

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for original certificates for proposed water and wastewater systems, in Hernando and Pasco Counties, and request for initial rates and charges, by Skyland Utilities, LLC.

DOCKET NO. 090478-WS
ORDER NO. PSC-10-0426-PCO-WS
ISSUED: July 2, 2010

ORDER DENYING MOTION TO STRIKE

Background

On October 16, 2009, Skyland Utilities, LLC (Skyland) filed an application for original certificates for water and wastewater to serve properties in both Pasco and Hernando Counties. On October 29, 2009, Skyland supplemented its application. On November 13, 2009, Hernando County, Hernando County Water and Sewer District, and Hernando County Utility Regulatory Authority (referred to jointly as Hernando County) filed a Motion to Dismiss the application and an objection to the certificates. Hernando requested a hearing pursuant to Sections 120.569 and 120.57, Florida Statutes (F.S.) On November 13, 2009, Pasco County and the City of Brooksville also filed objections to the certificates and requested a hearing.

On February 24, 2010, Order No. PSC-10-0105-PCO-EI was issued establishing the procedural milestones and requirements of this proceeding. On April 2, 2010, Skyland filed the testimony and exhibits of witness Hartman, including a copy of Skyland's application. On May 3, 2010, Pasco County filed the direct testimony of witnesses Gehring and Kennedy, and Hernando County filed the direct testimony of witnesses Stapf, Pianta, and Wieczorek. On May 24, 2010, Commission staff filed the testimony of witnesses Williams and Evans. On June 7, 2010, Skyland filed rebuttal testimony of witnesses Hartman, Edwards, and De Lisi.

On June 14, 2010, Pasco and Hernando Counties (jointly referred to as the Counties) filed a joint motion to strike all of rebuttal witness Edwards's testimony and portions of rebuttal witness Hartman's testimony. The Counties assert that the testimony was not rebuttal testimony and also challenged the expertise of the witnesses. In their motion, the Counties provide their summary of each non-utility witness's testimony. The Counties argue that the rebuttal testimony significantly deviates from the standard for rebuttal testimony and is an attempt by Skyland to use rebuttal testimony to buttress its direct testimony.

The Motion as to Edwards

The Counties ask that Edwards's testimony be stricken in its entirety and that Edwards be excluded as a witness. The Counties argue that there is nothing in Edwards's testimony to indicate he is an expert and that to the extent his testimony is permitted, it should not be considered expert testimony. The Counties argue that Pasco witness Kennedy addresses the need for service in his testimony by stating that there is no need for service because there has been no

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request for service in the area or nearby, the existing buildings and land uses are adequately served by individual wells and septic tanks, Skyland does not identify any specific need but only speaks to future need, and the nearby improvements are all on well and septic and that the proposed service area would encircle property owners that have not requested central service. The Counties argue that Hartman's testimony is not rebuttal. The Counties characterize Edwards's testimony as rambling, vague, non-specific narrative and that it does not rebut the specific allegations of Kennedy. The Counties argue that Edwards's testimony addressing the utility's willingness to work cooperatively with the Counties is not addressed in any non-utility's testimony. The Counties complain that Edwards's testimony regarding urban sprawl is a rambling discourse on how the property owner is a good and cooperative citizen. The Counties also complain that Edwards is not qualified to opine on the issue of urban sprawl. The Counties next attack Edwards's testimony because they believe it improperly addresses the financial and technical and operational ability of the Skyland Utility. The Counties assert that no witness testifies to these items.

The Motion as to Hartman

The Counties seek to strike portions of Hartman's rebuttal testimony as improper expert testimony and as improper rebuttal testimony. The Counties object to Hartman's testimony arguing that he is not an expert in legal issues or in land use and planning issues. The Counties ask that Hartman's testimony regarding legal issues and land use planning issues be stricken. The Counties also argue that a portion of the rebuttal testimony is not true rebuttal. The Counties complain that Hartman offers discussion of cases involving other counties, that the testimony is "random, gratuitous testimony" that does not address the conclusions of the land use planning witnesses, that the testimony is a legal argument best provided in a brief, that Hartman discussed emails, and that the rebuttal of Williams is merely a bolstering of Hartman's direct testimony.

