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February 10, 1999

Ms. Blanca S. Bayó  
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FEB 10 1999  
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TALLAHASSEE  
FLORIDA PUBLIC SERVICE COMMISSION

Re: Lake Utility Services, Inc. -- Docket No. 960444-WU

Dear Ms. Bayo:

Enclosed for filing on behalf of Lake Utility Services, Inc. are the original and fifteen copies of its Response to Citizens' Motion to Dismiss.

By copy of this letter, this document is being furnished to the parties on the attached service list.

Very truly yours,

Richard D. Melson

- ACK \_\_\_\_\_
- AFA 1
- APP \_\_\_\_\_
- CAF \_\_\_\_\_
- CMU \_\_\_\_\_
- CTR \_\_\_\_\_ RDM/kcg
- EAG \_\_\_\_\_ Enclosures
- LEG 1 CC: Parties of Record
- LIN 3
- OPD \_\_\_\_\_
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ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for rate )  
increase and for increase in ) Docket No. 960444-WU  
service availability charges in )  
Lake County by Lake Utility ) Filed: February 10, 1999  
Services, Inc. )  

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LAKE UTILITY SERVICES, INC.'S RESPONSE  
TO CITIZENS' MOTION TO DISMISS

Lake Utility Services, Inc. (LUSI) hereby files its response in opposition to the Motion to Dismiss filed by the Office of Public Counsel ("OPC") on February 2, 1999 and served by hand on counsel for LUSI on February 3, 1999. That motion asks the Commission to dismiss LUSI's application for a rate increase on the grounds that the 1995 test year used in the application can no longer be used to fix rates that are just, reasonable and compensatory.

The motion must be denied for at least three independent reasons: (1) the motion is untimely; (2) the motion does not demonstrate a legal basis for dismissal; and (3) the motion seeks to inject into the case an issue regarding the appropriateness of the test year which, under the controlling statute and the Commission's prior orders in this docket, is no longer an issue in this case. In support of its opposition, LUSI states:

## UNTIMELINESS

1. Rule 28-106.204(2), Florida Administrative Code, states that:<sup>1</sup>

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.

Regardless of whether the 20 day period is measured from the date the petition was filed (June 3, 1996), the date established as the "official date of filing" (July 9, 1996), the date that an order was entered acknowledging intervention by OPC (July 30, 1997), or even the date of OPC's protest on which this matter is proceeding to hearing (June 8, 1998), the motion to dismiss comes months too late. Further, there is no provision of law extending the time in which a motion to dismiss can be filed and OPC has failed to make any showing of mistake, inadvertence, or excusable neglect on its part which could justify its failure to file the motion on a timely basis. See, Hamilton County Board of County Commissioners v. FDER, 587 So.2d 1378, 1389-90 (Fla. 1st DCA 1991). Thus the motion must be denied as untimely. See, In re: Petition of Florida Cities Water Company, Order No. PSC-98-1160-PCO-WS (August 25, 1998).

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<sup>1</sup> The predecessor to this rule, Rule 25-22.037, likewise required that motions to dismiss be filed within the time provided for filing an answer, namely within 20 days of service of the petition.

## FAILURE TO MEET STANDARD FOR DISMISSAL

2. Even if it were not untimely, OPC's motion does not demonstrate a legal basis for dismissal. The purpose of a motion to dismiss is to "raise as a question of law the sufficiency of facts alleged 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 the allegations in the petition assumed to be true, the petition states a cause of action upon which relief can 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.

3. In this case, the facts alleged in LUSI's application for rate increase and the accompanying MFRs clearly state a proper request for rate relief pursuant to Section 367.081, Florida Statutes.

4. Absent other factors which preclude its litigation,<sup>2</sup> a dispute about the appropriateness of a test year involves factual issues that must be resolved through a hearing process, and cannot be considered or resolved on a motion to dismiss. A motion to dismiss is not a motion for summary judgment. A review of facts and evidence or a determination on the evidence is not appropriate for ruling on motions to dismiss. Instead, the

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<sup>2</sup> As shown in the next section of this response, there are other factors in this case which will preclude the litigation of the test year issue.

review is "necessarily confined to the well-pled facts alleged in the four corners of the complaint and . . . is not authorized to consider any other facts." Lewis v. Barnett Bank of South Fla., 604 So. 2d 937, 938 (Fla. 3d DCA 1992). "In determining the sufficiency of the complaint, the trial court must not look beyond the four corners of the complaint, . . . nor consider any evidence likely to be produced by either side." Varnes, 624 So. 2d at 350.

5. The mere fact that OPC felt it necessary to file an affidavit in support of its motion to dismiss shows that the motion involves factual issues that cannot properly be resolved on such a motion. Since OPC's motion fails to state a legal basis for dismissal, it must be denied.

**TEST YEAR ISSUE IS NOT BEFORE THE COMMISSION**

6. The motion to dismiss must also be denied on the grounds that it seeks to inject into the case an issue regarding the appropriateness of the test year which, under the controlling statute and the Commission's prior orders in this docket, is no longer an issue in this case.

