

FLORIDA PUBLIC SERVICE COMMISSION  
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Tallahassee, Florida 32399-0850

RECEIVED

MEMORANDUM

AUGUST 28, 1997

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3:30  
FPSC - Records/Reporting

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

FROM: DIVISION OF LEGAL SERVICES (BRUBAKER, REYES) *BRUBAKER*  
DIVISION OF WATER & WASTEWATER (WALKER) *WALKER*

RE: DOCKET NO. 960235-WS - APPLICATION FOR TRANSFER OF  
CERTIFICATES NOS. 404-W AND 341-S FROM ECON UTILITIES  
CORPORATION TO WEDGEFIELD UTILITIES, INC. *BL*

DOCKET NO. 960283-WS - APPLICATION FOR AMENDMENT OF  
CERTIFICATES NOS. 404-W AND 341-S BY WEDGEFIELD  
UTILITIES, INC.

COUNTY: ORANGE COUNTY

AGENDA: SEPTEMBER 9, 1997 - REGULAR AGENDA - INTERESTED PERSONS  
MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\LEG\WP\960235.RCM

CASE BACKGROUND

On August 1, 1997, one working day prior to the Prehearing Conference in these Dockets, Wedgefield Utilities, Inc. (Wedgefield, utility or petitioner) filed a Verified Petition and Suggestion of Disqualification (petition), along with a Motion for Continuance of Hearing. The petition seeks the disqualification of Commissioner J. Terry Deason from proceeding further in the aforementioned docketed matters, pursuant to Section 120.665, Florida Statutes, and Rule 25-21.004, Florida Administrative Code. Commissioner Deason is not the Prehearing Officer in this docket, but is one of the three Commission members assigned to the panel hearing this case.

By Order No. PSC-97-0949-PCO-WS, Order Declining to Withdraw from Proceeding, issued August 8, 1997, Commissioner Deason found that after reviewing Wedgefield's petition, the allegations concerning his dissent in Order No. PSC-96-1241-FOF-WS and prior employment with the Florida Office of Public Counsel (OPC) were not legally sufficient to demonstrate a bias, prejudice or interest in the instant proceeding. Commissioner Deason, therefore, declined

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FPSC-RECORDS/REPORTING

DOCKETS NOS. 960235-WS, 960283-WS  
DATE: AUGUST 28, 1997

to withdraw from the proceeding.

On August 12, 1997, Wedgefield filed an Affidavit by Carl Wenz, Vice President of regulatory matters for Utilities Inc., of which Wedgefield is a wholly owned subsidiary. The affidavit essentially sets forth Wedgefield's reasons for not filing a petition for disqualification prior to August 1, 1997.

Rule 25-21.004(3), Florida Administrative Code, provides: where the commissioner declines to withdraw from the proceeding, a majority vote of a quorum of the full commission, absent the affected commissioner, shall decide the issue of disqualification.

Pursuant to this rule, staff is presenting this Recommendation to the full Commission so that it may decide the disqualification issue raised in this proceeding.

Commissioner Deason's Order Declining to Withdraw from Proceeding is attached hereto as Appendix A. The utility's Verified Petition and Suggestion of Disqualification is attached hereto as Appendix B. The August 12, 1997 Affidavit of Carl Wenz is attached hereto as Appendix C.

DOCKETS NOS. 960235-WS, 960283-WS  
DATE: AUGUST 28, 1997

### DISCUSSION OF ISSUES

ISSUE 1: How should the Commission decide the matter of Commissioner Deason's disqualification in Dockets Nos. 960235-WS and 960283-WS?

RECOMMENDATION: The Commission should not disqualify Commissioner Deason. Further, the Commission should find that the August 12, 1997 affidavit filed by Wedgefield is untimely and is not appropriate for consideration. (BRUBAKER)

STAFF ANALYSIS: The allegations made in the utility's petition concerning Commissioner Deason's dissent in Order No. PSC-96-1241-FOF-WS and prior employment with OPC are not legally sufficient to demonstrate that Commissioner Deason has a bias, prejudice, or interest in the instant proceeding. Therefore, staff recommends that Commissioner Deason should not be disqualified.

As mentioned previously, on August 12, 1997, Wedgefield filed an affidavit which essentially sets forth the utility's reasons for not filing its petition for disqualification prior to August 1, 1997. Wedgefield's affidavit was not filed until eleven days after its petition for disqualification was filed, and four days after the issuance of Commissioner Deason's Order Declining to Withdraw from Proceeding. Commissioner Deason had no opportunity to review or give consideration to the contents of the affidavit prior to issuing Order No. PSC-97-0949-PCO-WS.

