitted that Farmton did not have any financial statements. (T-190, 215). Farmton submitted its Application without a financial statement despite the fact that PSC Rule 25-30.033(r), requires an 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).

Farmton's 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). However, the rule specifies that a detailed financial statement, including balance sheet and income statement, is required **for Farmton**. The PSC's rule does not allow a financial statement of a parent limited liability company to be substituted for the Financial Statement of Farmton. Farmton Water Resources has operated since 2002. (Exh. GCH-1, p. 2). At least one fiscal year has passed since Farmton Water Resources was incorporated. Consequently, at least one year of financial statements should be available.

The PSC review of the financial capability of a water utility must be based on more detailed information than has been provided by Farmton. 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, Farmton has only submitted a one page-summary of the assets and liabilities of its parent company (which is also a limited liability company). This information is not sufficient for the PSC to determine whether Farmton or Farmton's parent company has the financial capacity to operate safe reliable water systems as proposed in the application.

The affidavits of Farmton's parent companies are not competent evidence of a commitment to provide financial support to Farmton and are unenforceable by the PSC. The affidavit by Charles E. Schroeder, the purported president of Farmton Management, LLC and the affidavit by Christine Long, the purported "Executive VP and CFO" of the Miami Corporation are strictly hearsay and cannot be used as evidence of the matters asserted in the documents.

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 affidavits are clearly hearsay under the Florida Evidence Code. Both affidavits were by individuals that were never identified by Farmton as a witness in this case, did not testify, and were not subject to cross-examination.

Farmton failed to offer any non-hearsay evidence of financial commitments by Farmton Management, LLC or the Miami Corporation. 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, independent of the affidavits, that the Miami Corporation had in fact agreed to provide financial support. (T-194). In fact, Mr. Underhill testified that he did not know who owned Farmton! (T-190-191). Ms. Hollis also testified regarding the affidavits, but she did not provide any evidence, independent of the affidavits, that the Miami Corporation had in fact agreed and committed to providing financial support to Farmton. (T-217-218).

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 Farmton, the affidavits are at best only evidence of a non-enforceable promise to provide support, and not a guarantee or commitment. Only an enforceable agreement made with sufficient consideration would be necessary to evaluate the nature and extent of the commitment. It is important to note that the PSC would not have any recourse against the Miami Corporation or Farmton Management, LLC, if they did not support Farmton.

Based on the record before the PSC, a finding that Farmton has demonstrated financial capacity to operate the proposed utility would be reversible error. No competent evidence is in the record to support such a finding. No financial statements for Farmton were submitted into evidence. No non-

hearsay evidence of any other entity's commitment to provide financial support was admitted into evidence. 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).

ISSUE 8: Does Farmton have the technical ability to serve the requested territory?

TITUSVILLE'S POSITION SUMMARY:

No. Farmton failed to prove it has the technical ability to provide service. Farmton's director of operations admitted his only potable water supply experience has been with one potable water well serving one equivalent residential connection. Farmton has tendered no employees with experience providing water service as a utility.

TITUSVILLE'S ARGUMENT ON ISSUE 8:

According to the evidence offered at hearing, Farmton's only experience is with agricultural operations. Farmton has no experience with the types of potable water facilities identified in the application. Farmton's vice president of operations has no experience managing a public water utility. (T-190). Farmton apparently has no experience meeting drinking water quality standards or with chlorination. There is not competent substantive evidence that Farmton has the technical ability utilities will be operated in a manner that will provide safe and reliable water service.

ISSUE 9: Does Farmton have sufficient plant capacity to serve the requested territory?

TITUSVILLE'S POSITION SUMMARY:

No. Farmton does not propose to construct any plant. Farmton proposed a series of remote isolated wells with no interconnection, no delivery system, and no capacity to serve the entire 53,000 acre territory it seeks to certificate.

TITUSVILLE'S ARGUMENT ON ISSUE 9:

Farmton has requested the PSC to certificate a 53,000 acre territory. However, the facilities it proposes to construct to serve that extensive territory include only 7 or 8 rate production wells

(Farmton's evidence on this is confusing and often inconsistent with the Application). (T-145, Exh. 3). These wells range from 1½ inch wells to 4 inch wells. (T-145-146, 149). These wells are not interconnected and have no delivery system. These wells have only local treatment tanks ranging from 20 to 200 gallons. (Exh. 3, Exh. 38). Clearly, this does not create sufficient capacity to serve a 53,000 acre territory.

ISSUE 10: Has Farmton provided evidence that it has continued use of the land upon which the utility treatment facilities are or will be located?

TITUSVILLE'S POSITION SUMMARY:

No position.

ISSUE 11: Is it in the public interest for Farmton to be granted a water certificate for the territory proposed in its application?

TITUSVILLE'S POSITION SUMMARY:

No. The public interest is not served by creation of a regulated utility to provide services that can be provided as exempt services. Taxpayers and regulators should not be burdened with regulating Farmton's isolated wells serving only its parent corporation and intermittent customers on its parent corporation's property.

