ORIGINAL

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, FIRST DISTRICT

Case No. _____
PSC Docket No. 991437-WU

Wedgefield Utilities, Inc.,
Petitioner,

v.

Florida Public Service Commission
and the Office of Public Counsel,
Respondents.
_____/

PETITION FOR WRIT OF CERTIORARI
TO THE
FLORIDA PUBLIC SERVICE COMMISSION

APPENDIX

APPENDIX

INDEX

This Appendix contains conformed copies of documents from the current case (Wedgefield II). It also contains documents from the prior case in which the issue was first decided. The final order entered in 1998 in Wedgefield I was not appealed by the Office of Public Counsel. Those two Orders from Wedgefield I decided the issue of negative acquisition adjustment and formed the basis for the dispute in the recent Order which is now under review by certiorari. The Appendix also contains two orders from the generic Commission proceedings concluded in 1992, which affirmed the Commission's prior existing policy on acquisition adjustments, which OPC seeks to change in the current case.

I. From the current case (Wedgefield II): Docket No. 991437-WU, Application for increase in water rates in Orange County by Wedgefield Utilities, Inc.:

Orders:

A. **Order Denying Motion** for Summary Final Order Without Prejudice, Granting Motion to Amend, Denying Motion to Strike and Dismiss, and Accepting Wedgefield's Settlement Offer, Order No. PSC-00-2388-AS-WU issued on December 13, 2000

B. **Order Granting Motion to Abate and Stay** Proceedings, Order No. PSC-00-2365-PCO-WU issued on December 8, 2000

Motions:

C. Wedgefield Utilities, Inc.'s **Motion to Strike and Dismiss** the Office of Public Counsel's Petition Requesting § 120.57 Hearing and Protest of Proposed Agency Action, filed on October 3, 2000
(See Wedgefield's **Brief and other post-hearing documents** in Wedgefield I.)

D. Wedgefield Utilities Inc.'s **Motion for Summary Final Order and Motion to Amend Wedgefield's Motion to Strike and Dismiss** the Office of Public Counsel's Petition Requesting § 120.57 Hearing and Protest of Proposed Agency Action, filed on November 3, 2000

Conflicting Staff Recommendations on Wedgefield's motions in the current case:

E. **Staff Memorandum dated** October 26, 2000, for the November 7, 2000 agenda conference [**Grant** motion]

F. **Staff Memorandum** dated October 31, 2000, for the November 7, 2000 agenda conference [**Deny** motion}

G. **Staff Memorandum** dated November 16, 2000, for the November 20, 2000 Agenda. [**Grant** motion]
(The agenda conference was actually held on November 28, not November 20. Page 2, et seq., have the date October 31, 2000 at the top of the page.)

II. From the prior case (Wedgefield I): Docket No. 960235-WS, Application for transfer of Certificates Nos. 404-W and 341-S in Orange County from Econ Utilities Corporation to Wedgefield Utilities, Inc.:

H. **Order Approving Transfer** and Granting Amendment of Certificates to Include Additional Territory and Notice of Proposed Agency Action Order Establishing Rate Base for Purposes of the Transfer, Order No. PSC-96-1241-FOF-WS issued on October 7, 1996

I. **Final Order Establishing Rate Base** for Purposes of the Transfer, Declining to Include a Negative Acquisition Adjustment in the Calculation of Rate Base and Closing Docket, Order No. PSC-98-1092-FOF-WS issued on August 12, 1998

III. Orders from the generic proceedings in 1989 - 1992: Docket No. 891309-WS, In re: Investigation of Acquisition Adjustment Policy:

J. **Order Disapproving Proposed Amendment to Acquisition Adjustment Policy**, Order No. 23376 issued on August 21, 1990

K. **Order Concluding Investigation and Confirming Acquisition Adjustment Policy**, Order No. 25729 issued on February 17, 1992

A

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for increase in water rates in Orange County by Wedgefield Utilities, Inc.	DOCKET NO. 991437-WU ORDER NO. PSC-00-2388-AS-WU ISSUED: December 13, 2000

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
LILA A. JABER
BRAULIO L. BAEZ

ORDER DENYING MOTION FOR SUMMARY FINAL ORDER WITHOUT PREJUDICE, GRANTING MOTION TO AMEND, DENYING MOTION TO STRIKE AND DISMISS, AND ACCEPTING WEDGEFIELD'S SETTLEMENT OFFER

BY THE COMMISSION:

BACKGROUND

Wedgefield Utilities, Inc. (Wedgefield or utility) is a Class B utility which serves approximately 840 water and wastewater customers in Orange County, Florida. Wedgefield is a wholly-owned subsidiary of Utilities, Inc. In its annual report for 1998, the utility reported operating revenues of $252,903.

Rate base was last established for Wedgefield's water facilities by Order No. PSC-98-1092-FOF-WS, (Transfer Order) issued August 12, 1998, in Dockets Nos. 960235-WS and 960283-WS, pursuant to a transfer of the utility's assets from Econ Utilities Corporation.

On November 12, 1999, Wedgefield filed an application for an increase in water rates. The utility was notified of several deficiencies in its minimum filing requirements (MFRs). Those deficiencies were corrected and the official filing date was established as February 29, 2000, pursuant to Section 367.083, Florida Statutes. The utility's requested test year for final and interim purposes is the historical year ended June 30, 1999. The

utility requested that this case be processed using our Proposed Agency Action (PAA) procedure pursuant to Section 367.081(8), Florida Statutes.

By Order No. PSC-00-0910-PCO-WU, issued May 8, 2000, we suspended the rates requested by the utility pending final action and approved interim rates subject to refund and secured by a corporate undertaking. The interim rates were designed to allow the utility the opportunity to generate additional annual operating revenues of $103,394 for its water operations (an increase of 40.19%).

Wedgefield requested water rates designed to generate annual operating revenues of $404,098. Those revenues exceed test year revenues by $144,889 or 55.87 percent. By Proposed Agency Action Order No. PSC-00-1528-PAA-WU, issued August 23, 2000, (PAA Order) we proposed a $342,157 water revenue requirement for this utility, which represented an annual increase in revenue of $82,897 or 31.97 percent.

Wedgefield was also ordered to show cause in writing within 21 days, why it should not be fined $3,000 for its apparent violation of Rule 25-30.115, Florida Administrative Code, and Order No. PSC-97-0531-FOF-WU, issued May 9, 1995, in Docket No. 960444-WU, for its failure to maintain its books and records in conformance with the National Association of Regulatory Utility Commissioners (NARUC) Uniform System of Accounts (USOA). Wedgefield filed a timely response to the order to show cause on September 13, 2000.

On September 13, 2000, Wedgefield also timely filed a petition protesting the PAA Order. On that same day, the Office of Public Counsel (OPC) timely filed a Notice of Intervention in this matter and a petition protesting the PAA Order. OPC's Notice of Intervention was acknowledged by Order No. PSC-00-1755-PCO-WU, issued September 26, 2000.

On October 3, 2000, Wedgefield filed a Motion to Strike and Dismiss the Office of Public Counsel's Petition Requesting Section 120.57 Hearing and Protest of Proposed Agency Action. On November 3, 2000, Wedgefield filed a Motion for Summary Final Order and Motion to Amend its Motion to Strike and Dismiss. OPC filed a timely response on November 10, 2000.

We have jurisdiction pursuant to Sections 367.011(2) and 367.081, Florida Statutes.

Wedgefield's Motion for Summary Final Order

Wedgefield alleges that there is no genuine issue as to any material fact set forth in OPC's Petition and Protest regarding negative acquisition adjustment. Wedgefield further alleges that the negative acquisition adjustment issue, as well as the factual basis for OPC's Protest and Petition in this case, were fully litigated in the prior transfer proceeding. Wedgefield states that OPC makes no allegations of grounds justifying a negative acquisition adjustment, nor the existence of extraordinary circumstances. Therefore, Wedgefield argues that the entry of a summary final order on the issue of negative acquisition adjustment is appropriate in this case. Wedgefield summarily cites to Order No. PSC-00-0341-PCO-SU, issued February 18, 2000, in Docket No. 990975-SU, to support its proposition that the entry of a summary final order is appropriate in this case.

OPC's Response to Wedgefield's Motion for Summary Final Order

OPC asserts that we may change our policy affecting items in rate base as long as we base the change in policy on expert testimony, documentary, opinion, or other evidence, which OPC intends to provide in this proceeding. OPC cites to Florida Cities Water Company v. FPSC, 705 So. 2d 620 (Fla. 1st DCA 1998), to show that we have power to change our methodology if the decision is supported by record evidence. Likewise, OPC alleges that it is entitled to the opportunity to present evidence that will show us why we should change our policy.

OPC next cites to Section 120.68, Florida Statutes, for the proposition that we can take action inconsistent with prior agency practice if there is evidence in the record to support the change. OPC asserts that it will provide that record evidence in this case showing the reasons why we should not follow prior practice in this proceeding. OPC also cites to Section 350.0611, Florida Statutes, to show that it has the authority to raise the issue of negative acquisition adjustment again, even if inconsistent with positions that we have previously adopted.