Staff believes that Wedgefield's affidavit should have been filed with its petition for disqualification, and was therefore untimely filed four days after the issuance of Commissioner Deason's Order declining to withdraw. Applicable case law indicates that the appropriate scope of review precludes the Commission from considering Wedgefield's affidavit in conjunction with Commissioner Deason's Order declining to withdraw from these proceedings. See Bank & Trust Co. v. Lewis, 634 So.2d 672 (Fla. 1st DCA 1994). Therefore, staff recommends that Wedgefield's affidavit is untimely and it should not be considered by the Commission in evaluating whether Commissioner Deason's Order declining to withdraw is correct.

DOCKETS NOS. 960235-WS, 960283-WS  
DATE: AUGUST 28, 1997

ISSUE 2: Should these dockets be closed?

RECOMMENDATION: No. (BRUBAKER)

STAFF ANALYSIS: These dockets should remain open for the purposes of completing the transfer case. The matters at issue in this recommendation are procedural and are not in any way dispositive of these dockets.

ATTACHMENT A

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. 960283-WS  
ORDER NO. PSC-97-0949-PCO-WS  
ISSUED: August 7, 1997

ORDER DECLINING TO WITHDRAW FROM PROCEEDING

On August 1, 1997, in the above-captioned matter, Wedgefield Utilities, Inc. (Wedgefield) filed a Verified Petition and Suggestion of Disqualification, stating that for the reasons stated in the petition, I should be disqualified from sitting on the panel or participating further in this case.

Upon reviewing Wedgefield's petition, I find that the allegations contained therein are not legally sufficient pursuant to Section 120.665, Florida Statutes or Rule 25-21.004, Florida Administrative Code, to demonstrate a bias, prejudice, or interest in the instant proceeding. Therefore, I hereby decline to withdraw from these proceedings.

By ORDER of Commissioner J. Terry Deason, this 7th day of August, 1997.

/s/ J. Terry Deason  
J. TERRY DEASON  
Commissioner

This is a facsimile copy. A signed copy of the order may be obtained by calling 1-904-413-6770.

( S E A L )

JSB

ORDER NO. PSC-97-0949-PCO-WS  
DOCKETS NOS. 960235-WS, 960283-WS  
PAGE 2

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Further review of this interlocutory order shall be pursuant to Rule 25-21.004, Florida Administrative Code.

## BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for Transfer)  
of Certificate 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 Certificate Nos. )  
404-W and 341-S in Orange County )  
by Wedgefield Utilities, Inc. )

DOCKET NO. 960283-WS

Submitted for Filing:  
August 1, 1997

VERIFIED PETITION AND  
SUGGESTION OF DISQUALIFICATION

COMES NOW Utilities, Inc. and its wholly owned subsidiary, Wedgefield Utilities, Inc., (hereinafter collectively referred to as "Wedgefield") and, pursuant to Section 120.665, Florida Statutes, and Rule 25-21.004, F.A.C., file this verified Petition and Suggestion of Disqualification and state:

1. In his dissent in Order No. PSC-96-1241-FOF-WS in this Docket, Commissioner Deason acknowledged the existence of the current Commission policy on acquisition adjustments, including negative acquisition adjustments. Also in his dissent, Commissioner Deason took a position on burden of proof which is contrary to the existing Commission policy, and urged that it be changed in this case, on a case-by-case basis. Such a departure from the requirements of current Commission policy and the requirements of the Administrative Procedure Act (APA), Chapter 120, Florida States, shows that the Commissioner has demonstrated bias and prejudice in this matter and is disqualified from sitting on the panel deciding this case.

2. If a Commissioner has already taken a position in a pending case (as was done in the dissent in this case) before any evidence was heard, then that Commissioner's consideration of the evidence and oral argument adduced at hearing cannot be impartial. Taking such a position before the evidence or legal argument is heard shows that the Commissioner has demonstrated bias and prejudice in this matter and is disqualified from sitting on the panel deciding this case.

3. Commissioner Deason was one of the chief proponents of the position now taken by the Office of Public Counsel (OPC) in this case. On July 31, 1990, seven years ago, in Docket No. 891309-WS, the then-current Commissioners met in Agenda Conference to consider and decide whether to issue a proposed agency action (PAA) order on the Investigation of Acquisition Adjustment Policy. The Office of Public Counsel was represented by Mr. Rick Mann, who introduced one of the OPC employees to speak against the PSC policy on acquisition adjustments, which PSC Staff was recommending remain the same. That employee was introduced by Mr. Mann in the following words:

We did not come over here today to re-argue our entire position. We do feel compelled, however, to make some brief comments on the recommendation of staff and also to answer any questions that the Commission may have about our position.

