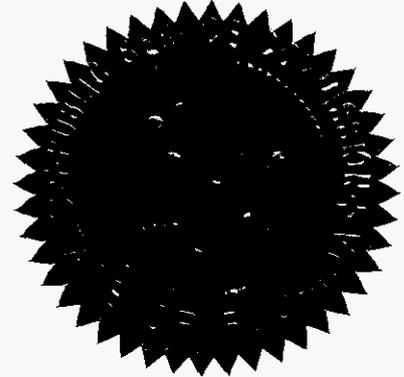


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of: 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.



PROCEEDINGS: AGENDA CONFERENCE
ITEM NO. 3

COMMISSIONERS
PARTICIPATING: CHAIRMAN NANCY ARGENZIANO
COMMISSIONER LISA POLAK EDGAR
COMMISSIONER NATHAN A. SKOP
COMMISSIONER DAVID E. KLEMENT
COMMISSIONER BEN A. "STEVE" STEVENS III

DATE: Tuesday, February 9, 2010

PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: LINDA BOLES, RPR, CRR
Official FPSC Reporter
(850) 413-6734

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P R O C E E D I N G S

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3 **CHAIRMAN ARGENZIANO:** Okay. Staff, we're
4 going to have to come back to Item 9. Sorry. We're
5 having difficulties.

6 So let's move on to Item 3, Issue 3, please.
7 And, staff, you're recognized.

8 **MS. KLANCKE:** Absolutely. Item 3 pertains to
9 Hernando County's motion to dismiss the application of
10 Skyland Utility, Inc., for lack of subject matter
11 jurisdiction.

12 Item 1 addresses the issue for oral
13 modification -- I mean, the issue for oral arguments on
14 this matter. Staff notes that oral argument is at the
15 Commission's discretion. Staff would also like to note
16 that the City of Brooksville has filed a motion for
17 joinder affirming the pleadings of Hernando County. And
18 should the Commission desire to hear oral argument, the
19 City of Brooksville is present and here to answer
20 questions of the Commission.

21 Item 2 addresses the utility's, the --
22 Hernando County's motion to dismiss.

23 Commission staff is available to answer any
24 questions.

25 **CHAIRMAN ARGENZIANO:** Commissioners?

1 Commissioner Stevens.

2 **COMMISSIONER STEVENS:** Yes, ma'am. Thank you.
3 Am I on now? On? Good. Thanks.

4 I agree with staff. I understand that the
5 motion was filed late, but particularly in this weather,
6 if some people came to see us, I think we, we ought to
7 hear them. So that's where I am.

8 **CHAIRMAN ARGENZIANO:** Commissioner Stevens, I
9 feel the same way. It can't hurt to have, to hear what
10 they have to say. And Commissioner Skop, Commissioner
11 Klement.

12 **COMMISSIONER SKOP:** Thank you. Thank you,
13 Madam Chair. And I believe brief oral argument would be
14 appropriate.

15 **COMMISSIONER EDGAR:** Madam Chair, I --

16 **CHAIRMAN ARGENZIANO:** I'm sorry. Commissioner
17 Edgar.

18 **COMMISSIONER EDGAR:** I would just say I do
19 agree that the staff made the right recommendation and
20 right read of our rules and all of that, but I concur
21 that I'd like to hear from them as long as they are here
22 and have made the request.

23 **CHAIRMAN ARGENZIANO:** Commissioner Klement.

24 **COMMISSIONER KLEMENT:** (Inaudible. Microphone
25 off.)

1 **CHAIRMAN ARGENZIANO:** Same? Okay. Well, then
2 I guess we're going for oral discussion.

3 **MS. KLANCKE:** If it is the preference of the
4 Commission, if it's the will of the Commission to hear
5 oral arguments, staff would recommend that you limit
6 oral argument to five or ten minutes per side.

7 **CHAIRMAN ARGENZIANO:** I would think -- did you
8 --

9 **MR. WHARTON:** Madam Chairman, if I may, I
10 think one -- John Wharton, Rose, Sundstrom & Bentley, on
11 behalf of Skyland Utilities, LLC. I think one thing
12 that it would behoove the Commission to keep in mind is
13 even though you're all here, we're sitting
14 quasi-judicially in a motion hearing in an ongoing
15 litigation, maybe one in which some of you won't be on
16 the panel. Maybe that doesn't really affect oral
17 argument because at hearing you might say you don't want
18 to hear oral argument. But I have two ore tenus motions
19 I want to make upfront about these late filings, this
20 joinder and this reply to the staff rec. And it's not
21 trivial because Hernando has said right in there they're
22 going to seek an interlocutory appeal. I don't think, I
23 don't think I want to wait until that appeal to say,
24 hey, they shouldn't have been allowed to file a response
25 to the staff rec. So I would like to make two motions.

