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Pasco County

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Pasco County's Post Hearing Brief

Bill Hollimon

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application of Skyland Utilities, LLC to operate a water and wastewater utility in Hernando and Pasco County, Florida Nuclear cost recovery clause.	DOCKET NO. 090478-WS

PASCO COUNTY'S
POST-HEARING STATEMENT OF ISSUES
AND POSITIONS AND POST- HEARING BRIEF

Pasco County ("Pasco"), by and through its undersigned counsel, files this Post-Hearing Statement of Issues and Positions and Post-Hearing Brief.

BASIC POSITION AND SUMMARY

As an initial matter, Pasco's position is that the Commission lacks jurisdiction to consider Skyland's application. If considered, the application filed by Skyland Utilities, LLC ("Skyland") is fatally deficient because it fails to comply with the requirements of sections 367.045 and 367.1213, Florida Statutes and Rule 25-30.033(1), Florida Administrative Code ("FAC"). Specifically, Skyland's application (hereinafter, the "Application" or "Exhibit 2") fails to provide evidence that Skyland owns, or has long term control over, the land upon which it proposes to locate utility treatment facilities.[1] Skyland has neither requested, nor received, a rule variance or waiver, and the Commission may not otherwise ignore or modify the unambiguous requirements of its Rule. On this basis alone the Commission should deny the Application.

On the merits of the Application, it is Pasco's position that the Application should be denied because: 1) Skyland failed to present competent, substantial evidence[2] establishing the

[1] This failure is discussed in detail in Pasco's discussion of Issue 8.

[2] Skyland, as the party seeking affirmative action from this administrative tribunal, bears the burden of proof in this proceeding. *See, Young v. Department of Community Affairs*, 625 So.2d 831, 834 (Fla. 1993).

requisite need for utility services; 2) the Application is inconsistent with the Pasco County comprehensive plan; 3) the Application is inconsistent with the Hernando County comprehensive plan; 4) Skyland's certification will create a utility in competition with Pasco County's water and wastewater utility; and 5) the requested utility does not serve the public interest.

Introduction

This proceeding raises fundamental questions about the certification of private utilities under section 367.045, Florida Statutes, and tests the limits of such certification. Skyland seeks to serve a checkerboard of parcels located in Pasco County and Hernando County. The Commissions jurisdiction, *vel non*, is predicated upon Skyland being a utility providing services that transverse the boundary between Pasco County and Hernando County. Phase I of Skyland's proposal (the only Phase for which even conceptual design work has been performed) involves four, dispersed, non-contiguous parcels, three of which are in Pasco County and the other in Hernando County. No utility infrastructure connects these parcels. Skyland asserts that its facilities in both counties will be "functionally related and operationally integrated," (Application, Ex. A) but not physically interconnected.

All of the property Skyland seeks to serve (the "Property") is owned by Evans Properties, Inc. ("Evans"). Skyland is a wholly owned subsidiary of a wholly owned subsidiary of Evans. The Property is currently in agricultural use. However, due to various factors (primarily citrus greening and canker) Evans anticipates that the existing agricultural uses are not sustainable. Recognizing that for Evans to be viable in the future it would have to transition away from citrus farming, Evans created Skyland and is using Skyland as a vehicle to capture water rights on the Property. By capturing these water rights, Evans believes it will best preserve its options for

alternative uses on the Property – and thereby add value to the Property. (*See generally,* Edwards, TRN – 805-808, 836).

While the Application, and the Skyland witnesses, talk about various potential uses of the Property, the simple fact is that Evans has no firm plans for how it will use the Property in the future, and no firm plans regarding when, how, or even if Skyland will provide service. The Application itself is premised upon and assumes that low density, single use (residential) development will occur on the Property – the use that is least likely to actually occur if Skyland is certificated. (*see,* Edwards, TRN - 836 -838). Thus, the Application appears to be a largely academic exercise that in no way reflects what is likely to occur on the Property.

Nonetheless, the *reason* that Evans, through Skyland, seeks certification of this utility is crystal clear:

> [w]e propose to certificate and operate a utility to ensure the current and future needs for water and wastewater services no matter which strategies are ultimately determined to be the most appropriate **for maintaining ourselves in business.** (Edwards, TRN – 807) (emphasis added).

This is the lens through which the Commission should evaluate and consider the Application. When the Commission considers whether the requested utility serves the public, or furthers the public interest, it must remember that the stated purpose of the utility is to keep the utility's parent company in business.

Ultimately, this proceeding tests whether the certification process established by section 367.045, Florida Statutes, and implemented by Commission's Rule 25-30.033, F.A.C., is substantive, or just a hypothetical exercise. Does it matter, for example, that the rates and charges Skyland asks the Commission to approve are premised upon a form of development that the applicant itself disfavors and is not likely to occur? Does it matter that the only documented

need for service[3] is currently adequately served by well and septic tank, and that after certification "[t]he existing structures will continue to use on-site septic systems." (Application, Ex. F). Does it matter that Skyland makes no binding commitment that it will ever serve any customer, anywhere, if it is certificated?

Pasco believes that the certification process is meaningful and is not simply a hypothetical exercise. And while Pasco wants Evans to be a thriving business (and employer) in Pasco County, Pasco believes that this process is intended to protect the public interest – not to enable a single landowner to protect its property values. As discussed in detail below, Pasco asserts that Skyland's Application should be denied.

ISSUES AND POSITIONS

ISSUE 1: **Has Skyland presented evidence sufficient to invoke the Commission's exclusive jurisdiction over Skyland's application for original certificates for proposed water and wastewater systems?**

A. Did Skyland provide evidence to support that it satisfies the definition of "utility" contained in Section 367.021(12), Florida Statutes?

B. Did Skyland provide evidence to support that the service proposed by Skyland transverses county boundaries pursuant to Section 367.171(7), Florida Statutes?

PASCO: A. No. Skyland is not a "utility" because it does not propose to serve the public.

B. No. Skyland provided no competent evidence that its services transverse county boundaries.

Discussion

[3] i.e., the employee house and office/barn identified in the "need" letters.

A. Section 367.021(12), Florida Statutes, defines a utility, in relevant part, as "a person . . . who is providing, or proposes to provide water or wastewater services to the public for compensation." It is undisputed that Skyland seeks to certificate a utility to provide water and wastewater services, and that the Application contains and proposes a rate structure. What is disputed, however, is whether Skyland proposes to serve the "public." *Black's Law Dictionary,* (9th Ed. 2009) defines "public" as "the people of a nation or community as a whole."

Here, Skyland proposes to serve a single property owner - Evans Properties, Inc. ("Evans"). Notwithstanding the Application, and the development assumption made therein, it is clear that Evans (the ultimate owner of Skyland) does not seek to provide water and wastewater utility services to the public; rather, Evans seeks to certificate a utility that it ultimately owns and controls because it will increase the value of the property Evans owns in the proposed service territory.

