BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Emergency petition by D.R. Horton Custom Homes, Inc. to eliminate authority of Southlake Utilities, Inc. to collect service availability charges and AFPI charges in Lake County.	DOCKET NO. 981609-WS ORDER NO. PSC-99-0648-PCO-WS ISSUED: April 6, 1999

The following Commissioners participated in the disposition of this matter:

JOE GARCIA, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JULIA L. JOHNSON
E. LEON JACOBS, JR.

ORDER DENYING MOTION TO DISMISS

BY THE COMMISSION:

BACKGROUND

Southlake Utilities, Inc. (Southlake or utility) is a Class C utility providing service to approximately 238 water and 237 wastewater customers in Lake County. According to the utility's 1997 annual report, the water system had actual operating revenues of $88,341 and a net operating loss of $73,058 and the wastewater system had actual operating revenues of $84,552 and a net operating loss of $168,550.

On November 16, 1998, D.R. Horton Custom Homes, Inc. (Horton or developer) filed an emergency petition, pursuant to Section 367.101, Florida Statutes, and Rules 25-30.580 and 28-106.301, Florida Administrative Code, to eliminate all of Southlake's service availability and allowance for funds prudently invested (AFPI) charges. On December 11, 1998, Southlake timely filed a motion to dismiss Horton's emergency petition, pursuant to Rule 28-106.204, Florida Administrative Code. By Order No. PSC-99-0027-PCO-WS, issued January 4, 1999, we initiated an investigation into

Southlake's service availability and AFPI charges and required that these charges be held subject to refund pending the completion of our investigation.

MOTION TO DISMISS

As previously noted, Horton filed an emergency petition, pursuant to Section 367.101, Florida Statutes, and Rules 25-30.580 and 28-106.301, Florida Administrative Code, wherein it requested that this Commission eliminate all of Southlake's service availability and AFPI charges. Southlake filed a motion to dismiss Horton's emergency petition pursuant to Rule 28-106.204, Florida Administrative Code. Southlake asserted three grounds as to why its motion to dismiss should be granted: 1) failure to state a cause of action upon which relief can be granted; 2) failure to join indispensable parties; and 3) Horton's petition is moot.

First, Southlake argued that Horton's petition should be dismissed because it is actually a request for an injunction against Southlake's collection of service availability and AFPI charges, and as such, Horton is required to allege the elements required for injunctive relief, which are the likelihood of irreparable harm; the unavailability of an adequate remedy at law; a substantial likelihood of success on the merits; considerations of public interest; and post a bond in the amount the court deems proper pursuant to Rule 1.610, Florida Rules of Civil Procedure. Southlake asserted that Horton's emergency petition does not allege the aforementioned elements required for injunctive relief and Horton posted no bond, and that therefore, the petition fails to state a cause of action upon which relief can be granted by this Commission.

Second, Southlake argued that Horton's emergency petition should be dismissed because it fails to join indispensable parties. Southlake claimed that any effective resolution of Southlake's rates and charges will require revision to all of Southlake's rates and charges; therefore, Horton's proposed remedy would adversely impact Southlake's existing and future customers without providing these individuals notice or an opportunity to be heard.

Third, Southlake argued that Horton's emergency petition should be dismissed as moot. Southlake contended that if we initiate an investigation into Southlake's service availability and AFPI charges, which we did by Order No. PSC-99-0027-PCO-WS, Horton's petition should be dismissed as moot.

Motion to Dismiss Horton's Emergency Petition as Moot

A case is moot when it presents no actual controversy or when the issues have ceased to exist. Godwin v. State, 593 So.2d 211, 212 (Fla. 1992). A moot case will generally be dismissed unless there are questions raised which are of great public importance, the issues are likely to recur, or if there are collateral legal consequences that affect the rights of a party that flow from the issue to be determined. Id.

In Order No. PSC-99-0027-PCO-WS, we initiated an investigation into Southlake's service availability and AFPI charges and found that these charges shall be held subject to refund pending the completion of the our investigation. Once the investigation is complete, Commission staff will bring a recommendation to us addressing whether Southlake's service availability and AFPI charges should be continued, reduced or eliminated. Therefore, although we are investigating Horton's allegations and will address whether the charges should be continued, reduced, or eliminated, the issue as to whether Southlake's service availability and AFPI charges should be eliminated still exists. Thus, Horton's emergency petition shall not be dismissed on the ground that it is moot.

Motion to Dismiss Horton's Emergency Petition for Failure to State a Cause of Action Upon Which Relief Can Be Granted

A motion to dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993). The standard to be applied in disposing of a motion to dismiss is whether, with all allegations in the petition assumed to be true, the petition states a cause of action upon which relief can be granted. Id. When making this determination, only the petition can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner. Id.

In order to determine whether the petition states a cause of action upon which relief can be granted, it is necessary to examine the elements which must be alleged under the substantive law on the matter. All of the elements of the cause of action must be properly alleged in the pleading that seeks affirmative relief. See Kislak v. Kreedian, 95 So.2d 510 (Fla. 1957). If all elements are not properly alleged, the pleading should be dismissed.

The substantive law upon which we derive our authority to grant the relief requested by Horton is Section 367.101(1), Florida Statutes, which states that the Commission "shall set just and reasonable charges and conditions for service availability," and that the Commission "shall upon request or its own motion, investigate...conditions for service availability." Horton's petition was filed pursuant to Section 367.101, Florida Statutes (however the developer erroneously cited to the statute as Sections 367.121 and 367.131, Florida Statutes, in two places in its petition), and Rules 25-30.580 and 28-106.301, Florida Administrative Code.