OPC cites Commission precedent in support of their argument that we may change a prior decision on acquisition adjustment. In Order No. 23728, issued as a PAA Order November 11, 1990, and becoming final and effective without protest, in Docket No. 900291-WS, this Commission declined to recognize a negative acquisition adjustment. However, in that utility's subsequent rate proceeding, we reversed the prior decision by recognizing the negative acquisition adjustment for the purpose of setting rates. Order No. PSC-93-1675-FOF-WS, issued November 18, 1993, in Docket No. 920148-WS.

OPC also argues that we reversed a previous decision to allow a positive acquisition adjustment. See Order No. 23166, issued July 10, 1990, in Docket No. 891179-GU (Chesapeake Utilities Corp). In that case, this Commission found that the predicted savings upon which the positive acquisition adjustment was granted had not materialized and therefore, based on this new information, removed the acquisition adjustment from rate base.

Finally, OPC alleges that we can recognize an adjustment if we find a substantial change in circumstances from a prior case.

ANALYSIS

Pursuant to Section 120.57(1)(h), Florida Statutes, a summary final order shall be rendered if it is determined from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final summary order.

Rule 28-106.204(4), Florida Administrative Code, states that "[a]ny party may move for Summary Final Order whenever there is no genuine issue as to material fact . . . ."

Under Florida law, "the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact, and . . . every possible inference must be drawn in favor of the party against whom a summary judgement is sought." Green v. CSX Transportation, Inc., 626 So. 2d 974 (Fla. 1st DCA 1993)(citing Wills v. Sears, Roebuck & Co., 351 So. 2d 29 (Fla. 1977)). Furthermore, "A summary judgment should not be granted

unless the facts are so crystallized that nothing remains but questions of law." Moore v. Morris, 475 So. 2d 666 (Fla. 1985).

OPC's Protest and Petition for hearing submitted the following disputed issue of material fact, policy and law:

> Should the utility's rate base include a negative acquisition adjustment?
>
> And what other changes, such as changes to depreciation expense, should be made to reflect a negative acquisition adjustment?

The issue of whether this utility's rate base should include a negative acquisition adjustment was addressed after hearing in Order No. PSC-98-1092-FOF-WS, issued August 12, 1998, in Docket No. 960235-WS (transfer docket). By that Order, we found that no extraordinary circumstances existed and held that no negative acquisition adjustment would be imposed. In that proceeding, we fully examined the condition of the assets, Econ as a "troubled utility," and whether any extraordinary circumstances existed.

OPC asserts that like the Florida Cities case, it has the right to an evidentiary hearing to support a change in our policy. We note that, in Florida Cities, the appeal and subsequent evidentiary hearing on remand arose from the Order stating our used and useful methodology. In the instant case, by Order No. PSC-96-1241-FOF-WS, issued October 7, 1996, in Docket No. 960235-WS, we made a proposed decision on the acquisition adjustment at issue here and an evidentiary hearing was held upon OPC's protest of that decision, which culminated in Order No. PSC-98-1092-FOF-WS. What OPC now seeks is to revisit that decision by protesting Order No. PSC-00-1528-PAA-WU, our recent PAA Order issued in this docket.

We agree that Section 350.0611(1), Florida Statutes, gives OPC standing to urge any position consistent or inconsistent with positions previously adopted by this Commission. However, we do not believe that the Statute gives OPC the right to overcome a Motion For Summary Final Order without alleging more than an inconsistent position.

OPC also cites to Order No. PSC-93-1675-FOF-WS, in which we reversed a previous finding on a negative acquisition adjustment. There, we reached our conclusion based on customer testimony, the need for repairs and improvements to the system at the time of the transfer, and the lack of responsibility in management. In Wedgefield's transfer docket, an evidentiary hearing was held after which we determined that a negative acquisition adjustment would not be imposed. Moreover, there has been no showing of any change in circumstances in the instant proceeding.

Next, OPC cites to Order No. 23166, in which we removed a positive acquisition adjustment after finding that the predicted savings had not materialized. Clearly, the approval of the original acquisition adjustment was based on predicted savings, and thus contingent upon those savings materializing. Once we found that the savings had not materialized, we removed the adjustment. Our decision in the Wedgefield transfer proceeding was not contingent upon the materialization of certain facts.

As stated throughout OPC's Response, OPC plans to provide evidence in this proceeding to support its assertions. Generally, "[i]t is not enough for the opposing party to merely assert that an issue does exist." Landers v. Milton, 370 So. 2d 368, 370 (Fla. 1979); See also Almand Construction Co. v. Evans, 547 So. 2d 626, 628 (Fla. 1989)(holding that counsel's mere assertion was insufficient to create an issue). However, we note that Section 120.57(1), Florida Statutes, contemplates that responses to discovery be considered in ruling on a motion for summary final order. In this case, OPC has pending discovery on the issue of negative acquisition adjustment. OPC asserts that it intends to establish through its discovery a change in circumstances sufficient to overcome our previous decision in acquisition adjustment. Therefore, we find that it is premature to decide whether a genuine issue of material fact exists when OPC has not had the opportunity to complete discovery and file testimony. See Brandauer v. Publix Super Markets, Inc., 657 So. 2d 932, 933 (Fla. 2d DCA 1995). Accordingly, we deny Wedgefield's Motion for Summary Final Order without prejudice. Once testimony is filed in January, Wedgefield may renew its motion for Summary Final Order at that time.

MOTION TO AMEND

On November 3, 2000, Wedgefield filed a Motion to Amend its Motion to Strike and Dismiss. In it, it requests that we take official notice of Order No. PSC-98-1092-FOF-WS. OPC did not file a response. Accordingly, Wedgefield's Motion to Amend its Motion to Strike and Dismiss is granted and official notice is taken of Order No. PSC-98-1092-FOF-WS.

MOTION TO STRIKE AND DISMISS

As stated above, on October 3, 2000, Wedgefield filed a Motion to Strike and Dismiss. The basis of the Motion is that OPC's Petition is barred by the doctrines of res judicata and collateral estoppel. OPC filed a timely response on October 13, 2000.

In reviewing a Motion for Summary Final Order, we may consider all documents on file in reaching our decision, including the Transfer Order. However, in reviewing a Motion to Dismiss, we are confined to the four corners of the initial pleading. See Moskovits v. Moskovits, 112 So. 2d 875, 878, (Fla. 1st DCA 1959). Based on the constraints of this standard, and consistent with our decision to deny Wedgefield's Motion for Summary Final Order, we deny Wedgefield's Motion to Strike and Dismiss.

OFFER OF SETTLEMENT

By Order No. PSC-00-1528-PAA-WU, we ordered Wedgefield to show cause in writing within 21 days, why it should not be fined $3,000 for its apparent violation of Rule 25-30.115, Florida Administrative Code, and Order No. PSC-97-0531-FOF-WU, issued May 9, 1995, in Docket No. 960444-WU, for its failure to maintain its books and records in conformance with the NARUC USOA.

On September 13, 2000, the utility filed its Response and Petition on Final Order Initiating A Show Cause (Response). In its Response, the utility requested that we:

(a) Waive the $3,000 fine imposed by this Order to Show Cause;

(b) Allow the utility to work with staff to resolve any discrepancies remaining after the 1998 modifications of its accounting system, and direct staff to perform a compliance audit of the books and records as they exist as of January 31, 2001;

© If (a) is not approved by the Commission, the Commission is hereby requested to hold a formal hearing pursuant to §120.57(1), Florida Statutes, on the show cause portions of the above-referenced Order; and

(d) Grant such other and further relief as the Commission may deem appropriate.

In its Response, the utility acknowledged that some additional time may have been required by our staff, but that our staff did not remain at the utility's office for any longer than the two-week period originally allotted by our staff to perform the audit. Moreover, the use of any accounting system that may require conversion of the format of certain accounts does not necessarily violate the requirements to keep information readily available. However, the utility did recognize that a few accounts, especially Accounts Nos. 620 and 675, may not be in total compliance with the NARUC USOA. Although the utility believes that its books and records are in substantial compliance with the NARUC USOA, it promised to sufficiently correct these differences by January 31, 2001, if given some guidance by our audit staff.

We disagree with certain allegations made in Wedgefield's Response. First, our auditors noted that the length of time they needed to complete the Wedgefield audit report was not limited to the amount of time they spent at the utility's offices. Our auditors spent a considerable amount of time reconciling the MFRs to its books and records before going to the utility's office and during their on-site investigation.

Our auditors also disputed the assertion that the Electronic Data Processing (EDP) tapes were provided on a timely basis. Our auditors requested the tapes on November 4, 1999, and the utility did not provide a usable copy until March 1, 2000. Moreover, the use of EDP information to reconcile the utility's MFRs to its books and records is of limited use because many of the account balances

contained in the MFRs are adjusted book balances which were calculated specifically for the current filing.

On October 20, 2000, our staff held an informal meeting with the utility and OPC. At this meeting, our staff informed the utility of specific deficiencies which need to be corrected to bring the books of the utility and Utilities, Inc., its parent company, into compliance. Our staff believed that the utility should be willing to pay a monetary fine in the amount of at least $1,000 because of its parent company's history of non-compliance with the NARUC USOA. In addition, on October 23, 2000, our staff sent a letter to the utility outlining the above information.

