



Public Service Commission

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DATE: AUGUST 26, 1999

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

FROM: DIVISION OF LEGAL SERVICES (BRUBAKER, CROSSMAN) *RB*
DIVISION OF WATER AND WASTEWATER (JOHNSON, REDEMANN, MESSER) *RR*
M for GW + CG *BL* *AMA*

RE: DOCKET NO. 971220-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.

AGENDA: 09/07/99 - REGULAR AGENDA - DECISION PRIOR TO HEARING - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\971220.RCM

CASE BACKGROUND

On September 19, 1997, Cypress Lakes Associates, Ltd. (Cypress Lakes or utility) filed an application with this Commission for approval of the transfer of Certificates Nos. 592-W and 509-S to Cypress Lakes Utilities, Inc. (CLUI) 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.

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' Motion to Dismiss or Strike. By Order No. PSC-98-1566-

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FPSC-RECORDS/REPORTING

DOCKET NO. 971220-WS
DATE: AUGUST 5, 1999

FOF-WS, issued November 23, 1998, in this docket, the Commission denied the utility's Motion to Dismiss.

On September 14, 1998, by Order No. PSC-98-1213-PCO-WS, the Commission issued an Order Establishing Procedure, and this matter was scheduled for an administrative hearing. Order No. PSC-98-1213-PCO-WS also established controlling dates that required OPC to file its direct testimony and exhibits by March 15, 1999.

On January 21, 1999, by Order No. PSC-99-0104-PCO-WS, the Commission issued an Order Revising Order Establishing Procedure, with a revised list of controlling dates requiring OPC to file its direct testimony and exhibits on April 16, 1999.

On February 23, 1999, by Order No. PSC-99-0383-PCO-WS, the Commission issued an Order Revising Order Establishing Procedure, with a second revised list of controlling dates requiring OPC to file its direct testimony and exhibits on May 21, 1999.

On April 16, 1999, the utility filed its direct testimony of Carl Wenz. On June 16, 1999, counsel for the utility contacted OPC to determine if OPC would be filing testimony. During that conversation, OPC informed counsel for the utility that OPC had not been served with a copy of the utility's testimony. On June 25, 1999, the Commission staff filed its direct testimony of Jeffrey A. Small, who sponsored the staff's Audit Report.

On July 12, 1999, the utility filed a second Motion to Dismiss the Office of Public Counsel's Protest and Petition for Section 120.57(1) Hearing. On July 16, 1999, OPC timely filed a Citizens' Response to Utility's July 12th Motion to Dismiss. On July 17, 1999, OPC filed the direct testimony of Hugh Larkin, Jr.

On July 19, 1999, Cypress Lakes filed Utility's Motion to Strike the Office of Public Counsel's Direct Testimony of Hugh Larkin, Jr. On July 26, 1999, OPC filed a Citizens' Response to Utility's July 19th Motion to Strike or in the Alternative Citizens' Motion to Strike Utility's Testimony. On July 30, 1999, Cypress Lakes filed Utility's Response to Citizens' Motion to Strike Utility's Testimony, as well as the 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.

On August 3, 1999, OPC filed a Citizens' Response to Utility's July 30th Motion to Dismiss.

This recommendation addresses Cypress Lakes and OPC's motions and responses.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant the utility's second and third Motions to Dismiss the Office of Public Counsel's Protest and Petition for Section 120.57(1) Hearing?

RECOMMENDATION: No. The utility's second and third Motions to Dismiss the Office of Public Counsel's Protest and Petition for Section 120.57(1) Hearing should be denied. (CROSSMAN)

STAFF ANALYSIS: On July 12, 1999, Cypress Lakes filed its second motion to dismiss OPC's protest and petition for a Section 120.57, Florida Statutes, hearing, based upon OPC's failure to file testimony in this docket. In support of its motion, the utility cites the following grounds:

1) In its protest of Order No. PSC-98-0993-FOF-WS, OPC raises the issue of a negative acquisition adjustment;

2) The utility's direct testimony indicates that no extraordinary circumstances exist which would justify a negative acquisition adjustment in this docket.

