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# Public Service Commission

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

**DATE:** December 2, 2010

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

**FROM:** Division of Economic Regulation (Brady, Chase, Daniel, Williams)  
Office of the General Counsel (Klancke, Bennett)

*pb AC PD cas*  
*AK*  
*AKB JSC*

**RE:** Docket No. 090478-WS – 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.

**AGENDA:** 12/14/10 – Regular Agenda – Post-Hearing Decision – Participation is Limited to Commissioners and Staff

**COMMISSIONERS ASSIGNED:** Graham, Edgar, Skop, Brisé

**PREHEARING OFFICER:** Skop

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

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

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### **Case Background**

On October 16, 2009, Skyland Utilities, LLC (Skyland or Utility), filed an application for original certificates to operate a water and wastewater utility in Hernando and Pasco Counties, and for approval of initial rates and charges (Application). While the privately owned water and wastewater utilities in Pasco County are subject to Chapter 367, Florida Statutes (F.S.), the privately owned utilities in Hernando are not. As such, Skyland relied on the provisions of Chapter 367.171(7), F.S., which gives the Commission exclusive jurisdiction over all utility systems whose service transverses county boundaries, whether the counties involved are jurisdictional or nonjurisdictional. On November 13, 2009, Hernando County, Hernando County Water and Sewer District, and Hernando County Utility Regulatory Authority (collectively Hernando), Pasco County (Pasco), and the City of Brooksville (Brooksville) each timely filed a protest to the Utility's Application. On June 16, 2010, the Office of Public Counsel intervened in this case.<sup>1</sup>

By Order No. PSC-10-0105-PCO-WS (Order Establishing Procedure), issued February 24, 2010, the Application was scheduled for administrative hearing to be held on July 7 – 8, 2010, with a Prehearing Conference scheduled for June 28, 2010. The administrative hearing was continued to September 23, 2010. Two service hearings were also conducted on July 7, 2010, with six citizens expressing concerns regarding the need for service, inconsistency with the counties' comprehensive plans, and public interest. One witness testified at both the morning and evening service hearings regarding public interest issues not previously addressed in the record. As such, Skyland witness Hartman was allowed to rebut those remarks prior to his rebuttal testimony. (TR 514-533, 558-561)

Skyland is proposing to establish a single utility system in Hernando and Pasco Counties that will provide potable and non-potable water and wastewater service to bulk exempt, bulk non-exempt, intensified agribusiness, residential and general service customers. (EXH 2) The proposed service territory consists of approximately 4,100 total acres, of which 788 acres (or 1/4<sup>th</sup>) are in Hernando County and 3,301 acres (or 3/4<sup>th</sup>) are in Pasco County. (TR 66) The land in both counties is owned by the Utility's parent, Evans Properties, Inc. (Evans) and consists of 15 contiguous and noncontiguous parcels as identified on Map 3A (EXH 42). The land is currently zoned mostly agricultural and has been used primarily to grow citrus crops. (EXH 2)

According to its Application, Skyland intends to provide central water and wastewater services in 5 separate phases. It is anticipated that Phase I utilization will take place over a 6-year time horizon, with 80 percent build out occurring between years 5 and 6. (EXH 2) At that time, it is anticipated there will be 155 water and 153 wastewater equivalent residential units (ERCs) utilizing 54,250 gallons per day (GPD) of water. At total build out of all phases, Skyland anticipates serving 624 water and wastewater ERCs utilizing 218,400 GPD of water. (EXH 2) According to the Application, there are two existing structures in the proposed service territory, both located in Parcel ID-3 in Pasco County. These existing structures will be connected to central water service but will continue to use their existing on-site septic systems,

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<sup>1</sup> See Order No. PSC-10-0387-PCO-WS, issued June 16, 2010, in Docket No. 090478-WS, 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.

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hence the difference in water and wastewater ERCs at build out of Phase I. (EXH 2, Appendix VIII, page 1)

The Commission has jurisdiction pursuant to Sections 367.031, 367.045, 367.081, 367.101 and 367.171(7), F.S.

**Issue A:** What is the appropriate disposition of the hearsay objections to Exhibits 2, 4, 14, 15, 40, and 45?

**Recommendation:** The hearsay objections to Exhibits 2, 4, 14, 15, 40, and 45 should be denied. (Klancke)

**Staff Analysis:** At the technical hearing conducted on July 7, 2010, staff noted for the record that pursuant to an agreement reached between staff counsel and the parties as to objections based on the grounds that exhibits contain or are comprised solely of hearsay, the parties agreed to make an objection on the record and that no rulings would be made at the hearing. Rather, the parties would be afforded the ability to address their particular hearsay arguments in their post-hearing briefs. (TR 6-7) Thereafter, a ruling would be made by the Commission as to the admissibility of those documents.

Exhibits 2, 4, 14, and 15

At the hearing, Pasco and Hernando raised hearsay objections as to the admissibility of Exhibits 2, 4, 14, and 15<sup>2</sup> on the grounds that these exhibits were hearsay and no exception to the hearsay rule was applicable. (TR 168-170, 174) Neither Hernando nor Pasco addressed the hearsay objections to Exhibits 2, 4, 14, or 15 in their briefs. Brooksville adopts and supports all arguments and requests for relief raised by Hernando but did not address these exhibits in its post-hearing brief.

In Skyland's brief, counsel for the Utility argued that the Application (including the funding agreement and the lease agreement contained therein), the challenged statements of Skyland including those pertaining to witness Hartman, and the financial statement should not be excluded or stricken from the record because the challenged statements are not hearsay. In particular, Skyland asserted that Section 90.801(1)(c), F.S., governing the admissibility of hearsay evidence provides that hearsay is a statement other than one made by the declarant while testifying at the trial or hearing offered into evidence to prove the truth of the matter asserted. Skyland argued that in this *de novo* proceeding, each of the challenged statements "were all reaffirmed, adopted, addressed, and affirmatively put forth, such that they could be subject to cross examination and such that they would and could be (and were) subject to discovery (the lack of which is the very concern the hearsay rule is intended to address)" and thus, did not constitute hearsay. (Skyland BR 36)

Skyland further argued that even if the challenged statements are hearsay, they are admissible pursuant to Section 120.569(2)(g), F.S. That subsection states that:

Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in

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<sup>2</sup> Exhibit 2 contains the Application. Exhibit 4 contains the resume of Skyland witness Gerald C. Hartman. Exhibit 14 contains a confidential financial statement made in response to staff's letter of deficiency dated November 29, 2009. Exhibit 15 contains the deposition transcript of witness Hartman.

the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida.

Skyland notes that no argument has been made that any of the challenged exhibits are either “irrelevant,” “immaterial,” or “unduly repetitious.”

Skyland further argued that the hearsay objections put forth by the Intervenors are premised upon a misinterpretation of the Administrative Procedures Act as it pertains to the admissibility of hearsay. Section 120.57(1)(c), F.S., specifies that “[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be used in itself to support a finding unless it would be over objection in civil actions.” Skyland asserted that the Intervenors have erroneously interpreted this subsection to mean that hearsay evidence is not admissible. To the contrary, Skyland asserted that this subsection makes it clear that hearsay evidence is admissible for the purpose of supplementing or explaining other evidence. Skyland further asserted that the contested exhibits have been offered to corroborate other evidence such that this proceeding may be adjudicated fully on the merits and to strike them at this time would be unduly prejudicial.

#### Exhibits 40 and 45

Although no hearsay objections were made at the hearing when the exhibits were moved into the record,<sup>3</sup> Pasco raised a hearsay objection to Exhibit 40<sup>4</sup> and Hernando raised an objection to Exhibit 45<sup>5</sup> in their respective briefs filed on October 15, 2010. Although the hearsay objections raised by the objectors to Exhibits 40 and 45 are untimely, a discussion of the objections and the admissibility of the exhibits is contained below.

With respect to Exhibit 40, Pasco objected to this exhibit on the grounds that it is hearsay and noted that no exception to the hearsay rule is applicable or established at the hearing. (Pasco BR 22) Neither Hernando or Brooksville address the admissibility of Exhibit 40 in their briefs.

Skyland asserted that although Exhibit 40 fits the classic definition of hearsay, it is nonetheless admissible because it is the type of evidence commonly relied upon by reasonably prudent persons in the conduct of their affairs. (Skyland BR 39) Moreover, Skyland argued that Exhibit 40 is evidence which should be considered in any determination of Skyland’s financial ability to serve the requested territory because it is supplemental to or explained by other evidence in this proceeding including the testimony of witness Edwards and Hartman, the funding agreement, and the confidential financial information contained in Exhibit 14.

With respect to Exhibit 45, Hernando asserted that this e-mail constitutes inadmissible hearsay because the author of the e-mail did not testify at the hearing, nor did the intended recipient. (Hernando BR 12) Hernando asserted that instead, what was admitted was a “daisy

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<sup>3</sup> See TR 758 and 918.

<sup>4</sup> Exhibit 40 contains a letter from SunTrust to Ronald Edwards, President and Chief Executive Officer of Evans Properties, Inc., which was attached to the testimony of witness Edwards’ rebuttal testimony.

<sup>5</sup> Exhibit 45 contains an e-mail dated November 20, 2009, from Mr. Charles Coultas with the Department of Environmental Protection (DEP) regarding possible contaminated wells located south of Brooksville.

chain” e-mail which may or may not have been altered along its route. (Hernando BR 12) As such, Hernando asserted that Exhibit 45 should be excluded or stricken as hearsay not otherwise satisfying any exceptions listed in the Florida Rules of Evidence. Hernando further argued that witness Hartman’s testimony regarding his purported conversation with an individual from DEP regarding the potentially contaminated wells should also be stricken. The post hearing briefs of Skyland, Pasco, and Brooksville do not address Hernando’s objection to Exhibit 45.

Sections 120.569(2)(g) and 120.57(1)(c), F.S., govern the admissibility of evidence in this proceeding. These sections are much broader than the Florida Evidence Code, and as such even hearsay evidence not admissible under the Florida Evidentiary Code, would still be admissible in a proceeding before the Commission. Section 120.569(2)(g), F.S., provides that all evidence upon which a reasonably prudent person would rely is admissible. Even hearsay evidence is admissible in Chapter 120 proceedings. Only “irrelevant, immaterial, or unduly repetitious material” is inadmissible.<sup>6</sup>

Staff believes that Exhibits 2, 4, 14, 40, and 45 are relevant, material, and not unduly repetitious evidence, the sort of evidence which a reasonably prudent person would rely upon.<sup>7</sup> Moreover, staff notes that the objections with respect to Exhibits 40 and 45 were not timely raised by the objectors. Staff believes that even if the above-referenced exhibits contain or are comprised of hearsay, each exhibit may be corroborated by other exhibits or testimony already in the record. Section 120.57(1)(c), F.S., explicitly states that “[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be used in itself to support a finding unless it would be over objection in civil actions.” In the instant case, staff believes the contested exhibits have been offered to corroborate other evidence in this proceeding and thus, should be admissible. Therefore, pursuant to Sections 120.569(2)(g) and 120.57(1)(c), F.S., staff believes that the hearsay objections to these exhibits should be denied.

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<sup>6</sup> See Order No. PSC-01-1919-PCO-WU, issued September 24, 2001, in Docket No. 991666-WU, In re: Application for amendment of Certificate No. 106-W to add territory in Lake County by Florida Water Services Corporation; Order No. PSC-10-0426-PCO-WS issued on July 2, 2010, in Docket No. 090478-WS, 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.; and Order No. PSC-10-0431-PCO-WS, issued July 6, 2010, in Docket No. 090478-WS.

<sup>7</sup> Staff notes that none of the parties to this proceeding have even asserted that the above-referenced exhibits are irrelevant, immaterial, or unduly repetitious.

### Discussion of Issues

**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?

**Recommendation:** Yes. Skyland has presented evidence sufficient to invoke the Commission's exclusive jurisdiction over Skyland's application pursuant to Section 367.171(7), F.S. (Klancke)

### Position of the Parties

**Skyland:** Yes, Skyland has presented evidence sufficient to invoke such exclusive jurisdiction and the Commission has exclusive jurisdiction under the provisions of Chapter 367, F.S., and any attempts by local government to assert jurisdiction over those issues, is contrary to law and ineffectual.

**Hernando:** No. See discussion throughout this Brief.

**Pasco:** No position filed.

**Brooksville:** Brooksville adopts by reference Hernando County's Post Hearing Statement of the Issues and Positions and Post Hearing Brief of Hernando County, Hernando County Water and Sewer District and Hernando County Utility Regulatory Authority filed or to be filed in the above styled matter, and adopts and supports all arguments and requests for relief stated therein.

**OPC:** In Order No. PSC-10-0123A-PCO-WS, the Commission determined that it has jurisdiction over this matter. On May 4, 2010, the Commission's Order on Jurisdiction and Denying Hernando County's Motion to Dismiss was per curium affirmed by the First District Court of Appeals. OPC does not intend to pursue this issue at the hearing.

### Staff Analysis:

### PARTIES' ARGUMENTS

In its brief, Skyland asserted that under Section 367.021(12), F.S., Skyland is a utility which proposes the construction and operation of a system which will provide water and wastewater service to the public for compensation. Under Section 367.171(7), F.S., Skyland notes that the Commission has exclusive jurisdiction over all utility systems whose service transverse county boundaries. Moreover, Skyland asserted that the record reflects that Skyland proposes the operation of a utility which will physically, operationally, and administratively transverse county boundaries. (Skyland BR 6) For the foregoing reasons, Skyland argued that it has presented evidence sufficient to invoke the Commission's exclusive jurisdiction over Skyland's Application.

Neither Hernando nor Pasco's brief addresses the issue of whether Skyland has presented evidence sufficient to invoke the Commission's jurisdiction over Skyland's Application. Rather,



their respective briefs focus upon the assertions that Skyland is not a “utility” as defined by Section 367.021(12), F.S., and that Skyland has not provided evidence to support that service proposed by the Utility transverse county boundaries pursuant to Section 367.171(7), F.S. These arguments are addressed in Issues 1A and 1B, respectively.

### ANALYSIS

The relevant statute to determine whether the Commission has jurisdiction over the Utility’s application is Section 367.171(7), F.S. That subsection provides:

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

In Section 367.021(12), F.S., the Legislature defines “utility” as “every person, lessee, trustee, or receiver [except those exempted under Section 367.022, F.S.] owning, operating, managing, or controlling a system, or proposing construction of a system, who is providing, or proposes to provide, water or wastewater service to the public for compensation.” (emphasis added). Further, Section 367.021(11), F.S., defines a “system” as “facilities and land used or useful in providing service.” Based on the plain meaning of the statute using the definitions provided by the Legislature, staff believes that the record supports the finding that the Commission has subject matter jurisdiction to consider Skyland’s Application under Section 367.171(7), F.S. In particular, staff believes that the Utility is proposing to construct a utility system whose service would transverse county boundaries, thereby causing the Application to fall within the Commission’s jurisdiction. (Skyland BR 5-7; TR 77, 162-163, 735) Section 367.171(7), F.S., provides this Commission with exclusive jurisdiction and authority to determine whether to grant the Utility’s Application.

In its Application and at the hearing, Skyland has proposed facilities and land forming a system which will exist in close geographical proximity across a county boundary.<sup>8</sup> (Skyland BR 5) Thus, the proposed service will result in its facilities that physically and operationally cross the Hernando County and Pasco County border. Staff believes that this proposal constitutes sufficient evidence to invoke the Commission’s jurisdiction pursuant to Section 367.171(7), F.S.

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<sup>8</sup> The issue of whether the proposed facilities will transverse county boundaries, including an analysis regarding the impact of Hernando County v. Florida Public Service Commission, 685 So. 2d 48 (Fla. 1st DCA 1996) on this proceeding, is addressed in Issue 1B.

The Commission squarely addressed the issue of the Commission's jurisdiction in this proceeding in Order No. PSC-10-0123A-PCO-WS.<sup>9</sup> On November 13, 2009, Hernando filed its Motion to Dismiss the Application of Skyland for Lack of Jurisdiction with Incorporated Memorandum of Law (Motion to Dismiss). At the Commission Conference held on February 9, 2010, the Commission denied Hernando's Motion to Dismiss on the grounds that the Commission has jurisdiction to consider Skyland's Application. On March 1, 2010, the Commission issued Order No. PSC-10-0123A-PCO-WS memorializing its decision. In that order denying Hernando's Motion to Dismiss the Commission determined that "the legislative intent behind Section 367.171(7), F.S., the logical construction of this statute, as well as court and Commission precedent support the conclusion that we have jurisdiction to consider Skyland's application."<sup>10</sup> Following the denial, Hernando filed a Petition for Writ of Quo Warranto, dated April 8, 2010, with the First District Court of Appeals. On May 4, 2010, the First District Court of Appeal, after stating that it would treat the Petition for Writ of Quo Warranto as a Petition for Writ of Prohibition, denied Hernando's petition. Since that date Skyland has provided further record evidence supporting its intent to provide service transversing county boundaries to the public for compensation. This evidence is discussed further in Issues 1A and 1B.

#### CONCLUSION

For the foregoing reasons, staff believes that Skyland has presented evidence sufficient to invoke the Commission's exclusive jurisdiction over Skyland's Application pursuant to Section 367.171(7), F.S.

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<sup>9</sup> Issued March 1, 2010 in Docket No. 090478-WS, 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.

<sup>10</sup> Id. at 7; see also Order No. PSC-00-1265-PCO-WS, issued July 11, 2000, in Docket Nos. 990696-WS and 992040-WS, In re: Application for original certificates to operate a water and wastewater utility in Duval and St. Johns Counties by Nocatee Utility Corporation and Application for certificates to operate a water and wastewater utility in Duval and St. Johns Counties by Intercoastal Utilities, Inc.

**Issue 1A:** Did Skyland provide evidence to support that it satisfies the definition of “utility” contained in Section 367.021(12), Florida Statutes?

**Recommendation:** Yes. Skyland has provided evidence to support that it satisfies the definition of “utility” contained in Section 367.021(12), Florida Statutes. (Klancke)

**Position of the Parties**

**Skyland:** Yes, Skyland has presented evidence sufficient to invoke such exclusive jurisdiction and the Commission has exclusive jurisdiction under the provisions of Chapter 367, F.S., and any attempts by local government to assert jurisdiction over those issues, is contrary to law and ineffectual.

**Hernando:** No. Skyland failed to present competent substantial evidence that it satisfies this definition: that it would be serving the “public” (where it would actually be serving one house and one shop/barn on property owned by its ultimate parent company) for “compensation” (merely shifting money among related or affiliated entities).

**Pasco:** No. Skyland is not a “utility” because it does not propose to serve the public.

**Brooksville:** Brooksville adopts by reference Hernando County’s Post Hearing Statement of the Issues and Positions and Post Hearing Brief of Hernando County, Hernando County Water and Sewer District and Hernando County Utility Regulatory Authority filed or to be filed in the above styled matter, and adopts and supports all arguments and requests for relief stated therein.

**OPC:** In Order No. PSC-10-0123A-PCO-WS, the Commission determined that it has jurisdiction over this matter. On May 4, 2010, the Commission’s Order on Jurisdiction and Denying Hernando County’s Motion to Dismiss was per curium affirmed by the First District Court of Appeals. OPC does not intend to pursue this issue at the hearing.

**Staff Analysis:**

**PARTIES’ ARGUMENTS**

In its brief Skyland asserted that pursuant to the definition of “utility” contained in Section 367.021(12), F.S., “Skyland is a utility plain and simple.” (Skyland BR 4) In support of this assertion, Skyland argued that the Utility proposes the construction and operation of a system that will provide water or wastewater service to the public for compensation. Therefore, it will constitute a “utility” as contemplated in Section 367.021(12), F.S.

In contrast, Hernando asserted that Skyland is a wholly owned subsidiary of Skyland Utilities, LLC, which in turn is wholly owned by Evans of which Ronald Edwards is the President and/or manager of all entities. (Hernando BR 5) Hernando alleges that the only two requests for service in Skyland’s Application were both from representatives of Evans. Thus, Hernando asserted that the only record evidence is that Skyland will be providing water and wastewater service to Evans, based upon the two requests for service contained in the record. Hernando argued that the phrase “the public” contained within the definition of “utility” in Section 367.021(12), F.S., envisions something broader than serving one’s self and the phrase

“for compensation” should envision something broader than “merely shifting balance sheets among related/affiliated entities or alter egos considering the close and familiar inter-relationship between Evans Properties, Evans Utilities, and Skyland.” (Hernando BR 5)

Similarly, Pasco argued in its brief that Skyland is only proposing to serve a single property owner, namely Evans Properties, Inc. Notwithstanding the Application, and the development assumption made therein, Pasco argued that Skyland does not in fact seek to provide water and wastewater service to the public but rather merely increase the value of the property Evans owns in the proposed service territory and to preserve its options with respect to this property. (Pasco BR 5-6) Because Skyland does not propose to serve the public, Pasco asserted that it is not a utility and, therefore, the Commission lacks jurisdiction. (Pasco BR 6)

Brooksville adopted and supported all arguments and requests for relief raised by Hernando but did not address this Issue in its post-hearing brief.

OPC contended that in Order No. PSC-10-0123A-PCO-WS, the Commission determined that it has jurisdiction over this matter. OPC explained that on May 4, 2010, the Commission’s Order on Jurisdiction and Denying Hernando County’s Motion to Dismiss was per curiam affirmed by the First District Court of Appeals. OPC did not pursue this issue at the hearing.

#### ANALYSIS

As discussed in Issue 1, in Section 367.021(12), F.S., the Legislature defines “utility” as “every person, lessee, trustee, or receiver [except those exempted under Section 367.022, F.S.] owning, operating, managing, or controlling a system, or proposing construction of a system, who is providing, or proposes to provide, water or wastewater service to the public for compensation.” Further, Section 367.021(11), F.S., defines a “system” as “facilities and land used or useful in providing service.” (emphasis added) Contrary to the assertions of both Pasco and Hernando, in its Application as well as at the hearing, Skyland put forth evidence supporting its proposal to provide service to the public for compensation. In particular, Skyland asserted that it intends to develop the proposed territory in five separate phases which will include potable and non-potable water and wastewater services to exempt and non exempt bulk customers, intensified agribusiness, residential and general service customers. (TR 76-77) According to the Application, Skyland has asserted that it intends to serve approximately 155 equivalent residential connections (ERCs) in Phase 1 development alone. (TR 77; EX 2, Exhibit D) Moreover, Skyland has also submitted record evidence in its Application and at the hearing in support of the setting of rates for the purpose of providing water and wastewater service for compensation.

#### CONCLUSION

On the basis of the record evidence in this matter, staff believes that Skyland has proposed the construction of a system that would provide, water or wastewater service to the public for compensation. Therefore, staff believes that Skyland has provided sufficient evidence to establish that it satisfies the definition of “utility” contained in Section 367.021(12), F.S.

**Issue 1B:** Did Skyland provide evidence to support that the service proposed by Skyland transverses county boundaries pursuant to Section 367.171(7), Florida Statutes?

**Recommendation:** Yes. Staff believes that Skyland has provided evidence to support that the service proposed by Skyland transverses county boundaries pursuant to Section 367.171(7), Florida Statutes. (Klancke)

**Position of the Parties**

**Skyland:** Yes, Skyland has presented evidence sufficient to invoke such exclusive jurisdiction and the Commission has exclusive jurisdiction under the provisions of Chapter 367, F.S., and any attempts by local government to assert jurisdiction over those issues, is contrary to law and ineffectual.

**Hernando:** No. Skyland has no infrastructure which transverses county boundaries; therefore, Commission lacks subject matter jurisdiction. Alternatively, Commission should deny certification because Skyland's attempt to bring this matter under its jurisdiction is based on speculation and hyperbole as to when Skyland would have infrastructure in the ground which transverses county boundaries.