On October 31, 2000, the utility filed a letter, stating that while it acknowledges that some additional time was required for our auditors to reconcile various accounts, it does not believe that this resulted in a delay in issuing the audit report. Further, the utility disagrees with our auditors' assertion that EDP tapes were not provided in a timely manner. Moreover, the utility maintains its position that any monetary penalty should be waived because of the significant good faith effort made to modify its books and records to bring it into compliance with our interpretation of NARUC USOA. While Wedgefield has acknowledged that there are still several accounts which are not in compliance with NARUC USOA, it believes that its books and records are in substantial compliance. On October 30, 2000, the utility filed its direct testimony, which is consistent with its Response and its letter.

The utility has agreed that, in future rate cases, it will begin its MFRs with the actual book balances and adjust from those amounts. Further, the utility requested that our staff be directed to perform a compliance audit of the utility's books and records as of January 31, 2001. The utility has further committed to work with our staff to correct any specific issues raised in the future.

Our auditors will provide guidance to the utility to correct the differences between its books and records and the NARUC USOA. However, such guidance shall not be used to preclude a finding of noncompliance with our rules in a future proceeding before this Commission. Furthermore, the utility and its parent company shall be required to begin its MFRs with the utility's book balances with

all adjustments made after the "per book" column. Moreover, a compliance audit shall be performed on the utility's parent company operations and on a representative sample of its Florida operations after the utility's books are closed and its financial statements have been issued for the fiscal year end.

We note that in Order No. PSC-00-1528-PAA-WU, the utility did not respond to Audit Exception No. 1, which states that the utility did not maintain its accounts in compliance with NARUC accounting. However, we have analyzed the utility's Response, letter, and direct testimony on this issue. Based upon this analysis, we find that the utility has made substantial progress in correcting the problems identified in previous orders. We find that the utility's actions and commitments are sufficient to achieve the desired goals of efficient analysis of its MFRs and efficient audits. Therefore, a monetary fine is unnecessary to ensure future compliance with our Rules and Orders.

Based on the foregoing, we hereby accept Wedgefield's offer of settlement made in response to Order No. PSC-00-1528-PAA-WU, requiring the utility to show cause as to why it should not be fined $3,000 for its apparent violation of Rule 25-30.115, Florida Administrative Code, and Order No. PSC-97-0531-FOF-WU. Therefore, the $3,000 fine shall be permanently suspended. The utility shall correct any remaining areas of noncompliance with the NARUC USOA by January 31, 2001. Further, the utility and its parent shall file, in future proceedings before this Commission, MFRs which begin with utility book balances, and show all adjustments to book balances after the "per book" column in the MFRs. The utility shall file with its MFRs, a statement which affirms that the MFRs begin with actual book balances.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Motion for Summary Final Order filed by Wedgefield Utilities, Inc. is hereby denied without prejudice. It is further

ORDERED that Wedgefield Utilities Inc.'s Motion to Amend Wedgefield's Motion to Strike and Dismiss is hereby granted. It is further

ORDERED that Wedgefield Utilities Inc.'s Motion to Strike and Dismiss is denied. It is further

ORDERED that the offer of settlement filed by Wedgefield Utilities Inc. is accepted. It is further

ORDERED that the $3000 fine is permanently suspended.

By ORDER of the Florida Public Service Commission this 13th day of December, 2000.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(S E A L)

JKF

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order denying Motion for Summary Final Order without prejudice, granting Motion to Amend Motion to Strike and Dismiss, and Denying Motion to Strike and Dismiss, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

Any party adversely affected by the Commission's final action accepting settlement offer in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

B

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for increase in water rates in Orange County by Wedgefield Utilities, Inc.	DOCKET NO. 991437-WU ORDER NO. PSC-00-2365-PCO-WU ISSUED: December 8, 2000

ORDER GRANTING MOTION TO ABATE AND STAY PROCEEDINGS

By Order No. PSC-00-1895-PCO-WU, issued October 16, 2000, controlling dates and hearing dates were established in this docket. These dates were subsequently modified by Order No. PSC-00-2182-PCO-WU, issued November 15, 2000. On December 1, 2000, Wedgefield Utilities, Inc. (Wedgefield or utility) filed its Motion to Abate and to Stay Proceedings Pending Appellate Review (Motion).

In support of its Motion, the utility states that it plans to appeal the Commission's decision made at the November 28, 2000, Agenda Conference, when an order is issued memorializing that decision. However, because a discovery dispute is pending, the utility believes that it is necessary to address the discovery issue and stay of the proceedings at this time. The utility states that if discovery and other matters proceed and the appeal is successful, then the pending discovery dispute will be moot. Consequently, the rate case expenses relating to the issue would turn out to be imprudent expenditures.

In its Motion, Wedgefield specifically requests that all discovery efforts be abated and that all further actions be stayed by the Commission until after the decision on appeal becomes final. Wedgefield agrees to waive the time limitations set forth in Section 367.081(8), Florida Statutes, for a period not to exceed eight months after the decision on appeal becomes final. The utility stated that it had contacted counsel for the Office of Public Counsel (OPC), and that OPC would file a written response to the Motion.

On December 4, 2000, OPC filed its Response to Wedgefield's Motion to Abate. In its Response, OPC questions the decision to file an appeal, but does not object to abating this proceeding as described in Wedgefield's Motion pending a decision by the First District Court of Appeal.

A TRUE COPY
ATTEST Kay Flynn
Chief, Bureau of Records

Abating this proceeding will avoid what may be unnecessary time and expense if Wedgefield is ultimately successful on appeal. Moreover, because Wedgefield has waived the time limitations set forth in Section 367.081(8), Florida Statutes, and the parties agree to abating this proceeding, Wedgefield's Motion shall be granted. All controlling dates, including the hearing dates upon approval of the Chairman's Office, shall be held in abeyance and will be reset upon completion of the appellate proceedings.

Based on the foregoing, it is

ORDERED by Commissioner Lila A. Jaber, as Prehearing Officer, that the Motion to Abate and Stay Proceedings Pending Appellate Review filed by Wedgefield Utilities, Inc. is granted. It is further

ORDERED that all discovery efforts and controlling dates are held in abeyance and will be reset upon completion of the appellate proceedings.

By ORDER of Commissioner Lila A. Jaber, as Prehearing Officer, this 8th day of December, 2000.

LILA A. JABER
Commissioner and Prehearing Officer

(S E A L)

JKF

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

C

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for increase in water rates in Orange County by Wedgefield Utilities, Inc.	DOCKET NO. 991437-WU Filed: October 3, 2000

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RECORDS AND REPORTING

WEDGEFIELD UTILITIES, INC.'S
MOTION TO STRIKE AND DISMISS
THE OFFICE OF PUBLIC COUNSEL'S
PETITION REQUESTING SECTION 120.57 HEARING AND
PROTEST OF PROPOSED AGENCY ACTION

A TRUE COPY
ATTEST _____
Chief, Bureau of Records

Wedgefield Utilities, Inc. ("Wedgefield" or "the Utility") hereby files its Motion to Strike and Dismiss the Office of Public Counsel's Petition Requesting Section 120.57 Hearing and Protest of Proposed Agency Action, and in support thereof states:

1. On August 23, 2000, the Florida Public Service Commission (PSC or "the Commission") entered its Proposed Agency Action Order No. PSC-00-1528-PAA-WU (the PAA Order) in the above styled Docket, setting rates and charges for the Wedgefield water utility system. Any protests and petitions for hearing on that PAA Order were due to be filed on or before September 13, 2000.

2. On September 13, 2000, the Office of Public Counsel (OPC) filed its Notice of Intervention and its Petition Requesting Section 120.57 Hearing and Protest of Proposed Agency Action. Copies of the Notice and the Petition and Protest are attached hereto as Attachment "A" and Attachment "B", respectively .

APP
CAF
CMP
COM 3
CTR
ECR Willis
LEG 2
OPC
PAI
RGO Fenstermaker
SEC 1
SER
OTH Henry

3. The only matter which OPC has attempted to raise for resolution as a "disputed issue" is, "Should the utility's rate base include a negative acquisition adjustment?" The OPC petition also stated the obvious fall-out question, "What other

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charges, such as changes to depreciation expense, should be made to reflect a negative acquisition adjustment?" (See OPC Petition, paragraph 5.)

4. The principles of res judicata, collateral estoppel, stare decisis, and administrative finality prevent proceeding on the OPC petition. Furthermore, the need for judicial economy, the unnecessary duplication of cost to the utility (and ultimately to the ratepayers) to re-litigate the same issue again for the same utility, and the pendency of a generic rule proceeding (Docket No. 001502-WS) on the Commission's policy on acquisition adjustments dictate that the OPC petition be stricken.

5. Wedgefield Utilities, Inc. is a public utility, subject to the jurisdiction of the Florida Public Service Commission pursuant to Chapter 367, Florida Statues. Utilities, Inc. is the parent company of Wedgefield Utilities, Inc., and owns and operates over 75 utilities in sixteen states. It owns and operates Cypress Lakes Utilities, Inc., which also is subject to the jurisdiction of the Florida Public Service Commission. Both Wedgefield and Cypress Lakes are Florida corporations.

