BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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.	DOCKET NO. 090478-WS ORDER NO. PSC-10-0088-PCO-WS ISSUED: February 22, 2010

ORDER DENYING SKYLAND UTILITY LLC'S
MOTION FOR ATTORNEY'S FEE AND SANCTIONS

BACKGROUND

On October 16, 2009, Skyland Utilities, LLC, (Skyland) 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. On November 13, 2009, Hernando County (Hernando) timely filed a protest to the Utility's application and requested a formal hearing.

Also on November 13, 2009, Hernando filed a Motion to Dismiss Application of Skyland Utilities, LLC., for Lack of Jurisdiction with Incorporated Memorandum of Law (Hernando's Motion to Dismiss). Hernando's Motion to Dismiss asserted that the Commission does not have jurisdiction to consider Skyland's application pursuant to Section 367.171(7), F.S. In support of its motion, Hernando relies upon Hernando County v. Florida Public Service Commission, 685 So. 2d 48 (Fla. 1st DCA 1996). Hernando argued that in that case, the First District Court of Appeals found that jurisdiction pursuant to Section 367.171(7), F.S., depends upon the actual existence of operationally integrated water and wastewater facilities that transverse county boundaries. 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 argued that the Commission does not have jurisdiction to consider Skyland's application. Hernando also cites to the Florida Supreme Court decision City of Cape Coral v. GAC Utilities, Inc., 281 So.2d 493 (Fla. 1973), which held that any reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against its exercise.

In its Motion to Dismiss, Hernando acknowledged that its argument contradicts the Commission's decision in its July 11, 2000, Order No. PSC-00-1265-PCO-WS,[1] In re: Application for Certificates to Operate a Water and Wastewater Utility in Duval and St. Johns Counties by Intercoastal Utilities, Inc. Hernando stated that the arguments made in its motion are presented as a good faith argument for the extension, modification, revised interpretation, or reversal of existing law or the establishment of new law. Specifically, Hernando asked that the Commission either overrule its decision in Order No. PSC-00-1265-PCO-WS or limit its scope.

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

Further, Hernando stated that if it were unsuccessful before the Commission, it intends "to seek similar relief in the appropriate appellate court."

On December 18, 2009, Skyland filed Skyland Utilities, LLC's Motion for Attorney's Fees and Sanctions (Motion for Sanctions). In its Motion for Sanctions, Skyland seeks an award of sanctions, reasonable costs, and attorney's fees and such other relief that the Commission deems appropriate pursuant to Section 57.105(5), F.S. Skyland gives several reasons in support of its request.

Skyland asserts that Hernando's Motion to Dismiss is not supported by the material facts necessary to establish the claim asserted therein and is not supported by the application of existing law to those material facts. Skyland argues that the Hernando is aware that its claims are unsupported as a matter of fact and law, because the Hernando's Motion to Dismiss states its awareness that its argument "contradicts the Public Service Commission's decision in In Re: Application for Certificates to Operate a Water and Wastewater Utility in Duval and St. Johns Counties by Intercoastal Utilities, Inc."

Skyland further asserts that Hernando's Motion to Dismiss is not a good faith argument for the extension, modification, revised interpretation, or reversal of existing law or the establishment of new law, as applied to the material facts, with a reasonable expectation of success. Skyland states that nothing about the fact pattern in this docket differs from the facts and laws on which the Commission has relied for decades on agency action which is directly contrary to the Hernando's interpretation of Section 367.171(7), F.S. Skyland believes that Hernando has no reasonable expectations of success, given the Commission's prior decisions, the plain language of Section 367.171(7), F.S., and the "absurd results" which would occur under Hernando's interpretation of the law. Skyland does not believe that Hernando's reliance on "a 9 year old Commission Order, based on a 13 year old appellate decision, addressing a 20 year old statutory provision" is a good faith argument for the extension, modification, or revised interpretation, or reversal of existing law. Finally, Skyland argues that for the Commission to revisit its interpretation of Section 367.171(7), F.S., would undermine two decades of Commission activities to the detriment of individuals, utilities, and governmental entities who have relied upon the Commission's interpretation of Section 367.171(7), F.S., and would undermine the clear will of the Legislature.

Neither Hernando nor any other party filed a response to the Utility's Motion for Sanctions.

The Commission unanimously denied Hernando's Motion to Dismiss at its February 9, 2010, Agenda Conference, finding that that the Commission does have jurisdiction to consider Skyland's application for water and wastewater certificates in Pasco and Hernando Counties pursuant to Section 367.171(7), F.S.

DECISION

Skyland's Motion for Sanctions requests relief pursuant to Section 57.105, F.S. In 2003, the Legislature amended Section 57.105, F.S., Attorney's Fees, to apply to administrative proceedings under Chapter 120, F.S. Section 57.105, F.S., states, that an administrative law judge shall award a reasonable attorneys fee and damages to be paid to the prevailing party in equal amounts by the losing party and a losing party's attorney on any claim in which it is found that the losing party or the losing party's attorney knew or should have known that a claim or defense at any time before trial:

> (1)(a) Was not supported by the material facts necessary to establish the claim or defense; or
> (b) would not be supported by the application of then-existing law to those material facts.
>
> However, the losing party's attorney is not personally responsible if he or she has acted in good faith, based on the representations of his or her client as to the existence of those material facts. If the court awards attorney's fees to a claimant pursuant to this subsection, the court shall also award prejudgment interest.
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> (2) Paragraph (1)(b) does not apply if the court determines that the claim or defense was initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success.