**Pasco:** No. Skyland provided no competent evidence that its services transverse county boundaries.

**Brooksville:** Brooksville adopts by reference Hernando County's Post Hearing Statement of the Issues and Positions and Post Hearing Brief of Hernando County, Hernando County Water and Sewer District and Hernando County Utility Regulatory Authority filed or to be filed in the above styled matter, and adopts and supports all arguments and requests for relief stated therein.

**OPC:** In Order No. PSC-10-0123A-PCO-WS, the Commission determined that it has jurisdiction over this matter. On May 4, 2010, the Commission's Order on Jurisdiction and Denying Hernando County's Motion to Dismiss was per curium affirmed by the First District Court of Appeals. OPC does not intend to pursue this issue at the hearing.

**Staff Analysis:**

**PARTIES' ARGUMENTS**

In its brief, Skyland asserted that it proposes the construction and operation of facilities upon land forming a system which will exist in close geographical proximity across a county boundary. (Skyland BR 5) It further argued that the proposed physical service will cross county boundaries and the rates, charges, administration, personnel and all the other accoutrements of service and on-going operations of the Utility will be operated on-site, in the service area, and physically located in both Hernando and Pasco counties. (Skyland BR 5)

Skyland noted that in Hernando County v. Florida Public Service Commission, 685 So. 2d 48 (Fla. 1st DCA 1996), the Commission found that certain facilities in separate counties were "functionally related," thus rendering the utility jurisdictional as one transversing county

boundaries. Skyland explains that the Hernando court concluded that the “relevant inquiry when determining the existence of jurisdiction under Section 367.171(7) is the actual inter-relationship of two or more facilities providing utility services in a particular geographic area . . .” Id. at 52. The Court held that the conclusion that the correct focus is on the relationship between the particular identified facilities (rather than the general corporate structure of the utility) is supported by the word “transverses” in the statutes, which indicates that the facilities forming a system must exist in close geographical proximity across the county boundary. In essence, Skyland explained that the court substantially found that jurisdiction under Section 367.171(7), F.S., cannot be exclusively founded upon evidence that the company utilizes an umbrella organizational structure, as in that case. (Skyland BR 5)

In this case, Skyland’s contention is that it has proposed the construction of facilities upon land forming a system which will exist in close geographical proximity across a county boundary. Moreover, Skyland asserted that physical service as well as the ongoing operations of the Utility will cross county boundaries. (Skyland BR 5) In support of this contention, Skyland stated that it proffered the testimony of witness Gerry Hartman who testified that his firm, GAI, prepared the engineering, accounting, and utility management aspects of the Application on behalf of Skyland. Witness Hartman testified that Evans owns all of the land within Skyland’s proposed service territory and that its anticipated development would occur in five separate phases which will transverse county boundaries. (Skyland BR 7, TR 77) Witness Hartman further stated that it was his opinion that Evan’s proposed activities would transverse county boundaries as described in the statute. (TR 162-163) Witness Hartman also stated that in his opinion whether or not there was a physical crossing of the county boundary in the immediate future, everything Skyland was proposing would function as one utility system. (TR 735)

On the basis of this testimony, in conjunction with the information contained in the Application, Skyland has asserted that the record demonstrates that the service contemplated by Skyland is proposed in a means, manner, and method which physically, operationally, and administratively will transverse county boundaries. (Skyland BR 6)

In contrast, Hernando asserted that the controlling law on whether the Commission may exercise jurisdiction over Hernando, a non-jurisdictional county, is Section 367.171(7), F.S., which states that “the Commission shall have exclusive jurisdiction over all utility systems whose service transverses county boundaries . . .” Hernando asserted that the record is clear that Skyland does not currently have any pipes or infrastructure in the ground which transverses the Hernando and Pasco boundaries. (Hernando BR 5) Hernando argued that, as a rule of statutory construction terms must be given their plain meaning and specific statutes must prevail over general statutes. Pursuant to the application of these principles of statutory construction, Hernando asserted that Section 367.021(12), F.S., is trumped by the more specific requirement in Section 367.171(7), F.S., which mandates that service must transverse county boundaries as a prerequisite to the Commission obtaining jurisdiction. (Hernando BR 7)

Hernando further argued that Section 367.171(7), F.S., should be read in *para materia* with the other subsections of Section 367.171, F.S., which recognize the rights of counties to self-govern water and sewer utilities within their boundaries. Thus, Hernando asserted that at the time Skyland has pipes in the ground which cross county boundaries, then the Commission will

have jurisdiction to set common rates. Hernando asserted that to find otherwise would render the rights given to the counties pursuant to Section 367.171, F.S., illusory and would reach an absurd result in which utilities merely proposing to provide service at some undefined future point could thereby defeat counties from exercising self-governance over local water and sewer utilities. (Hernando BR 7)

Pasco similarly asserted that Skyland currently provides no services that transverse county boundaries. (Pasco BR 6) Rather, Pasco argued that Skyland merely proposes to provide services that would transverse county boundaries. Pasco argues that Section 367.171(7), F.S., providing for jurisdiction extends only to utility systems whose service transverses county boundaries, not utility systems who propose the provision of services across county boundaries.

Pasco further argued that only one combined parcel (identified as ID 6 and ID 10 on Ex. 43) contains property in Pasco that is contiguous to property in Hernando. Thus, as depicted in the Application, Pasco asserted that for Skyland to provide utility services that transverse county boundaries, such services must be delivered between Parcels ID 10 and ID 6. However, Pasco explained that Skyland has not even made conceptual plans for development on these parcels. Therefore, because Skyland has not presented any evidence that its services transverse county boundaries, Pasco asserted that the Commission lacks jurisdiction in this proceeding. (Pasco BR 6)

Brooksville adopted and supported all arguments and requests for relief raised by Hernando but did not address this Issue in its post-hearing brief.

OPC contended that in Order No. PSC-10-0123A-PCO-WS, the Commission determined that it has jurisdiction over this matter. OPC explained that on May 4, 2010, the Commission's Order on Jurisdiction and Denying Hernando County's Motion to Dismiss was per curium affirmed by the First District Court of Appeals. OPC did not pursue this issue at the hearing.

#### ANALYSIS

As discussed in Issue 1, the relevant statute to determine whether the Commission has jurisdiction over the Utility's Application is Section 367.171(7), F.S. That subsection provides:

Notwithstanding anything in this section to the contrary, the commission shall have exclusive jurisdiction over all utility systems whose service transverses county boundaries, whether the counties involved are jurisdictional or nonjurisdictional . . .

In Section 367.021(12), F.S., the Legislature defines "utility" as "every person, lessee, trustee, or receiver [except those exempted under Section 367.022, F.S.] owning, operating, managing, or controlling a system, or proposing construction of a system, who is providing, or proposes to provide, water or wastewater service to the public for compensation." (emphasis added). Further, Section 367.021(11), F.S., defines a "system" as "facilities and land used or useful in providing service." Based on the plain meaning of the statute using the definitions

provided by the Legislature, staff believes that the Commission has jurisdiction to consider Skyland's Application under Section 367.171(7), F.S.

Moreover, the record in this case establishes that Skyland has proposed facilities and land forming a system which will exist in close geographical proximity across a county boundary. (Skyland BR 6-7, TR 77) Thus, the proposed service will result in its facilities physically crossing the Hernando County and Pasco County border, thereby placing it within our jurisdiction pursuant to Section 367.171(7), F.S. Furthermore, because the proposed system would constitute one system, staff does not believe that the question of functional relatedness is an issue in this matter. Thus, staff agrees with Skyland's assertion that Hernando County does not restrict the Commission's jurisdiction over Skyland's Application.

The Commission addressed this issue in Order No. PSC-00-1265-PCO-WS.<sup>11</sup> In that case, the Commission considered the applications of two utilities that sought original certificates to provide water and wastewater services to a development in Nocatee, Florida. Although no facilities existed at the time of the submission of the applications, the proposed service area would span two adjacent counties. Both applications were protested and several Motions to Dismiss for lack of subject matter jurisdiction were filed. In Order No. PSC-00-1265-PCO-WS, the Commission determined that pursuant to the clear and unambiguous language of Section 367.171(7), F.S., using the definitions provided by the Legislature, it had exclusive jurisdiction over the proposed utility system whose service would transverse county boundaries. Quoting Order No. 22459,<sup>12</sup> the Commission discussed the legislative intent behind Section 367.171(7), F.S. In that order, the Commission stated:

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

The Legislature chose to promote efficient, economic regulation of multi-county systems by giving the Commission exclusive jurisdiction over all utilities whose service crosses county boundaries .... By concentrating exclusive jurisdiction over

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<sup>11</sup> Issued July 11, 2000, in Docket Nos. 990696-WS and 992040-WS, In re: Application for original certificates to operate a water and wastewater utility in Duval and St. Johns Counties by Nocatee Utility Corporation and Application for certificates to operate a water and wastewater utility in Duval and St. Johns Counties by Intercoastal Utilities, Inc.

<sup>12</sup> Order No. 22459, issued January 24, 1990, in Docket No. 891190-WS, In re: Petition of General Development Utilities, Inc. For Declaratory Statement Concerning Regulatory Jurisdiction Over its Water and Wastewater System in DeSoto, Charlotte, and Sarasota Counties, (GDU).



these systems in the Commission, the Legislature has corrected the problem of redundant, wasteful, and potentially inconsistent regulation.

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

#### CONCLUSION

Thus, staff believes that the legislative intent behind Section 367.171(7), F.S., the logical construction of this statute, court and Commission precedent, and the record evidence in this case support the conclusion that the service proposed by Skyland will transverse county boundaries and therefore the Commission has jurisdiction to consider this Application pursuant to Section 367.171(7), F.S.

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

**Recommendation:** No. The preponderance of the evidence does not support an immediate need for service or when, or in what form, any future service would be required in the requested territory for which a Commission certificate would be required. (Chase)

**Position of the Parties**

**Skyland:** Yes, there is an immediate need for potable water and wastewater services throughout the proposed service territory and additional needs are anticipated in the near future.

**Hernando:** No. The request for service in the record is for Skyland to serve one house and one shop/barn owned by Skyland's parent company, Evans Properties. Accordingly, the preponderance of evidence in the record does not support a "need" for service.

**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.

**Brooksville:** Brooksville adopts by reference Hernando County's Post Hearing Statement of the Issues and Positions and Post Hearing Brief of Hernando County, Hernando County Water and Sewer District and Hernando County Utility Regulatory Authority filed or to be filed in the above styled matter, and adopts and supports all arguments and requests for relief stated therein.

**OPC:** OPC has a public interest concern regarding whether there is a current need or when a need for service will be required in the service territories, but at this time the untested record on this issue is not clear in the testimonies and other materials presented by all of the parties.

**Staff Analysis:**

**PARTIES' ARGUMENTS**

In its brief, Skyland asserted that it has established a present, quantifiable need and demand for the services that it proposes to provide; an ongoing investigation and development of other uses of the property for which water and wastewater service will likely be required; and a willingness to work on-site and off-site with state and local government to meet emerging, evolving, and developing demand for water and/or wastewater that are both in the interest of the utility and the public. (Skyland BR 16) Skyland argued that the need for service is manifested in the existing need on the property; the residential densities which allow development on the property; the possibility of increasing those residential densities subject to the approval of the county and the Department of Community Affairs (DCA); and a myriad of other potentialities which range from the cutting edge to the most basic demand any central water utility can fill – the provision of central water to those whose on-site facilities are contaminated. (Skyland BR 9-10)

Skyland argued that its Application is similar to other PSC-approved applications filed by large landowners who formed related party utilities which applied for water and wastewater certificates upon their land. Skyland cited excerpts from two cases to show the commonalities and similarities with this instant case. In the case involving East Central Florida Services, Inc. (ECFS) for a certificate to operate in Brevard, Orange and Osceola Counties, the Commission noted that:

Indeed, it is common for this Commission to grant an original water certificate and approve rates for services for which there is no present, quantifiable need, but which may be in demand at a future time.<sup>13</sup>

Also, the Commission noted in ECFS that:

Clearly, the need for services is not pervasive throughout the territory. This concern, however, is not cause to deny certification. We do not think it is in the public interest at this time to carve up a vast territory, which is allowed by one entity, so as to certificate only scattered portions thereof.<sup>14</sup>

Skyland further argued that in the case of the application of Farmton for a certificate in Volusia and Brevard Counties (Farmton), the Commission noted that:

Farmton is seeking the certificate in part for long-range planning purposes to allow it to be prepared to provide service as and when needed to any residential, commercial, or industrial development in the area.<sup>15</sup>

(Skyland BR 15-16)

Skyland proffered two witnesses, Gerald Hartman and Ronald Edwards, to address need for service. In his direct testimony, witness Hartman explained that Skyland intends to develop the proposed territory in five separate phases and that the need for service includes potable and non-potable water and wastewater services to exempt and non-exempt bulk customers, intensified agribusiness, residential, and general service customers. (TR 76-77) He claimed that the near term need for water and wastewater services are several existing properties, intensified agribusiness and the first phase of development as contained in the Application. According to the Application, Skyland will serve approximately 155 equivalent residential connections (ERCs) in Phase 1 development. (TR 77; EXH 2, Exhibit D)

Witness Hartman elaborated on the need for service in his rebuttal testimony. He stated that Evans properties, in looking for ways to diversify its business interests and take advantage of opportunities as they are presented, determined that creating a utility to provide additional utility

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<sup>13</sup> Order No. PSC-92-0104-FOF-WU, p. 19, issued March 27, 1992, in Docket No. 910114-WU, In re: Application of East Central Florida Services, Inc., for an original certificate in Brevard, Orange and Osceola Counties. (ECFS order)

<sup>14</sup> Id. At 20.

<sup>15</sup> Order No. PSC-04-0980-FOF-WU, p. 7, issued October 8, 2004, in Docket No. 021256-WU, In re: Application for certificate to provide water service in Volusia and Brevard Counties by Farmton Water Resources, LLC. (Farmton order)

services to its property would be the most cost efficient, effective method for utility service delivery. He added that the ability to provide utility service is important to these diversification opportunities for Evans Properties. (TR 579) The witness also testified that, in addition to the requests for service from Evans for the existing structures, Skyland has the opportunity to provide service to future intensified agribusiness and planned development. He opined that an email from the Department of Environmental Protection (DEP) relating to potential water service to approximately 200 contaminated private wells in Hernando County represented a request for service to those areas. (TR 579-580)

In his rebuttal testimony, witness Hartman stated that neither Evans Properties nor Skyland approached either Pasco or Hernando Counties for water or wastewater service to the proposed territory for several reasons. (TR 587, TR 600) He opined that because the service area traverses county boundaries, it would not be possible for either Hernando or Pasco County to provide service. (TR 587, 595, 598) The witness also stated that Evans is not aware of any Hernando County utility services in the vicinity, and that Evans felt that a private utility dedicated to the needs in its service area would be the quickest, most efficient and responsive way to have the needed utility services provided. (TR 587) With regard to possible service from Pasco County, witness Hartman stated that the county does not believe service to the territory would be necessary, cost effective, efficient or good utility practice. Thus, witness Hartman concluded that the existence of Pasco County utility assets within one to three miles of select parcels of the Skyland proposed service area is not relevant. He added that, in the event Pasco decided to serve the proposed area, it could only serve the Pasco County portion since the territory crosses county boundaries. (TR 595, 598)

Skyland proffered witness Ronald Edwards, President and Chief Executive Officer of Evans Properties, and Manager of Skyland, as a rebuttal witness to provide additional information about the intentions of Skyland and Evans with this Application. (TR 811-812) Witness Edwards stated that the citrus groves which are located upon much of the property have a disease, which is incurable and progressive. Because of that, Evans Properties is attempting to position its properties so that they can be utilized for varied purposes into the future. (TR 816) Witness Evans testified that the Application was filed in order to ensure that the current and future needs for water and wastewater service within the Evans Properties will be met. He asserted that, in addition to the need for service identified in the Application, Evans is considering the provision of exempt and non-exempt bulk water, the provision of central services to agricultural workers; the availability of central water to assist the Southwest Florida Water Management District (SWFWMD) as it engages in water supply planning efforts, and the availability of central wastewater treatment as may be required by recent changes in state and federal law. (TR 814-815) Witness Edwards maintained that Skyland and Evans are willing to engage state and local government to explore how water resources might be shared and allocated in a way that reduces water demand, water use, and undesirable discharges to Florida water bodies. (TR 817)

Under cross examination, both witnesses Hartman and Edwards conceded that there are no firm plans for any development in the requested territory except for the existing house and office barn owned by Evans Properties. (TR 616-617, 832) When asked under cross examination, Witness Hartman could not identify in which parcel the existing facilities are

located, or when Skyland plans to provide central wastewater service to these facilities. (TR 96, 619) Under cross examination, witness Edwards revealed that these existing facilities are located in Parcel ID 9, which is not scheduled to be developed until Phase 3 of the development. (TR 852) According to the Application, Phases 2 through 5 have not been conceptually designed at this time, so there is no time frame for Phase 3 development. (EXH 1, Exhibit D) In addition, although the Application indicates that one of the most immediate needs for water and wastewater service is to the first phase of retail use, witness Hartman could not identify any specific parcel in which service to retail customers will be needed. (TR 97; EXH 1, Appendix I) Further, witness Hartman admitted under cross examination that there has been no specific request for service by any of the landowners in Hernando County with contaminated wells. (TR 748-751)

In its brief, Hernando argued that Skyland failed to demonstrate need for service in the area it has proposed for certification. In support of this position, Hernando noted that the only requests for service in the record are to serve a house and a shop/barn, both owned by Evans Properties, Skyland's ultimate parent company. (Hernando BR 10; TR 616-617, 832) In addition, the county maintained that the area proposed for development in Phase 1 can be adequately served by the existing permitting policies for private wells and septic tanks. (EX 16) Hernando also asserted that no one from the public spoke in favor of Skyland's Application during the service portion of the formal hearing, while six persons testified in opposition to the Application. (Hernando BR 10; TR 12-50) Hernando concluded that the absence of any public support clearly goes to the issue of whether there is public "need" for a utility in the area being proposed by Skyland. (Hernando BR 10) Hernando witness Joseph Stapf, the county's Utilities Director, testified that the county has received only isolated inquiries for service in the requested territory over the past several years. (TR 232)

Hernando further argued in its brief that the contaminated wells referred to by Skyland witness Hartman in his rebuttal testimony do not demonstrate need for the Skyland Application. (Hernando BR 11) Hernando witness Stapf testified that the potentially contaminated wells are scattered over an extremely large area in Hernando County and none of these properties are within Skyland's proposed territory. Moreover, he added that when the county looked into providing service to the affected area, there was no public support or demand for service from the residents in the area. (TR 931) Under cross examination, witness Hartman admitted that there is no reference to these wells in Skyland's Application, and there has been no specific request for service by any of the landowners with a contaminated well. (TR 639, 751)

In its brief, Pasco argued that there is no competent, non-speculative, record evidence demonstrating any immediate need for utility services. In support of that statement, Pasco asserted that the most immediate need identified by Skyland (the house and office/barn) will not be served until Phase 3 of the project, and Skyland has offered no projections of when Phase 3 will occur. (Pasco BR 8; TR 852; EXH 2, Appendix VIII) In addition, Pasco asserted that Skyland failed to include in its Application the information required by Rule 25-30.033(1)(e), F.A.C., relating to need for service, and did not seek a waiver of this requirement. (Pasco BR 9) Pasco argued that Skyland failed to "describe the actions that it took to determine if any other utility could serve the purported need." (Pasco BR 8-9) Pasco maintained that 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, Inc. v. Department of Health and Rehabilitative Services, 493 So. 2d 1055 (Fla. 1st DCA 1986). According to Pasco, 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.

Pasco contended that the testimony is undisputed that Skyland never approached either Pasco or Hernando County to determine if either county could provide service. (Pasco BR 9; EXH 15, p. 00117; TR 232, 335) Further, Pasco argued that Pasco Witness Kennedy and Hernando Witness Staph both testified that the counties could serve the areas sought to be certificated, and could do so at a substantially lower cost to consumers. (Pasco BR 9; TR 972-73, 930, 129-130)

OPC questioned whether a true need for central services exists beyond the obviously superficial, strawman request from Skyland's affiliate for service at the house and office/barn located in Pasco County that clearly were built with a belief that well and septic service was sufficient for the needs of the occupant. (OPC BR 7 and 19; EXH 15, p. 41; EXH 42) OPC also noted that service to these structures is not slated for development until Phase 3. (OPC BR 19; TR 852) Further, OPC asserted that the overall Application is vague on details and does not represent a concrete comprehensive commitment to provide service in defined developments. (OPC BR 2)

In addition, OPC argued that the ECFS and Farmton cases cited by Skyland do not support certification of all eight non-contiguous raw land parcels dispersed across Pasco and Hernando Counties. (OPC BR 9-10; EXH 42) Under cross examination by OPC, witness Hartman admitted that the vast bulk of the certificated territory of both ECFS and Farmton are large monolithic parcels of land, whereas the Skyland territory is a number of non-contiguous parcels. (TR 659-660) Witness Hartman also testified that while the Skyland territory totals less than 5,000 acres, the Farmton territory is approximately 50,000 acres and the ECFS certificated territory is approximately 40,000 acres. (TR 651, 659-660; EXH 43) OPC expressed concern that this lack of contiguity could create a slippery slope with no clear line of demarcation as to widely flung parcels under common ownership at the time of certification. (OPC BR 10)

#### ANALYSIS

Section 367.045(1)(b), F.S., requires an examination of the need for service in the requested area, and Rule 25-30.033(1)(e), F.A.C., requires an applicant for original certificate to provide a statement showing the need for service in the proposed area. The record shows that the territory requested by Skyland consists of eight non-contiguous parcels of raw land dispersed over Pasco and Hernando Counties. (TR 659-660; EXH 42; EXH 43) Skyland is proposing to develop the territory in five separate phases, with Phase 1 occurring over a six year period. Future phases will begin sometime after the completion of Phase 1, although no timeline for development of any of the additional phases has been established. (TR76; EXH 2, Exhibit D) The total number of projected ERCs in all five phases is 624 ERCs, broken down by phase as follows:

|         |          |
|---------|----------|
| Phase 1 | 155 ERCs |
| Phase 2 | 255 ERCs |
| Phase 3 | 69 ERCs  |
| Phase 4 | 110 ERCs |
| Phase 5 | 35 ERCs  |

Staff agrees with the arguments of Pasco, Hernando and OPC that Skyland did little to demonstrate real and immediate need for service within this requested territory. As noted above by all intervening parties, witness Edwards, the Manager of Skyland, testified that he thought the existing house and barn/shop that are purported to need water and wastewater service are located in Parcel ID 9, a parcel that is not scheduled for development until Phase 3, for which there is no existing timeline. However, staff notes that the cost study filed as part of the Application contains two conflicting references to the parcel that contains the existing house and barn/shop. The description of Phase 1 on the first page of the cost study indicates that these structures are in Parcel ID 3, while the maps attached to the cost study appear to show the existing structures in Parcel ID 4. (EXH 2, Appendix VIII) If either of these two references are correct, service to the existing structures would be part of Phase 1. However, regardless of where in the proposed territory they are located, the existing facilities are currently served by wells and septic tanks, and there are no known problems with the existing service. (TR 150, 971) Therefore, based on record evidence, staff does not consider service to the existing structures an immediate need for service as alleged by Skyland.

