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July 30, 1999

ORIGINAL

Ms. Blanca Bayo  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850

Re: Docket No. <sup>7</sup>981220-WS - 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.

Dear Ms. Bayo:

Enclosed for filing are the original and fifteen copies of the following documents:

1. Certificate of Service (as to service of Direct Testimony of Carl Wenz)
2. Utility's Utility's Response to Citizens' Motion to Strike Utility's Testimony 09041-99
3. Utility's Third Motion to Dismiss the Office of Public Counsel's Protest And Petition For Section 120.57(1) Hearing Based on Lack of Case or Controversy 09042-99

Thank you for your assistance. If there are any questions, please let me know.

Sincerely yours,

Ben E. Girtman

AFA Encls.  
 APP cc w/encls: Mr. Carl Wenz  
 CMT \_\_\_\_\_ Mr. Frank Seidman  
 CNUJ \_\_\_\_\_ Jennifer Brubaker, Esq.  
 CTR \_\_\_\_\_ Harold McLean, Esq.  
 EAG \_\_\_\_\_  
 IEG 2 \_\_\_\_\_  
 JMS 3 \_\_\_\_\_  
 CFC \_\_\_\_\_  
 FTR \_\_\_\_\_  
 GSC \_\_\_\_\_  
 (LAW) \_\_\_\_\_  
 OTH \_\_\_\_\_

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RECEIVED & FILED  
*Wenz*  
FPSC-BUREAU OF RECORDS

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

DOCKET NO. 971220-WS

Filed: July 30, 1999

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Direct Testimony of Carl Wenz was served on Harold McLean, Esq., Office of Public Counsel, 111 W. Madison St., Tallahassee, FL 32399-1400, by hand delivery, not later than June 16, 1999, and that he acknowledged on June 16, 1999 that he already had in his possession a copy of the testimony; and that on April 16, 1999, the original and fifteen copies were filed with the Clerk of the Florida Public Service Commission, 2540 Shumard Oak Blvd., Tallahassee FL 32399-0850, by hand delivery, including a copy for Jennifer Brubaker, Esq., Division of Legal Services, Florida Public Service Commission, 2540 Shumard Oak Blvd., Tallahassee FL 32399-0850.



Ben E. Girtman  
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Attorney for Utilities, Inc. and  
Cypress Lakes Utilities, Inc.

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for transfer )  
of Certificate Nos. 592-W and )  
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UTILITY'S RESPONSE  
TO CITIZENS' MOTION TO STRIKE  
UTILITY'S TESTIMONY

COMES NOW Utilities, Inc. and its wholly owned subsidiary, Cypress Lakes Utilities, Inc., and in response to the OPC Motion to Strike Utility's Testimony state that:

1. On July 26, 1999, the Office of Public Counsel (OPC) filed its Citizens' Response to Utility's July 19<sup>th</sup> Motion to Strike or in the alternative Citizens' Motion to Strike Utility's Testimony.
2. The Utility's Response addresses the deficiencies in OPC's alternative Motion to Strike. Simultaneously herewith, the Utility has also filed its third Motion to Dismiss the Office of Public Counsel's Protest and Petition for Section 120.57(1) Hearing Based on Lack of Case or Controversy. The content of OPC's Direct Testimony of Hugh Larkin, Jr. and its dilatory tactics show that there is nothing for the Commission to decide in this case.
3. The Direct Testimony of Carl Wenz was timely filed by the Utility on April 16, 1999. A statement of the procedural background of the case is set forth in the Utility's second Motion to Dismiss the Office of Public Counsel's Protest and Petition for

Section 120.57(1) Hearing Based on Lack of Case or Controversy, filed on July 12, 1999, and is incorporated herein.

4. The OPC Motion to Strike Utility's Testimony (filed on July 26), alleges that no certificate of service accompanied the direct testimony. OPC did not allege that it did not receive the testimony or otherwise have in its possession a copy of the testimony. In fact, when contacted by the Utility's undersigned counsel on June 16, 1999, OPC's counsel acknowledged that OPC already had in its possession a copy of the testimony. Nevertheless, an additional copy was hand delivered to OPC that same day, June 16.
5. OPC's own direct testimony was due May 21, 1999, but was not filed. On July 12, 1999, the Utility filed its Motion to Dismiss the OPC protest and request for hearing based upon OPC's failure to file testimony in accordance with the Commission's revised Order Establishing Procedure. The OPC direct testimony was then filed on July 16, 1999.
6. OPC's Response takes the curious position that a party's actual notice of a document and actual possession of that document somehow relieves that party of compliance with its own obligation to comply with the Order Establishing Procedure.
7. First of all, a party's duty to file its own direct testimony is not contingent upon receipt of another party's direct testimony (but OPC even acknowledges that it had the Utility's direct testimony in its possession).