1 **CHAIRMAN ARGENZIANO:** I think you're
2 recognized to make your motions.

3 **MR. WHARTON:** Okay. Thank you.

4 First of all, Skyland would move to strike the
5 reply to the staff recommendation of Hernando County.
6 This motion was filed on November the 13th. The
7 response was filed by Skyland on November the 23rd. The
8 staff recommendation was on January the 28th. The reply
9 was filed on February 2nd. There is nothing in either
10 the uniform rules or the practice of the Commission that
11 allows a reply to a staff recommendation. One could
12 easily argue it is the oral response that Hernando seeks
13 to supplement here today. But I know that in all the
14 years that I have practiced in front of the Commission,
15 I've never seen a response to a staff recommendation
16 like this. It doesn't mean you guys haven't seen them.

17 And, again, it is not a trivial matter because
18 Hernando has indicated in their motion they're going to
19 seek an interlocutory appeal if the staff recommendation
20 is accepted. I move to strike Hernando's reply to the
21 staff recommendation.

22 **CHAIRMAN ARGENZIANO:** Commissioners?
23 Commissioner Klement.

24 **COMMISSIONER KLEMENT:** May I just ask for
25 clarification, who is the witness and who does he

1 represent?

2 **MR. WHARTON:** My name is John Wharton, Rose,
3 Sundstrom & Bentley here in town, and I'm the attorney
4 for Skyland Utilities, for the applicant.

5 **COMMISSIONER KLEMENT:** Thank you.

6 **COMMISSIONER STEVENS:** I'm sorry. Last name?

7 **MR. WHARTON:** Wharton.

8 **CHAIRMAN ARGENZIANO:** Staff?

9 **MS. KLANCKE:** I don't think, although the
10 response to staff's recommendation may constitute
11 superfluous pleadings, I don't think there's anything in
12 the rules -- the rules don't contemplate prohibiting the
13 Commission from considering them. So I think it's at
14 the Commission's discretion whether or not to strike.

15 **CHAIRMAN ARGENZIANO:** Commissioners?
16 Commissioner Skop, then Commissioner Edgar.

17 **COMMISSIONER SKOP:** Thank you, Madam Chair.

18 I appreciate Hernando County's reply. If it's
19 a procedural issue that is going to result in protracted
20 litigation, perhaps granting the motion to strike would
21 be appropriate to the extent that it just simplifies the
22 case before us. I'd just leave it at that and move
23 forward.

24 **MS. KLANCKE:** I think before we go forward
25 with anything though we should afford Hernando County,

1 who filed the pleading --

2 **CHAIRMAN ARGENZIANO:** An opportunity to --
3 absolutely. Commissioner Edgar first.

4 **COMMISSIONER EDGAR:** Thank you, Madam Chair.
5 I just wanted to ask a procedural question.
6 Realizing that a motion has been made orally to us as a
7 body this morning, and I do agree with hearing from both
8 sides before we act, but procedurally I would -- is that
9 something that should be dealt with by a vote of the
10 Commission or is it something that is within the
11 decision of the Chairman sitting basically as our
12 administrative officer?

13 **CHAIRMAN ARGENZIANO:** Whether -- you mean to
14 accept the motion?

15 **COMMISSIONER EDGAR:** To rule on the motion.

16 **CHAIRMAN ARGENZIANO:** To rule on the motion.
17 To rule --

18 **COMMISSIONER EDGAR:** To accept and/or rule.

19 **CHAIRMAN ARGENZIANO:** Right. Right. Well, I,
20 I have no problem letting the Commission, the full
21 Commission decide what they want to do. Either way,
22 whatever you prefer. Whatever is procedurally the right
23 way to go is fine with me.

24 **COMMISSIONER EDGAR:** And that's my question is
25 what is the way procedurally? How do we generally deal

1 with that? I mean, I think I remember some similar
2 instances in the past and having them dealt with, and I
3 don't feel strongly one way or the other, other than I
4 think parties coming before us should, should know how
5 we're going to deal with those sorts of issues.