#### Phase 1 Development

The Application is vague on any concrete plans for service in Phase 1, with the possible exception of the existing structures as noted above. Skyland proposes to provide service in Phase 1 to four disjointed parcels, ID 1 through ID 4, over a six year period beginning “as soon as immediately possible after certification and rate approval by the Commission”. (TR 616-617, 832; EXH 2, Exhibit D; EXH 42) The Application indicates that Phase 1 service will be consistent with the allowed densities for both counties, which are one dwelling unit per 10 acres for Parcels ID 1 and ID 3, one dwelling unit per five acres for Parcel ID 2, and one dwelling unit per four acres in Parcel ID 4. (EXH 2, Exhibit C; EXH 42)

Skyland offered no specific plan for development under the allowed densities in Phase 1, although it projects a total of 155 water and 153 wastewater ERCs at buildout of Phase 1. (EXH 2, Exhibit D) According to the Application, Skyland plans to provide water service in Phase 1 utilizing four existing wells with some improvements. Wastewater service will be provided to the existing structures via the existing on-site septic tanks. Parcel ID 1 will be serviced by a 7,500 gallon septic tank. Wastewater service to Parcel ID 2 will utilize a 10,000 gallons per day (gpd) pre-engineered wastewater treatment plant. Parcel ID 3 will be serviced by a 22,500 gpd pre-engineered wastewater treatment plant, and Parcel ID 4 will be serviced by a 5,000 gallon septic tank. (EXH 2, Appendix VIII)

Both Pasco and Hernando Counties stated that all of the parcels contained in Phase 1 can be adequately served by private wells and septic tanks under the current land use and zoning

requirements in the area. (EXH 16; EXH 22). In fact, as discussed further in Issues 3 and 4, the comprehensive plans of both counties encourage service by private wells and septic tanks in the proposed territory rather than through a central utility system since the area is designated as rural land use.

The record evidence indicates that development could occur in these parcels in Phase 1 through clustering, which would be consistent with the currently allowed densities. Clustering is a method of development that retains the same overall density within a parcel but groups the development in a portion of the property. (TR 204, 306-307, 438, 447) However, the record also indicates that such a designation would be subject to a strict evaluation process. (TR 204, 307, 439) Further, Hernando witness Ronald Pianta, the county's Planning Director, added that a cluster development would not necessarily require centralized services. (TR 325) There is nothing in the record to indicate that Skyland has formed a plan for a cluster development, nor requested approval of same.

The record also indicates that Skyland could provide service within Parcel ID 4 in Pasco County, which is part of Phase 1, to an employment center, which is an area in which the county wants to concentrate intense residential and commercial utilization. (TR 427, 443-444) However, Pasco witness Richard Gehring, the county's Planning and Growth Management Administrator, testified that an employment center development would be subject to a site plan, a ratio development and a demonstration that there is employment to support the projected number of units. (TR 444) Skyland did not provide any details as to how it would respond to any of these requirements, or offer any timeline for service to an employment center. Further, staff notes that Skyland proposes to provide wastewater service to Parcel ID 4 via a 5,000 gallon septic tank. (EXH 2, Appendix VIII) Staff questions whether this would be adequate to serve an employment center, which would include intense residential and commercial concentration.

Based on the above discussion, staff believes that Skyland failed to provide a showing of any immediate need for the provision of central water and wastewater service in Phase 1. Indeed, it appears that, absent approval of a cluster development or an employment center, service can be provided in Phase 1 through private wells and septic tanks, which would not require Commission certification.

#### Future Development

Skyland provided a host of possibilities for potential service throughout its proposed territory at some indeterminate time in the future. The applicant provided only vague descriptions of the type of service that could be needed, and no indication of when the service would be needed or even whether it would be subject to Commission jurisdiction. Witness Edwards testified that Evans proposes to utilize Skyland's services for a variety of ventures, such as exempt and non-exempt bulk water, the possibility of providing central water and wastewater services to agricultural workers upon Evans' property, the availability of central water to assist the SWFWMD as it engages in water supply planning efforts, and the availability of central wastewater treatment as may be required by recent changes in state and federal law. (TR 814-815)



Witness Edwards explains that Evans wants to preserve its options with regard to use of its property, and many of the things it is looking at would require additional processing or storage. Evans is looking at changing the types of crops grown on the land, and leasing portions of the land for farming and other processes, such as biofuel processing. Witness Edwards maintains that where continued farming is not viable, Evans is considering development consistent with the comprehensive plans. (TR 807-809) In response to questions regarding Evans' plans to investigate other agribusiness opportunities, such as castor, algae, and sugarcane, witness Edwards agreed that it may not be necessary to create a utility to serve those businesses. He added that Evans anticipates that these types of businesses may require additional processing, packaging, or even housing for workers that could make it necessary to form a utility to provide the service. (TR 893-895) When asked to give examples of the types of exempt and non-exempt bulk service, witness Edwards stated that bulk water sales to another utility would potentially be exempt, although sales to some other potential user, such as a large industrial plant, may invoke PSC regulation. However, witness Edwards stated that Evans has discussed the possibility of bulk sales only with Hernando County. (TR 833, 841) Based on the uncertainty and vagueness of Skyland's plans for utility service in the proposed territory, staff believes that certification may be premature at this time.

In addition, the record clearly shows that neither Skyland nor Evans approached either Hernando or Pasco County for service to the area. (TR 232, 335, 587, 600) Both counties stated that they could serve in the areas sought to be certificated if requested and appropriate. (TR 972-973, 930) Moreover, in response to Skyland's witness Hartman's assertion to the contrary, Hernando witness Stapf testified that it is possible for either Hernando or Pasco County to provide central water or wastewater service in the other county by entering into an interlocal agreement to that effect. (TR 934) Therefore, it is uncertain whether Skyland would have to create a new utility in order to obtain the central water and wastewater service it claims is needed on its properties.

#### Farmton and ECFS Cases

Staff agrees with Skyland's assertion that the Commission has granted original certificates in the past for which there is no present, quantifiable need, but for which there may be demand at a future time. We also agree that the need for service does not need to be pervasive throughout the territory. As noted by Skyland, Farmton and ECFS are two such cases. In each of those cases, a single landowner requested certification of a very large monolithic service area. In both cases, initial need for service was demonstrated in portions of the territory but not the entire proposed service area. Also, in both cases, the Commission expressed concern that need throughout the proposed territory was not established. However, it found that granting the entire territory was in the public interest so as to avoid carving up a vast territory which is all owned by a single entity.<sup>16</sup>

Staff believes that the need for service demonstrated in Farmton and ECFS are not reflected in this proceeding. For example, in Farmton the utility had three existing retail service customers and there had been a customer request for service from an unaffiliated corporation to

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<sup>16</sup> ECFS Order, p. 19-20; Farmton Order, p. 10.

serve 100 units.<sup>17</sup> In the instant case, the only purported need for service are two affiliated facilities currently being served by functioning wells and septic tanks. (EXH 2) In addition, as pointed out by OPC, while Farmton and ECFS involved very large monolithic service areas, Skyland's proposed territory is much smaller and dispersed over eight non-contiguous parcels. This difference in size and the checkerboard configuration of the proposed territory is significant to staff's analysis. As noted above, even in the ECFS and Farmton cases, the Commission was concerned that the need for service was not pervasive throughout the territory. Nonetheless, the entire requested territory was granted in order to avoid carving up a vast territory. In this case, there is significant amounts of raw land separating the various parcels of the requested territory. For instance, in Phase 1 alone, Skyland proposes to serve four disjointed parcels, ID 1 through ID 4. (EXH 42) The distance from Parcel ID 3 to the other three parcels in Phase 1 is approximately four and a half miles. (TR 97) This obviously is far from one large contiguous property. Indeed, to the contrary, Skyland's proposed territory, in essence, carves up portions of Pasco and Hernando County.

Staff also agrees with OPC that the Commission should be cautious about granting territories consisting of multiple, non-contiguous properties simply because they have common ownership and a single request for service from an affiliated company. (OPC BR 10 and 16) Staff believes that because of the checkerboard layout of the proposed territory, Skyland should have demonstrated a reasonable level of demand or potential need throughout its proposed territory that would support the need for a single utility providing central water and wastewater service to these dispersed parcels. Instead, Skyland provided a proposal that does not show any immediate need for central service, lacks detail, is void of any concrete plan for service in defined developments or even defined forms of service, and fails to show that whatever central water and wastewater service may be needed in the future cannot be provided by existing utilities operating in the area.

Compliance with Rule 25-30.033(1)(e), F.A.C

Staff does not agree with Pasco's assertion that Skyland failed to include in its Application the information required by Rule 25-30.033(1)(e), F.A.C., regarding need for service. The rule requires each applicant for an original certificate to provide:

- (e) A statement showing the financial and technical ability of the applicant to provide service, and 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)

As part of Exhibit A to its Application, Skyland stated:

There is currently no central potable water or wastewater service in the service territory described in this application. No other utilities are within the area proposed to be served, and none are capable of providing the necessary level of service in the area. Since Skyland's affiliate currently owns all of the land within

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<sup>17</sup> Farmton Order, p. 8.

the proposed service area, they will be in the best position to provide water and wastewater service in the most efficient and cost effective manner.

(EXH 2, Exhibit A)

Staff believes that the information filed by Skyland in Exhibit A to its Application satisfies the requirement of the rule. As noted above, the rule simply requires the applicant to identify any other utilities *within the area proposed to be served* and the steps the applicant took to ascertain whether such service could be provided. Skyland correctly noted that there are no utilities providing service within the proposed service area. While staff believes this statement satisfies the basic requirement of the rule, staff agrees with Pasco that it would have been reasonable for Skyland to have inquired whether Pasco or Hernando Counties could provide service to the area. This lack of inquiry is a factor in determining whether Skyland has adequately demonstrated a need for service.

#### CONCLUSION

Based on the above discussion, staff believes that Skyland did not demonstrate any immediate need for service or when, or in what form, any future central water or wastewater service would be required in the requested territory. Therefore, staff recommends that the record does not support a need for service for which a Commission certificate would be required.

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

**Recommendation:** Yes. Skyland's application appears to be inconsistent with the Hernando County Comprehensive Plan. However, in light of the evidence presented in this case, that inconsistency should not cause the Commission to deny the Application. (Chase)

**Position of the Parties**

**Skyland:** No, certification in the area applied for in its application is consistent with the comprehensive plan of Hernando County. If the Commission finds such an inconsistency exists under these facts and circumstances, it should grant the certificate to Skyland notwithstanding.

**Hernando:** Yes. The preponderance of the competent substantial record evidence is that locating a water and wastewater utility in the area that Skyland is seeking to serve in Hernando County would violate 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.

**Brooksville:** Brooksville adopts by reference Hernando County's Post Hearing Statement of the Issues and Positions and Post Hearing Brief of Hernando County, Hernando County Water and Sewer District and Hernando County Utility Regulatory Authority filed or to be filed in the above styled matter, and adopts and supports all arguments and requests for relief stated therein.

**OPC:** No position.

**Staff Analysis:**

**PARTIES' ARGUMENTS**

In its brief, Skyland addressed Issues 3 and 4, which involve the comprehensive plans of Hernando and Pasco counties together. Skyland contended that its Application is consistent with the comprehensive plans of Hernando and Pasco Counties. (Skyland BR 17; TR 761, 768-769, 772) Skyland asserted that the concerns of the planners of both counties are unsupported and based upon a speculative future in which a pattern of undesirable growth will somehow be realized by the granting of Skyland's Application, despite the fact that the issuance of a certificate will not erode or modify the authority of those local jurisdictions to control such growth. (Skyland BR 18) Further, Skyland argued that, to the extent an inconsistency exists, the Commission should elect to exercise its discretion expressly granted it by the Legislature such that it is not bound by any such inconsistency. Skyland maintained that the Commission should decline to adopt a policy that would effectively add it to the labyrinth of growth management regulations which already exist. Skyland argued that undesirable growth could occur on the lands it seeks to certificate only if local officials allow it, even in the absence of Skyland's certification. (Skyland BR 17) Skyland proffered the testimony of two rebuttal witnesses, Gerald Hartman and Daniel DeLisi, to support its position that the application for certificates is consistent with the Hernando County Comprehensive Plan.

Hernando proffered witness Ronald Pianta, the county's Planning Director, to support its position that locating a water and wastewater utility in the area Skyland seeks to serve would be inconsistent with the Hernando County Comprehensive Plan. Witness Pianta testified that the service area requested by Skyland in Hernando County is approximately 791 acres in the eastern portion of the county designated as rural by the county's comprehensive plan. (TR 289) He asserted that the purpose of the rural designation is to allow the continuation of agricultural pursuits and retain the rural nature of those portions of the county. The witness contended that the comprehensive plan requires that infrastructure in the rural area be consistent with the level of development allowed. (TR 290) He opined that Skyland's proposal would violate the intent of the comprehensive plan to direct future development to urban areas, discourage urban sprawl<sup>18</sup> as an unwanted and inefficient land use, and protect the character of rural areas from incompatible development trends. (TR 290) Witness Pianta asserted that a development that promotes urban sprawl, such as the proposal by Skyland, negatively impacts the character of the area and lifestyle of existing residents. Further, he argued that scattered development patterns create a demand for public services to support these populations, and the provision of these public services tends to be inefficient and costly. (TR 293) Finally, witness Pianta stated that the comprehensive plan provides that the county shall be the sole franchiser of central water and wastewater service except for areas served by cities. (TR 297, 301)

Under cross examination, witness Pianta conceded that the opinions he rendered in his testimony are not unique to Skyland, and he would object to any private utility that was seeking to locate in the requested territory, even if the proposed service was consistent with the allowed densities in the comprehensive plan. (TR 301) However, he explained that it was not just the fact that it was a private utility that would violate the comprehensive plan. He argued that since the development would occur in a rural area, it would be inconsistent with other provisions of the plan, which are designed to direct growth to urban areas designated to receive growth. He maintained that public facilities such as central water and wastewater services, are supposed to be provided only in areas designated for growth and adjacent to areas designated for growth. (TR 303-304, 308-311)

Witness Pianta admitted under cross examination that he could not identify a single instance in Florida where the certification of a private utility by the PSC has led to urban sprawl. (TR 311-312) He agreed that there are a variety of regulatory tools available to the county to control growth, such as zoning, land use processes, future land use maps, and permits. He further agreed that the county retains all of these tools to regulate growth regardless of whether Skyland is granted a certificate by the Commission. In fact, he admitted under cross examination that the kind of growth about which he expressed concern in his testimony that could lead to urban sprawl could only occur if the county were to approve such development on that land. (TR 313-317)

As mentioned previously, Skyland responded to Hernando County's arguments on this issue through the rebuttal testimony of its witnesses Hartman and DeLisi. In his rebuttal

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<sup>18</sup> Witness Pianta describes urban sprawl as characterized by leap-frog development not contiguous to existing urban development, linear development that expands along a major roadway beyond the existing limits of developed and planned infrastructure, single dimensional in nature, lacking the necessary facilities and services, and inhibiting infill development and redevelopment of existing developed areas. (TR 292-293)

testimony, Skyland witness Hartman argued that there is no causal relationship between Commission certification and urban sprawl, and he, in fact, is not aware of any Commission certification that led to urban sprawl. (TR 570) He asserted that, regardless of whether a utility is granted a Commission certificate, growth management tools are firmly in the hands of the county, and any changes in land use would still have to be approved at the county level. (TR 604) Witness Hartman cited to two prior certification cases in which the Commission maintained that a local government's control over development is not reduced with the issuance of a certificate.<sup>19</sup> (TR 605) In his rebuttal testimony, witness Hartman quoted the final order issued in one of these cases, as follows:

The evidence presented clearly shows that a county's control over development is not reduced with the issuance of a certificate. The counties' hands are not tied when it comes to enforcement of their own comprehensive plans if and when rezoning is needed. Our certification does not deprive the counties of any authority they have to control urban sprawl on the Farnton properties.<sup>20</sup>

(TR 578)

Witness Hartman opined that the Skyland application does not propose a level of service that violates the Hernando County comprehensive plan. (TR 584) He added that, even if it were inconsistent with the plan, the PSC is not bound by local comprehensive plans. The witness cites to the case titled City of Oviedo v. Clark, 699 So. 2d 316, 318 (Fla. 1st DCA 1997) in which the court found:

We hold that the PSC correctly applied the requirements of section 367.045(5)(b). The plain language of the statute only requires the PSC to consider the comprehensive plan. The PSC is expressly granted discretion in the decision of whether to defer to the plan.

(TR 586)

Skyland also proffered witness Daniel DeLisi, a professional land use planner, to present rebuttal testimony on the subject of comprehensive planning. Witness DeLisi asserted that the Skyland application does not undermine any of Hernando County's stated goals, objectives or policies contained within its comprehensive plan. (TR 774) He disagreed with Hernando witness Pianta's assertion that the comprehensive plan does not allow utility service in the area of the county designated as rural. He argued that the comprehensive plan provides only that Hernando County will not provide utilities and other infrastructure to support urban development in the rural land use category, and does not preclude a private utility, such as Skyland, from providing those same services. The witness maintained that such policies within comprehensive plans are likely designed to prioritize urban areas for the provision of public utilities in order to maximize

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<sup>19</sup> Order No. PSC-04-0980-FOF-WU, issued October 8, 2004, in Docket No. 021256-WU, In re: Application for certificate to provide water service in Volusia and Brevard Counties by Farnton Water resources LLC. (Final Order Granting Certificate No. 622-W), and Order No. PSC-92-0104-FOF-WU, issued March 27, 1992, in Docket No. 910114-WU, In re: Application of East Central Florida Services, Inc., for an original certificate in Brevard, Orange and Osceola Counties. (Final Order Granting Certificate No. 537-W).

<sup>20</sup> Order No. PSC-04-0980-FOF-WU, Final Order Granting Certificate to Farnton Water Resources, LLC., p. 16

the limited resources of public agencies. (TR 769-771) Witness DeLisi asserted that the only thing Skyland requests is the designation of a utility certificated area in a location where the county's comprehensive plan precludes the county itself from providing service. (TR 778)

Witness DeLisi also disagreed with witness Pianta's assertion that the provision of utilities in the requested territory will create pressure for new development to occur. He stated that, in his experience, utilities will create development pressure only if all other services are in place or otherwise planned for, and there is a market for that development. He added that if urban development is proposed in a rural area, the applicant for the change must show how infrastructure would be planned for and financially feasible, in addition to demonstrating need, land use form and satisfying the myriad of other local and state requirements. The existence of a utility, much less a Commission certificate, changes none of this. (TR 773-774)

Witness DeLisi disagreed with witness Pianta's assertion that the certification of Skyland alone would promote urban sprawl, arguing that urban sprawl relates to development patterns, not the location of certificated utility areas. He added that in order for either the certification or construction of a utility to promote urban sprawl, the county and state governments would first have to permit urban sprawl to occur under the county's comprehensive plan. The witness testified that he is not aware of any similar cases where the certification of a utility area in a rural area has led to a sprawling land use pattern. (TR 766-777, 781)

Hernando County proffered the surrebuttal testimony of witness Pianta to respond to the testimony of Skyland's rebuttal witnesses regarding the county's comprehensive plan. Witness Pianta disagreed with witness DeLisi's assertion that the policy in the comprehensive plan which does not allow utility services in rural areas applies only to county-owned facilities and not to a private utility. Witness Pianta testified that it is a "novel argument at best" to imply that private service providers do not have to comply with the comprehensive plan. He maintained that when reviewed in context with other policies, goals and objectives in the plan, it is clearly the county's intention to require that development occur in a coordinated and orderly fashion. (TR 960) In his surrebuttal testimony, witness Pianta also reiterated his positions that the introduction of centralized water and wastewater utilities into a rural area encourages development that is not compatible with existing land uses. He noted that according to witness Hartman's rebuttal testimony, Skyland requests to provide service for some undefined future development and expresses a desire to consider providing service for some 200 contaminated wells south of Brooksville and outside of the proposed service area. Witness Pianta concluded that this statement clearly shows that the granting of the PSC certificate would enable unforeseen development and service opportunities that are not consistent with the stated intent of the comprehensive plan. (TR 961)

Staff proffered Daniel Evans, a planner with the Department of Community Affairs (DCA) to provide the position of DCA with respect to whether the Skyland application is consistent with the Hernando County Comprehensive Plan. According to witness Evans, the DCA's position is that the application is inconsistent with the objectives and policies of 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 water services within the county. (TR 179) Witness Evans also testified that the DCA has not received a request to amend the existing comprehensive plan for the area in Hernando County proposed to be served by Skyland. (TR 180)

Under cross examination, witness Evans admitted that he is not aware of any Commission case in which the DCA expressed a concern that the application could promote urban sprawl, and urban sprawl actually occurred within the certificated territory. (TR 191, 197) He also admitted that the local governments have a measure of control over growth in rural areas through land development regulations that are retained after the issuance of a Commission certificate. (TR 197) The witness stated, however, that there is a fairly well-defined correlation between the provision of infrastructure and land use development and intensity. He maintained that if utility services are available, the argument for making a case against urban sprawl is significantly reduced. (TR 195, 197-198)

Witness Evans agreed under cross examination that Skyland could develop the properties it seeks to certificate in Hernando County under the current comprehensive plan through clustering, which is a method of development that retains the same overall density within a parcel but clusters the development in a portion of the parcel. He stated that Skyland would have to specify how it would be accomplished, and added that he has not seen any such plan. (TR 204)

In its brief, Pasco argued that because Hernando County and the 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 that of witness DeLisi, a witness paid by the applicant. (Pasco BR 11)

#### ANALYSIS

Section 367.045(4), F.S., provides that, notwithstanding the ability to object on any other ground, a county or municipality has standing to object on the ground that the issuance of a certificate violates established local comprehensive plans developed pursuant to Chapter 163, F.S. Section 367.045(5)(b), F.S., provides that, if such an objection has been timely made, the Commission shall consider, but is not bound by, the local comprehensive plan of the county or municipality.

The record evidence indicates that Hernando County's arguments that the Skyland proposal is inconsistent with its comprehensive plan center on two main concerns: (1) the creation of a central water and wastewater utility in this rural area of the county could result in or encourage urban sprawl; and (2) except for municipal governments, the county shall be the sole franchiser of central water and wastewater service within Hernando County.

With regard to the concern related to urban sprawl, witnesses Pianta contended that policies exist in the comprehensive plan which are designed to direct future development to urban areas, thus discouraging urban sprawl as an unwanted and inefficient land use, and protecting the character of rural areas from incompatible development trends. (TR 290) He also testified that public facilities, such as central water and wastewater services, are supposed to be provided only in areas designated for growth and not in the rural area. (TR 303-304) The witness opined that the existence of a central utility system in this rural area could undermine the



stated goals of the county as they relate to future development patterns. (TR 292) Staff witness Evans concurred with the concerns expressed by witness Pianta. (TR 179-180)

Staff believes the record evidence indicates that Skyland's application appears to be inconsistent with the policies described by witness Pianta. However, the record also indicates that every growth management tool which is available to local government to control unwanted growth would remain in place even if Skyland's application is granted. Witnesses Pianta admitted that such regulatory tools as zoning, land use processes, future land use maps and permits are available to local government and would remain in place if the certification is granted. (TR 312-313) Further, neither witness Pianta nor witness Evans could identify one specific instance where granting a PSC certificate has led to urban sprawl. (TR 311-312, 191-192) Staff believes that the evidence presented clearly shows that a county's control over development is not reduced with the issuance of a certificate. Therefore, while Skyland's application is inconsistent with the comprehensive plan in this regard, staff does not believe that this inconsistency should be cause for the Commission to deny Skyland's application.

In addition, Skyland's application is clearly inconsistent with the requirement in the comprehensive plan that, except for municipal governments, the county shall be the sole franchiser of central water and wastewater service within Hernando County. Staff maintains that this attempt to control utility service area through the comprehensive plan contradicts the statutory scheme regarding the Commission's responsibilities and jurisdiction over privately owned water and wastewater utilities as set forth in Chapter 367, F.S. In the East Central Florida case, the Commission said:

Section 367.011(1), Florida Statutes, states that this Commission has exclusive jurisdiction over each utility with respect to its authority, service, and rates. Section 367.011(4), Florida Statutes, states that Chapter 367 supersedes all other laws on the same subject and that subsequent inconsistent laws shall supersede Chapter 367, Florida Statutes, only to the extent they do so by express reference. Chapter 163 does not make express reference to Chapter 367. Section 163.3211, Florida Statutes, specifically states, "Nothing in this act is intended to withdraw or diminish any legal powers or responsibilities of state agencies or change any requirement of existing law that local regulations comply with state standards or rules."<sup>21</sup>

Therefore, while the Skyland application is inconsistent with the comprehensive plan in this regard, staff does not believe this inconsistency should be cause for the Commission to deny Skyland's application.