Skyland witness Ronald Edwards, Evan's President, testified:

> [w]e face a challenge of finding and implementing new potential crops and other land uses to remain a viable company. Nearly every viable strategy that we have considered is impacted by water. We propose to certificate and operate a utility to ensure the current and future needs for water and wastewater services no matter which strategies are ultimately determined to be the most appropriate for maintaining ourselves in business.
>
> Individual strategies may involve over time - - may evolve over time, but is especially difficult to decide with finality at this time which ones would be appropriate. We want to preserve our options to react to the market and the changing government regulation which is ongoing at this time. (Edwards, TRN – 807)

A fair interpretation of Mr. Edward's testimony is that Evans seeks to establish Skyland so that Evans can "preserve its options" with respect to future uses of its land as Evans transitions away from citrus farming. Evans has made no final decisions regarding what any such uses will be, where they will be located, or even if such uses will require water and/or wastewater services.

Thus, Evans, through Skyland, does not propose a utility to serve the public; rather, Evans, through Skyland, proposes a utility to enhance the value of Evans' properties, and to preserve Evans' "options" with respect to this property. Because Skyland does not propose to serve the public, it is not a utility and the Commission lacks jurisdiction.[4]

B. The unrebutted testimony is that Skyland currently provides no services that transverse county boundaries. (Hartman, TRN – 82). The Commission's jurisdiction under section 367.171(7), Florida Statutes, extends "over all utility systems whose service transverses county boundaries . . .." Notably, this section does not, by its terms, apply to services that are *proposed* to transverse county boundaries.[5]

Moreover, only one combined parcel (identified as ID 6 and ID 10 on Ex. 43) contains property in Pasco County that is contiguous to property in Hernando County. All other parcels are either in Pasco County or in Hernando County. Thus, as depicted in the Application, for Skyland to provide utility services that transverse county boundaries, such services must be delivered between Parcels ID 10 and ID 6. However, Skyland has not even made conceptual plans for development on these parcels. (Application, Ex. D). Because Skyland has not presented any evidence that its services transverse county boundaries, the Commission lacks jurisdiction in this proceeding.

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[4] The type of development assumed in the Application – low density, single use (residential) – does not represent the use that is likely to occur. Edwards' testimony makes it clear that residential development, particularly in today's market, would take a very long time on these properties. (Edwards, TRN-838).

[5] In fact, the Phase I conceptual plan includes no interconnections between the counties. The Application vaguely refers to physical interconnections occurring during "future phases." (Application, Ex. C). Of course, Skyland has not even begun conceptual design of any such "future phase."

ISSUE 2: **Is there a need for service in Skyland's proposed service territory and, if so, when will service be required?**

PASCO: No. The record evidence demonstrates no immediate need for service and no firm plans for a future need for service. In sum, the "need" identified is purely conjecture and speculation – other than the utility is "needed" to bolster the property value of the land sought to be certificated.

Discussion

Section 367.045(2)(b), Florida Statutes, and Rule 25-30.033(1)(e), FAC, require Skyland to demonstrate a need for service in the proposed service territory. This Rule requires Skyland to provide:

> [a] statement showing the . . . need for service in the proposed area. *The statement shall identify any other utilities within the area proposed to be served that could potentially provide service, and the steps the applicant took to ascertain whether such other service is available.* (emphasis added).

Exhibit A to the Application contains Skyland's statement of need. This statement of need is supported by two "request for service" letters contained in Appendix I to the Application. Exhibit A also states in part that "[n]o other utilities are within the area proposed to be served, and none are capable of providing the necessary level of service in the area."

Skyland witness Gerald Hartman ("Hartman") testified that the components of a "request for service" to a utility are: 1) a potential customer; 2) that is located within the area of certification; 3) that communicates to the utility; 4) a need and a request for service. (Ex. 15, p. 86-87). Although Skyland provided testimony indicating that Evans has considered alternative land uses that might, at some unspecified time in the future, need service from Skyland, both Hartman and Skyland witness Ronald Edwards ("Edwards") testified that the only formal request for service Skyland had received was for the "one employee house –office barn" contained in the request for service letter in Application, Appendix I. (Hartman, Ex. 15, p. 00097 -00098; Edwards, TRN: 832). Moreover, the Application is entirely premised upon, and assumes, that

the certificated properties will undergo residential development at a density (generally 1 unit per 10 acres) consistent with the densities currently allowed in the Pasco County and the Hernando County comprehensive plans.

As evidenced by the Application, Skyland plans to implement its proposed utility in five phases. Phase I includes property parcels identified as ID 1, ID 2, ID 3, and ID 4. (Ex. 43, p. 1). Phase I includes the "most important" parcels, and the parcels where utility infrastructure will first be implemented. (Hartman, Ex. 15, p. 00106) Further, Skyland's request for service letters identify the "most immediate need for water and wastewater services" to include the "one employee house – office barn." (Application, Appendix I). However, even though the employee house and the office barn serve as the only tangible, non-speculative, need for service[6] identified, Skyland does not plan to serve these facilities until Phase III of this project.[7] Skyland offers no projections of when Phase III will occur, or even if it will ever occur. (Application, Appendix VIII, p.1) Thus, there is no competent, non-speculative, record evidence demonstrating any immediate need for utility services.[8]

Further, Skyland has failed to comply with the requirement in Rule 25-30.033(1)(e) that the Application describe the actions that it took to determine if any other utility could serve the

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[6] Interestingly, the "immediate need" for wastewater services will be met by using the existing septic systems. (Application, Ex. F). Pasco suspects the "immediate need" for water will also be met by the existing water system.

[7] While the Cost of Service Study (Application, Appendix VIII, p. 1) identifies parcel ID 3 (which is in Phase 1) as generally including "1 residential connection and 1 general service connection," Skyland witness Edwards specifically testified: 1) that he is "very familiar" with the property sought to be certificated (Edwards, TRN – 900); and 2) that the house and barn for which service has been requested are located on parcel ID-9 (which is scheduled for development in Phase 3) (Edwards, TRN – 852; Ex. 43, p.1). Hartman, the sponsor of the Application, could not identify the parcel on which the house and barn are located. (Hartman, TRN – 96).

[8] Further, as Commissioner Skop's examination of Skyland witness Edwards highlighted, many of the possible uses Evans identified are likely exempt from Commission regulation under section 367.022, Florida Statutes. (Edwards, TRN – 895-897).

purported need. In Exhibit A to the Application, Skyland asserts "[n]o other utilities are within the area proposed to be served, and none are capable of providing the necessary level of service in the area." However, the testimony is undisputed that Skyland never approached either Pasco County or Hernando County to determine if either county could provide service. (Hartman, Ex. 15, p. 00117; Kennedy, TRN – 335; Staph, TRN – 232). Moreover, Hartman testified that there was nothing to preclude Pasco County or Hernando County from serving the area sought to be certificated. (Ex. 15, p. 00146). Finally, the unrebutted testimony from the Pasco County Utilities Director, Bruce Kennedy ("Kennedy") and the Hernando County Utilities Director, Joseph Staph ("Staph") was that Pasco County and Hernando County could serve the areas sought to be certificated, and could do so at a substantially lower costs to consumers. (Kennedy, TRN – 972-973; Staph, TRN – 930; Hartman, TRN - 130).