8. Second, OPC's counsel never complained of alleged failure to timely receive the Utility's direct testimony (or certificate of service), never contacted the Utility's attorney to inquire about the availability (or lack of availability) of the Utility's direct testimony (or certificate of service), and never filed a motion or other pleading with the Commission in regard to alleged failure to file a certificate of service along with the direct testimony.
9. Third, on June 16, 1999, the Utility's attorney contacted the OPC attorney by telephone to determine if OPC would be filing testimony and exhibits in this case. OPC's attorney stated that, as of that date (June 16), they had not decided whether they would be filing testimony and exhibits in this case. This was 26 days after the May 21, 1999 deadline for OPC to file its direct testimony. He also acknowledged that OPC already had a copy of the Utility's direct testimony in its possession. OPC did not, at any time, file a motion for extension of time to file its direct testimony.
10. In none of its pleadings has OPC cited to any case where the affected party had possession of a document and then claimed prejudice because they did not also receive a certificate of service simultaneously with the document. In such circumstances, if a certificate of service is not filed simultaneously, at worst it is harmless error and does not relieve the party of its obligation to comply with the Commission's Order Establishing Procedure.
11. If OPC wants to get technical, it has an obligation to correctly cite the source of any legal authority upon which it relies. In footnote 1 on page 3 of its Response to

Utility's July 12<sup>th</sup> Motion to Dismiss, OPC erroneously cited two cases, the correct citations of which are: Hughes v. Home Savings of America, F.S.B., 675 So.2d 649 (Fla. 2<sup>nd</sup> DCA 1996); Walt v. Walt, 574 So.2d 205 (Fla 1<sup>st</sup> DCA 1991). Furthermore, the legal principle which OPC seeks to argue in its response to the Utility's motion to dismiss and in its motion to strike is not supported by the cases. The cases related to situations where:

- 1) a party did not receive a document (here, OPC acknowledges that they had the direct testimony, even before June 16, 1999);
- 2) a party was not represented by counsel (OPC is the attorney of record in this case);
- 3) a party sought change of venue (there is no change of venue in this case);
- 4) a certificate of service was included, but there were *other grounds for reversal*, such an inaccurate representation by the Department of Revenue to the Circuit Court that all parties had agreed to a change of venue in a paternity case (here, OPC acknowledged having the direct testimony of the Utility's witness, and there was no *inaccurate representation regarding venue or otherwise*);
- 5) failure to give notice of hearing (the revised Order Establishing Procedure includes all relevant dates, including but not limited to the hearing date and the May 21, 1999 due date for OPC's direct testimony);
- 6) lack of notice (here, OPC had actual notice - a copy of the direct testimony of the Utility's witness);

- 7) summary denial of motion for post-conviction relief in a criminal trial where effective notice could not be presumed (here OPC had actual notice);
- 8) a charging lien for attorney fees due in an estate proceeding where there was no evidence of notice) OPC had actual notice and had possession of the document in question); and
- 9) lack of pleading in a complaint under the Uniform Child Custody Jurisdiction Act as to whether other claims of child custody or visitation were pending in other jurisdictions (here, there is only one jurisdiction involved).
12. Therefore, none of these factual situations is supportive of OPC's motion because OPC had actual notice; acknowledged that it had actual notice; had a copy of the Order Establishing Procedure (as revised); has a copy of the direct testimony; has acknowledged that it had a copy of the direct testimony; failed to contact the opposing counsel regarding the certificate of service or the testimony; and failed to file a motion or other pleading with the Commission seeking relief.
13. OPC's reliance on the "equity" provisions of GTE Florida v. Clark, 668 So.2d 971 (Fla. 1996) is likewise misplaced. To the contrary, the Court held that GTE Florida's failure to request a stay during pendency of appellate and remand proceedings did not preclude the utility from recovering its affiliate expenses, which the Commission had erroneously disallowed during that time. The GTE Florida case has nothing to do with notice or a certificate of service. Even so, to seek equity one must do equity. To seek equity, one must come to the tribunal with "clean

hands". OPC has not done so in this case.

14. Furthermore, OPC has cited no case decided pursuant to Rule 28-106-104, or any other rule, excusing it from complying with the Order Establishing Procedure (as revised) and from timely filing its prefiled testimony.

WHEREFORE, Utilities, Inc. and its wholly owned subsidiary, Cypress Lakes Utilities, Inc., request that the Commission grant their motion to strike the Office of Public Counsel's Direct Testimony of Hugh Larkin, Jr. and grant the second and third motions to dismiss the protest and request for hearing on the grounds that 1) OPC materially failed to comply with the Order Establishing Procedure and 2) there is no justiciable issue for the Commission to consider in this proceeding. All matters raised by OPC are the type which should be considered in a rate case proceeding, not in a transfer proceeding.

RESPECTFULLY SUBMITTED, this 30th<sup>th</sup> day of July, 1999.



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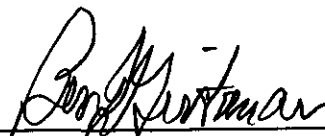
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Attorney for Utilities, Inc. and  
Cypress Lakes Utilities, Inc.



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Ben E. Girtman