6 **MS. HELTON:** I think that if the motion had
7 been filed in writing instead of being made as an ore
8 tenus motion here today, that it would have been
9 something that the Prehearing Officer who was assigned
10 to the case could have dealt with if there had been, if
11 time had allowed. But obviously that's not the posture
12 that we are in today. So I think it would be within the
13 discretion of the Chairman to rule as the chief
14 administrative officer, or if she wants to defer to the
15 full panel, that certainly has been done and is
16 appropriate here.

17 **MR. WHARTON:** And if I may, Madam Chairman,
18 Commissioner Skop is right. The point should not be
19 belabored. The uniform rules clearly state that a
20 motion may be made in writing or on the record at a
21 hearing.

22 The only other point I want to make, if you're
23 going to decide to move on it or dispose of it, is I
24 would move to strike the city's joinder. What you've
25 got is a single piece of paper looking back two months

1 saying that's my motion, that's my filing, that's my
2 argument, but now I'm going to be looking at a whole
3 separate brief at the court of appeal. So whether that
4 motion is well taken or not, I want to make it for the
5 record. I also want to move to strike the city's
6 joinder which was just filed in the last few weeks.
7 Those are my two motions.

8 **CHAIRMAN ARGENZIANO:** Okay. Commissioners,
9 any discussion? We have two motions, a motion to
10 strike, and then to, if we move forward, to remove the
11 city's joinder.

12 Commissioner Skop.

13 **COMMISSIONER SKOP:** Thank you, Madam Chair.
14 Just a procedural question to our General
15 Counsel. With respect to the, Mr. Wharton's point about
16 joinder, where would we as a Commission revisit that
17 request? Would it be filed as a, as a -- if we denied
18 it here, would it be a denial without prejudice and they
19 could refile it if we went into an evidentiary hearing
20 to join? Or if you could elaborate on that a little
21 bit.

22 **MS. HELTON:** Could I confer?

23 (Pause.)

24 It's my understanding that the City of
25 Brooksville has already intervened and been granted

1 intervention in this case. So it's not a question of
2 whether they're a party or not. They are a party.

3 As I understand what they filed with respect
4 to joining in on the motion to dismiss, it's simply a
5 notice of joinder. It's not something that you would
6 rule on per se. It's just giving you notice and the
7 world notice that they support Hernando County's
8 arguments that if it's your will and within your
9 discretion, you could allow them to share Hernando
10 County's time with respect to the oral argument and be
11 heard with respect to the oral argument. And it's also
12 I guess letting the court, in case there is actually an
13 interlocutory appeal, letting the court know that they
14 support Hernando County's arguments.

15 So as far as the process goes, it's really
16 within your discretion whether you want to hear from the
17 City of Brooksville as well. I would recommend though
18 that if you designate time per side, that Brooksville
19 share its time with Hernando County.

20 **MR. MCATEER:** Madam Chairman, my apologies.
21 Derrill McAteer, Hogan Law Firm, for the City of
22 Brooksville.

23 Just to concur with what counsel stated, it is
24 a simple notice of joinder endorsing and supporting
25 Hernando County's motion to dismiss for lack of

1 jurisdiction. It is not our intent to take away any of
2 Hernando County's oral argument time. If the Commission
3 has questions of the City of Brooksville regarding this
4 case, I'm here to respond, I'm here to support the
5 county and, in their pleadings and in their arguments.
6 But I defer the argument to Mr. Kirk of Hernando County.
7 It is his motion. I don't want to take time away from
8 him or split time that he may need to make his argument
9 or to counter arguments made by the other side.

10 **CHAIRMAN ARGENZIANO:** Okay. So then you're
11 here if we have questions, if there are questions.

12 **MR. MCATEER:** Exactly. I'm here if you need
13 to talk to me.

14 **CHAIRMAN ARGENZIANO:** Okay. Commissioners,
15 any, any questions? I'll put it before the whole
16 Commission. What is the pleasure of the Commissioners?
17 I have no problem with, with moving forward and giving
18 ten minutes to each side.

19 Is that okay? All right. Let's, let's move
20 forward with ten minutes for each side. Is that too
21 much?

22 **MS. KLANCKE:** I think at this time perhaps we
23 should make a ruling on the ore tenus motions to strike.

24 **CHAIRMAN ARGENZIANO:** Oh, I'm sorry.
25 Absolutely.

