



Public Service Commission

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RECORDS AND REPORTING

DATE: SEPTEMBER 24, 1998

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

FROM: DIVISION OF LEGAL SERVICES (REYES) *BURK* *DSM* *RRR* *JOW*
DIVISION OF WATER AND WASTEWATER (C. JOHNSON, REDEMANN)

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: OCTOBER 6, 1998 - REGULAR AGENDA - PARTIES 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. Accordingly, this matter is currently scheduled for a June 17, 1999 administrative hearing.

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. This recommendation addresses Cypress Lakes' motion and OPC's response.

DOCUMENT NUMBER-DATE

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DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Cypress Lakes Utilities, Inc.'s Motion to Dismiss or Strike OPC's Petition for Section 120.57(1) Hearing and Protest of Proposed Agency Action?

RECOMMENDATION: No. Because OPC has substantially complied with Rule 28-106.210, Florida Administrative Code, and has alleged facts sufficient to state a cause of action, the Commission should deny Cypress Lakes Utilities, Inc.'s motion to dismiss. (REYES)

STAFF ANALYSIS: As stated earlier, on August 10, 1998, OPC filed a 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, and on August 27, 1998, OPC filed a Response to Cypress Motion to Dismiss or Strike.

In its motion, Cypress Lakes alleges that OPC does not allege any grounds why the Commission should include a negative acquisition adjustment in rate base. Cypress Lakes also argues that "extraordinary circumstances" is the sole ground for including an acquisition adjustment in rate base, and OPC's petition fails to make that showing or even allege extraordinary circumstances.

Cypress Lakes also argues that there are no extraordinary circumstances in this case, and there is nothing in this case which would warrant an acquisition adjustment. Pursuant to the standard set by the Commission, which is set forth in Order No. PSC-98-1092-FOF-WS, issued August 12, 1998, in Dockets Nos. 960235-WS and 960283-WS, Cypress Lakes argues that it has met its burden and OPC has failed to meet its burden to show why a negative acquisition adjustment is warranted.

Furthermore, Cypress Lakes cites to Rule 25-22.029, Florida Administrative Code, alleging that it sets forth the requirements for initiating a formal proceeding. Staff notes, however, that Cypress Lakes has incorrectly cited the applicable rule which is actually Rule 25-22.036, Florida Administrative Code. However, even that rule has now been replaced by the newly adopted Uniform Rules of Procedure. Accordingly, the correct citation is to Rule 28-106.201, Florida Administrative Code, which provides in subsection (2), that each initial pleading shall contain a statement of all disputed issues of material fact and a concise statement of the ultimate facts alleged, as well as the rules and statutes which entitle the petitioner to relief. The rule further

provides in subsection (4) that a petition may be dismissed if it is not in substantial compliance with subsection (2) or it has been untimely filed. Dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured.

Cypress alleges that OPC's petition fails to set forth any issues of material fact, fails to give a concise statement of the ultimate facts alleged, and fails to set forth any rules and statutes which entitle it to relief. The only statutory allegation in the petition is Section 350.0611, Florida Statutes, which gives OPC the right to appear in a proceeding held under Chapter 120, Florida Statutes, not the substantive or procedural authority under which it can prevail or even meet the minimum threshold necessary to require the Commission to accept the Petition and hold a hearing. Accordingly, Cypress Lakes requests that the Commission dismiss or strike OPC's petition and make Order No. PSC-98-0993-FOF-WS final.

OPC argues in its response that the list of issues presented in its petition provide notice to Cypress Lakes and to the Commission exactly the factual, legal, and policy basis for denying present investors a return on investment which they did not make. OPC also argues that Cypress Lakes' motion is an invitation to the merits of the case in that it alleges that there are "no extraordinary circumstances in this case," that "there were no reasons to support an acquisition adjustment" and that there is nothing in the case which would warrant an acquisition adjustment. Finally, OPC argues that each and every allegation asserted by the petition must be taken as true for purposes of a motion to dismiss, including that portion which alleges that the Commission proposes to approve a return on investment never made by Cypress investors.

"The function of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action." Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993). "In determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint . . . nor consider any evidence likely to be produced by either side . . . Significantly, all material factual allegations . . . must be taken as true." Id.

Upon review of the petition, staff believes 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. Specifically, OPC's petition

identifies the following issues of fact, law, and policy by resolution by the Commission in a Section 120.57(1) hearing:

1. Did the former owners properly maintain the assets;
2. What was the condition of the assets sold to Cypress Lakes;
3. Should the burden of showing its actual investment be borne by Cypress Lakes;
4. Should the Commission recognize a negative acquisition adjustment in the rate base, and if so, how much;
5. What is the initial rate base of Cypress Lakes?

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.

Staff believes 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, staff believes that OPC has alleged sufficient facts to state a cause of action, and, therefore, pursuant to Varnes, recommends that Cypress Lakes' motion to dismiss or strike OPC's petition for hearing be denied.

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: No. If staff's recommendation is approved in Issue 1, this docket should remain open pending final disposition of this case. (REYES)

STAFF ANALYSIS: No. If staff's recommendation is approved in Issue 1, this docket should remain open pending final disposition of this case.