3) Pursuant to Order No. PSC-98-1092-FOF-WS, issued August 12, 1998, in Docket No. 960235 (Wedgefield Utilities), once the utility makes an initial showing that there are no extraordinary circumstances to justify an acquisition adjustment, the burden of persuasion shifts to the opposing party to justify that extraordinary circumstances do exist;

4) Because OPC failed to present testimony or exhibits, it has not met its burden of persuasion.

Staff also notes that Cypress Lakes references a letter from a utility customer who complained that his Cypress Lakes

Associates, Ltd. lot rental agreement included the provision of water service in the rental fee. The utility asserts that this letter has nothing to do with OPC's protest and petition. It is not clear whether this letter is cited as support for the utility's motion.

OPC's Response

On July 16, 1999, OPC filed its response to Cypress Lakes' second motion to dismiss. OPC asserts that the utility's motion to dismiss should be denied based on the following:

1) Cypress Lakes failed to serve its direct testimony. Further, the utility's testimony failed to include a certificate of service.

2) Rule 28-106.104, Florida Administrative Code, requires that copies of documents filed with an agency be served upon all parties to the proceeding. The rule also requires that documents filed with the agency include a certificate of service. Therefore, OPC argues that the utility's testimony was not filed and is a nullity;

3) The utility's prefiled testimony is not a part of the evidence until it is moved into the record. Until the utility's testimony becomes a part of the record, Cypress Lakes has not made any showing regarding extraordinary circumstances related to the issue of acquisition adjustment. Therefore, it is too early in this proceeding to determine whether any burden of persuasion has shifted to OPC.

4) Rule 28-106.204, Florida Administrative Code, requires that motions to dismiss a petition be filed no later than 20 days after service of the petition. Cypress Lakes' motion was filed nearly one year after OPC's petition for hearing and should be dismissed as untimely.

OPC also comments regarding the customer letter referenced by Cypress Lakes. OPC suggests that the reference to the letter may infer question regarding the adequacy of the Citizens' protest or OPC's standing to protest a Commission Proposed Agency Action. OPC asserts that the Commission already addressed the adequacy of OPC's protest when it denied the utility's first motion to dismiss by Order No. PSC-98-1566-FOF-WS. Further, OPC asserts that Section 367.0611, Florida Statutes, empowers it to act on behalf of the citizens of Florida in Commission proceedings. Therefore, any

protest it files need not be based upon any specific letter of complaint.

Staff Analysis

Staff believes that the utility's second motion to dismiss should be denied as untimely. OPC argues that 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. Cypress Lakes filed its motion on July 12, 1999. Staff is cognizant of the fact that the uniform rules became effective on July 1, 1998, and Cypress Lakes' application was filed on September 19, 1997. However, there is no provision in the uniform rule indicating that it does not apply to cases begun prior to the effective date of the rule.

Staff notes that its recommendation is consistent with past Commission action. See In re: Petition of Florida Cities Water Company, Order No. PSC-98-1160-PCO-WS (August 25, 1998). By that Order, the Commission denied OPC's motion to dismiss a petition for limited proceeding filed by Florida Water Services Company, in part, because the motion was filed beyond 20 days of the petition.

Even if the utility had timely filed its motion to dismiss, the motion would still fail on other grounds. 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 may 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.

Cypress Lakes' second motion to dismiss does not challenge the adequacy of OPC's protest and petition for a hearing in this matter but, instead, focuses upon the adequacy of OPC's testimony. Therefore, the utility's second motion to dismiss fails under the standard set forth in Varnes and should be denied.

Staff notes that there is some question regarding Cypress Lakes' reference to a customer letter and its relationship to OPC's protest and petition. However, the utility does not expressly state that OPC's petition and protest should be dismissed as a result of this letter. Regardless, staff believes that OPC is

DOCKET NO. 971220-WS
DATE: AUGUST 5, 1999

correct in its assertion that under Section 350.0611, Florida Statutes, it has standing to proceed on behalf of the citizens', regardless of any specific customer letter.