6. There are four relevant cases, involving four separate Commission dockets, which show the applicability of res judicata, collateral estoppel, stare decisis, and administrative finality to the instant case:

a) The first case is the generic proceeding - whereby OPC filed a request over a decade ago (1989) for the Commission to initiate rulemaking proceedings regarding negative acquisition adjustments. The Commission denied OPC 's request to initiate rulemaking, and instead reaffirmed its policy on acquisition adjustments

in a proposed agency action order (Docket No. 891309-WS, PAA Order No. 23376 issued August 21, 1990). OPC protested that PAA order, and the Commission opened a full investigation in that same docket and held hearings at which OPC and other interested parties, including utility companies, participated. The Commission then issued its final order, again reaffirmed its acquisition adjustment policy which had been in effect at least since 1983 (Docket No. 891309-WS, Order No. 25729 issued February 17, 1992).

b) The second case is the previous Wedgefield transfer proceeding , whereby the Commission approved the transfer of the water and wastewater utility systems from Econ Utilities Corporation to Wedgefield Utilities, Inc. (Docket No. 960235-WS, Order No. PSC-98-1092-FOF-WS issued August 12, 1998);

c) The third case is the transfer proceeding for Cypress Lakes Utilities, Inc., a sister company of Wedgefield Utilities, Inc., whereby the Commission approved the transfer of the utility systems from Cypress Lakes Associates, Ltd. to Cypress Lakes Utilities, Inc. (Docket No. 971220-WS, Order No. PSC-00-0264-FOF-WS issued February 8, 2000); and

d) The fourth case is the current Wedgefield rate proceeding to set rates and charges for the Wedgefield water system (Docket No. 991437-WU, Proposed Agency Action Order No. PSC-00-1528-PAA-WU issued August 23, 2000). It is this PAA Order which OPC has now protested, only on the basis of negative acquisition adjustment.

7. Also, there are over 100 cases decided by the Commission on the issue of acquisition adjustments. Those cases are consistent with the Commission's final orders in the generic proceeding, the Wedgefield transfer case, and the Cypress Lakes case.

8. In the Wedgefield transfer case, on February 27, 1996, Wedgefield Utilities, Inc. filed an application for transfer, seeking Commission approval to acquire the water and wastewater utility systems of Econ Utilities Corporation, in Orange County. OPC filed a protest, seeking to have the Commission impose a negative acquisition adjustment, the identical and only issue which OPC relies upon in its protest of the current Wedgefield rate case. After pre-hearing pleadings were considered and disposed of in the Wedgefield transfer case, the matter went to hearing in the Utility's service territory on March 19, 1998. The Commission received testimony and exhibits from several customers and from witness for the Utility and for OPC, respectively. Additional hearings were held at the Commission headquarters building in Tallahassee on March 26, 1998. The record in that PSC proceeding included three volumes of testimony containing 412 pages; 18 exhibits submitted on behalf of the various parties; and detailed prefiled direct and rebuttal testimony by the parties. After extensive post-hearing briefs were filed, the Commission entered its final order, Order No. PSC-98-1092-FOF-WS, on August 12, 1998, determining that no negative acquisition adjustment should be imposed. OPC did not seek reconsideration of the final order by the Commission, nor did OPC seek appellate review by the First District Court of Appeal.

9. OPC's protest and petition for hearing in the instant case cannot be construed to be based on any other disputed issue than negative acquisition adjustmennt. In the instant petition there was no other statement regarding disputed issues of material fact (required by Rule 26-106-201(2)(d), F.A.C.), nor was there "A concise statement of the ultimate facts alleged, as well as the rules and statutes which entitle the petitioner [OPC] to relief" (required by Rule 26-106-201(2)(e), F.A.C.). The only rules or statues cited in the OPC petition related to general hearing procedures and to standing.

10. The Office of Public Counsel also raised the issue of negative acquisition adjustment in the recent Cypress Lakes transfer case whereby that utility was transferred from Cypress Lakes Associates, Ltd. to Cypress Lakes Utilities, Inc., in Polk County. The Commission issued an order approving the transfer, and by PAA order set rate base for purposes of the transfer (Docket No. 971220-WS, Order No. PSC-98-0993-FOF-WS issued July 20, 1998). OPC filed a protest and petition for hearing on the issue of negative acquisition adjustment, but failed to even allege a single "extraordinary circumstance", which the Commission requires before a negative acquisition adjustment can be considered. The Commission denied several motions filed by Cypress Lakes seeking to have the protest dismissed based on the question of negative acquisition adjustment. Upon stipulation by the parties, the case was then decided on the pre-filed testimony and exhibits, without a hearing. The Commission entered its final order denying OPC's demand for a negative acquisition adjustment (Docket No. 971220-WS, Order No. PSC-00-0264-FOF-WS issued February 8, 2000), thereby <u>again</u> reaffirming its prior policy on acquisition adjustments,

which has been in effect, and has remained unchanged, since at least 1983.

11. In one aspect, the Cypress Lakes case is different than the pending Wedgefield case. In Cypress Lakes, the issue of negative acquisition adjustment had never been addressed and decided for that specific utility. In the current Wedgefield rate proceeding, the issue specifically has been addressed in the prior Wedgefield transfer proceeding, and has been exhaustively considered at hearing, through testimony and exhibits, and by extensive briefing. The Commission's final order in the prior Wedgefield (transfer) case not only was consistent with the Commission's prior one hundred decisions on acquisition adjustments, it also resulted from the specific consideration of the same issue, involving the same utility, involving identical parties (OPC and Wedgefield Utilities, Inc.) that OPC now seeks to pursue again by its current protest and petition for hearing. The Wedgefield transfer decision and the Cypress Lakes decision clearly exemplify the legal principles of res judicata, collateral estoppel, and stare decisis.

12. The issue has been decided previously as to Wedgefield Utilities, Inc.; OPC's petition is barred by res judicata, collateral estoppel, stare decisis, administrative finality, and for the other reasons set forth herein; and OPC has no legal basis to re-litigate the issue.

13. It is also important to note that the Office of Public Counsel did not seek further review of either the Wedgefield transfer final order or the Cypress Lakes final order, both of which denied OPC's request for a negative acquisition adjustment in the respective cases. In neither case did OPC seek reconsideration (by the Commission) of the

final orders pursuant to Rule 25-22.060, Florida Administrative Code, nor did OPC seek judicial review (by the First District Court of Appeal) of the final orders pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The Commission's final orders in both cases set forth the right, and the obligation, of a party "adversely affected" to seek reconsideration before the Commission or to appeal to the First District Court of Appeal. (See page 27 of the Wedgefield transfer final order and page 13 of the Cypress Lakes transfer final order.) OPC, a party to both the Wedgefield transfer case and the Cypress Lakes case, took no action in either case to seek reconsideration or to appeal the final orders.

14. Without further belaboring the history of the Commission's decisions and policy on acquisition adjustments, Wedgefield hereby attaches and incorporates herein, its post-hearing documents in the Wedgefield transfer case, including its Post-hearing Statement of Issues and Positions and Brief, Motion to File Post-Hearing Documents in excess of those Permitted by Rule 25-22.056(1)(d), F.A.C., and Post-hearing Proposed Findings of Fact and Conclusions of Law, all of which were filed on April 28, 1998, in the Wedgefield transfer case. Copies of those post-hearing documents are attached and incorporated herein as Attachment "C", Attachment "D", and Attachment "E", respectively. A similar Brief was filed on behalf of the utility in the Cypress Lakes case, almost verbatim except for matters specifically relating to the name and corporate history of Cypress Lakes Utilities, Inc. The Wedgefield Brief goes into great detail regarding both the generic proceedings whereby the Commission reaffirmed its prior policy on negative acquisition adjustments, and the Wedgefield transfer proceedings whereby the Commission already

found that it was inappropriate to require a negative acquisition adjustment, specifically with regard to Wedgefield Utilities, Inc.

15. In the instant case, OPC has not raised a disputed issue requiring resolution by the Commission. The issue of negative acquisition adjustment has already been decided by this Commission in 1998, in relation to this specific utility system, upon the urging of the same Office of Public Counsel, by the same two OPC attorneys, involving identical parties, and with a final order rendered, after extensive hearings, after receiving testimony from several customers, after receiving testimony from expert witnesses representing all parties, after considering the 18 exhibits, after considering the more than one hundred prior Commission orders establishing the precedent of the Commission regarding acquisition adjustments, after extensive briefing by Wedgefield and by OPC , and after the failure of OPC (or anyone else) either to request reconsideration of that final order by the Commission or to appeal that final order to the First District Court of Appeal.

16. Therefore, the issue of whether there should be a negative acquisition adjustment for his utility has already been decided. Loosely translated, "res judicata" means "The thing has been decided."

17. If there ever was a case where the principles of res judicata, collateral estoppel, stare decisis, and administrative finality demand dismissal of a proceeding, it is this Wedgefield rate case.

18. Res judicata operates as an estoppel between parties to a specific case, so that ". . . a right, question of fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies." Effective Legal Research, pages 120-121, Price and Bitner, 1969.