1 **MS. KLANCKE:** For -- the reply of Hernando
2 County was the first ore tenus motion to strike, and he
3 also moved to strike the City of Brooksville's joinder,
4 which was filed on February 3rd. So perhaps we can --

5 **CHAIRMAN ARGENZIANO:** Okay. Commissioners, do
6 I have a motion on the, on the --

7 **MR. WHARTON:** With that clarification of what
8 the joinder is I'll withdraw that motion.

9 **CHAIRMAN ARGENZIANO:** Okay. So the second
10 motion is withdrawn. The first motion is on the table.
11 And do I have a -- go ahead, Commissioner Skop.

12 **COMMISSIONER SKOP:** Thank you, Madam Chair.
13 And thank you, Mr. Wharton, because my, my motion would
14 have been styled to approve the first motion to strike
15 but deny the second, but only one is relevant. So I'd
16 move to grant the motion to strike the reply by Hernando
17 County.

18 **COMMISSIONER STEVENS:** Second.

19 **CHAIRMAN ARGENZIANO:** Okay. All in favor,
20 aye.

21 (Simultaneous vote.)

22 All opposed. Okay. We can move forward.
23 Thank you.

24 **MR. KIRK:** Good morning and birthday
25 greetings. Jeff Kirk on behalf of Hernando County, a

1 political subdivision of the State of Florida, on behalf
2 of the Hernando County Water and Sewer District and on
3 behalf of the Hernando County Utility Regulatory Agency.

4 The precise issue upon which Hernando County
5 has moved to dismiss is an interpretation of Section
6 367.171. It is Hernando County's position that because
7 Skyland Utilities does not have any physical pipes,
8 water or wastewater across Hernando or Pasco County
9 boundaries that this Commission respectfully lacks
10 jurisdiction, and we would humbly request that the
11 Public Service Commission grant Hernando County's motion
12 to dismiss.

13 Our reliances upon reading chapter --
14 fundamental principles of statutory interpretation that
15 a statute should be given the plain meaning. Secondly,
16 that's where you have a general statute and a specific
17 statute, the specific statute governs. And, third,
18 statutes and their subsections should be read in pari
19 materia, i.e., that they should be read in harmony with
20 each other.

21 Section 367.171, the Legislature does a
22 balancing. They say local governments, county
23 governments that wish to regulate water and wastewater
24 utilities by resolution can opt out of regulation and
25 they get to regulate utilities within their county's

1 jurisdiction. The Legislature has also carved out an
2 exception, and that is if a utility, you have two
3 contiguous counties and you have a utility providing
4 service to both counties, then they've said the PSC has
5 jurisdiction. And that makes sense because if the
6 PSC -- you have common utility, common infrastructure,
7 water going back and forth between counties, you should
8 have common rates, and the PSC is, has an ability to
9 govern rates.

10 We disagree with staff's memorandum for two
11 reasons. One, we believe that they have put the general
12 definition of utility ahead of the more specific
13 requirements set forth in 367.171(7). And that says
14 that you have a utility whose services transverse county
15 lines. Service and the word transverse modifies the
16 word utility. And what staff is saying it's sufficient,
17 because the definition of utility includes proposed
18 infrastructure, it's sufficient to have future or
19 proposed infrastructure in order to acquire
20 jurisdiction. We would respectfully submit that this
21 misses the fundamental principles of statutory
22 interpretation.

23 Secondly, we believe the controlling case in
24 this matter is an old, is a 1st District Court of Appeal
25 case, *Hernando County versus Public Service Commission*.

1 In that case -- and that is at 685 So.2d 48, and it's a
2 1st District Court of Appeal. It's the only case that
3 has, only appellate decision that has actually defined
4 the words, that phrase, service that transverses county
5 lines. And the court goes in great detail looking both
6 at what the term service means and what the term
7 transverses means.

8 In that case, the court -- and that's at Page
9 51 -- the Court goes on to note that Chairman Deason,
10 and Chairman Deason was a former Chairman of the PSC who
11 wrote a dissenting opinion at the PSC level, and the 1st
12 DCA goes on to say that, "Chairman Deason logically,
13 logically conferred that service meant the physical
14 delivery of water, waste and/or wastewater," physical
15 delivery.

16 And the court goes on to note that looking
17 through Chapter 367 there was over 40 references to the
18 term of service, and the court concluded that that
19 connotated a physical delivery of service.