### CONCLUSION

Skyland's application appears to be inconsistent with certain provisions in the Hernando County Comprehensive Plan. Hernando maintained that a central utility system is supposed to be provided only in areas designated for growth and not in the rural area, in order to discourage

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<sup>21</sup> Order No. PSC-92-0104-FOF-WU, Final Order Granting Certificate No. 537-W to East Central Florida Services, Inc., and Establishing Initial Rates and Charges, p. 24

urban sprawl. However, the development proposed by Skyland is consistent with the densities allowed in the comprehensive plan for areas designated as Rural Land Use. Staff believes that a county's control over development is not reduced with the issuance of a certificate. Hernando also maintained that the creation of a private utility in Hernando County is inconsistent with the requirement in the comprehensive plan that the county shall be the sole franchiser of central water and wastewater service within its boundaries. Staff believes this requirement contradicts the statutory scheme regarding the Commission's jurisdiction over privately owned water and wastewater utilities as set forth in Chapter 367, F.S.

In light of the evidence presented in this case, staff recommends that neither area of inconsistency with Hernando's comprehensive plan should be cause for the Commission to deny Skyland's application. This recommendation is in accordance with Section 367.045(5)(b), F.S., that provides that the Commission shall consider, but is not bound by, a local government's comprehensive plan, and the City of Oviedo v. Clark, 699 So. 2d 316, 318 (Fla. 1st DCA 1997), wherein the court held that the PSC was expressly granted discretion on the decision of whether to defer to a local government's comprehensive plan.

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

**Recommendation:** Yes. Skyland's application appears to be inconsistent with a number of provisions in the Pasco County Comprehensive Plan, most notably that which prohibits central water and wastewater services in the Northeast Pasco Rural Area, except under very limited circumstances. (Chase)

**Position of the Parties**

**Skyland:** No, certification of Skyland in the area applied for in its application is consistent with the comprehensive plan of Pasco County. If the Commission finds such an inconsistency exists under these facts and circumstances, it should grant the certificate to Skyland notwithstanding.

**Hernando:** Yes. The preponderance of the competent substantial record evidence is that locating a water and wastewater utility in the area that Skyland is seeking to serve in Pasco County would violate 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.

**Brooksville:** Brooksville adopts by reference Hernando County's Post Hearing Statement of the Issues and Positions and Post Hearing Brief of Hernando County, Hernando County Water and Sewer District and Hernando County Utility Regulatory Authority filed or to be filed in the above styled matter, and adopts and supports all arguments and requests for relief stated therein.

**OPC:** No position.

**Staff Analysis:**

**PARTIES' ARGUMENTS**

As mentioned in the previous issue, Skyland briefed Issues 3 and 4, which address the comprehensive plans of Hernando and Pasco counties together. Skyland contended that its Application is consistent with the comprehensive plans of Hernando and Pasco Counties. (Skyland BR 17, TR, 761, 768-769, 772) Skyland asserted that the concerns of the planners of both counties are unsupported and based upon a speculative future in which a pattern of undesirable growth will somehow be realized by the granting of Skyland's application, despite the fact that the issuance of a certificate will not erode or modify the authority of those local jurisdictions to control such growth to the extent allowed by law. (Skyland BR 18) Further, Skyland argued that, to the extent an inconsistency exists, the Commission should elect to exercise its discretion expressly granted it by the Legislature such that it is not bound by any such inconsistency. Skyland maintained that the Commission should decline to adopt a policy that would effectively add it to the labyrinth of growth management regulations which already exist. Skyland argued that undesirable growth could occur on the lands it seeks to certificate only if local officials allow it. (Skyland BR 17) Skyland proffered the testimony of two rebuttal witnesses, Gerald Hartman and Daniel DeLisi, to support its positions.

In its brief, Pasco County argued that the greater weight of evidence demonstrates that Skyland's Application is inconsistent with its comprehensive plan. One of the main concerns expressed by Pasco is that granting Skyland the ability to provide central water and wastewater service to the proposed territory will lead to urban sprawl. (Pasco BR 13) Pasco proffered witness Richard Gehring, who is the county's Planning and Growth Management Administrator, to support its position. Witness Gehring testified that Skyland's application violates certain policies within the Pasco County Comprehensive Plan which prohibit the expansion of central water and wastewater service into areas designated as agricultural (AG) or agricultural/rural (AG/R), such as the proposed service area, and encourage the purchase of private utilities by publicly operated utilities, not the creation of new private utilities. Further, witness Gehring testified that the Application is contrary to the county's policy to replace package plants with regional wastewater treatment plants. (TR 420) Also, under cross examination, witness Gehring opined that the mere certification of a private utility, like Skyland, would be inconsistent with the comprehensive plan. (TR 456)

Witness Gehring testified that all of Skyland's proposed service area in Pasco County is located in the Northeast Pasco Rural Area, within which future land use is designated as AG or AG/R. (TR 419) In his testimony, the witness explained that Pasco County has adopted four specific areas (including the Northeast Pasco Rural Area) for the protection and enhancement of rural living conditions and the preservation of agricultural activities. The comprehensive plan requires that water and wastewater service within these areas shall be provided by individual well and septic tanks. The plan allows for the construction of central public and private water and/or wastewater systems within this area only under the following very limited circumstances:

- (1) the development is conservation subdivision;
- (2) the development form is a Master Planned United Development (MPUD);
- (3) it is clearly and convincingly demonstrated that a health problem exists in a built, but unserved, area for which there is no other feasible solution;
- (4) it is part of the implementation strategies for the redevelopment plan for the Trilby, Lacoochee, and Trilacoochee areas; or
- (5) it is within the I-75/US 41 interchange mixed use/employment center designated properties.

(TR 419-420, 425-426)

Witness Gehring asserted that only one parcel of the proposed Skyland territory (Parcel ID 4) appears to meet any of these criteria, since it includes an area designated as an employment center.<sup>22</sup> (TR 427, 443) Under cross examination, he agreed that it would be possible to develop

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<sup>22</sup> Witness Gehring describes the employment center as an area where the county wants to concentrate intense residential and commercial utilization. (TR 444)

1,800 units in Parcel ID 4 without the need for a comprehensive plan amendment. However, the witness explained that such development would be subject to a site plan, a ratio development and a demonstration that there is employment to relate to this number of units. (TR 444)

Also under cross examination, witness Gehring admitted that Skyland could provide central water and wastewater service in the Northeast Pasco Rural Area if the development form is a conservation subdivision, which in essence is a clustered subdivision. (TR 438, 447) He maintained, however, that such a designation would be subject to an evaluation process, and he could not opine on the chance for approval. Witness Gehring stated that the county has approved only one conservation subdivision, with a second application pending. (TR 439, 448) He added that the county has designated different intensities within the entire rural market area, and the Northeast Pasco Rural Area is the largest and most restrictive area within the rural market. He maintained that this area would be the most difficult area in which to get flexibility in land use options. (TR 473-475)

In his testimony, witness Gehring opined that granting Skyland's application for certificates would promote urban sprawl by encouraging new development and growth to occur prematurely in an area that is presently rural and largely undeveloped and without proper planning and infrastructure in place. He asserted that the presence of centralized water and wastewater service would encourage other development to occur in a leap frog and unplanned manner. Witness Gehring maintained that leap-frog development is inefficient and requires on-going expenditures for both capital and operations for the myriad of services provided for the public, which would be an on-going burden to the taxpayers of Pasco County. The witness explained that Pasco County has changed its direction and planning from 2002 to 2007 in order to focus development in concentrated areas rather than throughout the county in an effort to limit urban sprawl. (TR 423, 427, 432-433) He argued that the "checkerboard"<sup>23</sup> effect of the Skyland proposal is proof of an inefficient development pattern that would produce sprawl and hinder the implementation of the comprehensive plan. (TR 434)

Witness Gehring admitted under cross examination that if a certificate is granted to Skyland, development that is not otherwise allowed by the comprehensive plan could not occur without the approval of county government. (TR 458) He agreed that there are a number of processes that any applicant for changes to the comprehensive plan would have to complete in order to obtain approval of an amendment. (TR 481) He maintained, however, that utility availability is a very strategic issue in whether property can be developed. It could be used to show a change of conditions that support development that might not otherwise be possible, thus opening the door for the rural area to lose its rural character. (TR 459, 482) However, under cross examination, witness Gehring could not offer any specific instance in which the mere granting of a PSC certificate has led to urban sprawl. (TR 462-471)

As mentioned previously, Skyland responded to Pasco County's arguments on this issue through the rebuttal testimony of its witnesses Hartman and DeLisi. In his rebuttal testimony, witness Hartman argued that there is no causal relationship between Commission certification and urban sprawl. In fact, the witness testified that he is not aware of any Commission

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<sup>23</sup> Witness Gehring describes "checkerboard" as a pattern of properties dispersed over a large area separated by multiple sections, not creating a unified development parcel. (TR 490)

certification that led to urban sprawl. (TR 570) He asserted that, regardless of whether a utility is granted a PSC certificate, growth management tools are firmly in the hands of the county, and any changes in land use would still have to be approved at the county level. (TR 604) Witness Hartman cited to two prior certification cases in which the Commission maintained that a local government's control over development is not reduced with the issuance of a certificate.<sup>24</sup> In his rebuttal testimony, witness Hartman quoted the final order issued in one of these cases, as follows:

The evidence presented clearly shows that a county's control over development is not reduced with the issuance of a certificate. The counties' hands are not tied when it comes to enforcement of their own comprehensive plans if and when rezoning is needed. Our certification does not deprive the counties of any authority they have to control urban sprawl on the Farnton properties.<sup>25</sup>

(TR 578)

In his rebuttal testimony, witness Hartman stated that even if the certification of a utility in the Northeast Pasco Rural Area is, in and of itself, inconsistent with the comprehensive plan, the PSC is not bound by local comprehensive plans. The witness cited to the case titled City of Oviedo v. Clark, 699 So. 2d 316, 318 (Fla. 1st DCA 1997) in which the court found:

We hold that the PSC correctly applied the requirements of section 367.045(5)(b). The plain language of the statute only requires the PSC to consider the comprehensive plan. The PSC is expressly granted discretion in the decision of whether to defer to the plan.

(TR 586)

Skyland also proffered witness DeLisi, a professional land use planner, to present rebuttal testimony on the subject of comprehensive planning. Witness DeLisi disagreed with Pasco witness Gehring's assertion that the creation of a utility impacts or influences development patterns. He argued that while the provision of utility service may allow development to happen, it does not cause development to happen. (TR 788) In his rebuttal testimony, he argued that Commission certification of a utility territory is not a development activity and does not remove or diminish any of the tools for growth management that exist under Florida law. (TR 776, 790) Witness DeLisi maintained that in order for the certification of a utility to promote urban sprawl, the county, with the concurrence of the DCA, would have to first approve and permit increased levels of development in a sprawling land use pattern. (TR 781) The witness stated that he is not aware of any similar cases where the certification of a utility area in a rural area has led to uncontrolled sprawling development. (TR 777, 790)

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<sup>24</sup> Order No. PSC-04-0980-FOF-WU, issued October 8, 2004, in Docket No. 021256-WU, In re: Application for certificate to provide water service in Volusia and Brevard Counties by Farnton Water resources LLC. (Final Order Granting Certificate No. 622-W), and Order No. PSC-92-0104-FOF-WU, issued March 27, 1992, in Docket No. 910114-WU, In re: Application of East Central Florida Services, Inc., for an original certificate in Brevard, Orange and Osceola Counties. (Final Order Granting Certificate No. 537-W).

<sup>25</sup> Order No. PSC-04-0980-FOF-WU, Final Order Granting Certificate to Farnton Water Resources, LLC., p. 16

In his rebuttal testimony, witness DeLisi noted that while there are several areas of the plan that discourage private utilities countywide, the policies that are specific to the Northeast Pasco Rural Area contain exceptions whereby private utilities could provide service in limited circumstances, such as to conservation subdivisions and employment centers within the area. (TR 761, 784-785) Under cross examination, witness DeLisi admitted that only one of the twelve parcels in Skyland's proposed territory falls within the employment center designation, and none of the proposed territory is currently designated as a conservation subdivision. (TR 794)

Staff proffered Daniel Evans, a planner with the Department of Community Affairs (DCA) to provide the position of DCA with respect to whether the Skyland Application is consistent with the Pasco County Comprehensive Plan. According to witness Evans, the DCA's position is that the application is inconsistent with the objectives and policies of the Pasco County Comprehensive Plan which limit the extension of public facilities in agricultural and rural land areas, encourages the conversion of private utilities to publicly owned utilities, and encourages the replacement of package treatment plants with regional wastewater plants. (TR 178-179) In addition, like witness Gehring, witness Evans stated that the Pasco County Comprehensive Plan specifically prohibits the extension of central water and sewer service within the Northeast Pasco Rural Area, except under limited circumstances, which, in his opinion, Skyland's application does not meet. (TR 179) Witness Evans also testified that the DCA has not received a request to amend the existing comprehensive plan for the area in Pasco County proposed to be served by Skyland. (TR 180)

Under cross examination, witness Evans admitted that he is not aware of any Commission case in which the DCA expressed a concern that the application could promote urban sprawl, and urban sprawl actually occurred within the certificated territory. (TR 191, 197) He also admitted that the local governments have a measure of control over growth in rural areas through land development regulations that are retained after the issuance of a certificate. (TR 197) The witness asserted, however, that there is a fairly well-defined correlation between the provision of infrastructure and land use development and intensity. He maintained that if utility services are available, the argument for making a case against urban sprawl is significantly reduced. (TR 195, TR 197-198)

Witness Evans agreed under cross examination that Skyland could develop the properties it seeks to certificate in Pasco County under the current comprehensive plan through clustering, which is a method of development that retains the same overall density within a parcel but clusters the development in a portion of the parcel. He stated that Skyland would have to specify how it would be accomplished, and added that he has not seen any such plan. (TR 204)

Under redirect examination, witness Evans stated that, while the DCA agrees with all of the reasons Pasco gives for concluding the Skyland application is inconsistent with its comprehensive plan, there are some provisions that carry more weight with the DCA than others. He asserted that the provision in the plan that discourages the use of central water and wastewater service in the rural areas within Pasco County is something that the DCA found more compelling than some other provisions, such as those that discourage private utilities countywide. (TR 227)

In its brief, Hernando County supports the positions of Pasco County and its witness Gehring that the Skyland application is inconsistent with the Pasco County Comprehensive Plan. Hernando also agrees with the testimony of staff witness Evans from the DCA, and notes that Skyland witness DeLisi did not specifically rebut any of the prefiled or live testimony of witness Evans. (Hernando BR 15-16)

### ANALYSIS

Section 367.045(4), F.S., provides that, notwithstanding the ability to object on any other ground, a county or municipality has standing to object on the ground that the issuance of a certificate violates established local comprehensive plans developed pursuant to Chapter 163, F.S. Section 367.045(5)(b), F.S., provides that, if such an objection has been timely made, the Commission shall consider, but is not bound by, the local comprehensive plan of the county or municipality.

#### Urban Sprawl

One of the major concerns of Pasco County with the Skyland Application is that the leapfrogging or checkerboard pattern of development will lead to urban sprawl. Pasco argued that a natural consequence of certification is infrastructure, i.e., putting pipes in the ground, and that infrastructure will lead to more intense development. Pasco asserted that 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. (Pasco BR 13) However, as discussed in Issue 3, the record indicates that every growth management tool available to local government to control unwanted growth would remain in place even if Skyland's application is granted. (TR 458, 481) Witness Gehring admitted that if a certificate is granted to Skyland, development that is not otherwise allowed by the comprehensive plan could not occur without the approval of county government. (TR 458) He agreed that there are a number of processes that any applicant for changes to the comprehensive plan would have to complete in order to obtain approval of an amendment. (TR 481) Staff believes that the evidence presented clearly shows that a county's control over development is not reduced with the issuance of a certificate. Moreover, Skyland's proposal appears to be consistent with the densities allowed in the comprehensive plan for areas designated as rural land use. Moreover, while it may not be consistent with other provisions in the comprehensive plan, the Skyland proposal appears to be consistent with the densities allowed in the comprehensive plan for areas designated as Rural Land Use. Therefore, while Skyland's application may be inconsistent with the comprehensive plan with regard to urban sprawl, staff does not believe that this inconsistency should be cause for the Commission to deny Skyland's application.

#### Discouraging Private Utilities Countywide

In addition, Skyland's Application is clearly inconsistent with the portions of the Pasco comprehensive plan that discourage private utilities from operating within the county. Staff maintains that this attempt to control utility service area through the comprehensive plan contradicts the statutory scheme regarding the Commission's responsibilities and jurisdiction over privately owned water and wastewater utilities as set forth in Chapter 367, F.S. In the East Central Florida case, the Commission said:



Section 367.011(1), Florida Statutes, states that this Commission has exclusive jurisdiction over each utility with respect to its authority, service, and rates. Section 367.011(4), Florida Statutes, states that Chapter 367 supersedes all other laws on the same subject and that subsequent inconsistent laws shall supersede Chapter 367, Florida Statutes, only to the extent they do so by express reference. Chapter 163 does not make express reference to Chapter 367. Section 163.3211, Florida Statutes, specifically states, "Nothing in this act is intended to withdraw or diminish any legal powers or responsibilities of state agencies or change any requirement of existing law that local regulations comply with state standards or rules."<sup>26</sup>

Therefore, while the Skyland application is inconsistent with this aspect of the Pasco County Comprehensive Plan, staff does not believe this inconsistency should be cause for the Commission to deny Skyland's Application.

#### Northeast Pasco Rural Area

The record indicates that Skyland's application is inconsistent with the provisions of the Pasco County Comprehensive Plan that prohibit central water and wastewater systems within the Northeast Pasco Rural Area, except under very limited circumstances. Skyland's entire proposed service area within Pasco County is located in this restricted rural area. (TR 425-426) As witness Gehring explains, the limited criteria that could be met by Skyland for the provision of water and wastewater service in this area include the employment center and the designation of a conservation subdivision. (TR 427, 438) However, the record shows that both services would be subject to a strict evaluation process. For the employment center, Skyland would have to provide a site plan, a ratio development and a demonstration that there is employment to relate to this number of units. (TR 444) With regard to conservation subdivision, the record indicates that the county has only approved one such area within the rural designation. (TR 439, 448) Since the Northeast Pasco Rural Area is the largest and most restrictive area within the rural market, this area would be the most difficult area in which to get flexibility in land use options. (TR 473-475) This provision that prohibits central water and wastewater service in the Northeast Pasco Rural Area is a restriction that would apply to any utility, whether privately or governmentally owned. (TR 419-420) Clearly, without obtaining the approval for one of the limited criteria discussed above, there can be no central service in this area. The prohibition of central water and wastewater systems, except in very limited circumstances, is a case of first impression for staff.

There is nothing in the record to indicate that Skyland or Evans Properties has taken any steps to gain approval for service to either an employment center or a conservation subdivision. Despite arguing that it could serve an employment center in Parcel ID 4, Skyland provided no details on its plans for providing such service, such as the timing of the development, a site plan including the number of units to be served, or a demonstration that there is adequate employment to relate to the number of proposed units. This is the case even though Parcel ID 4 is in Phase 1 of the proposed development. (EXH 42) The cost study used to develop Phase 1 rates does not contain any description or cost information for the provision of services to an employment

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<sup>26</sup> Order No. PSC-92-0104-FOF-WU, Final Order Granting Certificate No. 537-W to East Central Florida Services, Inc., and Establishing Initial Rates and Charges, p. 24

center. In fact, as noted in Issue 2, Skyland proposes to provide wastewater service to Parcel ID 4 via a 5,000 gallon septic tank. (EXH 2, Appendix VIII) Staff questions whether this would be adequate to serve an employment center, which would include intense residential and commercial concentration. Similarly, Skyland did not provide any details even for Phase 1 development regarding service to a conservation subdivision, such as which parcel or parcels would hold a conservation subdivision, how many units are proposed, and how they will be configured on the parcel or parcels. Without a clear demonstration of how Skyland could qualify for one of the limited criteria for central water and wastewater service within this area, staff believes this inconsistency with the comprehensive plan cannot be overcome without significant changes to the Pasco County Comprehensive Plan.

#### CONCLUSION

Skyland's Application appears to be inconsistent with provisions of the Pasco County Comprehensive Plan with regard to discouraging urban sprawl, discouraging the creation of private utilities within the county, and the prohibition of central water and wastewater service within the Northeast Pasco Rural Area except under limited circumstances. Staff believes the inconsistencies concerning urban sprawl and creating a private utility in Pasco County should not cause the Commission to deny Skyland's Application. However, the inconsistency with regard to central utility service in the Northeast Pasco Rural Area should be considered as a factor affecting public interest in determining whether the Application should be approved.

**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), F.S.?

**Recommendation:** No. The utility will not be in competition with, or duplication of, any other system. (Williams)

**Position of the Parties**

**Skyland:** No, there are no other existing utility systems other than those operated by Skyland within the proposed territory or immediately adjacent thereto.

**Hernando:** Yes. The area that Skyland proposes for certification within Hernando County is currently within the service area of the Hernando County Utilities Department and the area that Skyland proposes for certification within Pasco County is currently within the service area of the Pasco County Utilities Department.

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

**Brooksville:** Brooksville adopts by reference Hernando County's Post Hearing Statement of the Issues and Positions and Post Hearing Brief of Hernando County, Hernando County Water and Sewer District and Hernando County Utility Regulatory Authority filed or to be filed in the above styled matter, and adopts and supports all arguments and requests for relief stated therein.

**OPC:** OPC takes no position.

**Staff Analysis:**

**PARTIES' ARGUMENTS**

Skyland argued that there is no legitimate issue that the creation of Skyland will be in competition with or duplication of any other utility system. Skyland witness Hartman testified that no other system serves the proposed service territory, and that the Skyland utility system will not be in competition with or a duplication of any other system. (TR 77) Witness Hartman based this conclusion on his review of the service area and facilities of adjacent, surrounding, and nearby facilities. (TR 77-78) Witness Hartman also testified that no other utility has proposed to serve the areas, that no other utility has proposed rates for service to the areas, and that no other utility has conducted a cost of service study regarding providing service to the areas. (TR 741) Skyland also referenced the ECFS<sup>27</sup> and Farmton<sup>28</sup> cases in arguing that the Commission cannot determine whether a proposed system will be in competition with or a duplication of another system when such system does not exist. (Skyland BR 24-25)

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<sup>27</sup> PSC-92-0104-FOF-WU, issued March 27, 1992, in Docket No. 910114-WU, In re: Application of East Central Florida Services, Inc., for an original certificate in Brevard, Orange, and Osceola Counties.

<sup>28</sup> PSC-04-0980-FOF-WU, issued October 8, 2004, in Docket No. 021256-WU, In re: Application for certificate to provide water service in Volusia and Brevard Counties by Farmton Water Resources L.L.C.

