ORIGINAL

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JACK SHREVE
PUBLIC COUNSEL

November 4, 1999

Ms. Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0870

RE: Docket No. 971220-WS

Dear Ms. Bayó:

Enclosed are an original and fifteen copies of Citizens' Post-Hearing Statement for filing in the above-referenced docket.

Also enclosed is a 3.5 inch diskette containing Citizens' Post-Hearing Statement in WordPerfect for Windows 6.1. Please indicate receipt of filing by date-stamping the attached copy of this letter and returning it to this office. Thank you for your assistance in this matter.

Sincerely,

Harold McLean
Associate Public Counsel

AFA
APP
CAF
CMU
CTR
EAG
LEG 2
MAS 3
OPC
PAI
SEC 1
WAW
OTH

HM/dsb
Enclosures

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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	Docket No. 971220-WS Filed: November 4, 1999

CITIZENS' POST-HEARING STATEMENT

The Citizens of the State of Florida, by and through JACK SHREVE, file this their post hearing statement. Material which differs from the Citizens' prehearing statement is denoted with an asterisk (*):

ISSUE 1: What was the condition of the assets sold to Cypress Lakes Utilities, Inc.?

OPC: No position.

ISSUE 2: Was Cypress Lakes Associates, Ltd. a "troubled" system?

OPC: No position.

ISSUE 3: Are there any extraordinary circumstances which warrant an acquisition adjustment to rate base, and if so, what are they?

OPC: No position at this time.

ISSUE 4: What is the net book value for the water and wastewater system?

OPC: No position.

ISSUE 5: Should a negative acquisition adjustment be included in the rate base determination?

OPC: Yes. Please see the discussion under Issue 8.

ISSUE 6: What is the rate base for the water and wastewater systems, for the purposes of this transfer?

OPC: The rate base should reflect a negative acquisition adjustment. Please see the discussion under Issue 8.

ISSUE 7: Who bears the burden of proving whether an acquisition adjustment should be included in the rate base?

OPC: No position.

ISSUE 8: Must extraordinary circumstances be shown in order to warrant rate base inclusion of an acquisition adjustment?

OPC: *No. There is no Florida Statute or Rule in the Florida Administrative Code which permits the Commission to require any party to show extraordinary circumstances as a prerequisite to the imposition of a negative acquisition adjustment. The Citizens concede (for purposes of this docket alone) and Exhibit FS-1 conclusively shows that the Commission has a non rule policy of some years standing. This non-rule policy is neither sustained by expert testimony, or documentary opinion in this record; nor is it elucidated in the evidence presented in this record. Although the Utility presented considerable evidence that there was such a non-rule policy, the evidence of record

in this case is silent as to why such a policy is justified or even desirable as applied in this docket. Florida case law requires more. Flamingo Lake RV Resort, Inc. v. Department of Transp. 599 So.2d 732 (1st. DCA, 1992) the court said:

> Section 479.26(2)(a) authorizes the department to determine "not to permit specific information panels in areas where the department deems their placement would be contrary to the overall purpose of this chapter as provided for in s. 479.015." (Emphasis added.) The department presented no evidence that placing sign panels at interchanges along I-295 would be contrary to the legislative intent contained in Section 479.015, Florida Statutes (1989). Moreover, we know of no authority that would legitimize an agency's adoption of a nonrule policy which takes away that which a properly promulgated rule explicitly provides. (Emphasis in original)

599 So. 2d, at 733

Similarly, in this docket, there is no authority which would legitmize the agency's adoption of a non rule policy which would take away that which Florida Statutes require, i.e., that a utility be provided a return only upon investment in the used and useful assets, not investment made by a prior owner.

Although the Commission has applied its 'extraordinary circumstances' requirement in this docket, the record before the Commission is devoid of any evidence upon whcih the Commission can rely to elucidate that policy; yet case law requires this evidence to be of record. In Florida Medical Center v. Department of Health and Rehabilitative Services, 463 So.2d 380 (Fla.App. 1st DCA 1985) an applicant sought to gain HRS approval for placement of nuclear magnetic resonance unit (NMR) at its non-research facility. HRS, however had applied a non-rule policy, and on this account, the court reversed the HRS denial holding:

> The reason given that placement of such equipment was to be limited to research facilities was not based upon any rule promulgated by the agency; such reason could not be sustained on the basis that such was "incipient or emerging

agency policy," as was found by the hearing officer, because the agency failed to properly establish such non-rule policy.

