

State of Florida



# Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA 32399-0850

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

**DATE:** January 28, 2010

**TO:** Office of Commission Clerk (Cole)

**FROM:** Office of the General Counsel (Klancke) *Klancke*  
Division of Economic Regulation (Brady, Simpson) *Brady* *Simpson* *CS* *MS* *PD* *RC*

**RE:** Docket No. 090478-WS – Application for original certificates for proposed water and wastewater system, in Hernando and Pasco Counties, and request for initial rates and charges, by Skyland Utilities, LLC.

**AGENDA:** 02/09/10 – Regular Agenda – Oral Argument Requested – Participation is at the Commission’s Discretion

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Skop

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** Oral Argument Requested – Issue 1

**FILE NAME AND LOCATION:** S:\PSC\ECR\WP\090478.RCM.DOC

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### Case Background

On October 16, 2009, Skyland Utilities, LLC, (Skyland or Utility) filed an application for original certificates to operate a water and wastewater utility in Hernando and Pasco Counties and for approval of initial rates and charges. According to the application, the Utility proposes to provide potable and non-potable water and wastewater services to customers in southeastern Hernando and northeastern Pasco Counties. The Utility asserted that the proposed interconnections will transverse county lines.

On November 13, 2009, Hernando County (Hernando) timely filed a protest to the Utility’s application and requested a formal hearing. In its protest, Hernando argued that: the

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proposed citing of the Utility will violate Hernando's Comprehensive Plan; that the proposed Utility territory is wholly within the service district of Hernando County Water and Sewer District (HCWSD), which is governed by the locally elected Board of County Commissioners; that the Utility has not demonstrated that its current and future water and wastewater needs could not be satisfied by the HCWSD; that the proposed service is not in the public interest; and that Skyland is not a utility which proposes to provide service to the public for compensation as required by Section 367.021(13), Florida Statutes (F.S.).

Contemporaneously with its objection, on November 13, 2009, Hernando also filed a Motion to Dismiss Application of Skyland Utilities, LLC, for Lack of Jurisdiction with Incorporated Memorandum of Law (Motion to Dismiss or Motion). In its Motion, Hernando asserted that the Commission does not have jurisdiction to consider Skyland's application pursuant to Section 367.171(7), F.S., since facilities forming Skyland's proposed system do not exist and do not currently provide service across the border of Pasco and Hernando Counties. Hernando acknowledged that the Commission has addressed this issue in Order No. PSC-00-1265-PCO-WS,<sup>1</sup> but requested that the Commission overrule this order or limit its scope.

On November 23, 2009, Skyland filed its response to Hernando's Motion to Dismiss, asserting that Skyland is a utility as defined by Section 367.021(12), F.S., which has proposed the construction of a system which will provide water or wastewater service to the public for compensation. Skyland asserts that the proposed service will transverse the border of Pasco and Hernando Counties. Further, Skyland argued that Section 367.171(7), F.S., clearly provides that the Commission has exclusive jurisdiction over all utility systems (of which Skyland is one) whose service transverses county boundaries. Skyland notes that to read Chapter 367 the way the Hernando urges would require the Commission to ignore the definition of "utility" set forth in Section 367.021(12), F.S.

For the reasons described below, the Commission should deny Hernando's Motion to Dismiss. The Commission has jurisdiction pursuant to Section 367.171(7), F.S.

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<sup>1</sup>Order No. PSC-00-1265-PCO-WS, issued July 11, 2000, in Docket Nos. 990696-WS and 992040-WS, In re: Application for original certificates to operate a water and wastewater utility in Duval and St. Johns Counties by Nocatee Utility Corporation and Application for certificates to operate a water and wastewater utility in Duval and St. Johns Counties by Intercoastal Utilities, Inc.

**Discussion of Issues**

**Issue 1:** Should Hernando's Request for Oral Argument on its Motion to Dismiss be granted?

**Recommendation:** The Request for Oral Argument should be denied as being untimely filed. However, the Commission has the discretion to request oral argument from the parties if it believes oral argument would assist the Commission in rendering its decision. In such an event, staff recommends that each side should be allowed 10 minutes to address the Commission on the matter. (Klancke)

**Staff Analysis:** Hernando filed its Request for Oral Argument by separate written request filed January 19, 2010. In its request, Hernando suggests that there are factual and legal issues specific and unique with respect to this matter and that the Commission would benefit from oral argument.