Finally, staff notes that Cypress Lakes' second motion to dismiss appears to be another attempt to dismiss OPC's petition for a Section 120.57, Florida Statutes, hearing. Although different issues are raised, the intent remains the same. Staff also notes that the Commission addressed the adequacy of OPC's petition when it denied Cypress Lakes' first motion to dismiss by Order No. PSC-98-1566-FOF-WS:

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. . . . 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.

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.

Based on the foregoing, staff recommends that Cypress Lakes' second motion to dismiss should be denied.

UTILITY'S THIRD MOTION TO DISMISS

On July 30, 1999, Cypress Lakes filed its third motion to dismiss OPC's protest and petition for a Section 120.57, Florida Statutes, hearing, based on lack of case or controversy. The utility asserts that OPC's testimony fails to state any fact or raise any issue relevant to this proceeding.

OPC asserts in its response that the utility's third motion to dismiss must be denied, because it fails to address the sufficiency

DOCKET NO. 971220-WS
DATE: AUGUST 5, 1999

of OPC's petition. OPC also asserts that Cypress Lakes' motion should be dismissed as untimely.

Staff notes that this is the utility's third attempt to dismiss OPC's petition for a 120.57, Florida Statutes, hearing. Although the utility raises different issues, once again, the intent remains the same. Thus, based on staff's analysis regarding Cypress Lakes' second motion to dismiss, the utility's third motion to dismiss should also be denied. Cypress Lakes filed its motion beyond the 20-day period required by Rule 28-106.204(2), Florida Administrative Code, and should be denied on this ground. Furthermore, the utility's motion fails under Varnes to address the sufficiency of OPC's petition to state a cause of action upon which relief may be granted. Based on the foregoing, staff recommends that Cypress Lakes' second and third motions to dismiss be denied.

ISSUE 2: Should the Utility's Motion to Strike the Office of Public Counsel's Direct Testimony of Hugh Larkin, Jr., or the Citizens' Alternative Motion to Strike Utility's Testimony, be granted?

RECOMMENDATION: No. The Utility's Motion to Strike the Office of Public Counsel's Direct Testimony of Hugh Larkin, Jr., and the Citizens' Alternative Motion to Strike Utility's Testimony, should both be denied. (BRUBAKER)

STAFF ANALYSIS: On July 19, 1999, the utility filed its Motion to Strike the Office of Public Counsel's Direct Testimony of Hugh Larkin, Jr. In its Motion, the utility argues that the controlling dates established in this docket required OPC to prefile its direct testimony by May 21, 1999. However, OPC did not file its testimony until July 15, 1999. There was no motion, request for extension of time, or other pleading filed with OPC's testimony which explained why the testimony was not filed on or before May 21, 1999. The utility states that OPC has been on notice since September 14, 1998, by Order Establishing Procedure No. PSC-98-1213-PCO-WS, that OPC's direct testimony and exhibits would be due in this case.

On July 26, 1999, OPC filed its Response to Utility's July 19th Motion to Strike, or in the alternative, Citizen's Motion to Strike Utility's Testimony. In its response, OPC concedes that the filing of its testimony did not comport with the dates set forth in the most recent order establishing procedure. Further, OPC states that the appropriate time to challenge prefiled testimony is the point at which the tendering party seeks to have that testimony entered into the record by a sponsoring witness. Accordingly, OPC contends that the utility's Motion to Strike is premature and ought to be denied.

In the alternative, OPC argues that if its testimony is stricken for the failure to comply with the controlling dates established in this docket, that considerations of fairness would require that the utility's testimony be stricken for the failure to comport with the Florida Rules of Administrative Procedure. OPC states that the utility failed to follow the requirements of Rule 28-106.104, Florida Administrative Code, which provides that a party filing a pleading or other document with the agency shall serve copies of the document upon all parties to the proceeding, and that a certificate of service shall accompany each pleading or other document filed with the agency. OPC states that the utility's prefiled testimony lacked a certificate of service or any other representation that it had been served on OPC. OPC argues

that this failure to comply with Rule 28-106.104, Florida Administrative Code, is fatal to the filing of the testimony in that it renders the testimony a "nullity upon which the Commission cannot base a decision in this case."