20 Now one thing very interesting about that
21 case, in that case the PSC held that because you had a
22 utility operating in multiple counties, it was Hernando
23 and a few other counties, and you had administrative
24 offices in one county and billing offices and
25 administrative services and utility services, that it

1 was a functionally related utility. And the court says,
2 no, that's not enough. You have to have more. And in
3 defining the term service and defining the term
4 transverse they concluded that you have to have an
5 existing physical utility in order to invoke, in order
6 to usurp the ability of local government, county
7 government, in order for the PSC to usurp the local
8 sovereignty you had to have a physical connection.

9 And in fact the 1st District said, "We
10 conclude that the requirements of the statute can only
11 be satisfied by evidence that the facilities performing
12 their asserted system exist in contiguous counties
13 across which the service travels." And I'm citing to
14 Page 52 of the opinion.

15 Interesting about that case is on below the
16 Public Service Commission exerted jurisdiction over the
17 existing facilities of seven state utilities, but
18 expressly, expressly declined to exercise jurisdiction
19 over future acquired facilities.

20 Here staff is relying upon future acquired
21 facilities of Skyland Utilities. Looking within the
22 four corners of the application of Skyland Utilities,
23 Skyland says, "We anticipate having 155 ERC connections
24 over the Phase I planning period," which is
25 approximately 2010 to 2015. Skyland goes on to note

1 that "We have not conceptually designed the future
2 phases of this system." And this is Exhibit D to the
3 application.

4 In Exhibit C of the application Skyland says,
5 "Physical connection between the counties will occur
6 with some future phase," but they don't identify the
7 phase or how it would occur. It is extremely
8 speculative at best, and we would suggest humbly to this
9 Commission that if this Commission wanted to rule on
10 this matter very narrowly, that it could do so because
11 of the very speculative nature of what they are
12 proposing and how they are proposing to transverse
13 county lines.

14 There's a second fundamental principle of
15 statutory interpretation, and we would first -- well,
16 going back to the plain meaning, we would suggest humbly
17 to this Commission that the ruling in *Hernando County*
18 *versus Public Service Commission* is equally applicable
19 to the facts, to the unique facts present here and is
20 the controlling precedent upon which should be guiding
21 this body.

22 A second principle of statutory interpretation
23 is that a specific statute would govern over a general.
24 Here the general statute is a definition of utility,
25 which includes proposed utilities. However, the more

1 specific statute is 367.171(7), which says that, it
2 says, "A utility," and then it goes on to say, "which
3 service transverses, which service transverses," the
4 active verb modifies the utility. And as the court
5 reasoned in *Hernando County versus Public Service*
6 *Commission*, this means something more than just
7 something future, proposed, speculative or conjecture.

8 The third principle of statutory
9 interpretation we'd like this Commission to focus on is
10 the principle of reading statutes in *pari materia*. The
11 subsections dealing with a local government, a county
12 government's ability to regulate within its boundaries
13 is balanced with the, with the Legislature's grant of
14 authority to the Public Service Commission when you have
15 utilities across county boundaries.

16 We would humbly ask, Hernando County would
17 humbly ask this Commission to respect Hernando County's
18 sovereignty until such time as Skyland actually has
19 physical connections to Pasco County, Sumter County,
20 Citrus County or one of the other adjoining counties to
21 Hernando. At this time everything that Skyland is is
22 proposed. It's proposed, it's on paper, it's not built,
23 and they don't even have it designed when they're going,
24 designed or conceptualized as to when they're going to
25 cross county lines.

1 There is ample -- and in terms of the specific
2 governing over the general I cite to two cases, *School*
3 *Board of Palm Beach County versus Survivors Charter*
4 *School*, 3 So.3d 1220, Florida Supreme Court 2009, and
5 *Murray versus Mariner Health*, 994 So.2d at Page 1051,
6 Florida Supreme Court 2008, where they say, where the
7 court quotes, "Where two statutory provisions are in
8 conflict, the specific provisions control over the
9 general provisions."

10 We believe the basic principles of statutory
11 construction and the reasoned holding, and we believe
12 the PSC staff does not properly apply the holding. They
13 gave a very narrow interpretation of the holding in the
14 case of *Hernando versus Public Service Commission*, but
15 we submit that that case is equally applicable here.

16 Previously you had a system that was being
17 tied together by functional but not, not physical
18 components. Here you have a system being tied together
19 by future acquired facilities not yet built or
20 conceptualized or designed.

21 We would ask humbly, Hernando County would
22 humbly ask that you would, you would grant our motion to
23 dismiss only as to Hernando County. I believe Pasco
24 County is a jurisdictional county. And if you grant
25 Hernando County's motion, that would not affect, I

1 believe, the PSC's jurisdiction involving Pasco County.