While Skyland did not file a written request for oral argument, counsel for Skyland conveyed to staff counsel in a telephonic conversation on January 19, 2010, that it, too, would like to be able to orally address the Commission.

Rule 25-22.0021(1), Florida Administrative Code (F.A.C.), provides that participation at the Commission's Agenda Conference may be informal or by oral argument. Subsection (3) of the rule provides that informal participation is not permitted on dispositive motions (such as motions to dismiss), and that participation on such items is governed by Rule 25-22.022, F.A.C.

Rule 25-0022(1), F.A.C., provides in its pertinent part:

Oral argument must be sought by separate written request filed concurrently with the motion on which argument is requested, or no later than 10 days after exceptions to a recommended order are filed. Failure to timely file a request for oral argument shall constitute waiver thereof. Failure to timely file a response to the request for oral argument waives the opportunity to object to oral argument....

(emphasis added).

As discussed in the case background, Hernando's Motion to Dismiss was filed on November 13, 2009; Hernando's Request for Oral Argument was filed over two months later. Staff therefore recommends that, pursuant to Rule 25-22.022(1), F.A.C., the Request for Oral Argument should be denied as being untimely filed.

However, Rule 25-22.0022(7)(b), F.A.C., also provides:

The Commission can request oral argument on any issue to be decided by a dispositive motion or recommended order. The listing of the dispositive motion or recommended order on the notice of the agenda conference shall serve as notice to the parties to be prepared for oral argument on all issues associated with the dispositive motion or recommended order on the agenda, even if a request for

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oral argument has not been made by a party, or if a request made by a party pertains to a limited number of issues....

The Commission has the discretion to request oral argument from the parties if it believes oral argument would assist the Commission in rendering its decision. In such an event, staff recommends that each side should be allowed 10 minutes to address the Commission on the matter.

**Issue 2:** Should the Commission grant Hernando County's Motion to Dismiss Application of Skyland Utilities, LLC., for Lack of Jurisdiction with Incorporated Memorandum of Law?

**Recommendation:** No. The Commission should deny Hernando County's Motion to Dismiss Application of Skyland Utilities, LLC., for Lack of Jurisdiction with Incorporated Memorandum of Law. (Klancke)

**Staff Analysis:** A motion to dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action. Meyers v. City of Jacksonville, 754 So. 2d 198, 202 (Fla. 1st DCA 2000). The standard to be applied in disposing of a motion to dismiss is whether, with all the allegations in the petition assumed to be true, the petition states a cause of action upon which relief can be granted. Id. When making this determination, only the petition can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993).

#### Hernando County's Motion to Dismiss

As stated in the case background, Hernando timely filed a Motion to Dismiss Skyland's application on the grounds that the Commission lacked subject matter jurisdiction over Skyland's application. In its Motion, Hernando argued that it is a non-jurisdictional county pursuant to the Hernando County Board of County Commissioners' adoption of Resolution No. 94-77 rescinding Florida Public Service Commission jurisdiction in Hernando County on April 5, 1994. Hernando's rescision of the Commission's jurisdiction was recognized in Order No. PSC-94-0719-FOF-WS.<sup>2</sup>

Hernando acknowledges that Section 367.171(7), F.S., affords the Commission with exclusive jurisdiction over utility systems whose service transverses county boundaries. Hernando asserts, however, that Section 367.171(7), F.S., does not afford the Commission with subject matter jurisdiction over Skyland's application because Skyland's utility system does not currently exist and does not currently provide service across the border of Pasco and Hernando Counties. In support of this assertion, Hernando argued that pursuant to Hernando County v. Florida Public Service Commission, 685 So. 2d 48 (Fla. 1st DCA 1996), the Commission does not have jurisdiction to regulate utilities within its geographic boundaries. Citing to Hernando County, Hernando alleges that jurisdiction under Section 367.171(7), F.S., depends upon the actual existence of operationally integrated water and/or wastewater facilities that transverse county boundaries. Since no such facilities are present in the instant case, Hernando asserts that the Commission lacks the necessary jurisdiction to grant Skyland's application.

