



JACK SHREVE
PUBLIC COUNSEL

STATE OF FLORIDA
OFFICE OF THE PUBLIC COUNSEL

c/o The Florida Legislature
111 West Madison St.
Room 812
Tallahassee, Florida 32399-1400
850-488-9330

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RECORDS AND
REPORTING

July 16, 1999

ORIGINAL

Ms. Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0870

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

Dear Ms. Bayó:

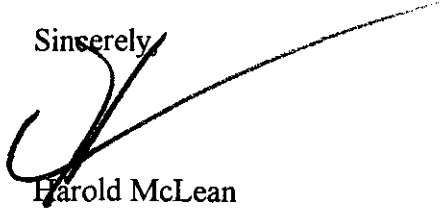
Enclosed are an original and fifteen copies of Citizens' Response to Utility's July 12th Motion to Dismiss for filing in the above-referenced docket.

Also enclosed is a 3.5 inch diskette containing the Citizens Response to Utility's July 12th Motion to Dismiss in WordPerfect for Windows 6.1. Please indicate receipt of filing by date-stamping the attached copy of this letter and returning it to this office. Thank you for your assistance in this matter.

RECEIVED & FILED

FPSC-BUREAU OF RECORDS

Sincerely,



Harold McLean
Associate Public Counsel

- ___ AFA
- ___ APP HM/dsb
- ___ CAF Enclosures
- ___ CMU
- ___ CTR
- ___ EAO
- ___ LEG
- ___ WRS 3
- ___ OPC
- ___ RRR
- ___ SEC 1
- ___ VAVW 2
- ___ OTH

DOCUMENT NUMBER-DATE

08509 JUL 16 99

FPSC-RECORDS/REPORTING

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, Florida)

Docket No. 971220-WS

Filed: July 16, 1999

ORIGINAL

CITIZENS' RESPONSE TO UTILITY'S
JULY 12TH MOTION TO DISMISS

The Citizens of the State of Florida, (Citizens) by and through JACK SHREVE, Public Counsel, respond to the Utility's Motion to Dismiss The Public Counsel's Protest and Petition for Section 120.57(1) Hearing (instant motion) as follows:

SUMMARY:

The instant motion should be dismissed because the Public Counsel's standing to protest an order of the Commission flows from statutory authority, not from the specific concerns of any one customer; because the bare filing of prefiled testimony -- even when properly filed -- never shifts any burden; because even if prefiled testimony did shift a burden, the Cypress Lakes Utilities, Inc.'s (Cypress, or the utility) supposed prefiled testimony has never been filed in accordance with relevant rules of administrative law; and because even if the instant motion had any substantive merit -- which it does not -- it is untimely.

The instant motion must be denied.

STANDING

The Citizens are left to guess the import of the instant motion's recitation of a letter received by the Commission from a utility customer, but infer that the issue is raised by Cypress to question either the adequacy of the Citizens' protest or the standing of the OPC to protest a Commission Proposed Agency Order on behalf of the Citizens.

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08509 JUL 16 99
FPSC-RECORDS/REPORTING

The Commission has directly addressed the adequacy of the protest in Order No. PSC-98-1566-FOF-WS in denying Cypress's motion which invited the Commission's attention to that issue.

With respect to OPC's standing to protest a Commission order of any kind, including a PAA order, Section 350.0611 provides in relevant part:

350.0611 Public Counsel; duties and powers.--It shall be the duty of the Public Counsel to provide legal representation for the people of the state in proceedings before the commission. The Public Counsel shall have such powers as are necessary to carry out the duties of his or her office, including, but not limited to, the following specific powers:

(1) To recommend to the commission, by petition, the commencement of any proceeding or action or to appear, in the name of the state or its citizens, in any proceeding or action before the commission and urge therein any position which he or she deems to be in the public interest, whether consistent or inconsistent with positions previously adopted by the commission, and utilize therein all forms of discovery available to attorneys in civil actions generally, subject to protective orders of the commission which shall be reviewable by summary procedure in the circuit courts of this state;

Thus the allegation that the customer's letter "[has] nothing to do with any matter which could be raised in this docket or with any matter raised by the subsequent protest and petition filed by the Office of Public Counsel" itself has nothing to do with this case. A protest filed by OPC, on behalf of the Citizens of the State of Florida, may or may not be based upon any specific letter of complaint authored by a utility customer.