Thus, it is readily apparent that Skyland not only did not include the information required by Rule 25-30.033(1)(e), F.A.C., in the Application, it also did not even make a reasonable inquiry to determine whether Pasco and/or Hernando could serve the area. Moreover, Skyland has not sought a waiver of this Rule requirement. It is well settled that an administrative agency must follow its own rules. *Cleveland Clinic Florida Hosp. v. Agency for Health Care Admin.*, 679 So. 2d 1237, 1242 (Fla. 1st DCA 1996); *Boca Raton Artificial Kidney Center v. Department of Health and Rehabilitative Services,* 493 So.2d 1055 (Fla. 1st DCA 1986). It is equally settled that an administrative agency cannot avoid the plain meaning of a rule for the sake of expediency – even if the Rule may be impractical in operation. *Cleveland*, 679 So. 2d at 1242. Here, there can be no dispute that Skyland has failed to comply with the requirements of Rule 25-30.033(1)(e), F.A.C., that Skyland has not requested a variance to this Rule, and that Skyland has otherwise failed to demonstrate the requisite need.

Notwithstanding the Application, and the development assumption made therein, it is clear that Evans Properties, Inc. (the ultimate owner of Skyland) does not seek to provide water and wastewater utility services to the public for compensation; rather, Evans seeks to certificate a utility that it ultimately owns and controls because it will increase the value of the property Evans owns in the proposed service territory, preserve Evans' business options, and maintain Evans as a viable business. (Edwards, TRN -854 ("we are looking at a host of ways that we can add value to these properties") TRN – 807 ("to remain a viable company")). Evans' "need" is to replace a citrus farming revenue stream with a new revenue stream. While there is not a thing in the world wrong with replacing a revenue stream, Evans/Skyland presented no evidence that the requested utility is required to meet this "need."

Moreover, most, if not all, of the potential water uses discussed by Skyland are exempt from Commission regulation. *See* § 367.022, Fla. Stat. Currently, the property sought to be certificated is in agricultural use – and agricultural use is the preferred use on a going forward basis. (Edwards, TRN – 836). Section 367.022(11) specifically exempts from Commission regulation "nonpotable water for irrigation."

ISSUE 3: **Is Skyland's application inconsistent with Hernando County's comprehensive plan?**

PASCO: Yes. The greater weight of competent evidence demonstrates that Skyland's application is inconsistent with the Hernando County comprehensive plan.

Discussion

The Florida Legislature has chosen to designate the Florida Department of Community Affairs (DCA) as the "state land planning agency." *See* Sec. 163.3164(20), Fla. Stat. Daniel

Evans, Principal Planner and Assistant Administrator of the DCA's Central Florida Region was admitted as an expert in land use planning in this proceeding (TRN 176, 182 - 183). Mr. Evans testified that pursuant to a Memorandum of Understanding between the Commission and the DCA, the DCA reviews applications for original utility certification for, among other things, consistency with the affected local government's comprehensive plan (Evans, TRN 178 - 179). In connection with his expert testimony, Mr. Evans stated that he reviewed Skyland's Application and relevant portions of the Hernando County's Comprehensive Plan (TRN 179). Evans testified that in DCA's opinion the Skyland Application was not consistent with the Hernando County comprehensive plan:

> [t]he application is **inconsistent** with the objectives and policies in the Hernando County Comprehensive Plan which discourage the use of public facilities in the Rural Land Use Category, discourage urban sprawl, require the provision of infrastructure in accordance with the long range plans of the County, and encourage the consolidation of wastewater and potable water services within the County

(Evans, TRN 179).

Hernando County also offered the testimony of its Planning Director, Ronald Pianta, who also opined that that locating a water and wastewater utility in the area proposed by Skyland would violate Hernando County's Comprehensive Plan (Pianta, Tr. 289 - 290, 294).

Skyland presented the rebuttal testimony of Daniel DeLisi, a land use planner in private practice. DeLisi did not rebut, or in any way directly counter, Evans' testimony. (DeLisi, TRN 759-780). Because Hernando County and DCA are charged with interpreting and implementing Florida's growth management laws, their interpretation of the Hernando County comprehensive plan should be given greater weight than the interpretation of a paid witness. Applying this

standard, it is clear that the Application is not consistent with the requirements of the Hernando County comprehensive plan.

ISSUE 4: **Is Skyland's application inconsistent with Pasco County's comprehensive plan?**

PASCO: Yes. The greater weight of competent evidence demonstrates that Skyland's application is inconsistent with the Pasco County comprehensive plan.

Discussion

In connection with his expert testimony, Mr. Evans also reviewed Skyland's Application and relevant portions of the Pasco County's Comprehensive Plan (TRN 179). When asked if Skyland's Application was consistent with Pasco County's Comprehensive Plan, Mr. Evans provided the following sworn testimony:

> The application is inconsistent with the objectives and policies of the Pasco County Comprehensive Plan which limits the extension of public facilities in agricultural and rural land areas, encourages the conversion of private utilities to publicly operated utilities, and encourages the replacement of package treatment plants with regional wastewater plants. In particular, Policy SEW 3.2.6 of the Infrastructure Element of the Pasco County Comprehensive Plan[] prohibits the extension of central water and sewer services within the Northeast Pasco Rural Area (most of the proposed service area within Pasco County is located within the Northeast Pasco Rural Area), except under limited circumstances, which the application does not meet.

(Evans, TRN 179).

Richard Gehring, Planning and Growth Management Administrator for Pasco, testified that the provision of utility service in the portion of Pasco County proposed to be certificated by Skyland would violate the Pasco County's Comprehensive Plan (Gehring, TRN 419 - 420). Specifically, Gehring testified:

> [t]he proposed provision of utility service is inconsistent with numerous policies and objectives of the Pasco County Comprehensive Plan including but not limited to the sections referenced below. The Comprehensive Plan designates all of the proposed service area as part of the Northeast Pasco Rural Area, within which central water and sewer is prohibited except under very limited circumstances

> (SEW 3.2.6). The proposed service area does not meet the limited criteria for central water and sewer service. (SEW 3.2.6). Residential properties in the Rural Area are to be developed with individual wells and septic tanks. (SEW 3.2.6; WAT 2.1.4; FLU 2.1.13; FLU 2.1.15; FLU 2.1.16; FLU 2.1.17). The Comprehensive Plan also prohibits the expansion of central water and sewer service into areas designated as AG, agriculture or AG/R, agriculture/rural, such as the proposed service area properties. (WAT 2.1.1; SEW 3.5.1 and Exhibit 2, Northeast Pasco Zoning Map). The comprehensive Plan encourages the purchase of private utilities and their conversion to publicly operated utilities, not the creation of new private utilities. (WAT 2.2.4). Skyland's proposal is contrary to the County policy to replace package plants with regional wastewater treatment plants. (SEW 3.2.1).