To this end I brought with me today Mr. Terry Deason, chief analyst on our staff and our expert on acquisition adjustments.

Mr. Deason's position was not accepted by the Commission, which reaffirmed its previously existing policy on acquisition



adjustments which has been in effect since at least 1983. That policy is, and has been, that "Absent extraordinary circumstances, no acquisition adjustment, either positive or negative, is authorized". The burden of proof rests on the proponent of the acquisition adjustment, whether positive or negative.

A PAA order was issued, OPC protested the PAA, and the matter was set for hearing.

Mr. Deason subsequently was appointed to membership on the Public Service Commission in February, 1991, prior to the Commission's final deliberation in that docket in February, 1992. Mr. Deason properly recused himself from taking part in that deliberation. The Commission at that time reaffirmed its prior policy on acquisition adjustments, which was contrary to the position then and now advocated by Commissioner Deason.

Although a Commissioner is free to advocate any position, even though different from existing policy of the Commission, all Commissioners are bound to follow the proper law and procedures to change that policy. Pursuant to the requirements of the APA, that change can now be implemented only in the context of a generic proceeding and not a case-by-case basis.

Acknowledging, as the Commissioner stated quite strongly in his dissent, that his position is different than the current policy of the Commission on negative acquisition adjustments, and then attempting to change the policy contrary to the procedures required by law, shows that the Commissioner has demonstrated bias and prejudice in this matter and is disqualified from sitting on the

panel deciding this case.

4. Commissioner Deason, merely by his position as a Commissioner and as an outspoken proponent of a change in the Commission policy, (even though it has been in effect since at least 1983), places the Commission Staff in a difficult situation in the conduct of their responsibilities in this case, in regard to taking positions contrary to prior Commission orders and policy of the Commission. Such influence on Staff, whether intentional or unintentional, shows that the Commissioner has demonstrated bias and prejudice in this matter and is disqualified from sitting on the panel deciding this case.

5. The Office of Public Counsel (OPC), which was Commissioner Deason's former employer, is the protestant in this case. OPC did not prevail in its prior challenges to the Commission policy on acquisition adjustments, as shown in the prior generic cases resulting in Commission Order No. 23376 issued 8/21/1990 and Order No. 25729 issued 2/17/1992. Those generic proceedings upheld the requirement that the proponent of an acquisition adjustment, either negative or positive, bears the burden of proof.

OPC now seeks to repeat their positions which were argued aggressively and supported by Mr. Deason as an employee of OPC seven years ago. If Commissioner Deason were an attorney, he would be barred from participating in this proceeding because of a conflict of interest, and by being willing to ignore the separation of one employment position and a subsequent employment position,

the Commissioner has demonstrated bias and prejudice in this matter and is disqualified from sitting on the panel deciding this case.

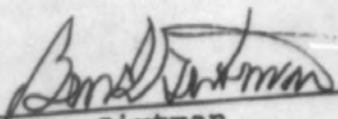
6. To assure confidence in the impartiality of the decisions of government, public officials must not only be fair, impartial, unbiased and not prejudiced for against any entity regulated by that government official, but they must also give the strictest attention to their appearance of impartiality. The fact that a former employee of the protestant in this proceeding, who has actively and aggressively participated in prior proceedings on the side of the opponent of the Petitioner in the current proceeding and in favor of the side of the other participant in the proceeding (as an employee, no less), demonstrates that the blatant appearance of bias and prejudice is present. Therefore, the Commissioner is disqualified from sitting on the panel deciding this case.

7. The assertions set forth in each numbered section above are sufficient by themselves for disqualification of a Commissioner for continuing to participate in the proceeding. Furthermore, all the facts set forth above, when taken as a whole, demonstrate that the Commissioner had demonstrated not only an appearance of bias and prejudice against the Petitioner in this case, but has demonstrated bias and prejudice in fact, the Commissioner is disqualified from sitting on the panel deciding this case.

WHEREFORE, due to the bias and prejudice of the Commissioner assigned to this proceeding, against Petitioner, the regulated utility states that the Commissioner is disqualified from sitting on the panel deciding this case and should not participate in any

manner in the current docket.

Respectfully submitted this 1st day of August, 1997



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Ben E. Girtman  
FL BAR NO. 186039  
1020 E. Lafayette St.  
Suite 207  
Tallahassee, FL 32301

Attorney for Utilities, Inc.  
and Wedgefield Utilities, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and fifteen copies of the foregoing has been filed with the Clerk, Division of Records and Reporting, Florida Public Service Commission, 2540 Shumard Oak Blvd., Tallahassee, FL 32399-0850 by hand delivery and that a true and correct copy has been sent to Charles Beck, Esq., Office of Public Counsel, 111 W. Madison St., Tallahassee, FL 32399-1400; to Mr. John Forrer, Econ Utilities, Inc., 1714 Hoban Rd. NW, Washington, D.C. 20007; 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 1st day of August, 1997.