#### Skyland's Response

In its response to Hernando's Motion to Dismiss filed on November 23, 2009, Skyland asserted that it is a utility as defined by Section 367.021(12), F.S., which has proposed the construction of a system which will provide water or wastewater service to the public for compensation. Further, Skyland argued that Section 367.171(7), F.S., clearly provides that the

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<sup>2</sup> Issued June 9, 1994, in Docket No. 940408-WS, In re: Request for acknowledgement of resolution rescinding Florida Public Service Commission jurisdiction over private water and wastewater utilities in Hernando County.

Commission has exclusive jurisdiction over all utility systems (of which Skyland is one) whose service transverses county boundaries. Skyland notes that to read Chapter 367 the way that Hernando urges would require the Commission to ignore the definition of utility set forth in Section 367.021(12), F.S.

Skyland further asserted that Hernando's reliance upon Hernando County is misplaced. Skyland argues that Hernando's narrow interpretation of Hernando County misconstrues the holding in that case. Skyland alleged that the court in Hernando County focused its analysis with respect to the determination of jurisdiction under Section 367.171(7), F.S., upon the interrelationship of particular identified facilities rather than the general corporate structure of the utility. Skyland further argued that in this case the proposed facilities and land forming a system will exist in close geographical proximity across a county boundary. Moreover, Skyland asserted that it is the proposed physical delivery of water and/or wastewater across county boundaries that invokes the Commission's jurisdiction under Section 367.171(7), F.S., and nothing in the court's holding in Hernando County changes that fact.

#### Staff's Analysis

Pursuant to Section 367.171(3), F.S., and Order No. PSC-94-0719-FOF-WS Hernando is excluded from the Commission's jurisdiction. However, Skyland is proposing to serve areas which would span both Hernando and Pasco Counties. Thus, the proposed service territory would transverse county boundaries. The relevant statute to determine whether the Commission has jurisdiction over the Utility's application is Section 367.171(7), F.S. That section provides:

Notwithstanding anything in this section to the contrary, the [C]ommission shall have exclusive jurisdiction over all utility systems whose service transverses county boundaries, whether the counties involved are jurisdictional or nonjurisdictional, except for utility systems that are subject to, and remain subject to, interlocal utility agreements in effect as of January 1, 1991, that create a single governmental authority to regulate the utility systems whose service transverses county boundaries, provided that no such interlocal agreement shall divest commission jurisdiction over such systems, any portion of which provides service within a county that is subject to [C]ommission jurisdiction under this section.

(emphasis added).

In Section 367.021(12), F.S., the Legislature defines "utility" as "every person, lessee, trustee, or receiver [except those exempted under Section 367.022, F.S.] 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." (emphasis added). Further, Section 367.021(11), F.S., defines a "system" as "facilities and land used or useful in providing service." Based on the plain meaning of the statute using the definitions provided by the Legislature, staff believes that the Commission has subject matter jurisdiction to consider Skyland's application under Section 367.171(7), F.S. The Utility is proposing to construct a utility system whose service would transverse county boundaries, thereby causing the application to fall within the jurisdiction of the Commission. Contrary to the interpretation

provided by Hernando, Section 367.171(7), F.S., provides this Commission with exclusive jurisdiction and authority to determine whether to grant the Utility's application.

In support of its Motion, Hernando relies upon Hernando County v. Florida Public Service Commission, 685 So. 2d 48 (Fla. 1st DCA 1996). In Hernando County the court addressed the issue of whether the Commission had jurisdiction pursuant to Section 367.171(7), F.S., over a utility whose facilities were located in a number of non-contiguous counties throughout Florida. The court stated that the relevant inquiry when determining the existence of jurisdiction under Section 367.171(7), F.S., is whether there is an "actual inter-relationship of two or more facilities providing utility services in a particular geographic area comparable to the 'service area' defined in Section 367.021(10), over which the PSC ordinarily has jurisdiction." Id. at 52. The court further stated that the correct focus is on the relationship between particular identified facilities rather than the general corporate structure of the utility and that this "is supported by the use of the word 'transverses' in the statute, which indicates a legislative intent that the facilities and land forming a system must exist in close geographical proximity across a county boundary." Id. The court characterized the inter-relatedness of operationally integrated facilities as "functional relatedness." The court further specified that, "jurisdiction under Section 367.171(7) cannot be found upon evidence that the company utilizes an umbrella organizational structure, or the central hub of management offices described by [the utility] in this case." Id. In essence, the court held that jurisdiction under Section 367.171(7), F.S., cannot be exclusively founded upon evidence that the company utilizes an umbrella organizational structure or a central hub of management offices.