19. The doctrine of administrative res judicata is applicable in this state. Hays v. State Dept. of Business Regulatioin, Div. of Pari-Mutuel Wagering, 418 So.2d 331 (Fla. 3rd DCA 1982). Administrative proceedings are subject to the doctrine of res judicata. Rubin v. Sanford, 168 So.2d 774 (Fla. 3rd DCA 1964). The doctrine of res judicata is equally applicable to decisions of administrative tribunals and courts. Flesche v. Interstate Warehouse, 411 So.2d 919 (Fla. 1st DCA 1982). Where an administrative agency acting in a judicial capacity has resolved disputed issues of fact which were properly before it and which parties have had an adequate opportunity to litigate, a court will apply the doctrine of res judicata or collateral estoppel. Jet Air Freight v. Jet Air Freight Delivery, Inc., 264 So.2d 35 (Fla. 3rd DCA1972). Only where there has been a substantial change of circumstances relating to the subject matter with which the ruling was concerned is it sufficient to prompt a different determination. Coral Reef Nurseries, Inc. v. Babcock, Co., 410 So.2d 648 (Fla 3rd DCA 1982); Metropolitan Dade County Bd. of County Com'rs v. Rockmatt Corp., 231 So.2d 41 (Fla. 3rd DCA 1970); Holiday Inns, Inc. v. City of Jacksonville, 678 So.2d 528 (Fla. 1st DCA 1996).

20. There has been no substantial change of circumstances, relating to the substance of OPC's petition to impose a negative acquisition adjustment. The mere change

of membership of the Florida Public Service Commission is not a sufficient "change of circumstances" to ignore the requirements of res judicata.

21. The doctrine of collateral estoppel is applicable to administrative orders and decisions. Brown v. Dept. of Professional Regulation, Bd. of Psychological Examiners, 602 So.2d 1337 (Fla 1st DCA 1992). Collateral estoppel, or estoppel by judgment, prevents identical parties from relitigating issues that have previously been decided between them. Florida courts adhere to that rule that collateral estoppel may be asserted only when the identical issue has been litigated between the same parties. (32 Fla.Jur2d, Judgements and Decrees §125. Citations omitted.)

22. Although res judicata and estoppel are sometimes used interchangeably, they are not the same.

> . . . [The] difference between the two doctrines is that under res judicata a final decree of judgment bars a subsequent suit on the same cause of action and is conclusive as to all matters germane thereto that were or could have been raised, while the principle of estoppel by judgment is applicable where the two causes of action are different, in which case the adjudication in the first suit only estops the parties from litigating in the second suit issues or questions common to both causes of action, which were actually adjudicated in the prior litigation. A distinction between the doctrine of estoppel by judgment and the doctrine of res judicata is important in cases where some but not all of the parties were before the court in the previous litigation, and where a part but not all of the present claim or demand was put in issue in the earlier suit. [Emphasis added. (32 Fla.Jur2d, Judgements and Decrees §135. Citations omitted.]

23. By participating in both the Wedgefield Utility transfer case and the Cypress Lakes Utility case and failing to seek reconsideration or to appeal the final orders of the

Commission in either case, OPC is now precluded by both res judicata and by collateral estoppel from now raising the same issue in the instant case.

24. OPC is also bound by stare decisis in regard to the Commission's final orders in over 100 cases decided by the Commission on acquisition adjustments.

25. Although courts technically have the power to refuse to apply the principle of stare decisis (in contrast to res judicata which always must be adhered to),

> [in] general, when a point has once been settled by judicial decision it should, in the main, be adhered to, for it forms a precedent to guide courts in future similar cases. This rule has become known as that of "stare decisis." Literally translated, its mandate is to let that which has been decided stand undisturbed.
>
> The doctrine of stare decisis serves the important purpose of providing stability to the law and to the society governed by that law. The rule is often expressed in a statement to the effect that when a point of law has been settled by decision of the same or of a superior court, it forms a precedent from which departure should generally not be made. [13 Fla.Jur.2d, Courts and Judges §174. Citations omitted.]

26. The theory of Anglo-American law is that "stare decisis et non quieta movere" -- we must "adhere to precedent and not to unsettle things which are settled". Effective Legal Research, pages 120-121, Price and Bitner, 1969.

27. The law of these cases on acquisition adjustments, as decided by the Florida Public Service Commission, and the legal precedent set thereby, is that: "Absent evidence of extraordinary circumstances, the rate base calculation should not include an acquisition adjustment." (Wedgefield Utilities, Inc. -- Final Order Establishing Rate Base for Purposes of Transfer, Declining to Include a Negative Acquisition Adjustment in the Calculation of

Rate Base and Closing Docket, Docket No. 960283-WS, Order No. PSC-98-1092-FOF-WS issued August 12, 1998). At page 16 of that Order the Commission also cites several other prior Commission orders of the Commission confirming the same policy. In the Wedgefield transfer case, OPC alleged but did not prove that any extraordinary circumstances existed. In the Cypress Lakes case, OPC did not even allege that extraordinary circumstances existed. In the current Wedgefield rate case, OPC again has not even alleged that extraordinary circumstances exist.

28. The Commission itself has addressed the issue of administrative finality. In the case In Re: Planning Hearings on Load Forecasts Generation Expansion Plans, and Cogeneration Prices for Florida's Electric Utilities, Docket No. 910004-EU, Order No. 24989 issued August 29, 1992, 91 FPSC 8:560, the Commission stated that,

> ". . . case law indicates that the Commission has only limited power to change its prior decisions. In fact, at some point the Commission loses the power to change its decisions and must live with them." [Order page 71, 91 FPSC 8:560 at 630.]

The Commission then went on to say,

> Orders of administrative agencies must eventually pass out of the agency's control and become final, and, therefore, no longer subject to modification. There must be in every proceeding a terminal point at which the parties and the public may rely on a decision of an administrative agency as final and dispositive of the rights and issues involved therewith. [Citing, People's Gas Systems, Inc. v. Mason, 187 So.2d 335 (Fla. 1966) and Austin Tupler Trucking Inc. v. Hawkins, 377 So.2d 679 (Fla 1979]. [Order page 72, 91 FPSC 8:560 at 631.]

Quoting from Reedy Creek Utilities Co. v. Florida Public Service Comm'n, 418 So.2d 249, 253 (Fla. 1982), the Commission stated,

". . . an underlying purpose of the doctrine of finality is to protect those who rely on a judgment or ruling."

The importance of "administrative finality" was then stressed by the Commission:

> The doctrine of administrative finality is one of fairness. It is based on the premise that the parties, as well as the public, may rely on Commission decisions." [Order page 72, 91 FPSC 8:560 at 631.]

29. There are many other cases showing why OPC's petition should be stricken and that the proceeding be dismissed. If the Commission would like the parties to more fully brief the issue, the Utility will provide such a brief.

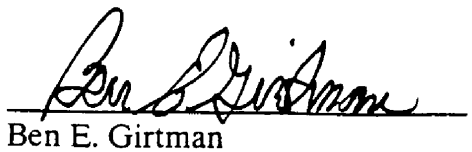
30. If OPC wants to create a new legal principle or change an existing one, it must go through the APA generic hearing process, not ask the PSC to make up the principle out of thin air. Nor can OPC now seek to reverse a final order from a prior case, involving the identical parties and the identical utility customers, involving the identical issue, in a final order where OPC did not seek reconsideration or appeal, and which ultimately cost tens of thousands of dollars to pursue to conclusion with the final order. The issue does not need to be re-litigated, and the company and ultimately the utility ratepayers should not be burdened with that cost.

31. The Commission is without legal authority to entertain the protest and petition of OPC in the instant case. In case after case, (over 100 cases), the Commission has stated, affirmed, and reaffirmed, at least since 1983, its policy on negative acquisition adjustments. The PSC has held generic hearings on the issue, and OPC was a party to those proceedings as well as a party to many of the 100 cases on the subject. After

extensive hearings relating to the transfer of this utility, the PSC has rendered a final order deciding the issue of negative acquisition adjustments, specifically as it relates to Wedgefield Utilities, Inc. The doctrines of res judicata, collateral estoppel, stare decisis, and administrative finality all require that the OPC petition and protest be stricken and that the proceeding be dismissed. The need for judicial economy, the unnecessary duplication of cost to the utility (and ultimately to the ratepayers) to re-litigate the same issue again for the same utility, and the pendency of a generic rule proceeding on the Commission's policy on acquisition adjustments dictate that the OPC petition be stricken.

WHEREFORE, Wedgefield Utilities, Inc. requests that the Florida Public Service Commission strike the Office of Public Counsel's Petition Requesting Section 120.57 Hearing and Protest of Proposed Agency Action, and that the Commission dismiss any proceedings based on OPC's request for a negative acquisition adjustment in this case.

Respectfully submitted,



Ben E. Girtman
FL Bar No. 186039
1020 E. Lafayette St.
Suite 207
Tallahassee, FL 32301

Attorney for
Wedgefield Utilities, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent to the following by U.S. mail (or by hand delivery*) this 3rd day of October, 2000.

Patty Christensen, Esq.*
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
(850)413-6220

Charles Beck, Esq.*
Office of Public Counsel
111 W. Madison St., Rm. 812
Tallahassee, FL 32399-6588
(850) 488-9330

Ben E. Girtman

WEDGEFIELD UTILITIES, INC.'s
Attachments to Its
MOTION TO STRIKE AND DISMISS

The Attachments to this Motion to Strike include the following:

Originally filed in the current proceeding

A. Notice of Intervention - filed by OPC on September 13, 2000.

B. Petition Requesting Section 120.57 Hearing and Protest of Proposed Agency Action - filed by OPC on September 13, 2000.