(Gehring, TRN 419 - 420)

One of the main concerns of the Counties and DCA is granting Skyland the ability to provide central water and sewer to the Evans' properties will lead to urban sprawl. Skyland's proposal is a classic example of urban sprawl where development occurs on former agricultural land that is not adjacent to previously developed land. This "leapfrogging" or "checkerboard" pattern of development is, by definition, urban sprawl. *See* Gehring testimony TRN 434 – 435 and TRN 490 - 491; *see also See* Rule 9J-5.006 (5)(g), F.A.C. Skyland takes the position that certification by the PSC alone will not lead to urban sprawl. But there is no real dispute that certification is a condition precedent to more intense/more dense development. So a natural consequence of certification is infrastructure, i.e., putting "pipes in the ground," and that infrastructure will lead to urban sprawl.

The pipes, this availability of service, will lead to development. There would be no need for central service if development will not follow it and it is this reality that concerns the Counties and DCA. Mr. Evans testified that infrastructure planning is the most effective part of comprehensive planning and granting the certificate to Skyland removes a basic part of planning. (Evans, TRN 220). By granting the certificate to Skyland, and thereby allowing central service, a condition precedent to more intense development would be in place. DCA would have a more

difficult argument against urban sprawl. While it is true that local governments have some control over the development of property under their jurisdiction, that control is diminished by the granting of the certificate and the resulting installation of utility infrastructure. Specifically, Evans testified:

> [Pasco and Hernando Counties] maintain the measure of control, but as I stated also in my deposition, you take away the issue of infrastructure, the argument for making a case against urban sprawl is a lot significantly reduced in my opinion. (TRN 197)

If utilities are in place, as Skyland proposes in the Application, it would be harder for DCA to make an argument to stop urban sprawl. Evans further testifies:

> [w]e believe that development potential frequently follows infrastructure, and we did not fight the extension of the infrastructure into these rural areas, and we think it is inconsistent with some of the policies in the comp plan. (TRN 223)

Following the certification of similar utilities in rural areas, have been requests for comprehensive plan amendment requests to increase densities. Sun River and North Florida Utilities are two examples, to which Mr. Evans testified:

> it has lead in those two cases to objections being filed by the Department against the amendments which increased intensities and densities as a result of a PSC action. (TRN 194)

Skyland's witness, Mr. DeLisi, confirmed that these projects have obtained Comp Plan amendments or are now seeking higher densities after receiving PSC certification. (Ex. 30, pp. 39-42). Specifically, Town & Country received a "comp plan change." (Ex. 30, p. 39). Mr. DeLisi is assisting Charlotte County with the Comp Plan Amendment in Sun River Utility's area.[9] (Ex. 30, p. 39). Mr. DeLisi discusses these utilities that have been established in rural areas to make the argument that having a utility does not lead to development, but he misses the

[9] It is not surprising that higher densities are being requested in these private utility service areas. Utility service is not cost effective, and more importantly, not profitable, unless a certain density is achieved. One unit per five acres or ten acres is not nearly dense enough for cost-effective utility service. (Kennedy, TRN 340; Evans, TRN 218).

point. In these areas, it is not a question of if they will be developed; it is only a question of when. The Comp Plan amendments would not be sought if not to allow for development when the market is right; and this development would not occur without the utilities. Mr. DeLisi spends a lot of time saying there is no development proposal in Skyland's application, and that there has been no development in recently certificated utilities; if that is indeed the case there is no need for a utility and no need for service. If it is not the case and development will some day occur, then Skyland's request is even more inconsistent with Pasco's Comp Plan because it will put central service in the Northeast Pasco Rural Area and it will lead to urban sprawl.

Similar to Mr. Evans, Mr. Gehring referred to PSC certification as a "change in condition" that increases the ability for the property to be developed. (Gehring, TRN 459) Most actions to amend land use and zoning designations are predicated on a "change in conditions." Such a change sets up the policy issues for reconsideration of the land use designation. The availability of water and sewer service is just the type of change that a landowner will present to a local government as justification to modify an existing policy position. A rural, low density designation is supported by an individual well and septic requirement, but the property owner will argue that more density is justified by the availability of central water and sewer. *Id.*

The central service proposed by Skyland with encourage urban sprawl and this sprawl in turn puts demand on other county services thereby increasing the tax burden on citizens to meet the demand. (Gehring, TRN 432) And by the admission of Skyland's own land use witness, the residential development proposed in its application will be urban sprawl. In his testimony, Mr. DeLisi defines "urban sprawl" to be "the proliferation of low density single use development spread over large areas of land." (DeLisi, TRN 776). Upon cross examination, he confirmed

that the development proposed in Skyland's application would be urban sprawl under his definition. He testified as follows:

> Q. Now, the development that is assumed in the application is only residential, is that correct?
>
> A. That's right.
>
> Q. So that would be a single use development?
>
> A. That's correct.
>
> Q. And is it fair to say that the cumulative area of land that is included within this application constitutes a large area of land?
>
> A. It's a fairly large area.

(DeLisi, TRN 800) This "low-intensity, low-density, or single-use development" has been identified by the Department of Community Affairs as one of the primary indicators of urban sprawl. *See* Rule 9J-5.006 (5)(g), F.A.C. Despite the obvious intent to establish a utility to serve development, Skyland argues that that there are no development proposals for the property, which is true and this fact shows that there is no need for service, but Skyland is not asking for a certificate to merely hang it on the wall. Skyland, if certificated, will provide service to future development and this development will be urban sprawl inconsistent with the Pasco County Comprehensive Plan.[10]

Legally, on the question of consistency with the Comprehensive Plans, the Commission should defer to the agencies charged with implementing the Plans, i.e., Pasco County, Hernando County, and DCA. More specifically, "[a]n agency's interpretation of its own rules and regulations is entitled to great weight, and shall not be overturned unless the interpretation is

[10] The "premature . . . conversion of rural land to other uses" is another example of urban sprawl according the DCA. *See* Rule 9J-5.006 (5)(g)4., F.A.C.

clearly erroneous." *Miles v. Florida A and M University,* 813 So.2d 242, 245 (Fla. 1st DCA 2002) *citing Golfcrest Nursing Home v. State, Agency for Health Care Admin.,* 662 So.2d 1330, 1333 (Fla. 1st DCA 1995); s*ee generally, Verizon Florida, Inc. v. Jacobs*, 810 So.2d 906, 908 (Fla. 2002) (agency's interpretation of the statute it is charged with enforcing is entitled to great deference); *see also Collier County Bd. of County Com'rs v. Fish and Wildlife Conservation Com'n*, 993 So.2d 69, 72 (Fla. 2d DCA 2008)(court affords great weight to an agency's construction of a rule that the agency is charged with enforcing and interpreting). The Commission, therefore, should find that Pasco County's finding is correct in that Skyland's proposal is inconsistent with the Pasco County Comprehensive Plan. The DCA is another agency charged with enforcing and interpreting Pasco's Comprehensive and its interpretation should also be followed. Furthermore, the rebuttal testimony of Skyland's witness, Mr. DeLisi, was not persuasive (TRN 764 - 792).[11]

Accordingly – based upon the testimony of Richard Gehring and the unrebutted expert testimony of Daniel Evans – Skyland fails to satisfy Section 367.045(5), Florida Statutes, and Rule 25-30.033(1)(f), F.A.C., regarding consistency with the Pasco County Comprehensive Plan.