As previously mentioned, the reason Southlake gave as to why Horton's emergency petition should be dismissed for failure to state a cause of action is that the petition does not state a cause of action for injunctive relief. Southlake is correct when it states that, in order for an injunction to be issued, the party requesting the relief must allege the likelihood of irreparable harm; the unavailability of an adequate remedy at law; substantial likelihood of success on the merits; considerations of the public interest; and post a bond pursuant to Rule 1.610(b), Florida Rules of Civil Procedure. However, Southlake has incorrectly characterized Horton's emergency petition as a request for an injunction. The governing law for Horton's emergency petition is Section 367.101, Florida Statutes, which does not require Horton to meet the aforementioned elements needed for the issuance of an injunction.

Order No. PSC-94-0210-FOF-WS, issued February 21, 1994, titled In Re: Complaint Against Tamiami Village Utility, Inc. By Cynwyd Investments, And Request For Emergency Order Requiring The Utility To Reestablish Water And Wastewater Service To Cynwyd's Friendship Hall In Lee County, supports our view that a request for emergency relief does not equate to a request for the Commission to issue an injunction. In that Order, we addressed the issue of whether emergency action by the Commission constitutes injunctive relief when the utility argued that the Commission's use of the term "emergency relief" instead of the term "injunction" did not change the end result, which is a restraining order. We concluded that emergency action taken by the Commission is not an injunction, stating that:

> While the right to issue injunctive relief is reserved to the circuit court, this Commission is granted broad police powers under Section 367.011(3), Florida Statutes.

> In the public interest, the Commission may exercise said police powers for the "protection of the public health, safety, and welfare."...We agree that this Commission does not have subject matter jurisdiction to issue injunctions....[h]owever, this Commission does have the power to enforce its own statutes, rules and regulations...affecting the public health, safety and welfare.

Order No. 94-0210 at 17. Thus, Southlake's argument that Horton's emergency petition is actually a request for an injunction is rejected.

By its petition, Horton seeks to have Southlake's service availability and AFPI charges eliminated. It is in essence a request to have us exercise our power to fix, what Horton alleges are, just and reasonable AFPI and service availability charges for Southlake. In support of its allegations that Southlake's service availability and AFPI charges should be eliminated, Horton sets forth calculations, based on Southlake's 1997 annual report, for service availability and AFPI charges that indicate that Southlake is overcontributed. Viewing the petition in the light most favorable to Horton and taking all allegations in the petition as true, consistent with Varnes, Horton's emergency petition states a cause of action upon which relief may be granted under Section 367.101, Florida Statutes. Therefore, Southlake's motion to dismiss shall be denied.

Mixed in Southlake's argument that Horton's petition fails to state a cause of action upon which relief can be granted, Southlake contended that the emergency petition does not provide for a hearing whereby Southlake can contest Horton's allegations; therefore, it should be dismissed. Section 367.101, Florida Statutes, contains no affirmative requirement that a hearing must be requested for relief under this statute. Moreover, action taken on the merits of Horton's petition will be proposed agency action which will allow the utility an opportunity to protest our order and request a hearing.

Motion to Dismiss Horton's Emergency Petition for Failure to Join Indispensable Parties

In W.R. Cooper, Inc. v. City of Miami Beach, 512 So.2d 324, 326 (Fla. 3d DCA 1987), the court defined an "indispensable party" as one who has such an interest in the subject matter of the action

that a final adjudication cannot be made without affecting the party's interest or without leaving the controversy in such a situation that its final resolution may be inequitable. Additionally, Rule 28-106.109, Florida Administrative Code, states that:

> [I]f it appears that the determination of the rights of parties in a proceeding will necessarily involve a determination of the substantial interests of persons who are not parties, the presiding officer may enter an order requiring that the absent person be notified of the proceeding and be given an opportunity to be joined as a party of record.

Although Cooper and Rule 28-106.109, Florida Administrative Code, initially seem to indicate that customers may be indispensable parties that should be joined to this action, Commission action taken on the merits of Horton's petition will be issued as proposed agency action; therefore, any person whose substantial interests are affected by our action, such as Southlake's current customers, may protest our order and request a hearing on the matter. Moreover, Section 367.101, Florida Statutes, contains no affirmative requirement to join customers to any action under this section. Thus, Southlake's motion to dismiss is hereby denied on the ground that it fails to join indispensable parties.

The investigation into Southlake's service availability and AFPI charges shall be combined with this docket, and Horton's emergency petition shall be addressed when the investigation is complete. This docket shall remain open pending the completion of the investigation into Southlake's service availability and AFPI charges and pending our action on Horton's emergency petition to eliminate Southlake's collection of service availability and AFPI charges.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Southlake Utilities, Inc.'s motion to dismiss D.R. Horton Custom Homes, Inc.'s emergency petition to eliminate all of Southlake Utilities, Inc.'s service availability and allowance for funds prudently invested charges is hereby denied. It is further

ORDERED that this Commission's investigation into Southlake Utilities, Inc.'s service availability and allowance for funds prudently invested charges shall be combined with this docket. It is further

ORDERED that D.R. Horton Custom Homes, Inc.'s emergency petition to eliminate all of Southlake Utilities, Inc.'s service availability and allowance for funds prudently invested charges shall be addressed when the investigation into Southlake Utilities, Inc.'s service availability and allowance for funds prudently invested charges is complete. It is further

ORDERED that this docket shall remain open pending the completion of the investigation into Southlake Utilities, Inc.'s service availability and allowance for funds prudently invested charges and pending this Commission's action on D.R. Horton Custom Homes, Inc.'s emergency petition to eliminate Southlake Utilities, Inc.'s collection of service availability and allowance for funds prudently invested charges.

By ORDER of the Florida Public Service Commission this 5th day of April, 1999.

Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

SAM

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.