Hernando argued that since the area that Skyland seeks to certificate lies within the Hernando County Utilities Department's and Pasco County Utilities Department's service areas, there is clear competition and duplication with the respective county systems. Hernando witness Stapf testified that the area Skyland seeks to serve within Hernando County is presently within the Hernando County Utilities Department's service area. (TR 235) Hernando also points out that Pasco witness Kennedy also testified that the area Skyland seeks to serve within Pasco County is within the Pasco County Utilities Department's service area. (TR 337-338) Hernando argued that this causes Skyland's proposed utility to be in competition with or a duplication of the public water and wastewater service areas of Hernando County Utilities, as to within Hernando County, and the Pasco County Utilities Department, as within Pasco County. (Hernando BR 17)

Pasco also argued that the territory Skyland seeks to certify will be in competition with both the Pasco and Hernando County utility systems. Pasco pointed out that neither Pasco, Hernando, nor Skyland have existing infrastructure on the parcels making up the proposed Skyland service territory. Pasco also pointed out that neither Pasco nor Hernando currently serve any customers located in the proposed Skyland service territory. (Pasco BR 18) However, Pasco witness Kennedy testified that Pasco has existing facilities in reasonably close proximity to the proposed Skyland service territory, and that Pasco is able to extend service to the proposed service territory should there be a need. (TR 337) Witness Kennedy also testified that the parcel identified as ID 4 is within a designated Employment Center for which Pasco plans to provide water and wastewater service. (TR 336) Witness Kennedy testified that Pasco's service territory is the entire unincorporated areas of Pasco County not currently served by a legally existing private utility. (TR 337-338) Pasco also referenced witness Stapf's testimony that Hernando County Utilities Department is the service provider for Hernando County. Pasco argued that, therefore, competition exists. Pasco stated that since competition exists, the Commission must first determine that the Pasco and Hernando county systems 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. (Pasco BR 20) Pasco argued that there is no record evidence that this is true, and that in fact, both witnesses Kennedy and Stapf testified that Pasco and Hernando are ready, willing, and able to serve any demonstrated need; therefore, the system proposed by Skyland would be in competition with Pasco and Hernando. (Pasco BR 20)

#### ANALYSIS

Pursuant to Section 367.045(5)(a), F.S., the Commission may not grant a certificate of authorization for a proposed system which will be in competition with, or duplication of, any other system or portion of a system, unless it 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. Section 367.021(11), F.S., defines "system" as facilities and land used and useful in providing service.

From the testimony and record evidence presented, it is clear that the area that Skyland seeks to certificate lies within the service territories of both Hernando and Pasco. However, staff believes that this fact in and of itself does not create competition with or duplication of Skyland's proposed system, because of the definition of "system" in the Florida Statutes. Both Hernando

and Pasco operate systems in the vicinity of the proposed areas. Hernando witness Stapf testified that Hernando operates a small water system “three to four miles” away. (TR 251) Pasco witness Kennedy testified that Pasco maintains an existing water system “less than 0.5 miles to the East,” other water facilities “within 1.53 miles,” and wastewater facilities within “2.54 miles” of the proposed area. (TR 336) However, since Skyland proposes service in phases to different parcels at different times, it is unclear exactly where the County facilities are in relation to each of the parcels that Skyland proposes to certificate. Witnesses Stapf and Kennedy both testified that their respective counties are ready, willing, and able to serve the proposed territories when appropriate. However, they also testified that the counties do not currently provide service, nor are there any immediate plans to extend service into the proposed areas. There was some testimony from Hernando witness Stapf about extending water service close to Skyland’s proposed service territory as a result of concerns related to the contaminated wells. However, these plans were preliminary, had a large associated cost estimate, and were put on hold, primarily because of a lack of public interest. (TR 260-263) There was also testimony from Pasco witness Kennedy about tentative plans for providing wastewater service near some of the proposed service areas; however, these plans did not seem immediate or tangible. (TR 967-969) This leads staff to believe that although both Hernando and Pasco may be capable of serving the areas that Skyland is seeking to certificate, neither county has existing facilities or systems, as defined in the statute, that are currently in place to provide service. Further, because the Skyland Application is vague with respect to when, where, and what specific services would be provided beyond Phase I, staff is unable to determine if any future systems would be in competition with, or duplication of, any other systems. Similar to the rulings in the ECFS and Farmton cases, there cannot be a determination of competition or duplication of proposed systems with other systems when such other systems do not exist. Engaging in speculation about which of the proposed systems would be in place first, and thus which would compete or duplicate the other, would be of little use.

#### CONCLUSION

Both Hernando and Pasco testified that the areas that Skyland seeks to certificate are within their respective service areas, that they are willing to provide service to those areas when deemed appropriate, and that they operate various water and wastewater facilities in proximity to the area. However, neither Hernando nor Pasco testified of any immediate tangible plans to provide the same service that Skyland proposes to provide. Consistent with the Commission’s findings in ECFS and Farmton, since Hernando or Pasco have not demonstrated that they have existing facilities in place to serve the area that Skyland seeks to certificate, staff recommends that the utility’s Application complies with Section 367.045(5)(a), F.S., in that it will not be in competition with, or duplicative of any other system.

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

**Recommendation:** Yes, Skyland has demonstrated the financial ability to serve the requested territory. (Brady)

**Position of the Parties**

**Skyland:** Yes, Skyland has demonstrated the financial ability to serve the requested territory.

**Hernando:** No. Skyland has no assets. Skyland is dependent upon funding from Evans Properties, its parent company. The Funding Agreement, which Skyland relies upon, may be unilaterally modified or terminated by Evans Properties; moreover, the Funding Agreement is not enforceable because it lacks essential terms.

**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.

**Brooksville:** Brooksville adopts by reference Hernando County’s Post Hearing Statement of the Issues and Positions and Post Hearing Brief of Hernando County, Hernando County Water and Sewer District and Hernando County Utility Regulatory Authority filed or to be filed in the above styled matter, and adopts and supports all arguments and requests for relief stated therein.

**OPC:** Prefiled testimonies and other materials submitted so far by all the parties indicates that, at the present time, and as currently configured, the applicant may NOT have the financial ability and near term commitment to serve the requested territories over the long term.

**Staff Analysis:**

**PARTIES’ ARGUMENTS**

Skyland cited the following record as demonstration of its financial ability to operate the proposed Utility to serve the requested territory. (Skyland BR 26-27) Skyland’s direct parent is Evans Utilities Company, Inc., whose parent is Evans. (TR 826) Skyland witness Edwards addressed the commitment of both the Utility and its ultimate parent to the sound and efficient construction and operation of the Utility on a going-forward basis. (TR 821-823) Evans owns and controls 43,000 acres of real property in Florida, free and clear of debt, on which it conducts substantial commercial activities. (TR 822) As an indication of its value, witness Edwards testified that Evans sold 1,700 acres in 2008 to the Southwest Florida Water Management District for which it received over \$52 million. (TR 863-864) The Utility, through funding from its parent company, has ample access to capital through infusion of debt or equity to fund any of the capital needs projected for the Utility. (TR 822; EXH 40) The Application included a funding agreement found at Appendix VII. (TR 822-823) Although witness Edwards did not know if the funding agreement was enforceable under law, he affirmed it fairly represents the capability and commitment of Evans, Evans Utilities Company, Inc., and Skyland. (TR 909, 912-913) In support of these statements, witness Hartman testified that, based on his personal

knowledge of Evans' finances and his review of Evans' operations, land holdings, and financial and operating information, Skyland has the financial ability to serve the requested territory. (TR 78, TR 99-100)

Skyland indicated that, under similar situations in the past, the Commission has found that testimony whereby the parent and owner of the land would provide funding was sufficient assurance, even without a written agreement.<sup>29</sup> (Skyland BR 27-28) In the ECFS case, Skyland also stated that the Commission rejected the suggestion that ECFS's witness Hartman's testimony that the parent organization would provide funding was hearsay, because he was qualified to testify on behalf of ECFS and his testimony was supplemented by a member of the Board of Directors of ECFS (parent) testimony that the parent would provide funding whenever funds were needed. Similarly, Skyland believes witness Hartman's testimony in this case is supplemented by witness Edwards' testimony. In addition, Skyland stated that it has been Commission practice to accept the statement of the parent's financial ability in original certificate cases where the utility has not yet established financial history.<sup>30</sup> In conclusion, Skyland noted that the Commission has traditionally recognized the vested interest of a parent in the financial stability of the utility. (ECFS, Farmton)

Hernando stipulated that Evans has the financial ability to operate a water and wastewater utility, but not Skyland. Hernando opined that the record showed Skyland does not own the land it proposes to operate the Utility on, nor the wells or consumptive use permits. (Hernando BR 18; TR 615-617, 713) There is no record evidence that Skyland, as a separate and distinct entity from Evans, has any assets of its own at this time. (Hernando BR 18; EXH 2; EXH 46) Hernando notes that funding will come from Evans pursuant to the funding agreement signed by witness Edwards as President of Evans and countersigned by witness Edwards as Manager of Skyland. (Hernando BR 18; EXH 2; EXH 46; TR 868) Hernando asserted that the funding agreement was the evidence provided by Skyland to satisfy the requirement of financial ability. (Hernando BR 18; TR 877-879) Hernando then opined that the funding agreement is deficient in several material ways and does not establish that Skyland will have a reliable and continued source of funds. First, it was not derived from an arm's-length transaction since witness Edwards signed on behalf of both the lender and the borrower. (Hernando BR 18; EXH 2; EXH 46; TR 868) Second, it arguably lacks "consideration," which Hernando states is an essential element of an enforceable contract. (Hernando BR 18) Hernando cited witness Edwards testimony that "inducement" in the funding agreement meant "that would be the consideration," but was then unable to further define that meaning. (TR 878) Third, it does not have any terms and conditions regarding interest rates or other key provisions, such as the rate of and duration for payback and principle amount to be borrowed, all of which Hernando states are essential to an enforceable loan agreement.<sup>31</sup> (Hernando BR 18-19; EXH 2; EXH 46; TR 869, 879)

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<sup>29</sup> Order No. PSC-92-0104-FOF-WU, issued March 27, 1992, in Docket No. 910114-WU, In re: Application of East Central Florida Services, Inc., for an original certificate in Brevard Orange and Osceola Counties, p. 18.

<sup>30</sup> Order No. PSC-04-0980-FOF-WU, issued October 8, 2004, in Docket No. 021256-WU, In re: Application for certificate to provide water service in Volusia and Brevard Counties by Farmton Water Resources, L.L.C., p. 22.

<sup>31</sup> Balter v. Pan American Bank of Hialeah, 383 So. 2nd 256, 257 (Fla 3rd DCA 1980).

Hernando further opined that Evans and Skyland could simply mutually agree to modify or terminate the funding agreement under their present related structure leaving Skyland at the mercy of its new lender. (Hernando BR 19; TR 826-827, 875) Furthermore, Hernando opined it was ludicrous to believe that witness Edwards as Skyland would ever sue witness Edwards as Evans in the event of a contract breach or failure to perform. (Hernando BR 19; TR 874) In addition, witness Edwards was unable to state that the funding agreement was legally binding and enforceable by Skyland against Evans. (Hernando BR 19; TR 876-877)

Pasco focused in greater detail on the record which conflates the corporate identities of Skyland and Evans. (Pasco BR 20-23; TR 821) In comparison to Hernando, which believed that the funding agreement was the only evidence of financial ability provided by Skyland, Pasco acknowledged that the evidence also included the proforma financial analysis in Exhibit 2, the financial statement in Exhibit 14, and the bank letter contained in Exhibit 40. Pasco agreed with Hernando that there is no dispute regarding Evans' finances. (Pasco BR 22) On the other hand, Pasco also opined that there is no mechanism or legal structure in place to preclude Evans from changing its business plan and divesting Skyland. As a consequence, Pasco believed the Commission must view Evans and Skyland separately and make its decision on financial ability based on Skyland's own ability. (Pasco BR 22; TR 860)

Further, Pasco stated its belief that a decision on financial ability has to be based on more than the verbal representations of witnesses Hartman and Edwards. Therefore, Pasco ultimately concurred with Hernando that the burden of the showing financial ability in this case must rest on the funding agreement, which it agreed with Hernando is fatally flawed and unenforceable. (Pasco BR 22) Pasco characterized Evans' promise to fund Skyland as nothing more than a gratuitous promise of a future gift. "The law is clear that there can be no indebtedness without legal consideration; and that a mere gratuitous promise of a future gift, lacking consideration, is unenforceable as nudum pactum<sup>32</sup> and "a contract must nevertheless be reasonable and must provide to a mutuality of obligation in order to be considered enforceable."<sup>33</sup> (Pasco BR 23)

OPC emphasized its concern as to whether Evans will maintain its business plan as described in the filing or, as a family-owned business, whether subsequent generations of the family-owned business will divest assets or change the business plan as Skyland acknowledged could happen. (OPC BR 8; TR 819-820, 859-860) OPC opined that Evans admitted that portions of its business are always for sale and that it has a track record of selling significant amounts of land. (OPC BR 15; TR 854, 876-880, 864) OPC indicated its awareness "of other utilities which have experienced service quality and financial resource deficiencies once the original developer sells off or abandons the utility, leaving the customers vulnerable to unanticipated increases in their bills once the cost of neglect is factored in or developer subsidies are removed from the Utility's cost structure." (OPC BR 11) Thereinafter, OPC's brief cited illustrative historical examples.<sup>34</sup> (OPC BR 11-13) OPC also agreed with Hernando's and Pasco's representations that the funding agreement is little more than illusory as there is no

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<sup>32</sup> Mt. Sinai Hospital of Greater Miami, Inc. v Jordan, 290 So. 2d 484, 486 (Fla. 1974).

<sup>33</sup> 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).

<sup>34</sup> Docket Nos. 000545-WS, 020484-WS, 030443-WS, 060262-WS, and 086249-WS.



consideration given for the commitments contained therein nor is it enforceable in court. (OPC BR 15)

### ANALYSIS

Section 367.045(1)(b), F.S., and Rule 25-30.033(1)(e), F.A.C., require a statement showing the financial ability of the applicant to provide service. Skyland's position was that it has the financial ability to serve the requested territory. Hernando's, Brooksville's (by adoption of Hernando's positions and arguments), and Pasco's positions were that Skyland has not demonstrated financial ability, primarily due to the unenforceability of the funding agreement in the Application. OPC's position was that Skyland may not have demonstrated the financial ability and commitment to serve the requested territories over the long-term, primarily due to uncertainty of Evans' long-term business plans. While staff concurs with all parties, including Skyland, that the funding agreement does not appear to be enforceable, staff ultimately agrees with Skyland that the remainder of the evidence on financial ability meets the standards the Commission has traditionally relied upon in similar cases. In addition, staff believes that OPC's focus on the uncertainty of Evans' long-term business plans is not warranted.

The Commission's rule requirement for a statement showing financial ability for original certificates, without any specificity on the nature or number of the statements provided, has given the Commission the latitude needed over the years to discern this issue among the myriad of original certificate applicants from the small, stand-alone developments, up to massive, state-of-the-art communities. Typically, the shared characteristic of original certificates is that, until certificates of authorization are granted, the utility cannot generate revenues from utility service. Instead, the applicants generally rely on the financial backing of another entity.<sup>35</sup> For this purpose, Rule 25-30.033(1)(s), F.A.C., requires a list of all entities, including affiliates, upon which the applicant is relying to provide funding to the utility, including their financial statements and copies of any financial agreements with the utility. Especially compelling in cases which go to hearing is the significant investment that is necessary to obtain certificates of authorization. (TR 821) In this case, Skyland is relying upon the financial backing of Evans, the ultimate parent and landowner. Evans' financial statement was provided in confidential Exhibit 14 and supported by a letter from Evans' bank in Exhibit 40 and witness Hartman's testimony. (TR 78, 99-101) These exhibits and testimony show sufficient evidence of the financial resources with which to support Skyland. Evans' financial statement was also supplemented in the Application by a written pledge of financial support for Skyland and at hearing by testimony. (EXH 2; TR 822) As noted in the parties' briefs, and discussed in more detail in staff's analysis below, a funding agreement between Skyland and Evans was also provided in the Application. (EXH 2)

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<sup>35</sup> Order No. PSC-08-0540-PAA-WS, issued August 18, 2008, in Docket No. 080103-WS, In re: Application for certificates to provide water and wastewater service in Hardee and Polk Counties by TBBT Utility LLC., p. 3; Order No. PSC-07-0076-PAA-SU, 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., p. 4; and Order No. PSC-07-0274-PAA-WS, issued April 2, 2007, in Docket No. 060694-WS, In re: Application for certificates to provide water and wastewater service in Flagler and Volusia Counties by D & E Water Resources., p. 3.

Staff concurs with the statement in Skyland's brief that, where the financial backing is from a parent to a subsidiary, the Commission has traditionally relied almost exclusively on the financial ability of the parent. (ECFS, p. 18-91, Farmton, p. 22) The Commission's reasoning is the logical vested interest of a parent in the financial stability of its subsidiary. The Commission has also traditionally required the funding party to provide an additional pledge of support for the utility, which was provided in the Application and reaffirmed at hearing. (ECFS, p. 18-19; Farmton, p. 22; TR 822)

On the other hand, the Commission has not relied on a funding agreement between a land-owner parent and a subsidiary utility as a statement of financial ability. In fact, staff is unaware of any such agreements being provided in prior dockets. Therefore, Skyland's witness Edwards' testimony that its consultants relied on forms that had been favorably received by the Commission in the past refers to the acceptance of the parents' financial statements and pledge to use its resources to support its subsidiary utility, not a funding agreement between parent and subsidiary utility. (TR 908) Staff agrees with the parties' arguments, summarized above, that having the same individual as signatory to both sides of the funding agreement is not an arms-length transaction. As such, and as apparently agreed to by all parties including Skyland, the document is not likely to be enforceable in a court of law. Instead, consistent with the prior orders cited, staff recommends that Evans' financial statements as supported by Evans' bank's letter and witness testimony and accompanied by a twice-sworn pledge of financial support for Skyland is evidence that Skyland will have access to any necessary funding until it can establish financial ability of its own.

As noted earlier, OPC's brief on this issue focused more on its concern as to whether Evans will maintain its business plan, as described in the filing, or whether, as a family-owned business, subsequent generations of the business will divest assets or change the business plan, as Skyland acknowledged could happen. Staff concurs with OPC's analysis of problems that have occurred historically with some developers in Florida. Staff would note that these problems are a shared history in Florida regardless of the regulating entity. (TR 532-533, 559-560) However, there is nothing in the docket record, or in the historical record for other similar cases, which supports OPC's concerns for Skyland. In fact, under questioning, witnesses against the Application affirmed that their opposition had nothing to do with any specific concerns about Skyland. (TR 245) Also, Evans has been successfully engaged in business operations in the state of Florida for over 50 years, which staff believes reflects corporate stability. While Evans, or its successors, may choose to divest all or a portion of its certificated territory at some time in the future, transfers are a fairly common occurrence for regulated utilities. As with original certificates, the Commission has the authority and responsibility pursuant to Section 367.071, F.S., to make a determination whether the transfer is in public interest. As noted by Skyland witness Edwards in response to questioning by Commissioner Brisé, protection for rate payers is provided by the Commission's rate-setting ability. (TR 891-892)

#### CONCLUSION

Given the financial ability of Skyland's parent, Evans, as shown in its confidential financial statement, the letter supporting the financial statements provided by its bank, the testimony of its witnesses, its twice-pledged oath of support for Skyland, and its inherent vested

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interest in the financial stability and success of Skyland, staff recommends Skyland has sufficiently demonstrated that it will have the financial ability to serve the requested territory. Even if divested, the Commission has authority to approve or deny the transfer.

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

**Recommendation:** Yes. The utility has the existing and potential technical ability to serve all the needs of the requested territory. (Williams)

**Position of the Parties**

**Skyland:** Yes, Skyland has the necessary technical ability. Skyland is currently operating the water systems within the proposed territory and has retained and will retain additionally qualified individuals and/or entities to assist in the operation of the utility as additional needs arise.

**Hernando:** No. The record evidence establishes that Skyland does not currently have the technical ability to run a public utility. Thus, the Commission must rely upon Skyland's mere representation that it will hire such technical talent in the future and presupposes that Skyland has the ability to construct the proposed facilities.

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

**Brooksville:** Brooksville adopts by reference Hernando County's Post Hearing Statement of the Issues and Positions and Post Hearing Brief of Hernando County, Hernando County Water and Sewer District and Hernando County Utility Regulatory Authority filed or to be filed in the above styled matter, and adopts and supports all arguments and requests for relief stated therein.

**OPC:** OPC takes no position.

**Staff Analysis:**

**PARTIES' ARGUMENTS**

Skyland asserted that it does have the necessary technical ability to serve the requested territory. Skyland witness Edwards testified that the utility would retain the very best people to design the facilities, to work with state and local government in the permitting and construction of the facilities, and to operate the facilities thereafter. (Skyland BR 28; TR 820-821) Skyland considers the hiring of witness Hartman demonstrative of the fact that they are committed to employing competent and experienced persons for the technical purposes of operating the utility, and plan to continue to do so. (Skyland BR 29; TR 901) Skyland also referenced the Farnton Water Resources, LLC.<sup>36</sup> In the Farnton case, the Commission noted that the utility had represented that it would employ competent, experienced persons for the technical purposes of operating a utility. The Commission also noted that with continued services of Hartman and Associates, coupled with the existing experience of the Farnton employees, the Commission had no indication that a high level of technical ability cannot be and would not be maintained by the utility. Skyland feels that similarly, they are committed to employ competent and experienced persons for the technical purposes of operating the utility.

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<sup>36</sup> PSC-04-0980-FOF-WU, issued October 8, 2004, in Docket No. 021256-WU, In re: Application for certificate to provide water service in Volusia and Brevard Counties by Farnton Water Resources L.L.C.

Hernando believes that Skyland does not currently have the technical ability to run a public utility. Hernando referenced Skyland witness Edwards' testimony that he has never worked for a utility or managed a utility in any manner. (TR 851) Hernando recognizes witness Edwards' extensive agricultural business experience, but believes that the agri-business experience Mr. Edwards has does not equate to the ability to run a public water or wastewater utility. (Hernando BR 20) Hernando believes that Skyland's commitment to hire a qualified company to operate the utility system is an admission that Skyland itself is not qualified to run a public utility. (Hernando BR 20; TR 820-821) Hernando also pointed out that Skyland does not currently own all of the parcels necessary to connect and serve all areas in the service territory, and believes that this should factor into a determination of Skyland's technical ability. Hernando also believes that simply accepting Skyland witness Edwards' testimony that Skyland would hire the necessary professionals to manage and operate the utility does not meet the burden of proof that Skyland has the necessary technical ability. (Hernando BR 21)

Pasco also stated that Skyland presented no evidence that it has the proper technical ability to operate the utility. Pasco argued that since Skyland and Evans are distinct entities, Evans' experience is unrelated to Skyland's technical ability. Pasco also argued that the experience of Skyland witness Hartman does not relate to Skyland itself. Pasco also noted that neither Skyland nor witness Edwards has any public utility experience. (Pasco BR 24) Finally, Pasco stated that Skyland has no financial ability (discussed in Issue 6), and therefore would not be able to hire the necessary personnel to manage and operate the utility as it has expressed the commitment to do so. Pasco, therefore, argued that Skyland has not provided evidence that it has the required technical ability.

#### ANALYSIS

Section 367.045(1)(b), F.S., and Rule 25-30.033(1)(e), F.A.C., requires a utility applying for an original certificate to provide information showing that it has the technical ability to provide service in the area requested. Technical ability usually refers to the utility's operations and management abilities, and whether the utility is capable of providing service to the development in question.

Skyland witnesses Hartman and Edwards both represented that Skyland will employ competent, experienced persons for the technical purposes of operating the utility. While Skyland witness Edwards' experience relates to agri-business and not public utility operations, his experience in operating the associated water facilities, as well as Skyland's commitment to employing competent, experienced persons for the technical purposes of operating the utility, will help to maintain Skyland's technical ability. Hernando raised the issue of Skyland not owning all of the easements and parcels necessary to connect and serve all of the proposed service areas. However, the plans to serve these areas and any potential interconnections have not been finalized, as they are in later development phases. (TR 151) As with previous

Commission decisions,<sup>37</sup> staff sees no indication that a high level of technical ability cannot be maintained by the utility with the employment of competent and experienced persons.