Originally filed in the Wedgefield transfer proceeding (Docket No. 960235-WS)

C. Post-Hearing Statement of Issues and Positions and Brief - filed by Wedgefield on April 28, 1998.

D. Motion by Wedgefield Utilities, Inc. to File Post-Hearing Documents in Excess of Those Permitted by Rule 25-22.056)1)(d), F.A.C. - filed by Wedgefield on April 28, 1998.

E. Post - Hearing Proposed Findings of Fact and Conclusions of Law of Wedgefield Utilities, Inc. - filed by Wedgefield on April 28, 1998.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Application for increase in water rates in Orange County by Wedgefield Utilities, Inc.	))))	Docket No. 991437-WU Filed: September 13, 2000

NOTICE OF INTERVENTION

Pursuant to Section 350.0611, Florida Statutes, the Citizens of the State of Florida, by and through Jack Shreve, Public Counsel, serve their Notice of Intervention in this docket.

Respectfully submitted,

Charles J. Beck
Deputy Public Counsel

Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street
Room 812
Tallahassee, FL 32399-1400

Attorney for the Citizens
of the State of Florida

A

DOCKET NO. 991437-WU
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail or hand-delivery to the following parties on this 13th day of September, 2000.

Charles J. Beck

Patricia Christensen
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Tallahassee, FL 32399-0850

Ben Girtman, Esq.
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991437.noi

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for increase)	Docket no. 991437-WU
In water rates in Orange County)	
By Wedgefield Utilities, Inc.)	Filed September 13, 2000
)	

PETITION REQUESTING SECTION 120.57 HEARING AND PROTEST OF PROPOSED AGENCY ACTION

Pursuant to Rules 25-22.029 and 28-106.201, Florida Administrative Code, the Citizens of Florida (Citizens), by and through Jack Shreve, Public Counsel, file this petition to protest proposed agency action order no. PSC-00-1528-PAA-WU issued August 23, 2000, and request an evidentiary hearing under section 120.57, Florida Statutes (2000).

1. Section 350.0611, Florida Statutes (2000) provides that it shall be the duty of the Public Counsel to provide legal representation for the people of the state in proceedings before the Commission. It specifically provides the Public Counsel the power 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.

2. The name, address and telephone numbers of petitioner are as follows: Jack Shreve, Public Counsel, Charles J. Beck, Deputy Public Counsel, c/o Florida Legislature, 111 West Madison Street, room 812, Tallahassee, FL 32399-1400,

telephone 850-488-9330, fax 850-488-4491. Petitioner received notice of the Commission's decision by downloading a copy of order no. PSC-00-1528-PAA-TL from the Commission's web site on or about August 24, 2000.

3. Wedgefield Utilities, Inc., is a utility as defined by §367.021(12), Florida Statutes (2000), subject to the jurisdiction of the Commission under §367.011(2), Florida Statutes (2000).

4. The action taken by the Florida Public Service Commission (Commission) in its proposed agency action order no. PSC-00-1528-PAA-WU affects the substantial interests of petitioner because the order uses an excessive rate base amount. This excessive rate base leads to the imposition of excessive rates on the citizens served by Wedgefield Utilities, Inc. The Commission should have used the actual purchase price paid by Wedgefield Utilities, Inc., for the utility in calculating the rate base, instead of the amount on the books of the selling utility Econ Utilities. Had the Commission done so, the proposed agency action order would have reduced the rates paid by the citizens in Wedgefield instead of increasing the rates.

5. Petitioner submits the following disputed issues of material fact, policy, and law for resolution in a hearing conducted under section 120.57, Florida Statutes (2000):

a. Should the utility's rate base include a negative acquisition adjustment?

b. What other changes, such as changes to depreciation expense, should be made to reflect a negative acquisition adjustment?

WHEREFORE, the Citizens protest the Commission's proposed agency action order no. PSC-00-1528-PAA-WU issued August 23, 2000, and request an evidentiary hearing to be held pursuant to §120.57, Florida Statutes (2000), as described in this petition.

Respectfully submitted,

JACK SHREVE
Public Counsel
Fla. Bar No. 73622

Charles J. Beck
Deputy Public Counsel
Fla. Bar No. 217281

Office of Public Counsel
c/o The Florida Legislature
111 W. Madison Street
Room 812
Tallahassee, FL 32399-1400

(850) 488-9330

Attorneys for Florida's Citizens

DOCKET NO. 991437-WU
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail or hand-delivery to the following parties on this 13th day of September, 2000.

Charles J. Beck

Patricia Christensen
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991437.pae

TRANSMISSION VERIFICATION REPORT

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FAX : 8506563233
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DATE,TIME	09/15 11:54
FAX NO./NAME	SEIDMAN
DURATION	00:03:09
PAGE(S)	06
RESULT	OK
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$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
	Filed: April 28, 1998

POST-HEARING

STATEMENT OF ISSUES AND POSITIONS

and

BRIEF

of

WEDGEFIELD UTILITIES, INC.

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

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

TABLE OF CONTENTS

I. BACKGROUND -

A. The Case

On January 17, 1997, Utilities, Inc. entered into a contract to purchase the assets of Econ Utilities Corporation (Econ) in Orange County. Through its newly formed subsidiary, Wedgefield Utilities, Inc., it subsequently filed an application with the Florida Public Service Commission seeking approval for transfer of the utility. [Ex. 11, Application for Transfer, at Exhibit B]. Wedgefield also filed an application for extension of territory.

On October 7, 1996, the Commission entered its Order No. PSC-96-1241-FOF-WS, a final order approving both the transfer and the extension of territory. A portion of the order was issued as a PAA, and set rate base for purposes of the transfer at $1,462,487 for water and $1,382,904, for wastewater. [See also, Tr. 166, Wenz Additional Direct Testimony page 3, line 17 to page 4, line 14.]

OPC protested the order, and a hearing was set and noticed to ". . . consider whether a negative acquisition adjustment should be included in rate base for the purpose of the transfer . . . ." [Notice of Hearing, issued March 2, 1998].

After several motions and other pleadings were disposed of, a hearing was held at Wedgefield on March 19, 1998. A continuation of that hearing for cross examination was held at the Public Service Commission in Tallahassee on March 26, 1998.

B. The Witnesses

There were four primary witnesses: Mr. Carl Wenz and Mr.

Frank Seidman on behalf of Wedgefield Utilities, Inc.; Mr. Hugh Larkin, Jr., on behalf of the Office of Public Counsel (OPC); and Ms. Kathy L. Welch on behalf of the Commission Staff (Staff). In addition, several customers presented statements during the customer phase of the hearing.

A customer witness, Mr. Nathan, acknowledged that the customers received notice of the applications [Tr. 84, lines 14-16] and that no one had requested that anyone notify the homeowners associations in the area of the proceeding, separate and apart from the notifications which to all customers. [Tr. 83, lines 2-6.]

C. References to the Record

Pages in the original transcript were numbered consecutively from the first page in Volume 1 to the last page in Volume 3, so reference to Volume numbers are not used. References to the hearing transcript include the transcript page and line number(s). Example: [Tr. 175, lines 4-7.]

References to testimony of witness appearing at the hearing include the witness's last name, transcript page, and line number(s). Example: [Seidman, Tr. 350, lines 13-19.]

References to prefiled testimony include both the transcript page number and the original page number. Line numbers are the same for both the transcript and for the original prefiled testimony. Example: [Tr. 170-171, Wenz Additional Direct Testimony page 7, line 18 to page 8, line 1.]

References to Exhibits include the exhibit number. Example: [Ex. 11.] "Negative Acquisition Adjustment" is sometimes

abbreviated as "NAA".

The Acquisition Feasibility Analysis of Econ Utilities Corporation (1995), prepared by the Orange County Public Utilities Division, (OCPUD) and issued under the name of Mr. Alan Ispass, is referred to as the Orange County Utility report.

The draft Capital Improvement Plan and Utility Rate and Impact Fee Analysis prepared by John B. Webb and Associates is referred to as the "Webb draft".

D. Wedgefield Utilities, Inc.

Wedgefield Utilities, Inc., was incorporated in Florida on January 23, 1996, and is a wholly owned subsidiary of Utilities, Inc., which was incorporated in Illinois in 1965. [Ex. 11, Application for Transfer, Part I, Para. E. and Part II, Para. A.]

Utilities, Inc. has 63 subsidiaries which own and operate water and/or wastewater utilities in fifteen states. [Tr. 157, Wenz Direct Testimony page 1, lines 17-18 and 24-25.] For a listing of all except the most recently added systems, see Ex. 11, Application for Transfer, and its Exhibit A.

E. Econ Utilities Corporation

Econ has about 700 customers. The rate case in which its rate base was last established was in 1984 [Docket No. 840368-WS, Order No. 15459]. In 1987, it applied for a rate increase, but the application was challenged by OPC. As a result of a stipulation, rates were set at less than the amount applied for. Therefore, the Commission did not render a decision on rate base at that time.

Some indexing and pass-through adjustments have occurred since the Public Service Commission (PSC) obtained jurisdiction.

