

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for transfer
of Certificates Nos. 592-W and
509-S from Cypress Lakes
Associates, Ltd. to Cypress
Lakes Utilities, Inc. in Polk
County.

DOCKET NO. 971220-WS
ORDER NO. PSC-98-1566-PCO-WS
ISSUED: November 23, 1998

The following Commissioners participated in the disposition of
this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK

ORDER DENYING MOTION TO DISMISS

BY THE COMMISSION:

BACKGROUND

On September 19, 1997, Cypress Lakes Associates, Ltd. filed an application for approval of the transfer of Certificates Nos. 592-W and 509-S to Cypress Lakes Utilities, Inc. (Cypress Lakes or utility) pursuant to Section 367.071, Florida Statutes. By Order No. PSC-98-0993-FOF-WS, issued July 20, 1998, the transfer was approved by final agency action and rate base was established for purposes of the transfer as proposed agency action. On August 10, 1998, the Office of Public Counsel (OPC) filed a timely Petition for Section 120.57(1) Hearing and Protest of Proposed Agency Action. Accordingly, this matter is currently scheduled for a June 17, 1999 administrative hearing.

On August 21, 1998, Cypress Lakes filed a Motion to Dismiss or Strike OPC's Petition for Section 120.57(1) Hearing and Protest of Proposed Agency Action. On August 27, 1998, OPC filed a Response to Cypress Lakes' Motion to Dismiss or Strike.

MOTION TO DISMISS

In its motion, Cypress Lakes argues that OPC does not allege any grounds why the Commission should include a negative acquisition adjustment in rate base. Cypress Lakes also argues

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that "extraordinary circumstances" is the sole ground for including an acquisition adjustment in rate base, and OPC's petition fails to make that showing or even allege extraordinary circumstances.

Cypress Lakes also argues that there are no extraordinary circumstances in this case, and there is nothing in this case which would warrant an acquisition adjustment. Pursuant to the standard set forth in Order No. PSC-98-1092-FOF-WS, issued August 12, 1998, in Dockets Nos. 960235-WS and 960283-WS, Cypress Lakes argues that it has met its burden and OPC has failed to meet its burden to show why a negative acquisition adjustment is warranted.

Furthermore, Cypress Lakes cites to Rule 25-22.029, Florida Administrative Code, alleging that it sets forth the requirements for initiating a formal proceeding. We note, however, that Cypress Lakes has incorrectly cited the applicable rule which is actually Rule 25-22.036, Florida Administrative Code. However, even that rule has now been replaced by the newly adopted Uniform Rules of Procedure. Accordingly, the correct citation is to Rule 28-106.201, Florida Administrative Code, which provides in subsection (2), that each initial pleading shall contain a statement of all disputed issues of material fact and a concise statement of the ultimate facts alleged, as well as the rules and statutes which entitle the petitioner to relief. The rule further provides in subsection (4) that a petition may be dismissed if it is not in substantial compliance with subsection (2) or it has been untimely filed. Dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured.

Cypress Lakes alleges that OPC's petition fails to set forth any issues of material fact, fails to give a concise statement of the ultimate facts alleged, and fails to set forth any rules and statutes which entitle it to relief. The only statutory allegation in the petition is Section 350.0611, Florida Statutes, which gives OPC the right to appear in a proceeding held under Chapter 120, Florida Statutes, not the substantive or procedural authority under which it can prevail or even meet the minimum threshold necessary to require the Commission to accept the Petition and hold a hearing. Accordingly, Cypress Lakes requests that we dismiss or strike OPC's petition and make Order No. PSC-98-0993-FOF-WS final.

OPC argues in its response that the list of issues presented in its petition provide notice to Cypress Lakes and to the Commission exactly the factual, legal, and policy basis for denying present investors a return on investment which they did not make. OPC also argues that Cypress Lakes' motion is an invitation to the merits of the case in that it alleges that there are "no extraordinary circumstances in this case," that "there were no reasons to support an acquisition adjustment" and that there is nothing in the case which would warrant an acquisition adjustment. Finally, OPC argues that each and every allegation asserted by the petition must be taken as true for purposes of a motion to dismiss, including that portion which alleges that the Commission proposes to approve a return on investment never made by Cypress investors.

"The function of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action." Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993). "In determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint . . . nor consider any evidence likely to be produced by either side . . . Significantly, all material factual allegations . . . must be taken as true." Id.

Upon review of the petition, we believe that OPC's petition sufficiently identifies certain disputed issues and the ultimate facts it alleges in accordance with Rule 28-106.210, Florida Administrative Code. Specifically, OPC's petition identifies the following issues of fact, law, and policy by resolution by the Commission in a Section 120.57(1) hearing:

1. Did the former owners properly maintain the assets;
2. What was the condition of the assets sold to Cypress Lakes;
3. Should the burden of showing its actual investment be borne by Cypress Lakes;
4. Should the Commission recognize a negative acquisition adjustment in the rate base, and if so, how much; and
5. What is the initial rate base of Cypress Lakes?

Furthermore, OPC alleges that Order No. PSC-98-0993-FOF-WS grants Cypress Lakes a rate base far in excess of the amount paid by Cypress Lakes for the utility's assets upon which rates will inevitably be based, thus providing a return on, and return of, investments never made by Cypress Lakes.

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We believe the foregoing statement and issues substantially comply with Rule 28-106.210, Florida Administrative Code, in identifying the ultimate issues and facts alleged, as well as OPC's position regarding rate base inclusion of a negative acquisition adjustment. Accordingly, we find that OPC has alleged sufficient facts to state a cause of action, and, therefore, pursuant to Varnes, Cypress Lakes' motion to dismiss or strike OPC's petition for hearing is denied.

CLOSING OF DOCKET

This docket shall remain open pending final disposition of this matter.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Cypress Lakes Utilities, Inc.'s Motion to Dismiss or Strike OPC's Petition for a Section 120.57(1) Hearing and Protest of Proposed Agency Action is hereby denied. It is further

ORDERED that this docket shall remain open pending final disposition of this matter.

By ORDER of the Florida Public Service Commission this 23rd day of November, 1998.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

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

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.