#### CONCLUSION

Skyland has represented that it will employ competent and experienced persons for the technical purposes of operating the utility. Skyland witness Edwards testified that the utility would retain the very best people to design the facilities, to work with state and local government in the permitting and construction of the facilities, and to operate the facilities thereafter. Staff agrees that Skyland's retention of witness Hartman, who has extensive experience in the certification, design, permitting, and operation of public and private utilities, is evidence of this commitment. It is not uncommon for utilities to utilize contract operators to handle the operations of the utility. Staff also recognizes that because of the nature of the Application for an original certificate, the utility system has yet to be constructed, and therefore, all personnel needed to operate the utility will be hired in the future when needed. Therefore, staff recommends that the utility has the existing and potential technical ability to serve all the needs of the requested territory.

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<sup>37</sup> PSC-04-0980-FOF-WU, issued October 8, 2004, in Docket No. 021256-WU, In re: Application for certificate to provide water service in Volusia and Brevard Counties by Farmton Water Resources L.L.C.; PSC-02-0179-FOF-WS, issued February 11, 2002, in Docket No. 010859-WS, In re: Application for original certificate to operate a water and wastewater utility in Sumter County by North Sumter Utility Company, L.L.C.; and PSC-96-0124-FOF-WU, issued January 24, 1996, in Docket No. 950120-WU, In re: Application for certificate to provide water service in Manatee and Sarasota Counties by Braden River Utilities, Inc.

**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?

**Recommendation:** No. The lease agreements provided in the Application do not provide sufficient evidence of continued use of the land upon which the Utility treatment facilities are or will be located, pursuant to Rule 25-30.033(1)(j), F.A.C. If certificates for the proposed water and wastewater systems are granted, the Utility should be required to file an executed and recorded copy of the deed, or executed copy of the lease, showing continued use of the land upon which the Utility water and wastewater treatment facilities are or will be located, within 30 days after the issuance of the order granting certificates. (Brady)

### **Position of the Parties**

**Skyland:** Yes, Skyland has provided leases between the Utility and landowner. These leases will allow Skyland the use of lands throughout the territory as and when needed on a long term basis. The landowner will continue to work with Skyland as to the continued use of the land.

**Hernando:** No. Skyland does not own any land. Skyland is dependent upon leasing its land, wells and permits from Evans Properties, its ultimate parent. The leases which Skyland relies upon may be unilaterally modified or terminated by Evans Properties; moreover the leases are not enforceable because they lack essential terms.

**Pasco:** No. There is no competent evidence in the record that demonstrates that Skyland has complied with the requirements of Section 367.1213, F.S., and Rule 25-30.033(1)(j), F.A.C. 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.

**Brooksville:** Brooksville adopts by reference Hernando County's Post Hearing Statement of the Issues and Positions and Post Hearing Brief of Hernando County, Hernando County Water and Sewer District and Hernando County Utility Regulatory Authority filed or to be filed in the above styled matter, and adopts and supports all arguments and requests for relief stated therein.

**OPC:** Prefiled testimonies and other materials submitted so far by all the parties indicates that, at the present time, and as currently configured, the applicant may NOT have the ability to provide continued use of the land in the requested service territories that the applicant proposes to serve.

### **Staff Analysis:**

### **PARTIES' ARGUMENTS**

Skyland stated that the Application contained leases between the Utility and the landowner which have been executed by the Utility and the landowner. These leases provide for Skyland's use of the lands throughout the proposed territory as and when needed on a long term basis for Utility treatment facilities. (Skyland BR 29-30) Skyland further asserted that Evans is fully committed to Skyland's operation and will continue to work with Skyland as to the Utility's need for the continued use of the land. (Skyland BR 30) Although there had been several

questions about the particular forms in the Application, such as the lease agreements, Skyland asserted that it had met with the staff and had attempted to use forms acceptable to the Commission. (Skyland BR 30; TR 908-909) If certificated, Skyland indicated its willingness to increase the leases in length or time frame such that they are acceptable to staff. Specifically, witness Hartman testified that he had been authorized by Evans to state that such changes, as needed, would be made to the lease after working with staff. (Skyland BR 30; TR 147-148) Witness Edwards also confirmed that the entities that had entered into the leases stand by their commitment. (Skyland BR 30; TR 909)

Hernando acknowledged that the property Skyland proposes to utilize is owned by Evans. (Hernando BR 22; EXH 2; TR 691) However, Hernando opined that the lease agreements provided in the Application are deficient in material ways such that they do not establish the certainty that Skyland will have continued use of the necessary land. (Hernando BR 22) Specifically, Hernando noted that witness Hartman stated that legal descriptions would not be provided until after the final design. (Hernando BR 23; TR 111) Also, the water lease agreement does not describe the four wells to be included as part of the initial lease property. (Hernando BR 23; TR 635) The pricing provisions of the leases are only for three years, after which time this provision needs to be renegotiated. (Hernando BR 23; TR 870) Also, the pricing provisions of the leases can also be renegotiated due to changes that diminish the value of the land as a result of withdrawal of water or additional costs imposed as the result of force majeure. (Hernando BR 23; TR 870-871) Finally, the royalty provisions contained in the lease could also change if there is a need to relocate a well. (Hernando BR 23; TR 871)

In addition, Hernando questioned the enforceability of the lease agreements since landlord and tenant are signed by the same individual and the absurdity that this individual would sue itself under contract failure. (Hernando BR 23; EXH 46; TR 826, 871) Hernando cited witness Edwards' agreement that this would probably not be allowed in court and that the lease could be changed or canceled upon mutual agreement of the same individual. (Hernando BR 23-24; TR 874-875) Further, there is no prohibition against Evans selling all or parts of its holdings in Hernando and Pasco Counties or divesting portions of the water and wastewater service land leaving Skyland at the mercy of the new landowner and at risk of the terms of the reassignment. (Hernando BR 24; TR 854, 864, 875)

In its brief, Pasco asserted that the lease agreements provided in the Application, and admitted into evidence at the hearing against Pasco's objection, are fatally flawed for a number of reasons including having a term insufficient to demonstrate long-term control. (Pasco BR 25-27) Skyland's lease agreement term is for 20 years, which Pasco believes does not demonstrate the long-term control required in the Commission's rule. (Pasco BR 27) However, Pasco asserted that the most important flaw is that the lease agreements provide no legal description, or any other description, of the leased properties. Pasco argues it has long been the law in Florida that an effective conveyance of land requires an accurate description of the land conveyed sufficient to permit the land to be identified.<sup>38</sup> (Pasco BR 27) Pasco does note that Rule 25-30.033(1)(j), F.A.C, appears to recognize that a utility may prefer to make the acquisition of the required land rights conditioned upon certification by the Commission. (Pasco BR 26) In these

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<sup>38</sup> Hoodless v. Jernigan, 35 So. 656, 660 (Fla. 1903).



situations, the applicant provides an unexecuted copy of a warranty deed or long-term lease, which it then executes within 30 days after the order granting the certificate. (Pasco BR 26) By providing executed lease agreements without legal descriptions in the Application, Pasco apparently believes Skyland has abrogated that provision of the Commission's rule.

Pasco further explained the mechanism that is afforded a utility under Section 120.542, F.S., to petition the Commission for a variance from, or waiver of, a particular rule requirement when it can be demonstrated that the purpose of the underlying statute will be or has been achieved by other means, or where the rule would create substantial hardship or violate principles of fairness. (Pasco BR 26) As examples, Pasco cited Order Nos. PSC-07-0076-PAA-SU<sup>39</sup> and PSC-07-0181-FOF-WS.<sup>40</sup> Pasco noted that Skyland did not petition for a variance from or a waiver of the Commission's rule. For all the above reasons, Pasco concluded that 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. (Pasco BR 29)

OPC recognized testimony that Evans and Skyland were willing to convert the leases from 20 year leases to "99-year" leases. (OPC BR 20; TR 869) While indicating that "sounded good," OPC argued that changing the number from 20 to 99 was a relatively insignificant event in light of the lack of permanence of the leases, the ability of Evans to modify the pricing every three years, as well as the ability to modify the leases unilaterally by Evans. (OPC BR 20) OPC opined that provisions to increase rates, as well as the ability to unilaterally terminate the lease agreements, only benefits Evans. (OPC BR 14; TR 870) OPC characterized witness Hartman as cryptic on this matter in his prefiled testimony and in response to questions seeking specifics on Skyland's access to water. (OPC BR 14; TR 608, 713-714)

OPC also questioned the Utility's claim that the form and terms of the lease agreements are based on an unnamed precedent and on private discussions with staff. No citation or listing of these examples was provided. (OPC BR 14; TR 872, 878-879) Furthermore, OPC opined that there was no rule waiver of Rule 25-30.033, F.A.C., that would allow the Utility to depart from the necessary proof of long-term access to the land underlying the Utility facilities.

### ANALYSIS

Section 367.1213, F.S., states that 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. Rule 25-30.033(1)(j), F.A.C., requires:

Evidence, 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

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<sup>39</sup> Order No. PSC-07-0076-PAA-SU, issued January 29, 2007, in Docket No. 060602-SU, In re: Application for certificate to provide water service in Lee and Charlotte Counties by Town and Country Utilities Company.

<sup>40</sup> 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 service in Okeechobee County by Grove Utilities, Inc.

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.

Staff disagrees with Skyland's arguments that the lease agreements provided in Appendixes IV and VI to the Application, were provided in a form acceptable to Commission staff. (TR 908-909) Skyland's witness Hartman testified at hearing that the lease agreements included in the Application were for a 20-year period, which was similar to what had been accepted in the Plum Creek Timber Company cases, B & C Utilities<sup>41</sup> and D & E Utilities.<sup>42</sup> (TR 65) In the case of B & C Utilities the order indicated that the primary term was for ten years from the effective date, not 20, but for as long thereafter as water is produced in paying quantities from the leased premises. The Commission determined that the lease agreement fulfilled the requirement of the rule because the term of the lease agreement was designed to be as long as the Utility is still charging for service. This is similar to other lease agreements accepted by the Commission whereby the initial term was limited, but the means to extend the lease agreement were assured.<sup>43</sup> Witness Hartman testified that Evans and Skyland had agreed to modify the lease agreement to provide for automatic renewals on a five-year basis so that there would be no concern relative to the land. (TR 65, 86)

As noted above and in Pasco's brief, Rule 25-30.033(1)(j), F.A.C., has provisions for the final documentation to be provided after Commission vote. The reason for this provision is the recognition of a timing conundrum inherent in the provision of Chapter 367.031, F.S., which requires that a utility obtain a certificate of authorization from the Commission prior to being issued a permit by the Department of Environmental Protection (DEP) for the construction of a new water or wastewater facility or prior to being issued a consumptive use or drilling permit by a water management district (WMD). For this reason, the legal description of the land upon which the utility plant will be located cannot always be known until after the construction permits have been approved. This is especially true for large land-owners whose holdings extend across different DEP offices, WMD districts, or water use designation areas.

For this reason, as noted in Pasco's brief, applications for a certificate of authorization are frequently filed in conjunction with a request for certain provisions to be bifurcated from the issuance of certificates of authorization so that the utility may proceed with the permitting process with DEP and the WMD. In these instances, the request for bifurcation of Rule 25-30.033, F.A.C., comes in the form of a request for variance from or temporary waiver of Commission rules. Most frequently, the request is for bifurcation of rates and charges and, less frequently, proof of ownership of the land. As noted in Pasco's and OPC's briefs, Skyland's Application was not filed with a request for variance or waiver of any of the Commission's rules.

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<sup>41</sup> Order No. PSC-04-1256-PAA-WU, issued December 20, 2004, in Docket No. 040140-WU, In re: Application for certificate to operate water utility in Baker and Union Counties by B & C Water Resources, L.L.C., p. 3.

<sup>42</sup> Order No. PSC-07-0274-PAA-WS, issued April 2, 2007, in Docket No. 060694-WS, In re: Application for certificates to provide water and wastewater service in Flagler and Volusia Counties by D & E Water Resources, L.L.C., p. 2-3.

<sup>43</sup> Order No. PSC-04-0980-FOF-WU, issued October 8, 2004, in Docket No. 021256-WU, In re: Application for certificate to provide water service in Volusia and Brevard Counties by Farmton Water Resources, L.L.C.

Apparently, Skyland perceived that the size, design, and costs of the Phase I facilities were sufficiently known to be used to establish rates. In addition, the well-sites for half of the proposed Phase I wells are existing. Presumably, for these reasons, the Application was not filed in conjunction with a request for variance from or temporary waiver of a portion of the Commission's rule.

Staff disagrees with Pasco's assertion that Skyland failed to include in its Application the information required by Rule 25-30.033(1)(j), F.A.C. The rule requires applicants for original certificates to provide "[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" for example, a 99 year lease. In the instant case, Skyland did file lease agreements purporting to be evidence of long-term use of the land upon which the Utility's plants are or will be located. Therefore, staff believes that Skyland did meet the minimum filing requirements of the rule. As such, contrary to the assertions of Pasco, staff does not believe that a rule variance was required in this case. However, staff noted that the acceptance of a document for a filing requirement is not the same as approval of the filing. Were this the case, then any application which met the minimum burden of Commission's rules to be considered filed, would also be considered approved.

Staff does agree with the parties that the lease agreements are not of sufficient term to satisfy the requirements of Section 367.1213, F.S., and Rule 25-30.033(1)(j), F.A.C., for continued use of the land upon which the Utility treatment facilities are or will be located, as they did not contain the provisions that the Commission has previously approved. However, as described in more detail in Issue 6, the leaser and lessee are affiliated entities bound together by mutual financial interest. As noted in Skyland's brief, Evans has stated it is fully committed to Skyland's operation and will continue to work with Skyland as to the Utility's need for the continued use of the land. As such, both entities have indicated a willingness to convert the leases from 20 year leases to "99-year" leases. (Skyland BR 30; TR 869)

Finally, while staff appreciates Hernando's and OPC's concerns that the lease agreements have numerous provisions for costs to be renegotiated, any increase will not be added to Skyland's operating and maintenance expenses unless the Commission determines the increase is both appropriate and prudent.

#### CONCLUSION

The lease agreements provided in the Application do not provide sufficient evidence of continued use of the land upon which the Utility treatment facilities are or will be located, pursuant to Rule 25-30.033(1)(j), F.A.C. If certificates for the proposed water and wastewater systems are granted, the Utility should be required to file an executed and recorded copy of the deed, or executed copy of the lease, showing continued use of the land upon which the Utility water and wastewater treatment facilities are or will be located, within 30 days after the issuance of the order granting certificates.

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

**Recommendation:** No. The preponderance of the evidence indicates that granting Skyland's application is not in the public interest. However, if the Commission grants the application, Water Certificate No. 653-W and Wastewater Certificate No. 558-S should be issued to serve the territory described in Attachment A. The resultant order should serve as Skyland's water and wastewater certificates and should be retained by the utility. The appropriate rates and charges are discussed in subsequent issues. (Chase)

**Position of the Parties**

**Skyland:** Yes, there is a need for service. No other entity has facilities to provide the service efficiently and effectively. Skyland is in the best position to provide the services and to operate those facilities in a manner which will best utilize and preserve available resources for customers within the territory.

**Hernando:** No. The preponderance of competent substantial record evidence indicates that granting Skyland certificates is not in the public interest: Skyland would not be cost effective or efficient; would move a valuable resource – water – from public to private control; would promote urban sprawl; and would violate Hernando's and Pasco's Comprehensive Plans.

**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.

**Brooksville:** Brooksville adopts by reference Hernando County's Post Hearing Statement of the Issues and Positions and Post Hearing Brief of Hernando County, Hernando County Water and Sewer District and Hernando County Utility Regulatory Authority filed or to be filed in the above styled matter, and adopts and supports all arguments and requests for relief stated therein.

**OPC:** It may not be in the public interest to grant the certificates to the full extent requested by Skyland in its application.

**Staff Analysis:**

**PARTIES' ARGUMENTS**

Skyland asserted that the preeminent public interest in this case is that of the landowner, who has requested this service, who supports Skyland's certification, and who has set forth the need and demand for service (both present and future). Skyland maintained that the record established that it is in the public interest to grant Skyland's Application for a variety of reasons including, but not limited to, the need for service, the potential utilization of the utility in the future, the fact that the lands Skyland seeks to certificate are owned and have been owned for a lengthy period by a related party who desires service from Skyland, and Skyland's willingness to construct and operate the utility in a way that is flexible, cooperative, and innovative. Skyland

also asserted that it is apparently the only entity willing to serve the densities currently permitted to be developed upon these lands. (Skyland BR 31)

Hernando asserted that public interest is promoted by cost effective and efficient utility systems. It claimed that the water and wastewater systems proposed by Skyland cannot be cost effective or efficient by providing centralized utility service to houses with a density of no less than one unit per ten acres scattered among multiple non-contiguous parcels. (Hernando BR 25; EXH 2, Exhibit B; TR 621-623) Hernando maintained that there is little opportunity to achieve any significant and meaningful economies of scale, and, in fact, there are few customers over which to spread large infrastructure costs. (TR 233)

Hernando also provided a number of other reasons why Skyland's application is not in the public interest, including: Evans does not own any of the land necessary to connect the multiple non-contiguous parcels owned by Evans; none of the costs of interconnecting the parcels were considered in the cost of service study; service by Skyland would duplicate the service of both county-owned systems by overlapping their established service areas; Skyland has a business plan that includes the sale of bulk water, which is not in the best interest of the citizens of Hernando County; and, the provision of central utility service by Skyland in the requested territory is inconsistent with the local governments' comprehensive plans by promoting urban sprawl. (Hernando BR 26-30; TR 114-115, 653-655, 705-706; EXH 2, Appendix VIII; TR 233-235, 337-338, 179, 292-293, 419, 423)

Pasco contended that the record evidence demonstrates that the purpose of the proposed utility is not to benefit the public, but rather to benefit a single landowner – Evans – by increasing the value of its property, preserving its business options, and maintaining Evans as a viable business. (Pasco BR 10 and 30; TR 804-807, 854) Pasco opined that the proposed utility could not operate economically or efficiently under its proposed plan to provide central service at such low densities in the non-contiguous parcels. (Pasco BR 31; TR 335, 233) Additionally, Pasco argued that since Skyland's proposed plan is inconsistent with the local governments' comprehensive plans, it cannot serve the public interest. (Pasco BR 31-32)

OPC stated in its brief that its limited participation in this case is consistent with its statutory authorization to make recommendations to the Commission regarding the public interest in matters like this. It maintained that what is in the public interest encompasses more than what is in the private corporate interests of Evans. (OPC BR 2) OPC stated that its fundamental concern is that Evans, with the best of intentions, will create a monopoly service in uneconomically configured raw land parcels that may not be sustainably and realistically priced. OPC acknowledged that this is not a certainty, but contends that it is a very real possibility and no less speculative than the potentialities and assumptions offered by Skyland to justify its proposal. (OPC BR 7) OPC also listed its concerns with the speculative nature of the application, including:

- Whether a true need for central services exists;
- Whether Evans will transfer irrevocable, dependable and reasonably priced rights to access water to the utility or whether Skyland will be allowed to acquire its own water rights. (TR 608, 713-714);

- Whether Evans will maintain its business plan as described in the filing, or whether subsequent generations of the family-owned business will divest assets or change the business plan. (TR 860); and
- Whether the lease, funding agreement and royalty arrangements, which are important parts of the utility's cost components, will be maintained. (TR 864; EXH 15, page 128; TR 870; EXH 46; TR 875)

(OPC BR 7)

OPC recommended that the Commission move cautiously and refrain from creating troubling precedent based on the facts in this case. It opined that uneconomical service in a sprawling, scattered, and disjointed combination of service territories should not be encouraged, since it holds a very real risk of coming back to haunt customers, regulators and local governments in the form of service problems and higher costs and rates. (OPC BR 9)

OPC offered an alternative approach as a balance between protecting the rights of future, unsuspecting customers, the interests of Skyland and Evans, and the interests of local governments, while avoiding the creation of a runaway precedent. (OPC BR 16-17) The alternative approach offered by OPC includes the following elements:

1. Limit the grant of a water certificate to the largest piece of monolithic property in the requested territory (namely Parcels 3, 7A, 7B, 7C, 9 and 11, lying wholly within Pasco County. OPC opined that this limitation would be in line with the theory that some level of certification might be appropriate consistent with past Commission cases. (OPC BR 10 and 17);
2. Further limit the wastewater certificate to the smallest parcel where service is being requested within Parcel 9. (OPC BR 17) OPC maintained that such a restriction would be in the public interest in that it would not require rates to be set based on the uneconomic dispersion of more capital intensive wastewater plant or relatively temporary package plants. (OPC BR 11 and 17) OPC asserted that limiting the wastewater territory to an even smaller portion than the water territory is consistent with the certificate case involving Silver Lake Utilities, in which Lykes Brothers, the land owner in that case, requested wastewater service for only that area where it would be providing initial wastewater service rather than the larger territory it requested for water service.<sup>44</sup> (OPC BR 17);
3. If the Commission grants the application in whole or in part, it should refrain from setting rates for future unrelated customers at this time, but authorize Evans/Skyland to charge rates to itself at the lone pending service request location (if necessary) until such time that Evans decides to serve customers that are not affiliated with itself. Also, the Commission should require Skyland to file for realistic rates based on a more defined,

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<sup>44</sup> Order No. PSC-07-0717-FOF-WS, issued September 4, 2007, in Docket No. 060726-WS, In re: Application for certificates to provide water and wastewater service in Glades County and water service in Highlands County by Silver Lake Utilities, Inc.

known and measurable cost structure, once actual development plans are more imminent. (OPC BR 17-18); and

4. If the Commission grants the application in whole or in part, it should require more certainty and definition to be provided by Skyland with respect to: cost structure, guaranteed access to a permanent and reasonable cost water supply; dependable and permanent access to land containing the utility facilities, and reasonable, realistic and binding access to financial resources. (OPC BR 18)

#### ANALYSIS

Section 367.011(3), F.S., provides that regulation of utilities is in the public interest as an exercise of the police power of the state for the protection of the public health, safety, and welfare. The provisions of Chapter 367, F.S., are to be liberally construed for accomplishment of this purpose. Sections 367.021 and 367.031, F.S., give the Commission the authority to issue a utility a certificate of authorization to serve a specific service area. Section 367.045(1)(b), F.S., authorizes the Commission to require each applicant for an initial certificate to provide all information required by rule or order of the Commission, which may include a detailed inquiry into the ability of the applicant to provide service, the area and facilities involved, the need for service in the area involved, and the existence or nonexistence of service from other sources within geographical proximity. To implement the above statutes, Rule 25-30.033, F.A.C., requires a statement showing the financial and technical ability of the applicant to provide service, continued use of the land upon which the utility facilities will be located, the need for service in the proposed service area, the identity of any other utilities within the proposed service area that could potentially provide service, and the steps the applicant took to ascertain whether such other service is available. In addition, the rule requires the applicant to state whether the proposed service would be inconsistent with the local government's comprehensive plan.

In Issue 2, staff recommends that the record does not support a need for service for which a PSC certificate would be required. Skyland did not demonstrate any immediate need for service or when, or in what form, any future central water or wastewater service would be required in the requested territory. As discussed in Issue 2, staff believes that because of the checkerboard layout of the proposed territory, Skyland should have demonstrated a reasonable level of need throughout its proposed territory that would support the need for a single utility providing central utility service to these dispersed parcels. Instead, Skyland provided a proposal that does not show any immediate need for central service, lacks detail, is void of any concrete plan for service in defined developments or even defined forms of service, and fails to show that whatever central water and wastewater service may be needed in the future, cannot be provided by existing utilities already operating in the area.

