

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 12, 1999

UTILITY'S MOTION TO DISMISS
THE OFFICE OF PUBLIC COUNSEL'S
PROTEST AND PETITION FOR SECTION 120.57(1) HEARING

COMES NOW Utilities, Inc. and its wholly owned subsidiary, Cypress Lakes

Utilities, Inc., and in support of the motion to dismiss state that:

1. On August 20, 1997, the seller and the buyer entered into an agreement for the sale and transfer of the water and sewer utility systems at Cypress Lakes.
2. On or about September 18, 1997, the application for transfer was filed with the Public Service Commission (the Commission).
3. On or about October 12, 1997, a letter was sent to the Commission from a utility customer, Mr. N. J. Ramey, Jr., complaining that his rental agreement for the lot on which his manufactured home was placed was supposed to include water, lawn maintenance, trash removal, cable TV and other extras the mobile home park had to offer. On November 17, 1997, the Commission's Staff Attorney responded to Mr. Ramey's letter, addressing his concerns and explaining that this was "... an application for transfer of certificates and not an application to increase rates. Therefore, the application should not impact your water bill or the availability of water for the sprinkler system because of this application." The matters raised by

the utility customer relate to possible contract disputes with the owner of the mobile home park, not the utility, and have 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 (OPC).

4. On July 20, 1998, the Commission issued its Order No. PSC-98-0993-FOF-WS, Order Approving Transfer, Requiring Submission of Proof of Land Ownership, Setting Rates and Charges and Notice of Proposed Agency Action Establishing Rate Base for Purposes of the Transfer (and other ancillary matters).
5. On or about August 10, 1998, the Office of Public Counsel (OPC) filed a Petition for Section 120.57(1) Hearing and Protest of Proposed Agency Action.
6. On August 21, 1998, the transferee utility 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 its Response. On November 23, 1998, the Commission issued its Order No. PSC-98-1566-FOF-WS, Order Denying Motion to Dismiss.
7. On September 14, 1998, the Commission issued its Order No. PSC-98-1213-PCO-WS, Order Establishing Procedure, with a list of controlling dates. That list included March 15, 1999 as the date for OPC to file its direct testimony and exhibits. On January 21, 1999, the Commission issued its Order No. PSC-99-0104-PCO-WS, Order Revising Order Establishing Procedure, with a revised list of controlling dates, including April 16, 1999 as the revised date for OPC to file its direct testimony and exhibits. Because the Commission's calendar needed further revisions to

accommodate scheduling requirements, on February 23, 1999, the Commission issued its Order No. PSC-99-0383-PCO-WS, Order Revising Order Establishing Procedure, with a second revised list of controlling dates, including May 21, 1999 as the second revised date for OPC to file its direct testimony and exhibits. The current revised list of controlling dates includes the following:

- 1) Utility's direct testimony and exhibits April 16, 1999
- 2) Intervenors' direct testimony and exhibits May 21, 1999
- 3) Staff's direct testimony and exhibits, if any June 25, 1999
- 4) Rebuttal testimony and exhibits July 30, 1999
- 5) Prehearing Statements September 3, 1999
- 6) Prehearing Conference October 4, 1999
- 7) Hearing October 20, 1999
- 8) Briefs November 17, 1999

8. On April 16, 1999, the transferee utility timely filed its Direct Testimony of Carl Wenz. Mr. Wenz's testimony (1) accepts, as rate base for purposes of transfer, the amount set forth in Commission Order No. PSC-98-0993-FOF-WS, (2) requests no acquisition adjustment, and (3) makes a *prima facie* case that there were no extraordinary circumstances in the purchase.
9. On June 25, 1999, the Commission Staff timely filed its Direct Testimony of Jeffrey A. Small. Mr. Small's testimony sponsored the Staff's Audit Report. It did not address the issue of acquisition adjustment.

10. On June 16, 1999, the Utility's attorney contacted the OPC attorney by telephone to determine if OPC would be filing testimony and exhibits. OPC's attorney stated that they had not decided whether they would be filing testimony and exhibits in this case. OPC's attorney stated that, although they had previously acquired a copy of the utility applicant's testimony, they had not been served with a copy of the testimony by the utility's attorney. On that same day, June 16, 1999, a copy of the utility's direct testimony was hand delivered to the OPC attorney, and a signed receipt for the testimony was acquired.
11. The docket file at the Commission Clerk's office indicates that the Direct Testimony of Carl Wenz was timely filed with the Commission on April 16, 1999.
12. As of the date of filing this motion, OPC still has not filed any testimony or exhibits in this docket.
13. The issue raised by the OPC protest in this case, negative acquisition adjustment, is the same issue raised by OPC in the transfer of Wedgefield Utilities, Docket No. 960235-WS. [See Order No. PSC-98-1092-FOF-WS issued 8/12/98, Final Order Establishing Rate Base for Purposes of the Transfer, Declining to Include a Negative Acquisition Adjustment in the Calculation of Rate Base and Closing Docket.] The utility's witness is the same, Mr. Carl Wenz, Vice-President - Regulatory of Utilities, Inc., which is the parent company of both Wedgefield Utilities, Inc. and of Cypress Lakes Utilities, Inc.
14. There has been no change in Commission policy on acquisition adjustments since

the Wedgefield case was decided, nor for more than a decade before that. [See, Order No. 23376 issued 8/21/90, Order No. 25729 issued 2/17/92, and Order No. PSC-98-1092-FOF-WS issued 8/12/98.] The law governing this Cypress Lakes case is the same as the law that governed the Wedgefield case. The legal doctrine of stare decisis requires that this case be decided the same as the Wedgefield case. There has been nothing filed with the Commission in this docket to suggest otherwise.

15. The parties, including OPC, have been on notice since September 14, 1998, the date of the first Order Establishing Procedure, that direct testimony and exhibits would be due in this case. OPC's deadline was deferred twice, from the original March 15, 1999, to April 16, 1999, and finally to May 21, 1999. As of June 16, 1999, twenty-six days after its last deadline, OPC still had not decided whether it would file direct testimony and exhibits. The utility's attorney discussed with the OPC attorney the possibility of holding a status conference and made an informal request to the Staff Attorney for a status conference for all parties to discuss this matter with the Prehearing Officer. No status conference has been set, and OPC still has not filed.
16. In Order No. PSC-98-1092-FOF-WS, the Wedgefield Final Order, the Commission addressed the issue of burden of proof with regard to acquisition adjustments. At page 8 the Commission stated, "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." OPC has not presented any testimony or exhibits in this Cypress Lakes case, and therefore has not met its burden of persuasion. Although the scheduled date for filing rebuttal testimony is July 30, 1999, there are no allegations for the utility to rebut. The utility's prima facie case remains uncontested.

WHEREFORE, Utilities, Inc. and its wholly owned subsidiary, Cypress Lakes Utilities, Inc., move for the dismissal of the OPC's Petition for Section 120.57(1) Hearing and Protest of Proposed Agency Action.

RESPECTFULLY SUBMITTED, this 12th day of July, 1999.



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Cypress Lakes Utilities, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent to Harold McLean, Esq. Office of Public Counsel, 111 W. Madison St., Tallahassee, FL 32399-1400; Jennifer Brubaker, Esq., Division of Legal Services, Florida Public Service Commission, 2540 Shumard Oak Blvd., Tallahassee FL 32399-0850, by hand delivery this 12th day of July 1999.



Ben E. Girtman