

**BEN E. GIRTMAN**

*Attorney at Law*

RECEIVED- FPSC

1020 East Lafayette Street  
Suite 207  
Tallahassee, Florida 32301-4552

SEP 10 PM 4:36

Telephone: (850) 656-3232  
(850) 656-3233  
Facsimile: (850) 656-3233

RECORDS AND REPORTING  
September 10, 1998

ORIGINAL

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

Re: <sup>971220-WS</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 ten copies of the following documents:

- 1. Utility's Motion to Strike Issues 9 and 10

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

Sincerely yours,



Ben E. Girtman

Encls.

AFA \_\_\_\_\_  
APP \_\_\_\_\_  
CAF \_\_\_\_\_  
CMU \_\_\_\_\_  
CTR \_\_\_\_\_  
EAG \_\_\_\_\_  
LEG 2  
MAS 3  
OPC \_\_\_\_\_  
PAI \_\_\_\_\_  
SEC 1  
WAW \_\_\_\_\_  
JTH \_\_\_\_\_

C:\cases\in\cypress lakes\bayo-cover ltr for filing.wpd

DOCUMENT NUMBER-DATE

10934 SEP 10 98

FPSC-RECORDS/REPORTING

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: September 10, 1999

ORIGINAL

UTILITY'S MOTION TO STRIKE  
ISSUES 9 AND 10  
AS SET FORTH IN CITIZENS' PREHEARING STATEMENT

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

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

1. On or about September 3, 1999, the Citizens Prehearing Statement was filed, containing the following issues:

Issue 9: Does the Commission have any rule which address the circumstances under which negative acquisitions should be imposed?

Issue 10: May the Commission rely upon a non rule policy which requires a showing of extraordinary circumstances as a prerequisite to a negative acquisition adjustment where the non rule policy is not show to be justified in this record?

2. The matters sought to be raised by OPC are within the exclusive jurisdiction of the Division of Administrative Hearings (DOAH), not the Public Service Commission. For example, see particularly but not limited to Section 120.56, Florida Statutes, including subsection (3) Challenging Existing Rules; Special Provision, and subsection (4) Challenging Agency Statements Defined as Rules; Special Provisions. Pursuant to the Florida Administrative Procedures Act, DOAH and not the Public Service Commission has been assigned jurisdiction over that type of proceeding.

3. The Office of Public Counsel (OPC) tried to raise the same matters in the transfer of Econ Utilities to Wedgefield Utilities, Inc., Docket No. 960235-WS. The Prehearing Officer (Commissioner Garcia) granted the motion to strike the two issues at the prehearing conference in the Wedgefield case, and those issues were excluded from the Prehearing Order No. PSC-97-0952-PHO-WS issued August 11, 1997. On OPC's Motion for Reconsideration, the full Commission denied the requested reconsideration, and the issues remained excluded. See Order No PSC-97-1510-FOF-WS issued November 26, 1997, a copy of which is attached as Exhibit #1.

WHEREFORE, Utilities, Inc. and its wholly owned subsidiary, Cypress Lakes Utilities, Inc., move to strike the Office of Public Counsel's Issue 9 and Issue 10.

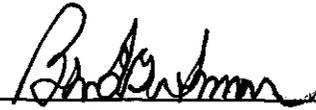
RESPECTFULLY SUBMITTED, this 10<sup>th</sup> day of September, 1999.



Ben E. Girtman  
FL BAR NO. 186039  
1020 E. Lafayette St.  
Suite 207  
Tallahassee, FL 32301  
Attorney for Utilities, Inc. and  
Cypress Lakes Utilities, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Utility's Motion to Strike Issues 9 and 10 as Set Forth in Citizens' Prehearing Statement has been sent to Harold McLean, Esq. Office of Public Counsel, 111 W. Madison St., Tallahassee, FL 32399-1400; Roger A. Larson, Esq., attorney for Cypress Lakes Associates, Ltd., P.O. Box 1368, Clearwater, FL 33757; and to Jennifer Brubaker, Esq., Division of Legal Services, Florida Public Service Commission, 2540 Shumard Oak Blvd., Tallahassee FL 32399-0850, by U.S. mail this 10th day of September, 1999.



Ben E. Girtman

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for transfer of  
Certificates Nos. 404-W and 341-S in  
Orange County from Econ Utilities  
Corporation to Wedgefield Utilities,  
Inc.

DOCKET NO. 960235-WS

---

In re: Application for amendment  
of Certificates Nos. 404-W and  
341-S in Orange County by  
Wedgefield Utilities, Inc.