In Issue 3, staff recommends that Skyland's Application appears to be inconsistent with certain provisions in the Hernando County Comprehensive Plan. Hernando maintained that a central utility system is supposed to be provided only in areas designated for growth and not in the rural area, in order to discourage urban sprawl. However, the development proposed by Skyland is consistent with the densities allowed in the comprehensive plan for areas designated as Rural Land Use. As discussed in Issue 3, staff recommends that a county's control over development is not reduced with the issuance of a certificate. Hernando also maintained that the

creation of a private utility in Hernando County is inconsistent with the requirement in the comprehensive plan that the county shall be the sole franchiser of central water and wastewater service within its boundaries. As discussed in Issue 3, staff believes this requirement contradicts the statutory scheme regarding the Commission's jurisdiction over privately owned water and wastewater utilities as set forth in Chapter 367, F.S. Staff concludes that neither area of inconsistency with Hernando's comprehensive plan should be cause for the Commission to deny Skyland's application.

In Issue 4, staff recommends that Skyland's Application appears to be inconsistent with provisions of the Pasco County Comprehensive Plan with regard to discouraging urban sprawl, discouraging the creation of private utilities within the county, and the prohibition of central water and wastewater service within the Northeast Pasco Rural Area except under limited circumstances. Staff believes the inconsistencies concerning urban sprawl and creating a private utility in Pasco County should not cause the Commission to deny Skyland's Application. However, the inconsistency with regard to central utility service in the Northeast Pasco Rural Area should be considered as a factor affecting public interest in determining whether the Application should be approved for service in Pasco County.

As discussed in Issue 4, the Pasco County Comprehensive Plan prohibits central water and wastewater systems, except under very limited circumstances. Skyland's entire proposed service area within Pasco County lies within this restricted rural area. While Skyland argued that it could meet two of the limited criteria for central service in this area (employment center and conservation subdivision), the record shows that approval for service under this limited criteria would be subject to a strict evaluation process. Skyland offered no evidence that it had taken any steps to gain approval for such service. Further, it failed to provide any specifics as to how it would provide service in the area that could gain approval given this limited criteria. Without a clear demonstration of how Skyland could qualify for one of the restricted criteria, staff believes that this inconsistency with the comprehensive plan cannot be overcome, and should be considered in determining whether the issuance of certificates to Skyland is in the public interest.

In Issue 5, staff recommends that the utility will not be in competition with, or duplication of, any other system. While the service area that Skyland seeks to certificate lies within the service territories of Hernando and Pasco Counties, staff does not believe that this fact alone creates competition with or duplication of Skyland's proposed system. Neither Hernando nor Pasco presented any immediate tangible plans to provide service in the proposed Skyland territory. Therefore, staff recommends that Skyland's Application complies with Section 367.045(5)(a), F.S., in that it will not be in competition with, or duplication of, any other system.

In Issues 6 and 7, staff recommends that Skyland has demonstrated the financial and technical ability to provide service pursuant to Section 367.045(1)(b), F.S. As a demonstration of financial ability, staff cites to the financial ability of Skyland's parent, Evans, as shown in its financial statement, the letter supporting the financial statements provided by its bank, and the testimony of its witness Edwards pledging the commitment of both Skyland and its ultimate parent, Evans, to the sound and efficient construction and operation of the utility on a going-forward basis. (EXH 14; EXH 40; TR 821-823) As demonstration of technical ability, staff cites to Skyland's representation that it will employ competent and experienced persons to operate the



utility systems. Staff agrees that by working with witness Hartman, who has extensive experience in the certification, design, permitting, and operation of public and private utilities, Skyland has demonstrated its commitment to obtain the technical resources necessary to operate the utility. Therefore, staff recommends that Skyland's application complies with Section 367.045(1)(b), F.S., in that it has demonstrated the financial and technical ability to provide service.

In Issue 8, staff recommends that the lease agreements provided in the Application do not provide evidence of continued use of the land upon which the utility treatment facilities will be located, as required by Rule 25-30.033(1)(j), F.A.C. If certificates for the proposed water and wastewater systems are granted, staff recommends that the Applicant be required to file an executed and recorded copy of the deed, or executed copy of the lease, showing continued use of the land upon which the treatment facilities will be located.

#### OPC Alternative

As discussed above, OPC offered an alternative approach as a balance between protecting the rights of future customers, the interests of Skyland and Evans, and the interests of local governments, while avoiding the creation of a runaway precedent. OPC's suggestion includes:

1. Limit the grant of a water certificate to the largest piece of monolithic property in the requested territory (namely Parcels ID 3, 7A, 7B, 7C, 9 and 11);
2. Limit the grant of a wastewater certificate to the smallest parcel where service is being requested within Parcel ID 9;
3. If the Commission grants the application in whole or in part, refrain from setting rates for future unrelated customers but authorize Evans/Skyland to charge rates to itself at the pending service request location until such time that Skyland decides to serve customers that are not affiliated with itself; and
4. If the Commission grants the application in whole or in part, require more certainty with regard to cost structure, water supply, access to land and binding access to financial resources.

Staff believes OPC's alternative is not valid and should be rejected for several reasons. First, the water and wastewater territory suggested by OPC is located entirely within Pasco County in the Northeast Pasco Rural Area, in which central water and wastewater service is prohibited except in very narrow circumstances. (TR 419-420) As discussed in Issue 4, Skyland has not demonstrated how it could qualify for any of the limited circumstances under which central service could be provided, namely the employment center or a conservation subdivision. Staff recommends in Issue 4 that Skyland's proposed service in this area is inconsistent with the Pasco County Comprehensive Plan, and that this inconsistency cannot be resolved without a demonstration of a more definite plan for central service that could qualify under the narrow criteria for central service. Further, as discussed in Issue 2, staff believes that without this demonstration that it could qualify for the limited criteria, Skyland has failed to provide evidence of sufficient need for service in the area.

Second, staff disagrees with OPC's suggestion to grant wastewater territory to the smallest parcel where service to existing facilities is being requested within Parcel ID 9. As discussed in Issue 2, there is confusion in the record as to which parcel contains the existing facilities that have requested service. As noted in Issue 2, while Skyland witness Edwards indicated the existing facilities are in Parcel ID 9, the Application indicates that these facilities may be in Parcel ID 3 or 4. (EXH 2, Appendix VIII) Further, according to the Application, these structures will continue to receive wastewater service via existing on-site septic tanks. (EXH 2, Appendix VIII) Therefore, there does not appear to be a need for central wastewater service to the existing structures at this time.

Third, OPC suggests that the Commission not set rates or charges for service to unaffiliated customers of Skyland at this time, but authorize Skyland/Evans to charge rates to itself at the pending service request location. Staff is concerned that this practice would be unfairly discriminatory in violation of Section 367.081(2)(a)1., F.S. It is Commission practice to set rates by class of service, not by relationship to the utility or its parent company. OPC maintained in its brief that the rates proposed by Skyland may not include all reasonable and realistic costs that would be expected. (OPC BR 3) If the Commission were to agree with OPC in this regard, then rates for all customers, affiliated or not, should be recalculated to include all realistic costs.

#### CONCLUSION

Staff recommends that Skyland has demonstrated that it has the technical and financial ability to provide service in the proposed territory, and that the proposed utility is not in competition with, or duplication of, any other utility system. In addition, staff recommends that the lease agreements provided in the Application do not provide evidence of continued use of the land upon which the utility treatment facilities will be located, as required by Rule 25-30.033(1)(j), F.A.C. If certificates for the proposed water and wastewater systems are granted, staff recommends that the Applicant be required to provide the necessary evidence of continued use pursuant to the rule.

However, for reasons discussed in Issue 2, staff does not believe that Skyland has adequately demonstrated a need for service in the proposed territory, either in the near term or in the future. Further, as discussed in Issue 4, staff believes that the service proposed by Skyland is inconsistent with the Pasco County Comprehensive Plan, which does not allow central water and wastewater service in the requested territory, except under limited circumstances. Skyland failed to demonstrate that it could provide service under the limited criteria. This inconsistency results in a lack of showing of need for service in this area. Absent a credible showing of need for service in the proposed territory and because of the above-noted inconsistency with the Pasco County Comprehensive Plan, staff does not believe it is in the public interest to grant the application for certificates.

If the Commission grants the Application, Water Certificate No. 653-W and Wastewater Certificate No. 558-S should be issued to serve the territory described in Attachment A. The appropriate rates and charges are discussed in subsequent issues.

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

**Recommendation:** If the certificates for the proposed water and wastewater systems are granted, the appropriate return on equity for Skyland should be 10.85 percent, with a range of plus or minus 100 basis points, based on the leverage graph formula in effect at the time of the Commission vote in this proceeding. (Brady)

**Position of the Parties**

**Skyland:** The appropriate return on equity for Skyland is the return on equity yielded by the most current leverage formula order in effect at the time the Commission issues its Final Order in this proceeding.

**Hernando:** N/A. The certificates should not be granted for the reasons stated herein; therefore, the Commission should not have to determine this issue.

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

**Brooksville:** Brooksville adopts by reference Hernando County's Post Hearing Statement of the Issues and Positions and Post Hearing Brief of Hernando County, Hernando County Water and Sewer District and Hernando County Utility Regulatory Authority filed or to be filed in the above styled matter, and adopts and supports all arguments and requests for relief stated therein.

**OPC:** No position.

**Staff Analysis:**

**PARTIES' ARGUMENTS**

Rule 25-30.033(3), F.A.C., provides that return on common equity be established using the current equity leverage formula established by order of the Commission pursuant to Section 367.081(4), F.S., unless there is competent substantial evidence supporting the use of a different return on common equity. Skyland proposed using the return on equity yielded by the leverage formula in effect at the time the Commission issues its Final Order in this proceeding. Hernando and Brooksville (by adoption of Hernando's position and arguments) took the position that the issue is moot because certificates should not be granted. Pasco agreed with Hernando and Brooksville, that certificates should not be granted. However, if certificates are granted, Pasco believed the appropriate return on equity would be as established by the Commission. OPC took no position on this issue and none of the parties briefed this issue any further than their position statements. Therefore, there is no dispute on the reasonableness of the capital structure proposed in Skyland's Application.

If the certificates for the proposed water and wastewater systems are granted, staff believes it is appropriate for the Commission to approve a return on equity, regardless of whether the Commission votes to establish rates and charges at this time, because the approved return on

equity is used to determine the appropriate rate for an allowance for funds used during construction, as discussed in more detail in Issue 13. Staff believes the appropriate return on equity is that yielded by use of the leverage formula in effect at the time of the Commission vote in this proceeding. This is consistent with the Commission's prior post-hearing decision in the Farnton case.<sup>45</sup>

The Commission's most recent leverage graph formula is contained in Order No. PSC-10-0401-PAA-WS, issued June 18, 2010, in Docket No. 100006-WS, In re: Water and wastewater industry annual reestablishment of authorized range of return on common equity for water and wastewater utilities pursuant to Section 367.081(4)(f), F.S. Skyland has a projected capital structure of 40 percent equity and 60 percent debt. (EXH 2, Appendix VIII, page 8) The leverage graph formula in Order No. PSC-10-0401-PAA-WS yields a cost of equity of 10.85 percent for a utility with 40 percent equity.

### CONCLUSION

If the certificates for the proposed water and wastewater systems are granted, the appropriate return on equity for Skyland should be 10.85 percent, with a range of plus or minus 100 basis points, based on the leverage graph formula in effect at the time of the Commission vote in this proceeding.

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<sup>45</sup> Order No. PSC-04-0980-FOF-WU, issued October 8, 2004, in Docket No. 021256-WU, In re: Application for certificate to provide water service in Volusia and Brevard Counties by Farnton Water Resources, L.L.C.

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

**Recommendation:** If the certificates for the proposed water and wastewater systems are granted, water and wastewater rates should not be approved at this time. Instead, the utility should be required to file rates and charges at the time that all aspects of cost are reasonably known. However, should the Commission choose to establish rates and charges at this time, the rates and charges contained in the staff analysis are reasonable and should be approved. Skyland should be required to charge these rates and charges until authorized to change them by the Commission in a subsequent proceeding. Within 30 days from the date of the issuance of the order in this proceeding, Skyland should be required to file revised tariffs representing the Commission's vote for administrative approval by staff. Pursuant to Rule 25-30.475, F.A.C., the tariffs should be effective for services rendered or connections made on or after the stamped approval date on the tariff sheets. (Brady)

**Position of the Parties**

**Skyland:** The appropriate potable water and wastewater rates are those proposed by Skyland in its Application.

**Hernando:** N/A. The certificates should not be granted for the reasons stated herein; therefore, the Commission should not have to determine this issue.

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

**Brooksville:** Brooksville adopts by reference Hernando County's Post Hearing Statement of the Issues and Positions and Post Hearing Brief of Hernando County, Hernando County Water and Sewer District and Hernando County Utility Regulatory Authority filed or to be filed in the above styled matter, and adopts and supports all arguments and requests for relief stated therein.

**OPC:** The Commission should not set rates or charges for service to unaffiliated customers of Skyland at this time.

**Staff Analysis:**

**PARTIES' ARGUMENTS**

The only party that specifically briefed this issue was OPC, which stated that Skyland's rates are calculated in a way that may not include all of the reasonable and realistic costs that would be expected if service is to be provided without a subsidy from Evans. (OPC BR 3; TR 108-113, 116, 118, 656-657) Specifically, OPC explained that crucial arrangements regarding access to land, water, funding, electric service, and rights-of-way and interconnection corridors are either incomplete, speculative, or illusory in nature. (OPC BR 3) As a result, OPC recommended that the Commission consider refraining from setting rates and charges for future unrelated customers at this time, but authorize Evans/Skyland to charge rates to itself, if necessary, until such time that Evans decides to serve customers who are not affiliated with

itself. (OPC BR 4) In addition, OPC recommended that the Commission require the Utility to file for rates at a future point in time based on a more defined, known, and measurable cost structure, once actual development plans appear to be more imminent. (OPC BR 4)

OPC believed that the core issue from future customers' perspective is whether unrelated third party purchases of residences will be receiving utility services that would be better provided by others at a lower price or provided by a utility that may be divested when Evans' subsidies are removed. (OPC BR 7; TR 107, 266, 377) Specifically, OPC opined that service from either Pasco or Hernando County would be at a significantly lower monthly cost than even Skyland's artificially low rates by almost half. (OPC BR 3) If this happened, OPC believed that a new owner would likely be entitled to seek higher, compensatory rates based on more realistic cost of service than that subsidized by Evans. (OPC BR 7) OPC noted that Evans recently divested 1,700 acres of land and witness Hartman disclosed that Evans is actively considering more divestments. (OPC BR 8; TR 864) Also of concern to OPC with respect to future cost was witness Edwards' acknowledgment that the lease, which he signed by himself as both the lessor and lessee, could be amended as to price three times during the initial term and for any reason deemed sufficient by Evans or unilaterally abrogated by Evans. (BR 8; TR 870, 875; EXH 46) While OPC recognized the speculative nature of its concerns about what may happen in the future, it also believed its concerns were no less speculative than Evans' plans for the proposed service territory. (OPC BR 7) OPC stated its respect for Evans' property rights and desire to use its property to the highest and best use and that the Application appears to be a good faith proposal representing Evans' corporate needs and interest. (OPC BR 1) However, OPC stated its belief that the interests of future ratepayers is the most important consideration. (OPC BR 6)

### ANALYSIS

Rules 25-30.033(1)(t), (u), (v), and (w), F.A.C., specify the requirements for establishing rates and charges for original certificates, including a cost study, growth projections, projected plant, capital structure, and operating expenses. If the utility is intended to be built in phases, the rules apply to the first phase of development. Hernando and Brooksville (by adoption of Hernando's position and arguments) took the position that this issue is moot because certificates should not be granted. Pasco agreed with Hernando and Brooksville, that certificates should not be granted. However, if certificates are granted, Pasco believed the appropriate rates and charges would be those established by the Commission. OPC took the position that rates and charges for unaffiliated customers should not be established at this time.

Staff shares OPC's position that it is premature to establish rates and charges for Skyland at this time, even if certificates for the proposed water and wastewater systems are granted. Based on the analysis of need in Issue 2, and as discussed below, staff believes that Skyland's proposed water and wastewater cost study is premature. Instead, the utility should be required to file rates and charges at the time that all aspects of cost are reasonably known. However, should the Commission choose to establish rates and charges at this time, the rates and charges contained in the staff analysis are reasonable and should be approved.

A number of criticisms of the information contained in the rates and charges were posed by the parties and staff during the proceedings. Specifically, it is not known whether or not the

Utility will bear the costs of running electrical lines to its plants; what the costs might be for right-of-ways or easements for the interconnections proposed in future phases; the eventual costs of the leases; the specific costs for the terms and conditions in the funding agreement; and, the specific costs of the royalty payments. (TR 880-882, 871-875, 869, 877-879) With respect to royalty payments, staff would note that they only apply to bulk service rates which are not being proposed by Skyland at this time. Also, with respect to the terms and conditions of the funding agreement, as discussed in more detail in Issue 6, all parties including Skyland agree that the funding agreement is not enforceable in court and therefore not evidence of financial ability.

Cost projections for original certificate applications are typically speculative to some degree because the facilities have not yet been built. Staff agrees that there is additional uncertainty in this case with respect to what entity will pay the costs of the electric lines to the plant sites, Skyland or the electric utility. While there is evidence provided in the record to quantify these costs, it is still unknown what entity will be responsible for the costs. In addition, staff agrees that the costs for future right-of-ways or easements for interconnections are also not known at this time. However, these costs are for future phases and will have to undergo Commission review and approval prior to being allowed in rates base. On the other hand, staff does not agree with OPC's recommendation that the Commission should only authorize Skyland to charge rates to itself until such time that Evans decides to serve customers who are not affiliated with itself. When approved by the Commission, rates and charges must be charged to all customers, regardless of affiliation, consistent with Section 367.081(2)(a)1., F.S.

Instead, staff's primary concern with establishing rates and charges at this time is the speculative nature of the need as discussed in Issue 2. The rates and charges proposed in this Application are for the least desirable, hence least likely, choice of service as stated by Skyland witness Edwards. (TR 836-838) Therefore, staff recommends that water and wastewater rates should not be approved at this time. Instead, the utility should be required to file rates and charges at the time that all aspects of cost are reasonably known. However, should the Commission choose to establish rates and charges at this time, the rates and charges contained in the staff analysis are reasonable and should be approved. Rate base, revenue requirements, monthly residential and general service rates, and residential bill comparisons are shown on Schedule No. 1 for water service and Schedule No. 2 for wastewater.

Pursuant to Commission rules, Skyland filed a cost study in the Application in support of its proposed rates and charges. Skyland's rates are based on 80 percent of Phase I capacity, which is expected to occur within six years after the initiation of construction. (EXH 2) The facilities are conceptually designed to serve the allowable development within the proposed service territory assuming adherence to the appropriate county's comprehensive plan density restrictions. (TR 79) The total number of ERCs at 80 percent build out of Phase I is anticipated to be 155 for water at 350 gallons of per day and 153 for wastewater at 270 gallons per day. (EXH 2)

The proposed Phase I water facilities will utilize the four existing wells previously used by Evans to provide irrigation of its citrus farms, as well as additional improvements to each of the wells. Each potable water treatment facility will also include a hydro pneumatic tank, chlorination, fencing, and a pre-fabricated building. A mobile 150 kilowatt generator will be

available to provide service to any of the plants. The total land requirements for the water treatment plants and associated wells are 16 acres per site, which will be rented from Evans pursuant to the lease agreements discussed in Issue 8. (EXH 2)

The proposed Phase I wastewater facilities will consist of various pre-engineered facilities utilizing the low-pressure collection systems and septic tanks. The collection systems will utilize an Extended Aeration and Modified Ludzack-Ettinger treatment process and discharge to percolation ponds and/or rapid infiltration basins. The required land will be leased or rented from Evans. (EXH 2)

Rate Base

Skyland’s projected rates are based on the rate base calculations shown on attached Schedule No. 1 for water service and Schedule No. 2 for wastewater service. (EXH 2) Staff recommends that Skyland’s proposed rate bases calculations of \$359,515 for water service and \$223,807 for wastewater service are reasonable for 80 percent of the Phase I design capacity described above. Projected rate base is established only as a tool to aid the Commission in setting initial rates and is not intended to formally establish rate base. This is consistent with Commission practice in applications for original certificates. If the Commission approves service availability charges other than those proposed by Skyland and recommend by staff in Issue 12, the projected contributions in aid of construction (CIAC) balances, rate base, revenue requirements, and rates will need to be adjusted to reflect that decision.

Cost of Capital

The calculations for Skyland’s proposed cost of capital is shown in the table below. Skyland’s projected capital structure consists of 40 percent equity and 60 percent debt. Skyland originally proposed an overall cost of capital of 8.88 percent based on a return on equity of 11.30 percent. (EXH 2) As discussed in Issue 10, staff recommends that the appropriate return on equity is 10.85 percent pursuant to the current leverage graph formula in Order No. PSC-10-0401-PAA-WS. The Utility’s projected cost of debt was 7.27 percent, based on the 10-year average of the prime rate plus 1.0 percent at the time Exhibit 2 was filed. Staff believes that Skyland’s projected cost of debt is still reasonable to use to calculate the overall cost of capital. Therefore, staff recommends that the utility’s initial rates should reflect an overall cost of capital of 8.70 percent.

**Cost of Capital**

| <b>Description</b>             | <b>Amount</b> | <b>Weight</b> | <b>Cost Rate</b> | <b>Weighted Cost</b> |
|--------------------------------|---------------|---------------|------------------|----------------------|
| Common Equity                  | \$322,852     | 40.0%         | 10.85%           | 4.34%                |
| Long and Short-Term Debt       | \$484,277     | 60.0%         | 7.27%            | 4.36%                |
| Totals                         | \$807,129     | 100.0 %       |                  | <b>8.70%</b>         |
| <b>Range of Reasonableness</b> | <b>High</b>   | <b>Low</b>    |                  |                      |
| Return on Common Equity        | 11.85%        | 9.85%         |                  |                      |



### Net Operating Income

The projected water and wastewater net operating income for service are shown on Schedule Nos. 1 and 2, respectively, and are based on the projected rate base for each system and the projected overall cost of capital of 8.70 percent, as discussed above. The resulting net operating income for potable water and wastewater is \$31,278 and \$19,471, respectively.

### Revenue Requirements

The calculations for Skyland's projected water and wastewater revenue requirements are also shown on Schedule Nos. 1 and 2. (EXH 2) The revenues include operating and maintenance expenses, net depreciation and amortization expenses, and taxes other than income, as well as a return on investment. The utility's proposed operating and maintenance expenses at 80 percent of design capacity of Phase I, including purchased power, contractual services, and rent for use of the land appear reasonable. As a limited liability company, Skyland has no income tax expense. Taxes other than income tax are based on regulatory assessments fees of 4.5 percent of the Utility's gross revenues. (EXH 2) Therefore, staff recommends that revenue requirements for potable water and wastewater of \$130,770 and \$116,549, respectively, are reasonable and should be approved.

### Rates and Rate Structure

Rule 25-30.033(2), F.A.C., requires that utilities utilize the base facility and usage rate structure, defined in Rule 25-30.437(6), F.A.C., in order to promote water conservation for metered service. Skyland's proposed rates are consistent with this rule. To encourage conservation, Skyland proposes to allocate approximately 23 percent of its costs to the base facility charge and 77 percent to the gallonage charge. The ratio is the same for wastewater service. (EXH 2) Staff's recommended service rates for potable water and wastewater services as shown on Schedule Nos. 1 and 2, respectively, differ slightly from those initially proposed by Skyland due to the adjustment reflecting the revised return on equity and resulting overall cost of capital addressed above. Comparison water and wastewater bills calculated at 5,000, 7,500, and 10,000 gallons of water are shown below the proposed water and wastewater service rates on Schedules Nos. 1 and 2, respectively.