ISSUE 5: **Will the certification of Skyland result in the creation of a utility which will be in competition with, or duplication of, any other system pursuant to Section 367.045(5)(a), Florida Statutes?**

PASCO: Yes. The utility Skyland seeks to certificate will be in competition with the Pasco County utility system and the Hernando County utility system.

Discussion

[11] Furthermore, at no point during the proceeding was Mr. DeLisi tendered or accepted as an expert in land use planning (see TRN 759 - 763 and TRN 802 - 804). Finally, and more importantly, nowhere in Mr. DeLisi's rebuttal testimony does he specifically rebut any of the prefiled or live testimony of Daniel Evans, DCA (see DeLisi, TRN 759 - 804).

It is undisputed that neither Pasco County, Hernando County, nor Skyland has existing infrastructure (pipes in the ground) on the checkerboarded parcels making up the proposed Skyland service territory. Similarly, it is undisputed that neither Pasco County nor Hernando County currently serve any customers located in the proposed Skyland service territory. Section 367.045(5)(a), Florida Statutes, prohibits the Commission from issuing Skyland the requested certificate if the Commission determines that Skyland's proposed system would be in competition with, or a duplication of, "any other system or portion of a system, unless [the Commission] first determines that such other system or portion thereof is inadequate to meet the reasonable needs of the public or that the person operating the system is unable, refuses, or neglects to provide reasonably adequate service."

The unrebutted testimony in this proceeding is that Pasco County has existing facilities in reasonably close proximity to the proposed Skyland service territory, and that Pasco County is ready, willing, and able to extend service to the proposed service territory should there be a need.[12] (Kennedy, TRN – 337). In fact, Pasco has a history of serving areas that are designated for sufficient density/intensity of development in the comprehensive plan, areas that are contiguous to such areas or otherwise are efficiently served because of installed or near-by facilities, areas that have an environmental issue that makes private wells and septic systems unviable, and isolated areas that are outside existing service areas. (Kennedy, TRN – 972). Moreover, the unrebutted testimony was that Pasco County could serve customers in the proposed service territory at rates significantly lower than the rates proposed by Skyland. (Kennedy, TRN – 973).

[12] Of course, Pasco County would only provide service if the service is consistent with the Comp Plan.

Also, the parcel identified as ID 4 on Figure 3(a), is included in Phase I of the assumed development. This parcel is within a designated Employment Center for which Pasco County plans to provide water and wastewater service consistent with the Pasco County Strategic and Comprehensive Plans. (Kennedy, TRN – 336 - 337).

In an attempt to rebut this testimony, Skyland witness Hartman testified that "no other entity but Skyland can as efficiently or effectively serve the customers requiring service within the proposed certificated area." (Hartman, TRN – 577). However, Hartman's concept of "efficient" and "effective" does not consider the delivered cost to the customer, (Hartman, Ex. 15, p. 78-79), which, without dispute, would be significantly higher if Skyland serves this territory. (Kennedy, TRN – 973). Moreover, Hartman's testimony serves only to obscure the real issue that the Commission must first consider under section 367.045(5)(a), Florida Statutes – namely, will Skyland be in competition with in any other system or portion of a system. Notably, Hartman *does not* testify that Pasco County is *unable* to serve the proposed service area. Rather, he argues that Skyland can do it better. In any competition, there usually is one competitor that is better than the others – however, that does not mean that there is no competition.

Pursuant to section 367.045(5)(a), Florida Statutes, the Commission "may not grant a certificate of authorization" where competition exists, unless the Commission first makes the following determinations: 1) that the competing system "is inadequate to meet the needs of the public; or 2) that the person operating the system "is unable, refuses, or neglects to provide reasonably adequate service."

There can be no dispute that competition exists to provide services to the proposed service areas located in Pasco County and Hernando County. Pasco County has adopted an

ordinance establishing as its service territory the entire unincorporated areas of Pasco County not currently served by a legally existing private utility. (Kennedy, TRN – 337-338; *see* § 110-28 Pasco County Code). The Hernando County Water and Sewer Master Plans designate the Hernando County Utility Department as the service provider for Hernando County. (Staph, TRN – 233). Thus, Pasco County is authorized to serve the proposed service territory in Pasco County and Hernando County is authorized to serve the proposed service territory in Hernando County – and competition exists.

Accordingly, unless the Commission first determines that the Pasco County system and the Hernando County system are "inadequate to meet the reasonable needs of the public, or that the person operating the system is unable, refuses, or neglects to provide reasonably adequate service," the Commission "may not grant" the requested certificate. Here, the unrebutted testimony from both Pasco and Hernando is that they are ready, willing, and able to serve any demonstrated need. (Kennedy, TRN- 337, 972-973; Staph, TRN – 233-234, 930-931). Hartman opines that Skyland can do it better than Pasco or Hernando – not that Pasco's or Hernando's system is inadequate to serve. Further, there is no competent record evidence from which the Commission could determine that either County is "unable, refuses, or neglects to provide reasonably adequate service." In fact, just the opposite is true.

Because the system proposes by Skyland will be in competition with Pasco and Hernando, the Commission must deny the requested certificate.

ISSUE 6: Does Skyland have the financial ability to serve the requested territory?

PASCO: Skyland has failed to put forward competent evidence in the record demonstrating the required financial ability. Skyland is entirely dependent upon Evans for funding – however, the Funding Agreement is unenforceable and cannot serve as a basis to demonstrate Skyland's financial ability.

Discussion

Because Skyland Utilities, LLC (the applicant here) and Evans Utilities, LLC, are wholly owned subsidiaries of Evans Properties, Inc., and Ronald Edwards is the President of all three of these entities, it would seem reasonable to conclude that there is no real distinction between these entities. However, while such a conclusion may seem reasonable, it would, in fact, be incorrect. As Skyland witness Edwards confirmed, each of these entities (i.e., Skyland, Evans Utilities, and Evans Properties) has a separate corporate existence and each is treated as an independent entity. (Edwards, TRN – 828). Thus, each entity is distinct.

However, Skyland's testimony, in many cases, conflates the corporate identities of Skyland and Evans. This is particularly true with respect to Issue 6. For example, witness Edwards testified (TRN – 821):

> **Q. Are the principals of the utility financially committed to the sound and efficient construction and operation of the utility on a going forward basis?**
>
> A. Yes, as described in *our* application, *Evans Properties and Skyland* appreciates and understands the financial commitment necessary to expand that service as the demand for the same presents itself . . . *[w]e* understand what it means to obtain a PSC certificate . . . *our* participation in this proceeding, against publicly funded opposition, is evidence in and of itself of *our* financial commitment to *our* proposal to provide water and wastewater services . . .. (emphasis added).