In the instant case, Skyland has proposed facilities and land forming a system which will exist in close geographical proximity across a county boundary. Thus, the proposed service will result in its facilities physically crossing the Hernando County and Pasco County border, thereby placing it within the Commission's jurisdiction pursuant to Section 367.171(7), F.S. Moreover, because the proposed system would constitute one system, staff does not believe that the question of functional relatedness is an issue in this matter. Thus, staff does not believe that Hernando County restricts the Commission's jurisdiction over Skyland's application.

The Commission squarely addressed this issue in Order No. PSC-00-1265-PCO-WS. In that case, the Commission considered the applications of two utilities that sought original certificates to provide water and wastewater services to a development in Nocatee, Florida. Although no facilities existed at the time of the submission of the applications, the proposed service area would span two adjacent counties. Both applications were protested and several Motions to Dismiss for lack of subject matter jurisdiction were filed. In Order No. PSC-00-1265-PCO-WS, the Commission determined that pursuant to the clear and unambiguous language of Section 367.171(7), F.S., using the definitions provided by the Legislature, it had exclusive jurisdiction over the proposed utility system whose service would transverse county boundaries. Quoting Order No. 22459,<sup>3</sup> the Commission discussed the legislative intent behind Section 367.171(7), F.S. In that order, the Commission stated:

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<sup>3</sup> Order No. 22459, issued January 24, 1990, in Docket No. 891190-WS, In re: Petition of General Development Utilities, Inc. For Declaratory Statement Concerning Regulatory Jurisdiction Over its Water and Wastewater System in DeSoto, Charlotte, and Sarasota Counties, (GDU).

We do not believe that the Legislature intended ... to perpetuate a situation where a utility would be subject to several regulators. On the contrary, we believe that the Legislature intended to eliminate regulatory problems that exist when utility systems provide service across political boundaries and are subject to regulation by two or more regulatory agencies .... This duplicative economic regulation is inefficient and results in potential inconsistency in the treatment of similarly situated customers .... These inefficiencies could result in unnecessary and wasteful efforts which would translate into higher rate case expense and higher rates to customers. Inconsistency can occur when regulators apply different ratemaking principles to the same system or make inconsistent determinations on the same issue.

The Legislature chose to promote efficient, economic regulation of multi-county systems by giving the Commission exclusive jurisdiction over all utilities whose service crosses county boundaries .... By concentrating exclusive jurisdiction over these systems in the Commission, the Legislature has corrected the problem of redundant, wasteful, and potentially inconsistent regulation.

Similarly, in the instant case, staff believes that the interpretation of Section 367.171(7), F.S., urged by Hernando would lead to an untenable and inefficient result. An interpretation of a statute that would produce absurd results should be avoided if the language is susceptible to an alternative interpretation. Amente v. Newman, 653 So. 2d 1030, 1032 (Fla. 1995). In this case, if the Commission does not have jurisdiction over the Utility's application pursuant to Section 367.171(7), F.S., then the Utility will be required to apply to two regulatory authorities, Hernando County and Pasco County, for separate certificates to provide service. Then, when the Utility begins providing service, the Commission would regulate the whole system. Staff does not believe that it would be logical, nor legally accurate, to assert that the Commission does not have jurisdiction to consider the application for certification, but that this Commission would have jurisdiction to subsequently regulate the system because it transverses county boundaries. Thus, staff believes that the legislative intent behind Section 367.171(7), F.S., the logical construction of this statute, as well as court and Commission precedent support the conclusion that the Commission has jurisdiction to consider Skyland's application.

Assuming that all of the allegations in the applications are true and viewing all reasonable inferences in favor of Hernando the application falls within the Commission's subject matter jurisdiction. Thus, staff recommends that Hernando County's Motion to Dismiss should be denied.

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**Issue 3:** Should this docket be closed?

**Recommendation:** No. This docket should remain open to allow this matter to proceed to hearing. (Klancke)

**Staff Analysis:** This docket should remain open to allow this matter to proceed to hearing.