DOCKET NO. 960238-WS  
ORDER NO. PSC-97-1510-FOF-WS  
ISSUED: November 26, 1997

---

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON  
SUSAN F. CLARK  
JOE GARCIA

ORDER DENYING MOTION FOR RECONSIDERATION

BY THE COMMISSION:

BACKGROUND

On February 27, 1996, Wedgefield Utilities, Inc. (Wedgefield, utility or petitioner) filed an application with this Commission for the transfer of Certificates Nos. 404-W and 341-S from Econ Utilities Corporation (Econ) to Wedgefield. Wedgefield is a wholly-owned subsidiary of Utilities, Inc. Utilities, Inc. focuses on ownership and operation of small systems, and provides centralized management, accounting and financial assistance to small utilities that were commonly built by development companies. On March 5, 1996, Wedgefield filed an application for amendment of Certificates Nos. 404-W and 341-S to include additional territory in Orange County.

In Order No. PSC-96-1241-FOF-WS, issued October 7, 1996, this Commission, by final agency action, approved the transfer and granted the amendment of the certificates to include the additional territory requested. By that same Order, the Commission, by proposed agency action, established rate base for purposes of the transfer.

The Office of Public Counsel (OPC) timely protested the Order. Accordingly, by Order No. PSC-96-1533-PCO-WS, issued December 17, 1996, this matter was scheduled for an April 29, 1997 hearing in Orange County. By Order No. PSC-97-0070-PCO-WS, issued January 22, 1997, the matter was continued and the hearing rescheduled for August 19, 1997. By Order No. PSC-97-0953-PCO-WS, issued August 11, 1997, the hearing on the matter was

EXHIBIT (1)

again continued, and pursuant to Order No. PSC-97-1041-PCO-WS, issued September 2, 1997, the hearing on this matter was rescheduled for March 19, 1998.

On May 30, 1997, OPC filed its prehearing statement with the Commission. In the course of informal meetings with the parties and staff, prior to the prehearing conference, OPC raised a proposed issue about the relevance of certain prior Commission Orders to the instant case. The proposed issue had not been previously identified in OPC's prehearing statement.

On August 4, 1997, a prehearing conference was held before the Prehearing Officer. After hearing from the utility, OPC and staff regarding the relevance of the proposed issue, the Prehearing Officer struck the issue from the Prehearing Order. Subsequently, on August 11, 1997, Prehearing Order No. PSC-97-0952-PHO-WS was issued identifying the relevant issues, witnesses and exhibits.

On August 20, 1997, OPC timely filed the Citizens' Motion for Reconsideration of Order No. PSC-97-0952-PHO-WS, together with the Citizens' Request for Oral Argument. Wedgefield's Response to Citizens' Motion for Reconsideration and Citizens' Request for Oral Argument was timely filed On August 26, 1997.

#### MOTION FOR RECONSIDERATION

Rule 25-22.060(1)(a), Florida Administrative Code, permits a party who is adversely affected by an order of the Commission to file a motion for reconsideration of that order.

In its motion, OPC first argues that the striking of its proposed issue violates Section 120.57(1)(b), Florida Statutes (1996 Supp.), which states that "all parties shall have an opportunity to respond, to present evidence and argument on all issues involved." OPC alleges that "the effect of the Commission's prior orders on this case is necessarily an issue because the Commission must decide whether its non-rule policy binds the parties in this case." OPC alleges that this decision affects the very tests that must be met for recognition of the negative acquisition adjustment, and that the fact it is an issue can be seen by the opposing positions of OPC and Wedgefield on the issue. According to OPC, the Commission can not avoid this legal issue simply by striking the issue and refusing to rule on it.

OPC's second argument for reconsideration is that striking the proposed issue violates Section 350.0611(1), Florida Statutes, which states that Public Counsel shall have the power:

[t]o recommend to the commission, by petition, the commencement of any proceeding or action or to appear, in the name of the state or its citizens, in any proceeding or action before the commission and urge therein any position which he or she deems to be in the public interest, whether consistent or inconsistent with positions previously adopted by the commission, and utilize therein all forms of discovery available.

OPC alleges that by striking the issue, the Prehearing Officer has denied OPC's statutory right to present argument on the merits of its position and to urge a position which it deems to be in the public interest.