Notwithstanding this testimony, it is Skyland, and only Skyland, that is the applicant in this proceeding. Further, it is Skyland, and only Skyland, that bears the burden of demonstrating that it has the financial ability to provide service. *See* Sec. 367.045(2)(b), Fla. Stat.; Rule 25-30.033(1)(e), (r), and (s), F.A.C.

To meet this burden of proof, Skyland relies upon its Application, specifically, Exhibit I and Appendix VII (the Funding Agreement), Exhibit 14 (Evans Properties, Inc. and Subsidiaries

12/31/2008 Consolidated Financial Report), and the testimony of Hartman and Edwards. Hartman testifies that the Funding Agreement demonstrates that Skyland has the required financial ability. (Hartman, TRN – 78). Although no intervenor filed any testimony related to this Issue, Edwards filed "rebuttal" testimony indicating that Skyland "through funding from its parent corporation, has ample access to capital . . .." (Edwards, TRN- 822). Edwards also sponsored Exhibit 40,[13] a letter from Evans' banker.

There is no dispute regarding *Evans*' finances. However, as witness Edwards recognized, there is no mechanism or legal structure in place that would preclude the owners of Evans Properties, Inc., from changing Evans' business plan, from divesting Evans' assets, or from divesting Skyland itself. (Edwards, TRN – 860). Thus, the lens through which the relationship between Evans and Skyland must be viewed is one that recognizes these two entities as separate and distinct, notwithstanding their common ownership. For the Commission to determine that *Skyland*, not *Evans*, has the requisite financial ability, there must be more than just the verbal representations of Hartman and Edwards – there must be a binding contractual obligation enforceable by Skyland even if it is divested by Evans – in other words, even if there is no longer common ownership. Thus, it is clear that Skyland's ability to meet its burden of proof on this issue rests entirely upon the Funding Agreement contained in Appendix VII to the Application.

However, the Funding Agreement is fatally flawed – and is unenforceable for many reasons. First, Evans' promise to fund Skyland is nothing more than a gratuitous promise of a future gift. While Evans promises to fund Skyland, nowhere in the Funding Agreement does Skyland promise to repay Evans. Skyland's only obligation under the Funding Agreement is to request funding 30 days in advance. "The law is clear that there can be no indebtedness without

[13] Pasco objects to this exhibit as hearsay and notes that no exception to the hearsay rule is applicable or was established at hearing.

legal consideration; and that a mere gratuitous promise of a future gift, lacking consideration, is unenforceable as a *nudum pactum.*[14]" *Mt. Sinai Hospital of Greater Miami, Inc. v. Jordan*, 290 So.2d 484, 486 (Fla. 1974). Further, the Funding Agreement is unenforceable because it is illusory and lacks essential terms. As Skyland witness Edwards admitted, the Funding Agreement does not specify terms and conditions for repayment of any funds advanced to Skyland and Evans has the unilateral right and discretion to set and change terms and conditions at any time. (Edwards, TRN 879-880). *See Office Pavilion South Florida, Inc. v. ASAL Products, Inc.*, 849 So. 2d 367, 370 (Fla. 4th DCA 2003); *Hardwick Properties, Inc. v. Newbern*, 711 SO. 2d 35, 38 (Fla. 1st DCA 1998) ("a contract must nevertheless be reasonable and must provide to a mutuality of obligation in order to be considered enforceable").

Because the Funding Agreement is unenforceable it cannot serve as a basis to demonstrate that Skyland has the required financial ability. Absent the Funding Agreement, there is no competent record evidence demonstrating Skyland's financial ability.

ISSUE 7: Does Skyland have the technical ability to serve the requested territory?

PASCO: No. The record evidence does not demonstrate that Skyland has the technical ability to serve the requested territory.

Discussion

Skyland bears the burden of proving that it has the technical ability to serve the required territory. *See* Sec. 367.045(2)(b), Fla. Stat.; Rule 25-30.033(1)(e) F.A.C. Again, it is Skyland, and only Skyland, that is the applicant and that must demonstrate technical ability. Because Skyland and Evans are legally distinct entities, to the extent that Evans has relevant experience,

[14] A "bare agreement," an informal agreement that is not legally enforceable, because it does not fall within the specific classes of agreements that can support a legal action. *Black's Law Dictionary,* (9th Ed. 2009).

this experience cannot serve as a basis for the Commission to determine that Skyland has the required technical ability. Exhibit I to the Application provides the "statement showing the . . . technical ability *of the applicant* to provide service" required by Rule 25.30.033(1)(e) (emphasis added). This statement is completely devoid of any information that is relevant to *Skyland's* technical ability.[15] It is undisputed that *Skyland* has never provided any utility services. (Ex. 14, p. 51).

Skyland witness Hartman also testified about Skyland's technical ability. Once again, this testimony is unrelated to *Skyland's* technical ability. (Hartman, TRN – 78). On cross examination, Hartman again testified about Skyland's technical ability. In summary, it is Hartman's opinion that Skyland possesses the required technical ability because it can contract with the people necessary to run the utility. (Hartman, TRN – 150). While Skyland's one "employee," Ronald Edwards, has experience with a citrus processing facility, he has never run a waster/wastewater utility. (Edwards, TRN 851). Thus, the undisputed evidence in this proceeding is that Skyland itself has no relevant experience, but says that it will contract out for all required expertise with unknown and unspecified "contractors." But without the financial ability, which Skyland is lacking as discussed in Issue #6, Skyland cannot hire technical assistance. *See* Order No. PSC-22847, issued April 23, 1990, in Docket No. 890459-WS, *In Re: Objection to notice of CONROCK UTILITY COMPANY of intent to apply for a water certificate in Hernando County.* Skyland, therefore, has failed to present competent evidence demonstrating the required technical ability.

[15] Other than in the title, the portion of Exhibit I related to technical ability does not even mention Skyland. Instead, it discusses the abilities of the "related landowner," Evans Properties, Inc. However, Skyland, not Evans, is the applicant here.

ISSUE 8: **Has Skyland provided evidence that it has continued use of the land upon which the utility treatment facilities are or will be located?**

PASCO: No. There is no competent evidence in the record that demonstrates that Skyland has complied with the requirements of section 367.1213, Fla. Stat., and Rule 25-30.033(1)(j), FAC. The Lease Agreements are completely ineffective as instruments of conveyance of land rights and Skyland has neither sought nor obtained a variance from or waiver of the applicable rule requirements.

Discussion

Section 367.1213, Florida Statutes, states:

> [a] utility under the Water and Wastewater System Regulatory Law must own the land or possess the right to continued use of the land upon which treatment facilities are located. The commission shall adopt rules in accordance with this section.
>
> Pursuant to this statute, the Commission adopted Rule 25-30.033(1)(j), F.A.C., requiring:
>
> [e]vidence, in the form of a warranty deed, that the utility owns the land upon which the utility treatment facilities are or will be located, or a copy of an agreement which provides for the continued use of the land, such as a 99 year lease. The Commission may consider a written easement or other cost-effective alternative. The applicant may submit a contract for the purchase and sale of land with an unexecuted copy of the warranty deed, provided the applicant files an executed and recorded copy of the deed, or executed copy of the lease, within 30 days after the order granting the certificate.