2 We would ask that you grant it as a matter of
3 law and alternatively based upon the specific facts of
4 this case, upon the very highly speculative, conjectural
5 and illusory nature of what this specific utility, and
6 staying within the four corners of the application as
7 filed. I humbly thank the Commission for its time.

8 **CHAIRMAN ARGENZIANO:** Thank you. Thank you
9 very much. And just a little bit over the ten minutes,
10 so we'll do the same for the -- Mr. Wharton, do you want
11 to begin?

12 **MR. WHARTON:** Thank you. First of all,
13 Commissioners, I don't consider the bowls of candy to be
14 a positive step forward.

15 **CHAIRMAN ARGENZIANO:** I haven't seen you eat
16 any yet, so.

17 **MR. WHARTON:** I, I do think that the
18 Commission should consider the statutory construction
19 and its role in the statutory construction. I think
20 what it's important for the Commission to remember is
21 that your interpretation of Chapter 367 and all the
22 statutes that enable you, including 367.171(7) here, is
23 entitled to great weight. And I also think while there
24 are maybe hundreds of cases saying this about the higher
25 courts, maybe there are none about you, it's true

1 nonetheless. When you think of that responsibility that
2 our interpretation is entitled to great weight, you need
3 to think about the fact that prior Commissions have
4 looked at this exact statute, this unchanged statute,
5 and interpreted it the way that the staff recommendation
6 does. And everyone on this side of these ropes needs to
7 be able to depend on that kind of consistency. There's
8 nothing new in the statute. It's been around a long
9 time.

10 Another principle of statutory construction
11 that I think it's important that you keep in mind is --
12 and that you really have the latitude to do as you're
13 interpreting these statutes, and that interpretation is
14 entitled to great weight, is to avoid an absurd result
15 or an untenable or undesirable result.

16 Basically what Hernando County is asking you
17 to do would lead to one of two scenarios. Skyland
18 proposes to operate in Pasco and Hernando Counties. The
19 counsel for Hernando County said, well, if it's a common
20 utility with common infrastructure and common rates, we
21 understand why you would regulate it.

22 Well, imagine what might come out of this. If
23 you've got a utility that is on Evan's property in
24 Hernando and a utility that is on Evan's property in
25 Pasco and you are attempting to avoid that scenario, no

1 common infrastructure, no common billing, no -- one
2 water plant in Pasco, one in Hernando, one sewer plant
3 in Pasco, one in Hernando, that's no way to run a
4 utility. That is very inefficient and very inexpensive
5 (sic.), and I don't think this Commission should find
6 that's what the Legislature intended.

7 It also leads to the rather absurd result that
8 if we do fight a battle in Hernando and we get a
9 utility, then we fight a battle in Pasco and we get us a
10 utility, and then we do run some lines across and we do
11 bill from one building and we do serve from one water
12 plant, well then suddenly even under Hernando's
13 interpretation we're an existing utility and maybe we're
14 back here. I don't think that makes any sense either.

15 But rather than repeat what's in the briefs,
16 what's in the filings and what you've already read, let
17 me ask you to consider one thing: The Legislature
18 carved out, fully understanding that the statute allows
19 some counties to opt out of the jurisdiction of the
20 Commission, the Legislature carved out a certain class
21 of utilities and said these types of utilities, these
22 utilities that transverse county boundaries, it makes
23 sense for these utilities to be regulated by the
24 Commission.

25 Why would the Legislature -- nobody has

1 addressed this question and I don't think there's any
2 way to answer it -- why would the Legislature just have
3 meant to those utilities existing in 1991 or '93 or
4 whenever the statute came in but not to all the
5 subsequent utilities that are likely situated?

6 I think the Commission should find that what
7 the Legislature meant was here's a class of utilities
8 that by the vagaries of their operations and their
9 economics and the politics and the fact that utilities
10 operate in monopoly service areas and that that
11 theoretically works to the benefit of the customers
12 through the consolidation of facilities and operations,
13 these class of utilities, the regulation should not be
14 divided. To say, well, this was a snapshot, this
15 applied to existing utilities when the statute went in
16 but not those that came after I just don't think is
17 consistent with any reasonable interpretation of what
18 the Legislature intended.