> To the extent an agency may intend in its final order to rely upon or refer to policy not recorded in rules for discoverable precedents, that policy must be established by expert testimony, documentary opinion, or other evidence appropriate to the nature of the issues involved and the agency must expose and elucidate its reasons for its discretionary action. Florida Cities Water Co. v. Public Service Commission, 384 So.2d 1280 (Fla.1980); Anheuser-Busch, Inc. v. Dept. of Business Regulation, 393 So.2d 1177 (Fla. 1st DCA 1981); McDonald v. Dept. of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977).

E.M. Watkins & Co. v. Board of Regents, 414 So.2d 583, 588 (Fla. 1st DCA 1982). See also Amos v. Department of Health and Rehabilitative Services, 444 So.2d 43, 47 (Fla. 1st DCA 1984). at 381

While this record includes testimony which says that there is a policy of general applicability, it offers no expert testimony, documentary opinion, or other evidence whch justifies the non-rule policy's application to the facts of this case.

In Florida Cities Water Co. v. Florida Public Service Commission 384 So.2d 1280 (Fla 1980) the Commission ran afoul of the requirment that application of a non-rule policy had to be based upon evidence of record. In that case, the supreme court explained that an agency did not need to adopt a rule -- even though that would have been the preferable course -- but that where it sought to apply a non-rule policy, that it must do so based only upon evidence of record. The supreme court said:

> Petitioner first argues that the Commission has announced a rule, as that term is defined in section 120.52(14), but that in doing so the Commission failed to follow appropriate procedures for rulemaking as set out in section 120.54. Quite clearly the Commission did not announce its new policy in a rule proceeding nor was it required to do so. Administrative agencies are not required to institute rulemaking procedures each time a new policy is developed, McDonald v. Department of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977), although that form of proceeding is preferable where established industry-wide policy is being altered. City of Plant City v. Mayo, 337 So.2d 966, 974-75 (Fla.1976).

> Nonetheless, when an agency elects to adopt incipient policy in a non-rule proceeding, there must be an adequate support for its decision in the record of the proceeding. McDonald at 583-84. In this case, there is absolutely no record foundation for the Commission's disallowance of CIAC and AIAC deductions. Consequently, we must quash the Commission's order and remand this cause for further proceedings consistent with this opinion.

at 1281

Aside from the court's caution that a rule proceeding is preferable where a policy is to be of industry-wide application, the court also notes the necessity for evidence of record in support of the decision, of which this record is devoid.

Lastly, while the non-rule policy applied in former cases includes a "extraordinary circumstances" standard, that supposed standard is neither defined by commission precedent, nor does the common meaning of the word convey a sufficiently definite notice to an affected party as to what evidence will be required for finding of extraordinary circumstances. It is, in a word, vague. The application of this non-rule policy to the facts of this case is impermissible for that reason as well. Section 120.52(8) Florida Statutes (1999) provides:

> "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
>
> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an

agency shall be construed to extend no further than the particular powers and duties conferred by the same statute. (Emphasis supplied)

While the Citizens are not supportive of the non-rule policy championed by the Commission, the challenge here is not to the non-rule policy itself, but to the application of that non-rule policy to the facts of this case, as established in the record. This record is entirely devoid of any 'fleshing out' of the meaningless phrase "extraordinary circumstances". The phrase, as applied in this case, accords unbridled discretion to the Commission to say what circumstances are regarded extraordinary. This presents particular irony where the Commission implicitly holds that it will consider negative acquisition adjustments on a 'case by case' basis. If there is justification for the 'case by case' decision making, there is implict recognition that each case presents extraordinary circumstances, else a rule would suffice.

Because Florida Statutes require the Commission to permit a return only upon that investment which is used and useful in providing utility service to the public; because the uncontested facts of this case show that the purchaser of this utility invested materially less than the existing net book value of the system prior to purchase; because the Commission may not rely upon a non-rule policy, the basis for which is not included in this record; and because that non-rule policy is, in any case,

vague to the extent that it vest unbridled discretion in the agency, the Citizens respectfully suggest that a negative acquisition is required in the amount established in the record before the Commission.

Respectfully submitted,

Jack Shreve
Public Counsel

Harold McLean
Associate Public Counsel

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Attorneys for the Citizens
of the State of Florida

CERTIFICATE OF SERVICE
DOCKET NO. 971220-WS

I HEREBY CERTIFY that a true and correct copy of the foregoing CITIZENS' POST-HEARING STATEMENT has been furnished by U.S. Mail or *hand delivery to the following parties, this 4th day of November, 1999.

Jennifer Brubaker, Esquire*
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