Environmental standards for Econ utility are set by the Florida Department of Environmental Protection (DEP) and by the Orange County Environmental Protection Department (OCEPD). The Orange County Public Utilities Division (OCPUD) has no regulatory authority over, and sets no regulatory standards for, Econ.

F. Purpose of the Commission Policy

A major purpose for the current Commission policy on acquisition adjustments is to create an incentive for larger utilities to acquire small, troubled utilities. [Tr. 319, Seidman Rebuttal Testimony page 4, lines 19-23.]

G. Purchaser's Reliance on Existing Commission Policy

Utilities Inc., in deciding to purchase Econ Utilities:

1) relied on the established Commission policy on acquisition adjustments in justifying its decision to purchase [Tr. 162-1633, Wenz Direct Testimony page 6, line 16 to page 7, line 5];

2) relied on the fact that the burden of proof rests with the proponent of an acquisition adjustment [Tr. 161, Wenz Direct Testimony page 5, lines 20-23]; and

3) relied on the fact that the existing Commission policy on negative acquisition adjustments cannot be changed on a case-by-case basis [Tr. 160, Wenz Direct Testimony page 4, lines 10-19].

Utilities, Inc. was fully aware of the long-standing policy of this Commission on acquisition adjustments prior to entering into

the contract to purchase Econ Utilities. Its understanding of that policy was based both on its experience in purchasing and operating twelve utilities in Florida under this Commission's jurisdiction, and on reading the Commission's orders establishing, investigating and reconfirming its policy on acquisition adjustments. [Tr. 168-169, Wenz Additional Direct Testimony page 5, line 20 to page 6, line 2.]

Utilities, Inc. relied on that policy when entering into negotiations to purchase these utility companies in Florida. [Tr. 169, Wenz Additional Direct Testimony page 6, lines 8-20.] To change that policy now, during pendency of this case and after the fact of entering into a contract to purchase Econ Utilities, not only would be a denial of due process but it also would defeat the purposes of the policy as originally developed and implemented by the Commission.

The Commission has already found that the transfer in this case is in the public interest. The contract was signed because of the incentive provided by the existing Commission policy. The existing policy does work. [Seidman, Tr. 353, lines 12-23.]

However, since the protest of the PAA order in this proceeding was filed, it has been unclear whether OPC was seeking to challenge the current Commission policy on acquisition adjustments. [Tr. 159-160, Wenz Direct Testimony page 3, line 22 to page 4, line 3.]

H. Benefits to Customers

Contrary to Mr. Larkin's assertion, any benefit that comes to the purchaser as a result of the Commission's policy on acquisition

adjustments is at the expense of the seller, not the customers. If a benefit results from the purchase price being lower than book value, it is at the expense of the seller, not at the expense of the customer. It comes out of the seller's pocket, not the customers'. [Seidman, Tr. 352, line 22 to Tr. 353, line 3.] [See also, Tr. 335-336, Seidman Rebuttal Testimony page 20, line 15 to page 21, line 12.]

Similarly, if the buyer paid more than book value, it's at the buyer's expense, not at the expense of the customer. The customer's position remains neutral when ownership of the utility changes, regardless of whether the buyer pays book value, less than book value or more than book value. Therefore, it is an absurdity to suggest that the acquiring utility will benefit at the expense of the customer. [Tr. 335-336, Seidman Rebuttal Testimony page 20, line 15 to page 21, line 12.]

In fact, benefits will accrue to the customers from the Commission's current policy and from the sale. [Seidman, Tr. 353, lines 4-7.]

As discussed in Order No. 25729 in the investigation docket, Docket No. 891309-WS, several years ago, the Commission's existing policy on acquisition adjustments translates into several benefits for the customers which result from the new ownership of utilities purchased under that policy. [See, Order No. 25729; Tr. 320-321, Seidman Rebuttal Testimony page 5, line 1 to page 6, line 4.]

Conversely, in that investigation OPC had proposed the same changes in the negative acquisition policy that it proposes in this

docket, and the Commission rejected those proposals. Order No. 23376 stated that: "Not only might OPC's proposed change not benefit the customers of troubled utilities, it might actually be detrimental, by removing any incentive for larger utility companies to acquire distressed systems." [Tr. 336, Seidman Rebuttal Testimony page 21, lines 12-21.]

Mr. Wenz testified that a change in ownership will benefit the utility customers because the new owner: 1) is utility-oriented and replaces a developer-related owner that has expressed disinterest in operating and funding the utility; 2) will not have the financial pressures faced by the previous owner of deciding whether to invest in utility operations or in real estate development; 3) has the ability to attract capital at a reasonable cost; 4) has the ability and commitment to make any necessary improvements; 5) has a professional staff with years of experience in utility operations; 6) has the potential to reduce costs through the allocation of existing administrative expenses and through access to an established purchasing system; and 7) is familiar with, and has the ability to comply with, all state and federal regulations. [Tr. 173-174, Wenz Additional Direct Testimony page 10, line 23 to page 11, line 15.]

Mr. Seidman testified about beneficial changes (due to a change in ownership) as listed by the Commission in its Order No. 25729. They include: 1) elimination of financial pressure due to the inability of the old owner to attract capital; 2) the ability of the new owner to attract capital; 3) a reduction in the high

cost of debt of the old owner due to lower risk of the new owner; 4) the limitation of sub-standard operating conditions; 5) the ability of the new owner to make necessary improvements; 6) the ability of the new owner to comply with DEP regulatory requirements; 7) reduced costs due to economies of scale and the ability of the new owner to buy in bulk; 8) the introduction of more experienced management; and 9) the elimination of a general disinterest in utility operations in the case of a developer owned system. [See, Order No. 25729; Tr. 320, Seidman Rebuttal Testimony page 5, lines 1-25.]

In its Order No. 25729 the Commission also found that the customers of utilities acquired under its acquisition adjustment policy are not harmed, and indeed benefit from a better quality of service at a reasonable cost. [See, Order No. 25729; Tr. 321, Seidman Rebuttal Testimony page 6, lines 1-4.]

I. Detrimental Consequences of Imposing NAA

If a negative acquisition adjustment is imposed, for whatever reason, several detrimental consequences would result. If the Commission's policy were changed now, it would make future changes in ownership unlikely. With no change in ownership, many of the benefits which the Commission identified in its Order No. 25729 would not be available to the customers of a "troubled" utility.

In addition, rates that are set to recover a return on a rate base that has been reduced by a negative acquisition adjustment would not reflect the actual cost of providing water and wastewater service to the customers of the utility. The rate base, excluding

Background

a negative acquisition adjustment, is the actual cost of the assets serving those customers. Those dollars were actually spent to provide service to those customers. The transfer of the system from one owner to another does not change that fact.

Furthermore, it is important to use the costs which were actually incurred in order to encourage the conservation of scarce resources. Rates set below cost would give customers a false signal regarding the cost of obtaining, treating and distributing potable water. Below-cost water rates would encourage excessive use. Below-cost wastewater rates would give a false signal as to the cost of treating and disposing of wastewater in an environmentally acceptable manner and would understate the cost to conserve and preserve our natural resources.

In addition, imposing a negative acquisition adjustment would discourage the purchase of a system such as Econ, and that thwarts Commission policy and is a detrimental consequence. [Tr. 345-346, Seidman Rebuttal Testimony page 30, line 12 to page 31, line 23.]

And there is another matter to consider. If Econ had not been purchased, Econ would still be entitled to apply for rates based on the net original cost of assets serving the public. That is the same asset base that the Commission would deny to a purchaser if the Commission were to impose a negative acquisition adjustment. [Tr. 347, Seidman Rebuttal Testimony page 32, lines 1-8.]

If Econ had not been sold, the limited capital available for improvements would cause service to deteriorate further; without access to capital at reasonable costs, any capital it could obtain

would be more costly; and without access to economies of scale and bulk purchasing, the cost of improvements would be higher. Clearly, Econ utility customers are better off with the utility being purchased under the current Commission acquisition adjustment policy, than to continue to be served under the older ownership. [Tr. 347, Seidman Rebuttal Testimony page 32, lines 8-18.].

J. The Generic Proceedings Before the Commission

In 1990, at the urging of OPC, the Commission opened a docket to inquire into its acquisition adjustment policy. [Docket No. 891309-WS.] By its PAA Order No. 23376 issued on August 21, 1990, the Commission reaffirmed its policy on acquisition adjustments. OPC protested the PAA order and requested formal hearings. The PSC opened a full investigation and held hearings at which OPC and other interested parties, including utility companies, presented their views on July 29, 1991.

In the Investigation proceeding, OPC unsuccessfully tried to make "prior maintenance" a basis for granting acquisition adjustments. [Tr. 161, Wenz Direct Testimony page 5, lines 7-17.] It also tried to shift the burden of proof from the proponent of the acquisition adjustment so it would always be on the utility company. [See, Order No. 23376 issued 8/21/90 and Order No. 25729 issued 2/17/92.]

On February 17, 1992, the Commission issued its Order No. 25729 reaffirming its acquisition adjustment policy which had been developed, and which had been in place and followed, at least since 1983. [Tr. 319, Seidman Rebuttal Testimony page 4, lines 1-17.]