Section 57.105(5), F.S., provides that an award of attorney's fees and damages shall be a final order subject to judicial review.

Attorneys fees are awarded pursuant to Section 57.105, F.S., if the movant shows that the opposing party and counsel "knew or should have known" that any claim or defense[2] asserted was (a) not supported by the facts or (b) not supported by an application of "then-existing" law. Boca Burger, Inc. v. Forum, 912 So. 2d 561, 570 (Fla. 2005).[3] Defenses subject to the imposition of Section 57.105, F.S., fees are those that a party or its counsel knew or should have known, at the time of filing, were not grounded in fact, or were not warranted by existing law or by reasonable argument for extension, modification, or reversal of existing law. Gopman v. Department of Education, 974 So. 2d 1208 (Fla. 1st DCA 2008), appeal dismissed, 980 So. 2d 489 (Fla. 2008) (dismissed for lack of jurisdiction).

An argument for a reasonable extension, modification, or reversal of existing law, requires the party to acknowledge before the presiding officer that they are seeking such a

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[2] A motion to dismiss for lack of subject matter jurisdiction is a defense which may be made by motion. Fla. R. Civ. Pro. 1.140(b).

[3] The Florida Supreme Court in Boca Burger, Inc., explained that the standard for granting Section 120.57 attorneys fees changed when that statute was revised in 1999. Previously, a movant had to show "a complete absence of a justiciable issue of either law or fact raised by the losing party."

change in the law. To be reasonable, an argument must be made in good faith; to be in good faith an argument must, in part, acknowledge the state of the current law. Gopman v. Dept. of Education, 974 So. 2d at 1210, fn. 1; De Vaux v. Westwood Baptist Church, 953 So. 2d 677, 684 (Fla. 1st DCA 2007); Mercury Ins. Co. of Fla. v. Coatner, 910 So. 2d 925, 927 (Fla. 1st DCA 2005). In De Vaux and Mercury Ins. Co., Section 57.105, F.S., attorney's fees were imposed, and the courts in both cases noted that no effort had been made by counsel to distinguish the applicable law or, in good faith, argue for an extension, modification or reversal of existing law. Hernando County's Motion to Dismiss did acknowledge the state of the current law and requested a change in the law.

Important to the analysis of whether to grant Skyland's Motion for Sanctions is the courts' admonition that Section 57.105, F.S., must be applied carefully to ensure that it serves the purpose for which it was intend: To deter frivolous pleadings. Wendy's of N.E. Florida, Inc v. Vandergriff, 865 So. 2d 520, 523 (Fla. 1st DCA 2004). The First District Court of Appeals has cautioned:

> If an order dismissing a claim or striking a defense routinely leads to a motion for attorney's fees, the point of the statute would be subverted and, in the end, it might even have the reverse effect of making civil litigation more expensive. The need to adjudicate multiple fee claims in the course of a single case could create conflicts between lawyers and their clients, and it could take time away from the court's main objective; that is, to resolve the controversy presented by the case.

Bridgestone/Firestone, Inc. v. Herron, 828 So. 2d 414, 419 (Fla. 1st DCA 2002); See also Connelly v. Old Bridge Village Co-Op, Inc., 915 So. 2d 652, 656 (Fla. 2nd DCA 2005)("An even more significant potential ramification of the courts' unrestrained assessment of fees is the unconstitutional infringement of our citizens' rights of access to the courts, as guaranteed by article I, section 21, of the Florida Constitution.")

Hernando's Motion to Dismiss was supported by the material facts necessary to establish its defense. There was no showing to the contrary. Although Skyland's Motion for Sanctions asserts otherwise, it does not offer any specifics.

In denying Hernando's Motion to Dismiss Skyland's application for water and wastewater for lack of subject matter jurisdiction, the Commission's rejected Hernando's interpretation of Hernando County v. Florida Public Service Commission, and instead found that the Commission has subject matter jurisdiction over Skyland's application, consistent with previous Commission orders. However, that the Commission and Hernando interpret Hernando County v. Florida Public Service Commission differently is not sufficient basis for granting Skyland's Motion for Sanctions. See e.g. Peyton v. Horner, 920 So. 2d 180, 183 (Fla. 2nd DCA 2006).

Hernando County's Motion to Dismiss stated its good faith effort to change existing law as interpreted by the Commission and argued for an extension, modification or reversal of same. The courts have stated that to be reasonable, an argument must be made in good faith; to be in

good faith an argument must, in part, acknowledge the state of the current law. I find that Hernando's Motion to Dismiss was initially presented to the Commission as a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Skyland Utility LLC's Motion for Attorney's Fee Sanctions is hereby denied.

By ORDER of Commissioner Nathan A. Skop, as Prehearing Officer, this 22nd day of February, 2010.

NATHAN A. SKOP
Commissioner and Prehearing Officer

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or

wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.