19 The last thing I would say to the Commission,
20 and this is related to my point of the consistency of
21 the interpretation of your decisions, is that
22 everyone -- and I know that the Commission does
23 understand this and sometimes maybe stating the obvious
24 for the record is a good thing to do -- if you've got a
25 bunch of utilities out there you've regulated under this

1 statute, that if you accept what Hernando County is
2 telling you, you've done it wrong. They're going to
3 have to be looked at somehow because you regulated them
4 because they transversed county boundaries but they came
5 into existence after the statute was put in.

6 So I just think this Commission is entitled
7 to, to enforce the statute and interpret the statute in
8 the reasonable way that it sees fit, that it's important
9 that it be done so consistently, and we do support the
10 staff recommendation and the interpretations of both the
11 Hernando case and the statute in the staff
12 recommendation.

13 **CHAIRMAN ARGENZIANO:** Commissioner Klement and
14 then Commissioner Skop.

15 **COMMISSIONER KLEMENT:** Thank you, Madam
16 Chairman.

17 Regarding Hernando's assertions about the
18 status of the plans for the cross-county service, is it
19 appropriate to ask Mr. Wharton whether -- what is the
20 status of those, that plant? He said it's just some
21 words on paper and not even a design. Is there a
22 timeline when you think that you would be doing it?

23 **MR. WHARTON:** I can -- I would have to look
24 more thoroughly in the application, which is a large
25 application, for a timeline. But I can tell you that I

1 know that I was an attorney at the PSC and joined my
2 firm in 1987. Marty was here at the PSC and he was
3 already at my firm. This is pretty much the way it's
4 done. I mean, right now you design that utility to the
5 extent that it is feasible to do so to get a certificate
6 to allow you to operate. You don't do a lot of extra
7 effort that might be superfluous if you don't get that
8 certificate. The statute says you're a utility if you
9 provide or propose to provide water and wastewater
10 service to the public. I.

11 Think that we feel that our application
12 satisfies the Commission's rules even if Hernando County
13 feels that it's not sufficiently laid out in detail.
14 Obviously the future is sometimes affected by events of
15 economy and et cetera. I can tell you that in our
16 application we're saying there's a need. We think we'll
17 be able to meet that need. We'll have the technical and
18 financial ability laid out in the application.

19 **COMMISSIONER KLEMENT:** But no specific year in
20 which you would plan to do that.

21 **MR. WHARTON:** I cannot answer, Commissioner
22 Klement, whether there, whether we have said in our
23 application that we will begin to provide service in, in
24 2014 or what not. I would imagine that it says as soon
25 as we get the certificate, that to the extent that we

1 have demonstrated need, which is implicit in the fact
2 that we got the certificate, that that need will begin
3 to be met.

4 **CHAIRMAN ARGENZIANO:** Commissioner.

5 **MR. KIRK:** May I respond?

6 **CHAIRMAN ARGENZIANO:** Yes, please.

7 **MR. KIRK:** Regarding the application, and I'm
8 just staying within the four corners of the application
9 because the document speaks for itself, Skyland
10 projects, I quote, "The need for Phase I utility
11 services are anticipated to occur from 2010 to 2015,
12 with 80 percent capacity reached in 2015. For this
13 filing, 2015 will be the test year." It's Page 23 on
14 the online docket, it's Exhibit 2 at Paragraph 2.

15 It then goes on to say, "During the first five
16 years Skyland projects providing water supply to 20
17 ERCs," blah, blah, blah, "155 over up to year six."
18 That's Page 26 on the online docket, Exhibit D, Table
19 D2 on the application.

20 They go on to say, "Future phases will begin
21 upon the completion of Phase I." That's Page 23 of the
22 online docket, Exhibit D at Paragraph 2. And then it
23 goes on to say, however, according to the application,
24 quote, "Phases II through V have not been conceptually
25 designed at this time," close quote. Again, that's Page

1 23 of the online docket application, Exhibit D at
2 Paragraph 2.

3 And then in the Skyland Utility, LLC, cost of
4 service study at Page 1 -- this is Page 610 on the
5 online docket, "It is anticipated that the future phases
6 will be utilized in the order indicated on the proposed
7 service area map in Appendix I and as discussed in more
8 detail in Exhibit A."

9 **CHAIRMAN ARGENZIANO:** Mr. Kirk --

10 **MR. KIRK:** "There have been no conceptual
11 plans developed as of this time for future development
12 phases," that's quoting. And then Exhibit C at
13 Paragraph 1 says, "Physical interconnect --

14 **CHAIRMAN ARGENZIANO:** Mr. Kirk, let me, let me
15 cut you off just for a moment because I think the
16 Commissioners read that. And did that answer your
17 question?