The regulatory scheme established by section 367.1213, Florida Statutes, and Rule 25-30.033(1)(j), F.A.C., is clear and unambiguous. Simply put, Skyland must demonstrate either ownership, or long term control over, "the land upon which utility facilities are or will be located." Equally clear and unambiguous is the simple fact that Skyland has neither complied with these requirements nor requested a variance from or waiver of these requirements. Rule 25-30.033(1)(j), F.A.C., requires *documentary* evidence demonstrating either ownership, or long term control over, the land upon which the utility treatment facilities "are or will be" located. The only *documents* in the record related to this requirement are: 1) a "Water Lease Agreement"

between Skyland and Evans (Application, Ex. E, App. IV); and 2) a "Wastewater Lease Agreement" between Skyland and Evans (Application, Ex. H, App. VI). Hereinafter, these agreements will be referred to as the "Lease Agreements."

Rule 25-30.033(1)(j), F.A.C., also recognizes that, in some circumstances, an applicant for certification as a utility may reasonably prefer to make the acquisition of the required land rights conditioned upon certification by the Commission. In this situation, applicants like Skyland are allowed to provide an *unexecuted* copy of the required warranty deed, or long-term lease, in the application, and then provide an *executed* copy "within 30 days after the order granting the certificate." In this proceeding, Skyland chose not to utilize this procedure. Instead, the Lease Agreements are *executed* documents, with an Effective Date of October 1, 2009.[16] Nonetheless, the issue of whether the Lease Agreements are executed or unexecuted is meaningless. In either circumstance the Lease Agreements must identify the property to satisfy the requirements of Rule 25-30.033(1)(j).

Section 120.542, Florida Statutes, provides a mechanism whereby a person affected by a Commission rule may petition the Commission for a variance from, or a waiver of, a particular rule's requirements. "Variances and waivers shall be granted when the person subject o the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create substantial hardship or would violate principles of fairness." § 120.542(2), Fla. Stat. The Commission regularly grants Waiver/Variance Petitions where appropriate. *See, e.g.,* Order No. PSC-07-0076-PAA-SU,

[16] Staff's cross examination of Skyland witness Hartman misses this distinction. (TRN – 147-149). However, even if the Lease Agreements contained in the Application are treated as "unexecuted," the unrebutted testimony was that the earliest that "executed" copies of the Lease Agreements could be provided is six months after certification - far outside the 30 day window required by Rule 25-30.033(1)(j) , F.A.C. (Hartman, TRN 149).

issued January 29, 2007, in Docket No. 060602-SU, *In Re: Application for Certificate to Provide Wastewater Service in Lee and Charlotte Counties by Town and Country Utilities Company* (waiving, *inter alia,* the requirements of Rule 256-30.033(1)(j) , F.A.C.); Order No. PSC-07-0181-FOF-WS, issued February 27, 2007, in Docket No. 060601-WS, *In Re: Application for Certificates to Provide Water and Wastewater Serve in Okeechobee County by Grove Utilities, Inc.* (same). It is undisputed that Skyland has not petitioned for a variance from or a waiver of Rule 25-30.033(1)(j) , F.A.C.

Rule 25-30.033(1)(j), F.A.C., requires that Skyland's Application contain either: 1) a warranty deed; or 2) an agreement which provides for the continued use of land, such as a 99-year lease. Skyland's Application contains neither. The Lease Agreements are for terms of 20 years, and thus do not demonstrate the long-term control required.[17] Of much greater importance, however, is the simple fact that the Lease Agreements do not identify the property that is purportedly "leased" under these Agreements because the Lease Agreements themselves provide no legal description (or any other description) of the "leased" property.

It has long been the law in Florida that an effective conveyance of land requires an accurate description of the land conveyed. To effect a valid conveyance of land, a deed must contain a legal description which is sufficiently definite and certain to permit the land to be identified. *Hoodless v. Jernigan,* 46 Fla. 213, 223, 35 So. 656, 660 (1903). As the Florida supreme court held in *Campbell v. Carruth,* 32 Fla. 264, 268, 13 So. 432, 433 (1893), a legal description satisfies this requirement if the description of the land conveyed in a deed is such that "a surveyor, by applying the rules of surveying, can locate the land, ... and the deed will be

[17] At hearing, Skyland admitted the Lease Agreements do not provide the required long term control over the land by offering a verbal amendment to the Lease Agreements to add "automatic renewals on a five year basis." (Hartman, TRN – 65). However, no *documents* reflecting Hartman's testimony are in the record.

sustained if it is possible from the whole description to ascertain and identify the land intended to be conveyed." A deed containing a legal description which is so vague and indefinite that a surveyor would not be able to locate the described land is a nullity. *Hoodless v. Jernigan,* 46 Fla. at 223, 35 So. at 660. Here, it is undisputed that the Lease Agreements do not even attempt to identify property. (Hartman, TRN – 86-87, 111). Thus, the Lease Agreements are a "nullity" and ineffective as a conveyance of land rights.

At hearing, Pasco objected to the admission into evidence of the Lease Agreements, contending that the Lease Agreements are irrelevant. Relevant evidence is evidence "that tends to prove or disprove a material fact." Sec. 90.401, Fla. Stat. The "material fact" for which the Lease Agreements were included in the application is the proof of ownership/control of the land upon which utility facilities are or will be located. Because the Lease Agreements contain no property description, they cannot prove this material fact. Notwithstanding Pasco's arguments, and the clear and unambiguous language in Rule 25-30.033(1)(j) , F.A.C., the Commission overruled Pasco's objection.[18]

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[18] The objection was referred to the Commission's counsel, who advised that the Commission has never required documents like the Lease Agreements to contain a legal description at this stage of the proceeding and that the normal practice is to allow the applicant to provide the legal description after the hearing. (TRN – 164-166). Based on this advice, the Commission overruled Pasco's objection. Respectfully, the Commission received erroneous legal advice. First, regardless of whether the Lease Agreements are considered to have been submitted as "executed" or "unexecuted" documents, it is clear that Rule 25-30.033(1)(j) , F.A.C., requires written documentation identifying the "land," and it is without question that the lack of a legal description makes these agreements ineffective as instruments conveying an interest in land. Second, as detailed *infra,* the practice of the Commission is to grant Petitions for Waiver/Variance of Rule 25-30.033(1)(j) , F.A.C., when an applicant makes the required showing under section 120.542, Florida Statutes. Third, and most importantly, the Commission, "without question," must follow its own rules. *Cleveland Clinic Florida Hospital v. Agency for Health Care Admin.*, 679 So. 2d 1237, 1242 (Fla. 1st DCA 1996). Absent a variance from, or waiver of, Rule 25-30.033(1)(j) , F.A.C., the Commission is required to effect the rule's unambiguous requirements – even if the result may be impractical. *See Boca Raton Artificial Kidney Center v. Department of Health and Rehabilitative Services*, 493 So. 2d 1055, 1057 (Fla.