TITUSVILLE'S ARGUMENT ON ISSUE 11:

Farmton's Application is not in the public interest. (Henry Thomas Prefiled Direct Testimony p. 2; Raynetta Curry Grant Prefiled Direct Testimony p. 5). Section 367.011(3), Florida Statutes, provides:

> The regulation of utilities is declared to be in the public interest and this law is an exercise of the police power of the state for the protection of the **public health, safety, and welfare**. The provisions of this Chapter shall be liberally construed for the accomplishment of this purpose.

(Emphasis added.) Farmton's Application does not serve the purpose of the protection of the public health, safety, and welfare. As noted throughout this brief, each of the activities proposed by Farmton can be provided as an exempt service. In fact, much of the proposed service is not for the "public," but

for Farmton's related party landowner, the Miami Corporation and its lease holders. Public resources and the time and effort of the PSC should not be expended regulating the proposed "utility" in this situation. The Miami Tract Hunt Club is a lease holder of the corporate landowner and can negotiate protections for itself through its lease. Farmton's proposed retail service will have only three customers. (T-181). None of these are individuals. The purpose of PSC regulation is not invoked under these circumstances.

Moreover, certification of Farmton without proper proof of financial ability **of the Applicant** is not in the public interest. Gloria Marwick testified that Volusia County is often forced to take over failed utilities. (T-370, 380). The public interest clearly requires proof of financial ability.

Farmton has admitted that the real purpose of the Application is not to provide water service to a territory of customers, but instead to improperly seek to protect the water beneath the Miami Corporation land. On cross-examination, when asked about the reason for the Application, Mr. Underhill admitted:

> I think the impetus is the whole package. It is the package of withdrawing the water responsibly and seeing that we do not either overpump and have salt water intrusion as this happens so often on cities up and down the east coast of Florida. They have they opportunity then to go to other lands. We sitting at Farmton do not want to see that happen. We don't have the opportunity to go to other lands. We only own this land. We do not want to see the water resources below Farmton destroyed.

These admissions by Farmton make it clear that the purpose of its Application is not protection of the public interest, but protection of the Miami Corporation interest. This is not a proper basis for certification.

ISSUE 12: What is the appropriate return on equity for Farmton?

TITUSVILLE'S POSITION:

No position.

ISSUE 13: **What are the appropriate potable water, fire protection, and bulk raw water rates and charges for Farmton?**

TITUSVILLE'S POSITION SUMMARY:

Farmton has no contracts to provide bulk water and such service is not needed. Quantities of bulk water and the costs for such service are unknown and speculative. Bulk water service to a government utility is exempt from PSC regulation and establishment of bulk water rates is not appropriate.

TITUSVILLE'S ARGUMENT ON ISSUE 13:

See Titusville Argument on Issue 2.

ISSUE 14: **What are the appropriate service availability charges for Farmton?**

TITUSVILLE'S POSITION SUMMARY:

The charges proposed by Farmton are not appropriate. After its initial application, Farmton changed its service availability charges (See Exh. 41), but never sought to amend its application. This proves that Farmton's service availability charges set forth in the Application are inappropriate.

ISSUE 15: **What is the appropriate Allowance for Funds Used During Construction (AFUDC) rate for Farmton?**

TITUSVILLE'S POSITION:

No position.

CONCLUSION

The PSC should deny Farmton's Application. If the PSC believes regulation is necessary to protect the Miami Tract Hunt Club from its lessor, 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.

Respectfully Submitted,

de la PARTE & GILBERT, P.A.

Edward P. de la Parte, Jr.
Florida Bar No. 236950
Patrick McNamara
Florida Bar No. 699837
Charles R. Fletcher
Florida Bar No. 0093920
Post Office Box 2350
Tampa, Florida 33601-2350
Telephone: (813) 229-2775
Counsel for City of Titusville, Florida

CERTIFICATE OF SERVICE

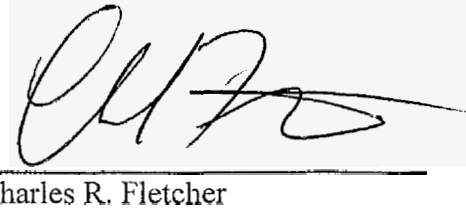
I HEREBY CERTIFY that a true and correct copy of the foregoing was served by **Federal Express** to the following on July 28, 2004:

Scott L. Knox, Esquire
Brevard County Attorney
2725 Judge Fran Jamieson Way
Viera, FL 32940
Federal Express Airbill
Number 8464 0354 8653

Jennifer A. Rodan, Esq.
Office of General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
Federal Express Airbill
Number 8464 0354 8664

John Wharton, Esquire
F. Marshall Deterding, Esquire
Rose, Sundstrom & Bentley, LLP
2548 Blairstone Pines Drive
Tallahassee, FL 32301
Federal Express Airbill
Number 8464 0354 8675

William J. Bosch, III, Esquire
Volusia County Attorney
123 West Indiana Avenue
DeLand, FL 32720-4613
Federal Express Airbill
Number 8464 0354 8686



Charles R. Fletcher

#165733