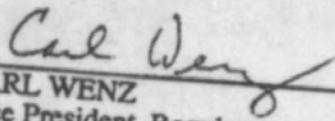
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Ben E. Girtman

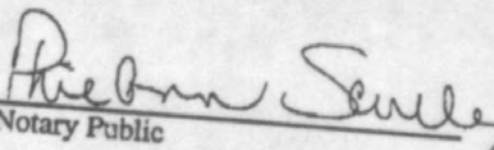
STATE OF ILLINOIS  
COUNTY OF COOK

VERIFICATION

Under penalties of perjury, I declare that I have read the foregoing Petition and Suggestion for Disqualification and the statements therein are true to the best of my knowledge and belief.

  
CARL WENZ  
Vice President, Regulatory Matters

SWORN TO AND SUBSCRIBED before me by Carl Wenz, who is Vice President, Regulatory Matters, of Utilities, Inc., and who is personally known to me, this 1st day of August, 1997.

  
Notary Public



BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 960235-WS

In Re: Application for Transfer )  
of Certificate Nos. 404-W and )  
341-S in Orange County from Econ )  
Utilities Corporation to )  
Wedgefield Utilities, Inc. )

DOCKET NO. 960283-WS

In Re: Application for )  
Amendment of Certificate Nos. )  
404-W and 341-S in Orange County )  
by Wedgefield Utilities, Inc. )

Submitted for Filing:  
August 12, 1997

AFFIDAVIT

STATE OF ILLINOIS

COUNTY OF COOK

Comes now Affiant, Carl Wenz, and states that:

1. Affiant is Vice President, Regulatory Matters, for Utilities Inc., of which Wedgefield Utilities, Inc. is a wholly owned subsidiary. They have filed a petition for transfer of Econ Utilities to Wedgefield Utilities, Inc. in the above styled docket. In the capacity of Vice President, Affiant has caused to be filed a Verified Petition and Suggestion of Disqualification on August 1, 1997.

2. On June 16, 1997, the first preliminary prehearing conference was held in this case. At that preliminary prehearing, Petitioner first became aware that the Office of Public Counsel (OPC) probably would be challenging the existence of the current policy of the Public Service Commission (PSC or the Commission) on acquisition adjustments. This was also the first time that OPC

DOCUMENT NUMBER-DATE  
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FPSC-RECORDS/REPORTING

alluded to their position in this case as being driven by Commissioner Deason's dissent in Order PSC-96-1241-FOF-WS, the Proposed Agency Action (PAA) order in this case. Also at this first preliminary prehearing, it was learned that Commission Staff was considering a position on burden of proof which was contrary to existing Commission policy on burden of proof, that is, that the burden of proof resides with the proponent of the acquisition adjustment which, in this case, is OPC.

3. In pleadings previously filed in this docket, Petitioner had attempted to clarify OPC's protest and request for hearing, to determine whether OPC intended to follow the current Commission policy on acquisition adjustments and seek to show "extraordinary circumstances" which would warrant a negative acquisition adjustment, or whether OPC was seeking to challenge the existing policy. The Commission ruled against all of Petitioner's pleadings, thus leading Petitioner to believe that the current policy of negative acquisition adjustments, including burden of proof, would be followed. Petitioner also had sought to have the case heard by the full 5-member Commission because it appeared that OPC might try to have the Commission policy changed. Petitioner's objections to the lack of generic proceeding and its request for a hearing by the full Commission were rejected. This affirmed Petitioners' belief that the current policy regarding acquisition adjustments and burden of proof would be followed.

4. As part of the research and preparation for this case, on June 26, 1997, Petitioner attempted to have docket files at the

Commission reviewed for Docket No. 891309-WS, resulting from the OPC's Petition to Initiate Rulemaking and Initiate Investigation, filed by OPC in 1989. The Commission had rejected the OPC's proposed rule, but initiated a generic docket and investigation on acquisition adjustments. We sought to locate the rule language which the OPC had proposed in its request for rulemaking. The Commission Order Nos. 22361, 23376 and 25729 issued in Docket No. 891309-WS alluded to that language, but the Orders were not specific.