Pasco asserts that whether or not the Lease Agreements are admitted into evidence, the Lease Agreements are fatally flawed due to their lack of a property description. Thus, there is no competent, substantial evidence in the record from which the Commission may conclude that Skyland has continued use of the land upon which the utility treatment facilities are to be located.

ISSUE 9: Is it in the public interest for Skyland to be granted water and wastewater certificates for the territory proposed in its application?

PASCO: No. The public interest is not furthered by granting Skyland the requested water and wastewater certification. The proposed utility would not be cost effective or efficient, would promote urban sprawl, and would be inconsistent with the Pasco County and Hernando County comprehensive plans.

Discussion

For the Commission to grant the requested certification it must first determine that the proposed utility is in the public interest. § 367.045(5)(a), Fla. Stat. Similarly, for the Commission to have jurisdiction over this proceeding, Skyland must meet the statutory definition of "utility," and therefore must serve the public for compensation. § 367.011(12), Fla. Stat. It is Pasco's position that the "public" referred to in the "public interest" test and the "public" referred to in the definition of "utility" refer to the same relevant community.[19] And, Skyland itself admits that the relevant community (or "public") whose interests must be considered extends beyond the interests of a single landowner. (Edwards, TRN – 853).

1st DCA 1986) ("if the rule, as it plainly reads, should prove impractical in operation, the rule can be amended pursuant to established rulemaking procedures. However, absent such amendment, expedience cannot be permitted to dictate [the rule's] terms").

[19] Pasco asserts that the applicable meaning of "public" is "the people of a nation or community as a whole." *Black's Law Dictionary,* (9th Ed. 2009)

However, the record evidence in this proceeding demonstrates that the purpose of the proposed utility is not to benefit the relevant public; rather it is to benefit a single landowner - Evans. In summarizing his testimony, Skyland witness Edwards made this abundantly clear:

> Q. Mr. Edwards, would you summarize your testimony in five minutes or less?
>
> A. Yes, I will. My testimony begins with a short history and description of the lands, and we have covered that description fairly well in all the testimony so far, but it is those -- there are contiguous and noncontiguous parcels in Hernando and Pasco County, and they have been in the Evans family companies for, in most cases, over 50 years. I think the most recent acquisition of any of those properties was in 1987.
>
> They have been used for agricultural purposes, primarily citrus and cattle, pasture grazing. In regard to these parcels, we have filed not only an application as Skyland Utilities for certification of these properties, but we filed two others at virtually the same time for other properties that we own in Okeechobee, Martin, Indian River, and St. Lucy Counties, Groveland Utilities and Bluefield Utilities.
>
> Evans has faced a rapid decline in our citrus acreage over the last several years, and that decline has been accelerated by a disease known as greening, which has been introduced into the citrus industry and currently has no cure that's known to the industry, although a lot of money is being spent on that research. We face the likelihood that in the next three to five years we could possibly lose the remaining part of the citrus that we now operate, which is approximately 16,000 acres across the state. Ten years ago we were operating 25,000, and there has already been roughly a 9,000-acre reduction in our production because of the disease. And greening is now the ultimate disease that none of us have an answer for.
>
> We face a challenge of finding and implementing new potential crops and other land uses to remain a viable company. Nearly every viable strategy that we have considered is impacted by water. **We propose to certificate and operate a utility to ensure the current and future needs for water and wastewater services no matter which strategies are ultimately determined to be the most appropriate for maintaining ourselves in business.**
>
> Individual strategies may involve over time -- may evolve over time, but it is especially difficult to decide with finality at this time which ones would be appropriate. **We want to preserve our options to react to the market and the changing government regulation which is ongoing at this time**. We are looking at changing what crops that may be grown, and we are doing a great deal of testing in various test plots to determine other things that will grow in these areas.

(Edwards, TRN 805-807) (emphasis added).

In this proceeding, the "public," the relevant "community as a whole," whose interests the Commission must consider are the citizens and residents of Pasco and Hernando County.

An important interest that must be considered is the economic efficiency of the proposed utility. The unrebutted testimony in this proceeding is that the proposed utility is not, and cannot be, economically efficient:

> . . . it is not efficient, cost effective, good utility practice, or in the public interest to provide central water and sewer to such low density (one unit per 10 acres) as is proposed by Skyland. Skyland's proposed water and sewer rates will be substantially higher than those charged by Pasco County Utilities. It is not efficient, cost effective, good utility practice, or in the public interest to provide central water and sewer to such widespread, non-contiguous parcels of property. Generally, density of at least 2 units per acre is necessary for central water and sewer service to be economical. (Kennedy, TRN – 335)
>
> * * * * *
>
> [i]n my experience, and in my professional opinion, attempting to provide water and wastewater service to such a comparatively small number of customers is difficult at best. There is little opportunity to achieve any significant and meaningful economies of scale. In fact it is quite the opposite. There are few customers over which to spread large infrastructure costs. (Stapf, TRN - 233).

Another public interest is consistency with the Pasco County and Hernando County comprehensive plans. A primary purpose of a comprehensive plan is to strike a balance between development and preservation of environmental resources and quality of life. (Gehring, TRN – 423).

As discussed in Issues 3 and 4, the evidence in this proceeding demonstrates that the proposed utility is inconsistent with the Pasco County comprehensive plan and inconsistent with

the Hernando County comprehensive plan. By definition, a comprehensive plan is an expression of the public interest. Thus, a utility that is inconsistent with these counties' comprehensive plans cannot serve the public interest.

In a proceeding such as this, the public interest would be served where a private utility proposes to provide central water and wastewater services, in an efficient and economical fashion, in a manner consistent with the applicable comprehensive plan, to customers who would not otherwise receive the service. Here, none of these standards are met. Skyland freely admits that the reason it seeks this certificate is to keep Evans in business. (Edwards, TRN – 807). Simply put, while this reason admirably seeks to protect and preserve Evans' interests, there can be no doubt that the proposed utility is not intended to, and does not, serve the public's interests.

ISSUE 10: **If the certificates for the proposed water and wastewater system are granted, what is the appropriate return on equity for Skyland?**

PASCO: The certificates should not be granted; if granted, the appropriate return on equity is as established by the Commission.

ISSUE 11: **If the certificates for the proposed water and wastewater system are granted, what are the appropriate potable water and wastewater rates for Skyland?**

PASCO: The certificates should not be granted; if granted, the appropriate rates are as established by the Commission.

ISSUE 12: **If the certificates for the proposed water and wastewater system are granted, what are the appropriate service availability charges for Skyland?**

PASCO: The certificates should not be granted; if granted, the appropriate service availability charges are as established by the Commission.

ISSUE 13: **If the certificates for the proposed water and wastewater system are granted, what is the appropriate Allowance for Funds Used During Construction (AFUDC) rate for Skyland?**

PASCO: The certificates should not be granted; if granted, the appropriate AFUDC rate is as established by the Commission.

ISSUE 14: **Should this docket be closed?**

PASCO: After denying the requested certificates this docket should be closed.

Respectfully submitted this 15th day of October, 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S. Mail, to the following, this 15th day of October, 2010:

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