18 **COMMISSIONER KLEMENT:** Yes, it did.

19 **CHAIRMAN ARGENZIANO:** I think it did. And
20 we've read that.

21 **COMMISSIONER KLEMENT:** He's made the point
22 well.

23 **CHAIRMAN ARGENZIANO:** Yes.

24 Commissioner Skop, and then we'll move on.

25 **COMMISSIONER SKOP:** Thank you, Madam Chair.

1 And I just want to get to the matter before
2 us. Again, getting into these ancillary evidentiary
3 issues I think is problematic at this point in the
4 process.

5 What I wanted to state is that the matter
6 before us today is the Hernando County motion to dismiss
7 for lack of subject matter jurisdiction. It's well
8 settled that the Commission has subject matter
9 jurisdiction. Accordingly, the motion to dismiss should
10 be properly denied by the Commission pursuant to the
11 staff recommendation.

12 The Hernando County protest, however, raises
13 several general -- excuse me. The Hernando County
14 protest, however, raises several genuine questions of
15 material fact and issues of law which will need to be
16 addressed through an evidentiary hearing. And in this
17 regard I wish to emphasize that the denial of the motion
18 to dismiss for lack of subject matter jurisdiction
19 should not be construed to mean that the applicant will
20 ultimately prevail on the merits with respect to the
21 application for original certificate. In fact, using
22 the statute and the Commission rules by a developer to
23 circumvent a comprehensive use plan of the county I
24 think would be an abuse of the process. So, again, that
25 would remain to be determined in the course of an

1 evidentiary hearing. But the matter before us today is
2 a motion to dismiss for lack of subject matter
3 jurisdiction. We clearly have subject matter
4 jurisdiction, so denial of the motion is proper.

5 **CHAIRMAN ARGENZIANO:** Commissioner Edgar.

6 **COMMISSIONER EDGAR:** Thank you, Madam Chair.

7 I just wanted to ask our staff so I kind of
8 understand where we are in the process, have dates been
9 set or held -- excuse me -- set or held for a potential
10 hearing on this? And if so, do we know when? Realizing
11 that could change, of course.

12 **MS. KLANCKE:** We do have tentative dates
13 currently. We wanted to --

14 **COMMISSIONER EDGAR:** Sure.

15 **MS. KLANCKE:** -- allow this determination to
16 be made prior to the issuance of an Order Establishing
17 Procedure which would contain those hearings dates.
18 We're looking at the summer.

19 **COMMISSIONER EDGAR:** Okay. That's what I
20 wanted. Just a little, a little time frame. Again,
21 realizing that there are steps to come before that
22 should we go down that route.

23 And then -- excuse me -- are there -- has this
24 been assigned to a panel or to the full Commission?

25 **MS. KLANCKE:** I believe that this will go to

1 the full Commission.

2 **COMMISSIONER EDGAR:** I just wanted to kind of
3 understand where we were in the process. Thank you.

4 **CHAIRMAN ARGENZIANO:** Commissioner Skop.

5 **COMMISSIONER SKOP:** Thank you. And to staff,
6 noting that I guess the tentative dates for hearing are
7 in summer, is there a way that this might be able to be,
8 move forward a little bit into the docket for late
9 spring?

10 **MS. KLANCKE:** We will try to the best of our
11 ability to accommodate that request.

12 **COMMISSIONER SKOP:** I think -- I don't know
13 whether the counties and the City of Brooksville may
14 want to do that, but certainly I think they would like
15 to get resolution of this issue dispositively sooner
16 rather than later. Thank you.

17 **CHAIRMAN ARGENZIANO:** Okay. Commissioners?
18 Staff, anything to add?

19 Okay. Do I have a motion?

20 **COMMISSIONER SKOP:** Yes, Madam Chair.

21 I'd move to approve staff recommendation on
22 Issues 2 and 3.

23 **COMMISSIONER STEVENS:** Second.

24 **CHAIRMAN ARGENZIANO:** All those in favor, say
25 aye.

1 (Simultaneous vote.)

2 Opposed, same sign. Show it approved. Thank
3 you very much.

4 **MR. WHARTON:** Thank you, Commissioners.

5 (Agenda item concluded.)

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STATE OF FLORIDA)
 :
COUNTY OF LEON)

CERTIFICATE OF REPORTER

I, LINDA BOLES, RPR, CRR, Official Commission Reporter, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 2nd day of February, 2010.

Linda Boles
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