OPC asserts that the central issue in this case is whether the Commission will recognize rate base inclusion of a negative acquisition adjustment associated with Wedgefield's purchase of Econ's assets and facilities. OPC contends that in order to make that determination, the Commission must first decide the extent to which it is bound by previous Commission orders. OPC also states that:

At the prehearing conference, staff orally moved to strike this issue. No prior notice was given to the parties about staff's motion. Over the objection of the citizens, the prehearing officer granted the motion. The prehearing order issued subsequent to the prehearing conference does not mention the staff's oral motion or the prehearing officer's ruling on the motion. Instead, the prehearing order simply deleted the issue as if it never existed. The citizens seek reconsideration of the prehearing officer's decision to strike this issue.

In its response to the motion for reconsideration, Wedgefield contends that OPC's reference to Section 120.57(1)(b), Florida Statutes, seeks to claim a right to designate as a Commission issue a legal matter which, if relevant, should be properly before DOAH. The utility also states that OPC's reference to Section 350.0611(1) seeks to do the same thing, and that the statute does not convey upon OPC the right to transfer jurisdiction from one state agency to another. Wedgefield also correctly observes that there is no prohibition against making an oral motion at a prehearing conference, nor is there any requirement of notice of an oral motion.

The purpose of a motion for reconsideration is to point out some matter of law or fact which the Commission failed to consider or overlooked in its prior decision. Diamond Cab Co. of Miami v. King, 146 So.2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So.2d 161 (1st DCA 1981). A motion for reconsideration is not an appropriate vehicle for mere reargument or to introduce new evidence or arguments which were not previously considered.

OPC argues in its motion for reconsideration that the Prehearing Officer made a mistake of law because he failed to apply Sections 120.57(1)(b) and 350.0611(1), Florida Statutes, when he struck OPC's proposed issue from the Prehearing Order. Upon review of the pleadings, we believe that OPC has failed to demonstrate that either Section 120.57(1)(b) or 350.0611(1), Florida Statutes, was violated by the Prehearing Officer's striking of OPC's proposed issue. Section 120.57(1)(b), Florida Statutes, provides parties with the opportunity to respond and present evidence and argument on all issues applicable to agency hearings. Nothing in that section prohibits, in the course of a prehearing conference, a Prehearing Officer from striking a proposed issue which is inapplicable to the proceeding. Pursuant to Section 350.0611(1), Florida Statutes, OPC has already been given an opportunity in the course of the prehearing conference to recommend and urge upon the Commission its proposed issue regarding the effect of prior Commission Orders on the instant proceedings. However, nothing in that section entitles OPC to introduce and litigate at hearing any and all issues which it proposes. OPC was given a full opportunity at the prehearing conference to demonstrate the relevance and jurisdictional appropriateness of its proposed issue. If OPC's interpretation of Sections 120.57(1)(b) and 350.0611(1), Florida Statutes, were effected, OPC

would essentially have carte blanche to raise any issue in a proceeding, regardless of the issue's relevance or appropriateness to that proceeding.

Rule 25-22.038(3), Florida Administrative Code, provides that a prehearing officer may require the parties to hold prehearing conferences for the purposes of hearing arguments on pending motions, clarifying or simplifying issues, discussing the possibility of settlement of issues, examining exhibits and documents, exchanging names and addresses, and resolving other procedural matters. After considering staff's recommendation and listening to all points raised by OPC and Wedgefield, the Prehearing Officer fully considered the proposed issue and ruled that it would be stricken from the Prehearing Order. In our opinion, neither Section 120.57(1)(b) nor 350.0611(1), Florida Statutes, was violated as a result of the Prehearing Officer's action. Based on the foregoing, we find that OPC did not point out any mistake of law or fact which the Prehearing Officer overlooked or failed to consider when striking the proposed issue in question. Therefore, we find it appropriate to deny OPC's Motion for Reconsideration.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Citizens' Motion for Reconsideration of Order No. PSC-97-0952-PHO-WS is hereby denied. It is further ORDERED that these dockets shall remain open pending the final disposition of this case.

By ORDER of the Florida Public Service Commission this 26th day of November, 1997.

BLANCA S. BAYÓ, Director  
Division of Records and Reporting

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for name change on  
Local Exchange Company Certificate  
No. 29 from GTC, Inc. to GTC, Inc.  
d/b/a GT Com.

DOCKET NO. 971477-TL  
ORDER NO. PSC-97-1511-FOF-TL  
ISSUED: November 26, 1997

---

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman  
J. TERRY DEASON  
SUSAN F. CLARK  
DIANE K. KIESLING  
JOE GARCIA