### Miscellaneous Service Charges

Rule 25-30.460, F.A.C., defines four categories of miscellaneous service charges. The utility's proposed miscellaneous service charges, shown on the chart below, are consistent with this rule. (EXH 2) In addition, the utility's cost justification appears reasonable. Therefore, staff recommends that the proposed miscellaneous service charges for water and wastewater should be approved.

Miscellaneous Service Charges

| Description            | Water Service | Wastewater Service |
|------------------------|---------------|--------------------|
| Initial Connection     | \$ 15.00      | \$ 15.00           |
| Normal Reconnection    | \$ 15.00      | \$ 15.00           |
| Violation Reconnection | \$ 15.00      | Actual Cost        |
| Premise Visit Charge   | \$ 15.00      | \$ 15.00           |

CONCLUSION

If the certificates for the proposed water and wastewater systems are granted, water and wastewater rates should not be approved at this time. Instead, the utility should be required to file rates and charges at the time that all aspects of cost are reasonably known. However, should the Commission choose to establish rates and charges at this time, the rates and charges contained in the staff analysis are reasonable and should be approved. Skyland should be required to charge these rates and charges until authorized to change them by the Commission in a subsequent proceeding. Within 30 days from the date of the issuance of the order in this proceeding, Skyland should be required to file revised tariffs representing the Commission's vote for administrative approval by staff. Pursuant to Rule 25-30.475, F.A.C., the tariffs should be effective for services rendered or connections made on or after the stamped approval date on the tariff sheets.

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

**Recommendation:** If the certificates for the proposed water and wastewater systems are granted and if the Commission votes to establish rates and charges at this time, Skyland's service availability policy and staff's recommended water and wastewater service availability charges shown on Schedule Nos. 1 and 2, respectively, are consistent with the guidelines of Rule 25-30.580, F.A.C., and should be approved. The charges should be effective for connections made on or after the stamped approval date on the tariff sheets. (Brady)

**Position of the Parties**

**Skyland:** The appropriate service availability charges for Skyland are those as proposed by Skyland in its application.

**Hernando:** N/A. The certificates should not be granted for the reasons stated herein; therefore, the Commission should not have to determine this issue.

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

**Brooksville:** Brooksville adopts by reference Hernando County's Post Hearing Statement of the Issues and Positions and Post Hearing Brief of Hernando County, Hernando County Water and Sewer District and Hernando County Utility Regulatory Authority filed or to be filed in the above styled matter, and adopts and supports all arguments and requests for relief stated therein.

**OPC:** The Commission should not set rates or charges for service to unaffiliated customers of Skyland at this time.

**Staff Analysis:**

ANALYSIS

Pursuant to Rule 25-30.580(1), F.A.C., the maximum amount of CIAC, net of amortization, should not exceed 75 percent of the total original cost, net of depreciation, of the utility's facilities and plant when the facilities and plant are at their designed capacity. The Commission's rule also provides that the minimum amount of CIAC should not be less than the percentage of such facilities and plant that is represented by water transmission and distribution and sewage collection systems. None of the parties briefed this issue and no specific testimony was proffered at hearing indicating that Skyland's proposed service availability and policy are not consistent with the CIAC guidelines provided by the rules.

Service Availability Policy

The Application contains the Utility's proposed service availability policy. (EXH 2, Appendix X) The proposed policy requires developers to construct and convey, all on-site distribution and off-site transmission facilities, pump stations, hydrants, and service meters for water service and all on-site collection, off-site transmission facilities, and lift/pump stations for

wastewater service. At the Utility's option, where facilities, either on-site or off-site, are required to serve more than one developer, the first developer may be required to construct oversized facilities. In that event, subsequent developers, builders, and individuals who connect to those facilities or use those facilities may be required to pay their prorata share of the costs of the facilities, which will be refunded to the developer who constructed the facilities, less a reasonable administrative fee not to exceed 10 percent, which will be retained by the Utility.

#### Water Service Availability Charges

Skyland proposes to require new connections to pay a water plant capacity charge of \$2,889.57 per ERC. (TR 72) As noted in Issue 11 and shown on Schedule No. 1, Skyland's net cost for 80 percent of Phase I water facilities is \$1,008,841 (\$1,211,193 UPIS less \$202,352 accumulated depreciation). The projected net CIAC is \$658,668 (\$728,167 CIAC less \$69,500 accumulated amortization of CIAC) and includes both cash and property contributions. (EXH 2) These amounts result in a net overall water contribution level of 65 percent. Staff recommends that the Utility's proposal to require donated on-site and off-site water facilities and to collect a water plant capacity charge of \$2,889.57 per ERC, or \$18.64 per gallon, are consistent with Rule 25-30.580, F.A.C., and should be approved.

However, in addition to the requirement for donated property and a water plant capacity charge, staff recommends that Skyland's tariffs include a separate water main extension charge in lieu of donated lines and a meter installation charge based on the cost per ERC of those facilities as shown in the Utility's application. (EXH 2) The main extension charge would allow the Utility to collect the appropriate CIAC from a single property owner, in addition to developers who may be installing and donating on-site and off-site lines. The meter installation charge would apply to the entity which installs the meters, i.e., the Utility, the developer, or customer. Skyland's projected costs for water transmission and distribution mains is \$622,203 for Phase I facilities. (EXH 2) Therefore, staff proposes that a water main extension charge in lieu of donated lines of \$4,014.22 per ERC, or \$11.47 per gallon, be approved. The projected cost of meters for meters and meter installation is \$48,688 for Phase I. (EXH 2) Therefore, staff proposes that a meter installation charge of \$300.00 for a 5/8" x 3/4" meter also be approved.

#### Wastewater Service Availability Charges

Skyland proposes to require new connections to pay a wastewater plant capacity charge of \$2,399.35 per ERC. (TR 72) As also noted in Issue 11 and shown on Schedule No. 2, Skyland's net costs for Phase I wastewater facilities is \$681,151 (\$857,146 UPIS less \$175,995 accumulated depreciation) and related net costs for contributed facilities is \$466,789 (\$522,364 CIAC less \$55,575 accumulated amortization of CIAC). (EXH 2) These amounts result in a net overall wastewater contribution level of 69 percent. Staff recommends that the Utility's proposal to require donated on-site and off-site water facilities and to collect a wastewater plant capacity charge of \$2,399.35 per ERC, or \$15.68 per gallon, are consistent with Rule 25-30.580, F.A.C., and should be approved.

For the reasons stated above for water service, in addition to the requirement for donated property and a wastewater plant capacity charge, staff recommends that Skyland's tariffs include a separate wastewater main extension charge in lieu of donated lines based on the cost per ERC

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of those facilities as shown in the Utility's Application. Skyland's projected costs for wastewater transmission and distribution mains is \$370,396 for Phase I facilities. (EXH 2) Therefore, staff proposes that a wastewater main extension charge in lieu of donated lines of \$2,420.89 per ERC, or \$8.97 per gallon, be approved.

#### CONCLUSION

If the certificates for the proposed water and wastewater systems are granted and if the Commission votes to establish rates and charges at this time, Skyland's service availability policy and staff's recommended water and wastewater service availability charges shown on Schedule Nos. 1 and 2, respectively, are consistent with the guidelines of Rule 25-30.580, F.A.C., and should be approved. The charges should be effective for connections made on or after the stamped approval date on the tariff sheets.

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

**Recommendation:** If the certificates for the proposed water and wastewater systems are granted, an annual AFUDC rate of 8.70 percent and a discounted monthly rate of 0.69760205 percent should be approved and applied to the qualified construction projects beginning on or after the date the certificates of authorization are issued. (Brady)

**Position of the Parties**

**Skyland:** The appropriate AFUDC rate for Skyland is that yielded by use of the leverage formula in effect at the time the Commission issues its Final Order in this proceeding and the cost of debt, as outlined in the Application of Skyland.

**Hernando:** N/A. The certificates should not be granted for the reasons stated herein; therefore, the Commission should not have to determine this issue.

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

**Brooksville:** Brooksville adopts by reference Hernando County's Post Hearing Statement of the Issues and Positions and Post Hearing Brief of Hernando County, Hernando County Water and Sewer District and Hernando County Utility Regulatory Authority filed or to be filed in the above styled matter, and adopts and supports all arguments and requests for relief stated therein.

**OPC:** The Commission should not set rates or charges for service to unaffiliated customers of Skyland at this time.

**Staff Analysis:**

**ANALYSIS**

Rule 25-30.033(4), F.A.C., allows utilities obtaining initial certificates to accrue AFUDC for projects found eligible pursuant to Rule 25-30.116(1), F.A.C. Skyland believed the appropriate AFUDC rate is that yielded by use of the leverage formula in effect at the time the Commission issues its Final Order in this proceeding and Skyland's proposed cost of debt. Hernando and Brooksville (by adoption of Hernando's position and arguments) took the position that the issue is moot because certificates should not be granted. Pasco agreed with Hernando and Brooksville that certificates should not be granted. However, if certificates are granted, Pasco believed the appropriate return on equity should be as established by the Commission. OPC believed the Commission should not set rates or charges for service to unaffiliated customers of Skyland at this time. None of the parties briefed this issue nor was any information proffered in the hearing with respect to AFUDC.

If the certificates for the proposed water and wastewater systems are granted, staff believes it is appropriate for the Commission to approve an AFUDC rate, regardless of whether the Commission votes to establish rates and charges at this time. AFUDC is a deferred return in both debt and equity on capital used during construction. The purpose for AFUDC is to allow the utility to capitalize the costs for eligible construction work in progress, but not completed. Pursuant to Rule 25-30.116, F.A.C., eligible construction projects are those that involve gross additions to plant in excess of \$5,000 and are either, not expected to be completed within sixty days after commencement or were expected to be completed in sixty days or less but are not ready for service in sixty days. Until construction is completed, the plant item is not included in utility plant in service. Once the plant item is placed in service, the accrued capitalized AFUDC is added to rate base and recovered over the useful service life of the asset through the appropriate depreciation allowance. By means of AFUDC, a utility can earn compensation for capital costs incurred during construction, but ratepayers are not required to pay those capital costs until the plant is actually in service and considered used and useful. For these reasons, staff recommends that the Commission establish an AFUDC rate even if rates and charges are not being established at this time.

For purposes of establishing an AFUDC rate, the appropriate return on equity is that yielded by use of the leverage formula in effect at the time of the Commission vote in this proceeding. As noted in Issue 10 and 11, the current leverage graph formula in Order No. PSC-10-0401-PAA-WS generates a return on equity of 10.85 percent at Skyland's proposed 40 percent equity ratio and a cost debt of 7.27 percent.

#### CONCLUSION

If the certificates for the proposed water and wastewater systems are granted, a return on equity of 10.85 percent and a cost of debt of 7.27 percent, results in an annual AFUDC rate of 8.70 percent and a discounted monthly rate of 0.69760205 percent. Staff recommends these rates be approved and applied to the qualified construction projects beginning on or after the date the certificates of authorization are issued.

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

**Recommendation:** If the Commission denies the Application, upon the expiration of the appeal period, if no party timely appeals the order, this docket should be closed. If the proposed certificates for water and wastewater and rates and charges are granted, this docket should remain open pending staff's verification that the Utility has filed evidence of continued use of the land upon which the treatment facilities will be located, and revised tariff sheets. Upon the Utility's filing of this evidence, and upon filing and staff's approval of the revised tariff sheets, this docket should be closed administratively. If the proposed certificates for water and wastewater are granted but rates and charges are not approved, the docket should remain open pending staff's verification that the Utility has filed evidence of continued use of the land and the Utility's filing of rates and charges at the time that all aspects of the case are reasonably know. (Klancke)

**Position of the Parties:**

**Skyland:** Upon the issuance of the certificates requested, this docket should be closed.

**Hernando:** This matter should be dismissed for lack of subject matter jurisdiction pursuant to Section 367.171(7), Florida Statutes, or alternatively, the Commission should enter a Final Order denying the requested certificates.

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

**Brooksville:** Brooksville adopts by reference Hernando County's Post Hearing Statement of the Issues and Positions and Post Hearing Brief of Hernando County, Hernando County Water and Sewer District and Hernando County Utility Regulatory Authority filed or to be filed in the above styled matter, and adopts and supports all arguments and requests for relief stated therein.

**OPC:** No position on this issue.

**Staff Analysis:** If the Commission denies the Application, upon the expiration of the appeal period, if no party timely appeals the order, this docket should be closed. If the proposed certificates for water and wastewater and rates and charges are granted, this docket should remain open pending staff's verification that the Utility has filed evidence of continued use of the land upon which the treatment facilities will be located, and revised tariff sheets. Upon the Utility's filing of this evidence, and upon filing and staff's approval of the revised tariff sheets, this docket should be closed administratively. If the proposed certificates for water and wastewater are granted but rates and charges are not approved, the docket should remain open pending staff's verification that the Utility has filed evidence of continued use of the land and the Utility's filing of rates and charges at the time that all aspects of the case are reasonably know.



**SKYLAND UTILITIES, LLC**

**Water and Wastewater Service Territory  
in  
Hernando and Pasco Counties**

**Description ID Parcel 1**

**Township 24 South, Range 20 East, Section 4, Pasco County**

NE 1/4 of the NW 1/4 AND the North 1/2 of the NE 1/4, LESS road Right of Ways, all in Section 4, Township 24 South, Range 20 East in Pasco County, Florida.

**Description ID Parcel 2**

**Township 23 South, Range 20 East, Section 29, Hernando County**

SW 1/4 AND the South 1/2 of the NW 1/4 lying East and South of State Road 420 TOGETHER WITH the North 1/2 of the NE 1/4 AND the NE 1/4 of the NW 1/4 LESS State Road 420 Right of Way, all in Section 29, Township 23 South, Range 20 East in Hernando County, Florida.

**Description ID Parcels 3, 7A, 7B, 7C, 9, and 11**

**Township 23 South, Range 21 East, Sections 20, 21, 28, 29, 31, 32, and 33, Pasco County**

All of Section 20 TOGETHER WITH the NW 1/4 of Section 21 AND the NW 1/4 of the SW 1/4 lying South and West of Bonnett Pond in Section 28, AND all of Section 29 AND that part of the East 1/2 of the NE and SE 1/4 of Section 31, lying East of State Road 575, LESS AND EXCEPT the North 611.00 feet of the West 700.0 feet of said SE 1/4 AND the North 1/2 AND that part of the South 1/2 in Section 32, lying West of the former Seaboard Coastline Railroad Right of Way TOGETHER WITH the North 1/2 AND the North 1/2 of the SW 1/4 AND the SE 1/4 of the SW 1/4 of Section 33 ALL in Township 23 South, Range 21 East in Pasco County, Florida.

**Description ID Parcel 4**

**Township 24 South, Range 20 East, Section 3, Pasco County**

North 1/2 of the SW 1/4, LESS road Right of Way, in Section 3, Township 24 South, Range 20 East in Pasco County, Florida.

**Description ID Parcel 5**

**Township 23 South, Range 20 East, Section 30, Hernando County**

NW 1/4 of the SE 1/4 LESS one Acre in the Southwest corner thereof AND the NE 1/4 of the SW 1/4, all lying North of State Road 420, TOGETHER WITH the West 1/2 of the SW 1/4 of the NE 1/4 AND the South 1/2 of the NW 1/4 all in Section 30, Township 23 South, Range 20 East in Hernando County, Florida.

**Description ID Parcel 6**

**Township 24 South, Range 20 East, Section 1 and  
Township 24 South, Range 21 East, Section 6, Pasco County**

North 1/2 of the NE 1/4 AND the NE 1/4 of the NW 1/4 AND the SW 1/4 of the NE 1/4 AND the North 1/2 of the SE 1/4 of the NW 1/4 AND the SE 1/4 of the SE 1/4 of the NW 1/4 AND all land lying North & West of a branch or stream running through the NW corner of the SE 1/4 of the NE 1/4 all in Section 1, Township 24 South, Range 20 East TOGETHER WITH that portion of the NW 1/4 of Section 6, more particularly described as follows: Commence at the SW corner of the NW 1/4 of said Section 6; thence East 677 feet; thence North of a point situated 663 feet East of the NW corner of the said NW 1/4, thence West to the NW corner of aforesaid NW 1/4; thence South to the Point of Beginning LESS AND EXCEPT that portion lying in Dowling Lake, all in Township 24 South, Range 21 East in Pasco County, Florida.

**Description ID Parcel 8**

**Township 23 South, Range 20 East, Section 30, Hernando County**

The SW 1/4 of the SW 1/4 in Section 30, lying South of State Road 420 and West of road Right of Way all in Township 23 South, Range 20 East in Hernando County, Florida.

**Description ID Parcel 10A & 10B**

**Township 23 South, Range 20 East, Section 36, Hernando County**

SW 1/2 of the SE 1/4 AND the E 1/2 of the SW 1/4 lying South and West of Flag Pond AND the SW 1/4 of the SW 1/4 in Section 36 TOGETHER WITH the following described land: Begin at the SE corner of Section 36, thence Northwesterly 570.65 feet along the East line of the SW 1/2 the SE 1/4; thence East 700 feet; thence South 700 feet to the Point of Beginning, all in Section 36, Township 23 South, Range 20 East in Hernando County, Florida.

**Description ID Parcels 12A and 12B**

**Township 24 South, Range 21 East, Sections 4 and 5, Pasco County**

The West 1/2 the NW 1/4 of Section 4 AND the NE 1/4 of Section 5 TOGETHER WITH that portion of the NW 1/4 of said Section 5 that lies East of the Railroad all in Township 24 South, Range 21 East in Pasco County, Florida.

**FLORIDA PUBLIC SERVICE COMMISSION**  
**authorizes**  
**Skyland Utilities, LLC.**  
**pursuant to**  
**Certificate Number 653-W**

to provide water service in Hernando and Pasco Counties in accordance with the provisions of Chapter 367, Florida Statutes, and the Rules, Regulations, and Orders of this Commission in the territory described by the Orders of this Commission. This authorization shall remain in force and effect until superseded, suspended, cancelled or revoked by Order of this Commission.

| <u>Order Number</u> | <u>Date Issued</u> | <u>Docket Number</u> | <u>Filing Type</u>   |
|---------------------|--------------------|----------------------|----------------------|
| *                   | *                  | 090478-WS            | Original Certificate |

\*Order Number and date to be provided at time of issuance.

**FLORIDA PUBLIC SERVICE COMMISSION**  
**authorizes**  
**Skyland Utilities, LLC**  
**pursuant to**  
**Certificate Number 558-S**

to provide wastewater service in Hernando and Pasco Counties in accordance with the provisions of Chapter 367, Florida Statutes, and the Rules, Regulations, and Orders of this Commission in the territory described by the Orders of this Commission. This authorization shall remain in force and effect until superseded, suspended, cancelled or revoked by Order of this Commission.

| <u>Order Number</u> | <u>Date Issued</u> | <u>Docket Number</u> | <u>Filing Type</u>   |
|---------------------|--------------------|----------------------|----------------------|
| *                   | *                  | 090478-WS            | Original Certificate |

\*Order Number and date to be provided at time of issuance.

**SKYLAND UTILITIES, LLC  
 WATER SYSTEM**

**Water Rate Base**

|   |                          |
|---|--------------------------|
| Utility Plant in Service                    | \$ 1,211,193             |
| Accumulated Depreciation                    | (202,352)                |
| Contributions in Aid of Construction (CIAC) | (728,268)                |
| Accumulated Amortization of CIAC            | 69,500                   |
| Working Capital Allowance                   | <u>9,342</u>             |
| <b>Water Rate Base</b>                      | <b><u>\$ 359,515</u></b> |

**Water Revenue Requirement**

|                                   |                         |
|-----------------------------------|-------------------------|
| Operating Revenue                 | \$ <u>130,770</u>       |
| Operating and Maintenance Expense | 74,739                  |
| Net Depreciation Expense          | 18,838                  |
| Taxes Other Than Income           | <u>5,915</u>            |
| Total Operating Expense           | <u>99,523</u>           |
| Net Operating Income              | <b><u>\$ 31,278</u></b> |
| Water Rate Base                   | \$ 359,515              |
| Rate of Return                    | 8.70%                   |

**Monthly Water Service Rates – Residential and General Service**

|                          |           |
|--------------------------|-----------|
| Base Facility Charge     |           |
| 5/8 x 3/4"               | \$ 17.91  |
| 3/4"                     | \$ 27.87  |
| 1.0"                     | \$ 44.78  |
| 1.5"                     | \$ 89.56  |
| 2.0"                     | \$ 143.30 |
| 3.0"                     | \$ 286.60 |
| Charge per 1,000 gallons | \$ 5.77   |

**Comparison Residential Water Service Bills**

|                |          |
|----------------|----------|
| 5,000 gallons  | \$ 46.66 |
| 7,500 gallons  | \$ 61.04 |
| 10,000 gallons | \$ 75.41 |

**Water Service Availability Charges**

|   |             |
|---|-------------|
| Meter Installation Charge                         |             |
| 5/8" x 3/4"                                       | \$ 300.00   |
| All others meter sizes                            | Actual Cost |
| Plant Capacity Charge                             |             |
| Residential-per ERC (350) GPD                     | \$ 2,889.57 |
| All others-per gallon                             | \$ 8.26     |
| Main Extension Charge ( in lieu of donated lines) |             |
| Residential-per ERC (350) GPD                     | \$ 4,014.22 |
| All others-per gallon                             | \$ 11.47    |

**SKYLAND UTILITIES, LLC  
 WASTEWATER SYSTEM  
 Wastewater Rate Base**

|   |                          |
|---|--------------------------|
| Utility Plant in Service                    | \$ 857,146               |
| Accumulated Depreciation                    | (175,995)                |
| Contributions in Aid of Construction (CIAC) | (522,364)                |
| Accumulated Amortization of CIAC            | 55,575                   |
| Working Capital Allowance                   | 9,445                    |
| <b>Water Rate Base</b>                      | <u><u>\$ 223,807</u></u> |

**Wastewater Revenue Requirement**

|                                   |                  |
|-----------------------------------|------------------|
| Operating Revenue                 | \$ 116,549       |
| Operating and Maintenance Expense | 75,559           |
| Net Depreciation Expense          | 16,256           |
| Taxes Other Than Income           | 5,263            |
| Total Operating Expense           | <u>97,078</u>    |
| Net Operating Income              | <u>\$ 19,471</u> |
| Water Rate Base                   | \$ 223,807       |
| Rate of Return                    | 8.70%            |

**Monthly Wastewater Service Rates – Residential Service**

|  |          |
|--|----------|
| Base Facility Charge                               | \$ 16.40 |
| Charge per 1,000 gallons<br>(11,000 maximum usage) | \$ 5.11  |

**Monthly Wastewater Service Rates – General Service**

|                          |           |
|--------------------------|-----------|
| Base Facility Charge     |           |
| 5/8 x 3/4"               | \$ 16.40  |
| 3/4"                     | \$ 24.60  |
| 1.0"                     | \$ 41.00  |
| 1.5"                     | \$ 82.00  |
| 2.0"                     | \$ 131.20 |
| 3.0"                     | \$ 262.40 |
| Charge per 1,000 gallons | \$ 5.11   |

**Comparison Residential Wastewater Service Bills**

|                |          |
|----------------|----------|
| 5,000 gallons  | \$ 41.95 |
| 7,500 gallons  | \$ 54.73 |
| 10,000 gallons | \$ 67.50 |

**Wastewater Service Availability Charges**

|  |             |
|--|-------------|
| Plant Capacity Charge                            |             |
| Residential-per ERC (270) GPD                    | \$ 2,399.35 |
| All others-per gallon                            | \$ 8.89     |
| Main Extension Charge (in lieu of donated lines) |             |
| Residential-per ERC (270) GPD                    | \$ 2,420.89 |
| All others-per gallon                            | \$ 8.97     |