Skyland's Response

Skyland responds to the Motion to Strike by stating that the Counties' witnesses opened the door to the issues of whether the applicant's proposal is needed, whether the applicant's proposal is duplicative, and whether the applicant's proposal is in the public interest. Skyland argued that it offers testimony to address these issues raised by the other parties. Skyland states that it offers a very detailed response by its rebuttal witnesses to explain why the application is in the public interest and why the service is needed. Skyland argues that the rebuttal goes to the heart of the intervenor's testimony and to limit it is an abuse of discretion.

Analysis and Ruling

The rebuttal testimony offered by Skyland fits within the definition of rebuttal testimony as described by the Federal Courts, and adopted by this Commission:

It is well settled that the purpose of rebuttal testimony is "to explain, repel, counteract, or disprove the evidence of the adverse party" and if the defendant opens the door to the line of testimony, he cannot successfully object to the

prosecution “accepting the challenge and attempting to rebut the presumption asserted.”

United States v. Delk, 586 F.2d 513, 516 (5th Circ. 1978), quoting Luttrell v. United States, 320 F.2d 462, 464 (5th Circ. 1963); Order No. PSC-04-0928-PCO-EI, issued September 22, 2004, in Docket No. 030623-EI, In re: Complaints by Ocean Properties, Ltd., J.C. Penney Corp., Target Stores, Inc., and Dillard’s Department Stores, Inc. against Florida Power and Light Company concerning thermal demand meter error. Witness Edwards responds to the challenges of each of the witnesses by explaining what the utility and property owner intends to do with the utility and property and how it intends to accomplish the utility’s development. Witness Hartman offers his expertise to explain, counteract and disprove the concerns of the non-utility witnesses. Skyland’s testimony is directed at each of the objections raised by the Counties. I note that:

A trial court has broad discretion to admit rebuttal testimony. See Dale v. Ford Motor Co., 409 So. 2d 232 (1st DCA 1982). However, a trial court abuses that discretion when it limits non-cumulative rebuttal that goes to the heart of the principal defense. See Young-Chin v. City of Homestead, 597 So. 2d 879 (3rd DCA 1992)

Mendez v. Caddell Construction Co., 700 So. 2d 439, 440-441 (3rd DCA 1997). Based on the foregoing, the Motion to Strike is denied.

The Counties also challenge the expertise of Hartman and Edwards on issues involving land use planning and the law. The testimony of witness Edwards is not offered as expert testimony. He is a factual witness. As a factual witness, Edwards’s testimony shall be permitted to explain the intent of the utility and its owners to develop the utility. Edwards can be cross-examined on his testimony and the Commission will give the factual testimony of this witness the weight it is due. The testimony of witness Hartman is offered as an expert in water and wastewater matters in Florida. He is not being offered as an expert in land use planning or in law. All of his testimony is subject to objection and cross examination. His testimony will be viewed in light of his knowledge and expertise as an expert in water and wastewater matters. The Commission will give his testimony the weight it is due.

Finally, while the testimony of Skyland is rebuttal testimony, it appears from the Counties pleadings that the Counties may not have presented the Commission with their full case. As noted by Skyland in its response to the Motion to Strike, the Commission endeavors to develop the most complete record possible so that the Commission may reach its decision on the merits of the case. Accordingly, to ensure that the record in this proceeding is complete and to provide all parties a full opportunity to present their case, the non-utility parties of record shall be afforded four (4) days from the date of the Prehearing Conference to provide surrebuttal testimony in this docket. Non-utility surrebuttal testimony is due Friday, July 2, 2010.

Based on the foregoing, it is:

ORDERED that Pasco County and Hernando County's June 14, 2010, Joint Motion to Strike is denied, as set forth herein. It is further

ORDERED that non-utility parties of record shall be afforded four (4) days from the date of the prehearing conference to provide surrebuttal testimony in this docket. Non-utility surrebuttal testimony is due Friday, July 2, 2010. It is further

ORDERED that each of the findings made in the body of this Order is hereby approved in every respect.

By ORDER of Commissioner Nathan A. Skop, as Prehearing Officer, this 2nd day of July, 2010.



NATHAN A. SKOP
Commissioner and Prehearing Officer

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