5. Subsequently, as a result of the search for records on Docket 891309-WS, the PSC Bureau of Records reported that they did not have the files in that docket; nor did the State Archives have them and they apparently were lost. However, the Bureau did have a document list from that docket. It was from a reading of that document list that we first became aware that Commissioner Deason participated in Docket 891309-WS as an OPC employee. (Document No. 01577-91, 2/18/91, Memo from Commissioner Deason recusing himself from participating in the docket because of involvement while employed at OPC.) We did not know the extent of Mr. Deason's involvement at that time. The Bureau of Records inquired if there were any specific documents that they could look for, and we identified several documents from the documents list, including Document No. 01577-91, 2/18/91, the Memo from Commissioner Deason recusing himself.

6. On or about July 9, 1997, the Bureau of Records reported that they could not find any of the specific documents requested



from Docket No. 891309-WS.

7. Further effort was made to locate copies of the records. Counsel for a participant in Docket No. 891309-WS was located, and after review of their file lists, they believed they had some documents from that case in storage.

8. On or about July 11, 1997, we researched those files in storage. The file was not complete, but we did find a copy of the OPC petition (11/17/89), the OPC statement of issues and positions (3/14/90), and the transcript of the 7/31/90 PSC Agenda Conference at which the PAA in Docket No. 891309-WS was considered. Shortly thereafter, copies of those documents were made and distributed to company officials for their consideration. Upon reviewing the documents, it became clear that the position which OPC is taking in the instant transfer proceeding is essentially the same as was litigated in the prior Commission investigation, and that Mr. Deason, then an OPC employee, had spoken in support of OPC's position as the OPC's "expert on acquisition adjustment policy." This was also the first time we were aware that Mr. Deason was the author of the OPC position to shift the burden of proof away from the proponent of a negative acquisition adjustment to the utility. That position is also repeated in Commissioner Deason's dissent in the PAA order on the transfer in this case.

9. PSC Staff requested a second preliminary prehearing conference on the transfer from Econ to Wedgefield. It was held on July 21, 1997. It was at this second preliminary prehearing conference that OPC confirmed that its position would be that the

Commission's acquisition adjustment policy, consistent since 1983 (and confirmed in Order Nos. 23376 and 25729 after a full, generic proceeding), did not apply to this case. It was also not until this second preliminary prehearing that Petitioner learned that the PSC Staff had made the firm decision to take a position on burden of proof that would change prior policy of the Commission that the proponent of a negative acquisition adjustment bore the burden of proof. Furthermore, OPC again alluded to the fact that their position was driven by Mr. Deason's dissent in this case in Order No. PSC-96-1241-FOF-WS in which he acknowledged but complained about the existing Commission policy requiring the proponent of the acquisition adjustment to bear the burden of proof.

10. We still have not been able to locate a copy of Document No. 01577-91, 2/18/91, Memo from Commissioner Deason recusing himself from participating in the docket because of involvement while employed at OPC. However, it is evident that, in this case, a Commissioner is being placed in a position of ruling on his own argument made on behalf of a party while employed by that party, in a case before the same agency where the prior generic proceeding considered and rejected that argument. This is particularly problematical when the Commissioner would be deciding the case as a member of a 3-member panel of the full 5-member commission.

11. Seeking the disqualification of a Public Service Commissioner, or any other public official, for bias or prejudice, is not a matter to be taken lightly. It requires careful consideration of the relevant facts, which takes some time.

Petitioner believes that it has acted with all reasonable timeliness in filing the Verified Petition and Suggestion of Disqualification on August 1. After carefully researching and analyzing the matters involved, and after giving due and careful consideration to the matter, it was decided on the morning of August 1, 1997, that the Verified Petition and Suggestion of Disqualification should be filed.

FURTHER AFFIANT sayeth not.

Carl J. Wenz

Carl J. Wenz  
Vice President, Regulatory Matters  
Utilities, Inc.  
Wedgefield Utilities, Inc.

SWORN TO AND SUBSCRIBED before me by Carl J. Wenz, who is Vice President,  
Regulatory Matters of Utilities, Inc., and who is personally known to me, this 12th day of  
August, 1997.

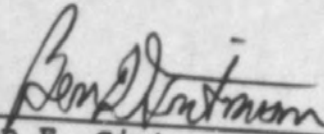


Joyce Ann Twarog

Notary Public

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent to Charles Beck#, Esq., Office of Public Counsel, 111 W. Madison St., Tallahassee, FL 32399-1400; Mr. John Forrer, Econ Utilities, Inc., 1714 Hoban Rd. NW, Washington, D.C. 20007; 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 (or by hand delivery \* or facsimile #) this 12th day of August, 1997.



Ben E. Girtman  
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Suite 207  
Tallahassee, FL 32301

Attorney for Utilities, Inc.  
and Wedgefield Utilities, Inc.