The issue thus raised by Cypress is neither related to the validity of the protest nor to any supposed standing of the OPC to file this protest on behalf of Citizens: it does not support the instant motion to dismiss. The instant motion must be denied.

CYPRESS HAS FILED NO PREFILED TESTIMONY

Cypress claims in the instant motion that it has timely filed testimony; the Citizens say that it has not.

On April 16, 1999, Cypress either mailed or delivered the original and some copies of its direct testimony to the Director of Records and Reporting of the Commission. The pleading neglects any allegation or even bare statement that the testimony has been furnished to any party, or even to the staff. Indeed, after diligent inquiry, undersigned counsel has determined that no one was served with the testimony. The Florida Administrative code, which governs practice and procedure before the Commission, does not neglect this subject:

28-106.104 Filing.

(4) Whenever a party files a pleading or other document with the agency, that party shall serve copies of the pleading or other document upon all other parties to the proceeding. A certificate of service shall accompany each pleading or other document filed with the agency.

It should be noted that the rules require not only that the party serve copies upon other parties to the proceeding, but that each document filed with the agency include a certificate of service, a certificate notably lacking from the utility's testimony. The Citizens submit that a document otherwise filed is a nullity if a certificate is omitted therefrom.¹ The requirement that parties be

¹ The absence of a certificate of service has formed the basis of reversal of default judgments (Grahn v. Dade Home Services, Inc., 277 So.2d 544 (Fla. 3rd DCA 1973)) (Scott v. Johnson, 386 So.2d 67 (Fla. 3rd. DCA 1980)); reversal of a change of venue order (J.L.S. v. R.J.L. 708 So.2d 293 (Fla. 2nd DCA 1998)); reversal of summary judgment of foreclosure (Hughes v. Home Stav. of America, F.S.B. 675 So.2d 64 (Fla. 2nd DCA 1996)); reversal of order denying post conviction relief (Jones v. State, 642 So.2d 121 (Fla. 5th DCA 1994)); reversal of a final judgment in a "complex, confused estate" (Boles v. Estate of Romer, 595 So.2d 296 (Fla. 5th DCA 1992)); reversal of a Florida court's order under the UCCJA--Uniform Child Custody Jurisdiction Act--deferring to an order of a Mississippi court (Walt v. Walt 574 So.2d 20 (Fla. 1st

served and that counsel certify that he or she had done so is not window dressing to the contrary, it gives rise to a rebuttable presumption that service has taken place. Here, neither the presumption of the certificate has been acquired, nor the plain, unequivocal requirement of the rule met.

The Citizens submit that where a document lacks a certificate of service, it is not filed. That it might be provided to the clerk of the agency (or in the case of the Commission, the Director of Records and Reporting) is notwithstanding.

THE PREFILING OF TESTIMONY DOES NOT OPERATE TO SHIFT ANY BURDEN OF ANY PARTY

The Citizens reiterate their position that the Utility's attempt to file testimony is flawed such that the filing championed by the utility is a nullity. But even were it not so, it cannot be said that a successful filing of prefiled testimony shifts any burden of any party.² The prefiled testimony isn't even part of the evidence until it is moved into the record at the hearing. Cumbersome as it sometimes is, the questions directed to a witness at hearing as to whether that person prefiled testimony, whether there are corrections, deletions or the like, and whether were the witness asked the same questions as reflected in the prefiled testimony whether their answers would be the same, the procedure is not without import. It is, in a sense, the authentication of the testimony and *for the first time* subjects that prefiled testimony to scrutiny by the opposing side. To put it simply, the supposedly prefiled testimony submitted by Cypress is not yet part of this record and would not be so even if it had been filed correctly. It may become part of this record if it survives a motion to strike for having been filed improperly, and if successfully introduced, but to argue that it can be

DCA 1991)).