7. The definition of the matters at issue in this case started with Proposed Agency Action Order No. PSC-97-0531-FOF-WU (the First PAA Order) and LUSI's protest of that order. That protest identified six specific issues that were in dispute, and related fall-out issues "to the extent they are affected by each

of the items" which had specifically been protested.<sup>3</sup> The appropriateness of the 1995 test year was not protested, nor was the use of 1995 test year billing determinants to translate a revenue requirement into rates. Section 120.80(13)(b), Florida Statutes, provides that:

Notwithstanding ss. 120.569 and 120.57, a hearing on an objection to a proposed action of the Florida Public Service Commission may only address the issues in dispute. Issues in the proposed action which are not in dispute are deemed stipulated.

Because neither LUSI nor any other party protested the use of the 1995 test year, the appropriateness of the test year was not an "issue in dispute" and therefore was "deemed stipulated."

8. The utility's protest was subsequently resolved by the entry of PAA Order No. PSC-98-0683-AS-WU (the Second PAA Order) accepting LUSI's offer of settlement. The Second PAA Order in turn was protested by OPC and the case was set for hearing on OPC's protest.

9. When subsequent settlement negotiations between LUSI and OPC reached an impasse, LUSI filed notice that it was (a) withdrawing its offer of settlement, thereby mooted the Second PAA Order; and (b) withdrawing its protest of the First PAA Order, thereby allowing that order to become effective and final. After hearing argument from the parties, the Commission entered

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<sup>3</sup> The six disputed issues were: (1) quality of service (2) amount of plant in service, (3) amount of non-used and useful plant; (4) amount of CIAC, (5) amount of rate case expense, and (6) proposed service availability charges.

Order No. PSC-98-1582-PCO-WU (the Order Rejecting Withdrawal) ruling that LUSI did not have the right to withdraw its offer of settlement and directing that the case go forward to hearing on OPC's protest of the Second PAA Order.

10. The Order Rejecting Withdrawal contained a detailed analysis of what issues remain for resolution in this case. That order held:

In [the Second PAA Order], we specifically stated that we accepted LUSI's offer of settlement "as a reasonable resolution of this matter." We reiterated on page six of the Order that **the issues which were not protested were deemed stipulated** and stated that our acceptance of the settlement offer "resolves all issues in [the First PAA Order]." Therefore, this second Order superseded the original PAA Order, thus, eliminating the existence of the original PAA Order, with regard to the disputed issues. Further, because LUSI's settlement offer specifically excluded the protested issues of used and useful and quality of service, and because [the Second PAA Order] resolved the first PAA Order, those issues cease to exist in this docket.

On June 8, 1998, OPC filed a petition on PAA, protesting [the Second PAA Order], and requesting a formal hearing on the protest. OPC protested the following issues approved in the Order: plant in service, CIAC; fall-out issues, including accumulated depreciation and revenue requirement; service availability charges; and return on equity. OPC did not protest the approved rate case expense, and **pursuant to Section 120.80(13), Florida Statutes, that issue is deemed stipulated.** OPC also raised the following issues in its protest: LUSI's quality of service; the appropriate calculation of LUSI's used and useful plant; LUSI's cost of capital and capital structure; and LUSI's

alleged over collection of allowances for fund prudently invested charges. ***OPC is precluded from raising these issues, because they go beyond the scope of [the Second PAA Order].***

Order No. PSC-98-1582-PCO-WU at 4-5, emphasis added. OPC did not seek review of the Order Rejecting Withdrawal, either by reconsideration or appeal. That order has therefore become the law of the case and definitively settles the effect of Section 120.80(13) on the issues that remain for determination in this docket.

11. The absence in the Order Rejecting Withdrawal of any issue regarding the appropriateness of the test year means simply that this issue is not properly before the Commission at this stage in this proceeding. OPC's attempt to interject that issue through the filing of its motion to dismiss is an improper and untimely attempt to seek reconsideration of the Order Rejecting Withdrawal.

12. Even assuming for the sake of argument that the test year issue were not excluded from this case by the Commission's ruling in the Order Rejecting Withdrawal, OPC's own protest of the Second PAA Order contains no test year issue. By failing to raise that issue in its own protest, that issue is deemed stipulated under Section 120.80(13), and OPC cannot now undo that stipulation merely by filing a motion to dismiss the original application.

**CONCLUSION**

13. OPC's motion to dismiss must be denied on at least three independent grounds:

- a. The motion is untimely.
- b. The motion fails to state a legal basis for dismissal.
- c. The motion attempts to interject into this case an issue which has been excluded by the Commission's earlier Order Rejecting Withdrawal. As such, it constitutes an untimely motion for reconsideration of that order. Even if the order were ignored, however, OPC's failure to raise a test year issue in its protest of the Second PAA Order means that the issue is deemed stipulated and cannot be interjected into this case at this time.

WHEREFORE, LUSI urges the Commission to deny OPC's motion to dismiss.

RESPECTFULLY SUBMITTED this 10th day of February, 1999.

HOPPING GREEN SAMS & SMITH, P.A.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to the following by hand delivery this 10th day of February, 1999.

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