On July 30, 1999, the utility filed a Response to OPC's Alternative Motion to Strike the utility's testimony. In its Response, the utility states that its testimony was timely filed on April 16, 1999. While OPC's Alternative Motion to Strike notes that no certificate of service was filed with the utility's testimony, the utility states that OPC did not allege it did not receive the testimony or otherwise have a copy in its possession. In its Response, the utility states that OPC's counsel acknowledged having actual possession of a copy of the utility's testimony on June 16, 1999.

The utility argues that a party's duty to file its own direct testimony is not contingent upon receipt of another party's direct testimony. Further, OPC's counsel never complained of an alleged failure to timely receive the utility's direct testimony, inquired about the availability of that testimony, or filed a motion or pleading with respect to the apparent failure to file a certificate of service along with the utility's testimony. The utility argues that ultimately OPC had actual notice of its obligation to file direct testimony, and at least as of June 16, 1999, OPC had actual possession of a copy of the utility's testimony. Cypress Lakes states that the apparent failure to file a certificate of service with the testimony is not necessarily prejudicial; at worst, it is harmless error and does not relieve a party of its obligation to comply with the Commission's Order Establishing Procedure.

On the first hand, staff notes that neither the utility nor OPC have cited to any statute, rule, or precedent which establishes that the appropriate remedy for failure to timely file testimony, or to file a certificate of service with the testimony, is to strike the non-comporting testimony.

As a matter of information, Rule 28-106.204, Florida Administrative Code, provides for the filing of motions but does not specifically set forth the grounds upon which a motion to strike may appropriately be granted. Rule 1.140(f), Florida Rules of Civil Procedure, provides that a party may move to strike or the court may strike redundant, immaterial, impertinent, or scandalous matter from any pleading at any time. As a matter of practice, a motion to strike is typically made once the prefiled testimony is tendered at hearing, not on the grounds of a procedural irregularity, but because the testimony being sponsored is

irrelevant, beyond the scope of the witness' expertise, argumentative, and so forth.

Secondly, neither party has demonstrated that it has been harmed or prejudiced due to the procedural failings of the other party's testimony. In spite of the fact that OPC's testimony was not filed by the established deadline, the utility nevertheless was able to timely file rebuttal testimony by the July 30, 1999 filing date.

Regardless of when OPC had actual possession and notice of the utility's prefiled direct testimony, it was put on notice by the Orders Establishing Procedure in this docket that its testimony and exhibits were due by a particular date. If it did not timely receive a copy of the utility's testimony, the appropriate recourse would have been to solicit a copy from either the utility or the Commission's Division of Records and Reporting, or to file a motion or pleading with respect to the utility's failure to serve a copy of its testimony on OPC or requesting additional time in which OPC might file its own testimony.

It appears that neither party is faultless with respect to the prefiling of its testimony. The docket file contains no evidence that a certificate of service accompanied the filing of the utility's testimony, as required by Rule 28-106.104, Florida Administrative Code. In addition, staff believes it was inappropriate for OPC's testimony to have been filed late without being accompanied by a motion requesting that the Commission accept the testimony and providing an explanation as to why it was not timely filed.

The Prehearing Conference and Hearing in this matter are scheduled for October 4 and 20, 1999, respectively. Staff believes that there has been, and still remains, an abundance of time for any prejudice or harm due to the irregularities in the filing of the parties' testimonies to be remedied. Ultimately, there is no statute, rule or precedent which urges, in the absence of some harm or prejudice, that either parties' testimony should be stricken. Staff therefore recommends that the both the utility's Motion to Strike and OPC's Alternative Motion to Strike should be denied.

DOCKET NO. 971220-WS
DATE: AUGUST 5, 1999

ISSUE 3: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open pending the outcome of the 120.57(1) hearing and final disposition of the case. (BRUBAKER, CROSSMAN)

STAFF ANALYSIS: A hearing has been scheduled in this matter for October 20, 1999. This docket should remain open pending the outcome of the 120.57(1) hearing and final disposition of the case.