² Such a claim is advanced by Cypress in paragraph 16 of the instant motion.

relied upon by the Commission to shift any burden of any party is clearly erroneous. The prefiled testimony, even if it were correctly filed, presents no prima facie case as alleged by the utility.

The utility's reliance upon the Wedgefield case treatment of burden of proof is misplaced. Wedgefield argued that the proponent of a negative acquisition adjustment bears the burden of proof. That argument was rejected by the Commission, as the Commission said:

As discussed in greater detail below, we find that a showing of extraordinary circumstances must be made to warrant a rate base inclusion of an acquisition adjustment. Once the utility makes an initial showing that there are no extraordinary circumstances, the burden of persuasion shifts to the opposing party to demonstrate that extraordinary circumstances are present. If the opposing party meets the burden of persuasion, the ultimate burden of rebutting the opposing party's allegations rests upon the utility.

In re Application of Wedgefield Utilities, Inc., 98 F.P.S.C. 8:234, 240 (1998).

At this point, the utility has made no showing of any kind. Any "showing" it might make is to be found in its non-filed prefiled testimony, and even were that filed correctly, it is not yet part of this record, may never be, and is untested by "the opposing party."

Thus, even were the utility to correctly file eminently persuasive testimony, it is far too soon in the proceedings to recognize any shifting of any burden upon which the instant motion could be based. The instant motion must be denied.

THE INSTANT MOTION IS UNTIMELY

The instant motion seeks to dismiss a Petition filed by the Citizens on August 21, 1998, nearly a year prior to the instant motion's filing. Rule 28-106.204, Florida Administrative Code, addresses the appropriate time for motions to dismiss:

Motions.

(2) Unless otherwise provided by law, motions to dismiss the petition shall be filed no later than 20 days after service of the petition on the party.

In a recent case the Commission has dutifully given effect to this rule. In In Re Application of Florida Cities Water Company, 98 F.P.S.C. 8:449, 445, the Commission held:

We agree with FCWC that OPC's motion to dismiss should be denied because it was untimely filed. As previously noted, Rule 28-106.204(2), Florida Administrative Code, requires that motions to dismiss a petition shall be filed no later than 20 days after service of the petition unless otherwise provided by law, and the law does not provide otherwise.

Considerably more time than the twenty days permitted by Rule 28-106.204(2), F.A.C., has passed; the law -- the same law which prevailed in FCWC -- prevails here and similarly does not provide "otherwise." Even were the instant motion otherwise well-founded, it must be denied on the basis that it is untimely.

WHEREFORE, the Citizens of the Sate of Florida, by and through JACK SHREVE, Public Counsel, request the Commission deny the instant motion forthwith.

Respectfully submitted,

Jack Shreve
Public Counsel

Harold McLean
Associate Public Counsel

Office of the Public Counsel
c/o The Florida Legislature
111 West Madison Street
Tallahassee, Florida 32399-1400
(850) 488-9330
Attorneys for the Citizens
of the State of Florida

**CERTIFICATE OF SERVICE
DOCKET NO. 971220-WS**

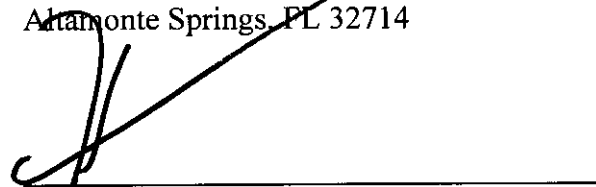
I HEREBY CERTIFY that a true and correct copy of the foregoing CITIZENS' RESPONSE TO UTILITY'S JULY 12TH MOTION TO DISMISS has been furnished by U.S. Mail or *hand delivery to the following parties, this 16th day of July, 1999.

Jennifer Brubaker, Esquire*
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Michael L. Resnick, Esquire
1342 E. Vine Street, Suite 236
Kissimmee, Florida 34744

Ben E. Girtman, Esquire
1020 East Lafayette Street
Suite 207
Tallahassee, Florida 32301

Cypress Lakes Utilities, Inc.
200 Weathersfield Avenue
Altamonte Springs, FL 32714



Harold McLean
Associate Public Counsel