Those Orders They discussed the pros and cons of negative acquisition adjustments, and set forth arguments by participating utility companies and by OPC regarding acquisition adjustments, particularly relating to negative acquisition adjustments. The Commission specifically considered the same arguments made by OPC which OPC is now making again in the Wedgefield case. The Commission previously rejected the effort to change the acquisition adjustment policy, and it should do so again now.

K. Net Original Cost

Since 1971, when the Florida Legislature removed from the statues any reference to the "fair value" ratemaking concept, the Commission has set rates based not on so-called "worth" or "value," but on the cost of utility property when first dedicated to public service. [See, Section 367.081(2)(a), Fla. Stat.; Tr. 323, Seidman Rebuttal Testimony page 8, lines 2-17.]

For ratemaking, the Commission has interpreted "cost basis" to mean the original cost of property when first dedicated to public service. That interpretation applies not only in the context of acquisition adjustments, but elsewhere as well. [Order No. 25729; Tr. 323-324, Seidman Rebuttal Testimony page 8, line 19 to page 9, line 21.]

L. Earnings and Depreciation Expense

Mr. Larkin correctly notes that, without a negative acquisition adjustment, the utility would be allowed to earn on,

and depreciate, the full rate base of the seller. Mr. Larkin doesn't agree with that established policy, either. His testimony simply ignores the fact that this is also part of the Commission's policy developed over the years and reaffirmed in its investigation docket. In its order on the investigation docket, the Commission specifically indicated that, without these benefits, large utilities would have no incentive to look for and acquire small troubled utilities. [Seidman, Tr. 351, lines 9-23.]

It is misleading (at best) when the OPC witness states that the benefits to the purchaser occur at the expense of the customer, and that they provide a return on assets which do not exist. [Seidman, Tr. 351 line 24 to Tr. 352, line 3.] Certainly, the assets exist. They didn't just vanish into thin air, and they didn't disappear with the sale. They are still there. The original cost that was incurred to put them into service is still there. According to the audits testified to by Ms. Welch [Composite Ex. 9 and Ex. 10], there was approximately $7 million in assets to serve the customers. The assets now have a net book value of $2.8 million after taking into consideration accumulated depreciation and CIAC. These are real costs for real assets. They didn't just go away. In fact, rate base is unchanged, and the Commission's investigation Order found that, because of this, there is no harm to the customer. The rate base is the same, both before and after the sale. [Seidman, Tr. 352, lines 4-21.]

In the past, the Commission has considered the question of whether the acquiring utility should recover depreciation expense

on the original cost of the assets. The Commission found that it is appropriate to do so. From the customer's point of view, nothing changes as a result of change in ownership. [Tr. 337-338, Seidman Rebuttal Testimony page 22, line 11 to page 23, line 6.]

In its Order No. 25729, the Commission stated:

> We still believe that our current policy provides a much needed incentive for acquisitions. The buyer earns a return on not just the purchase price but the entire rate base of the acquired utility. The buyer also receives the benefit of depreciation on the full rate base. Without these benefits, large utilities would have no incentive to look for and acquire small, troubled systems. The customers of the acquired utility are not harmed buy this policy because, generally upon acquisition, rate base has not changed, so rates have not changed. Indeed, we think the customers receive benefits which amount to a better quality of service at a reasonable rate. [Emphasis added. Commission Order No. 25729; See also, Tr. 338-339, Seidman Rebuttal Testimony page 23, line 4 to page 24, line 5.]

If the revenues from depreciation expense on used and useful plant are not available, the funds would have to come from somewhere and that somewhere is additional utility funding, the return on which would end up in rates. Depreciation expense averages about 4% of the asset cost and there is no tax consequence. Replacing those funds with investment would cost about 12-14%, including any tax effect. So, disallowing recovery of depreciation expense would be at the customer's expense. [Tr. 339-340, Seidman Rebuttal Testimony page 24, line 20 to page 25, line 5.]

The utility will not earn an excessive return. It will continue to be afforded the opportunity to earn a fair return on

the net original cost of the assets, used and useful in serving the public. From the customer's point of view, nothing changes as a result of the change in ownership. [Tr. 337, Seidman Rebuttal Testimony page 22, lines 1-9.]

M. Purchase Price

Mr. Larkin's argues that a negative acquisition adjustment must be included in rate base merely because the assets were purchased for less than net book value. This is simply a re-argument against current, established Commission policy. Mr. Larkin doesn't agree with that policy, but the matter was settled by the Commission in its investigation, Docket No. 891309-WS. [Seidman, Tr. 350, line 20 to Tr. 351, line 8.]

N. The Policy Works

The Commission's current policy on acquisition adjustments is an appropriate policy because: 1) it works; 2) it provides a better quality of service, more experienced management, and access to economies of scale in construction and operation; and 3) except for extraordinary circumstances, there will be continuity and consistency in the rate base which reflects the actual costs incurred to provide service to utility customers, and rates will not fluctuate simply as a consequence of changes in ownership. [Tr. 321-322, Seidman Rebuttal Testimony page 6, line 6 to page 7, line 5.]

The transfer of Econ Utilities to Wedgefield Utilities is just the type of transfer intended to be encouraged by existing

Commission policy and which will produce the type of benefits anticipated by the existing Commission policy. [Tr. 322, Seidman Rebuttal Testimony page 7, lines 7-12 and 21-25.]

O. Lack of Authority to Change Current Policy On a Case-by-Case Basis

Chapter 120, Fla. Stat., prohibits a state agency from changing its policy statements without full notice to all affected entities and a right to a formal hearing in which all affected entities can participate. Such a change cannot occur on a case-by-case basis, and incipient rulemaking no longer available. [Eg., see sections 120.536 and 120.54, Fla. Stat.]

At the beginning of this case, Wedgefield raised the question whether either OPC or the Commission were intending to use this case to try to change the existing Commission policy. Orders on various Wedgefield motions indicated that no change in existing policy was contemplated. [See prior orders, including but not limited to, Order Nos. PSC-96-1241-FOF-WS (10/7/97) Order Approving Transfer, PSC-97-0104-FOF-WS (1/27/97) Order Granting OPC's Motion to Strike and Denying Wedgefield's Motion to Dismiss or Strike, PSC-97-0377-FOF-WS (4/7/97) Order Denying Motion to Assign Dockets to Full Commission, PSC-97-0949-PCO-WS (8/7/97) Order Declining to Withdraw from Proceeding, (PSC-97-1041-PCO-WS (9/2/97) Order Revising Order on Procedure and Scheduling Hearing Date (see also PSC-97-0953-PCO-WS 8/11/97), PSC-97-1178-FOF-WS (10/2/97) Order Denying Verified Petition and Suggestion of Disqualification, and PSC-97-1510-FOF-WS (11/26/97) Order Denying Motion for Reconsideration.] Such a change cannot be made by a PSC panel.

II. STATEMENT OF ISSUES AND POSITIONS -

The following are the nine issues in this case, followed by Wedgefield's position on each issue and a discussion of evidence as to each issue.

SUMMARY OF WEDGEFIELD'S OVERALL POSITION:

Rate base for purposes of transfer is $1,462,487 for water and $1,382,904, for wastewater. Established Commission policy requires that no acquisition adjustment be included in the rate base calculation. The burden of proof is always on the proponent of an acquisition adjustment (whether positive or negative) to show why one should be granted.

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

*****The assets were all functioning and not in violation of any state regulations. They were not in the best of condition, but were not in extremely poor condition, either.*****

Allegations were made - erroneously made - regarding the condition of the utility plant. OPC's witness, Mr. Larkin, asserted that the plant was in such allegedly poor condition that that must be the reason why the purchase price was lower than the net book value. [Tr. 340-341, Seidman Rebuttal page 25, line 7 to page 26, line 2; Seidman, Tr. 353, line 24 to Tr. 359, line 9; [Tr. 266, Larkin Direct Testimony page 20, lines 1-20.]

A. The Orange County Utility Report

Mr. Larkin relied solely upon reports of others, particularly the report prepared by the Orange County Public Utility Division (OCPUD). It was a feasibility report to determine whether Econ should be incorporated into the County Utility system. However, it

was taken out of context by the witness and misapplied to a stand-alone, privately owned system which operates under different regulatory requirements and a substantially different operating situation. The County system has 70,000 customers and a 900-mile system; the stand-alone system has 700 customers and a 17-mile system. [Seidman, Tr. 405, line 18 to Tr. 406, line 9.]

The County Utility report was done at the request of the Econ customers to see if they could hook up to the County system at lower rates. The report showed that the County could not provide service at lower rates than Econ. Apparently one reason the County Utility didn't want to hook up to Econ utility was because the County's nearest main was some ten miles away. [Seidman, Tr. 354, line 16 to Tr. 355, line 3.]

B. Inspection of the Plant

The testimony for the OPC witness was initially prepared by Mr. DeWard. In the absence of Mr. DeWard, that testimony was later adopted by Mr. Larkin, who eventually testified for OPC.

Neither Mr. DeWard nor Mr. Larkin ever visited or inspected the utility system prior to preparing the testimony. Nor did Mr. Larkin inspect the system prior to testifying at the hearing and expressing what were represented to be "authoritative" opinions about the condition of the utility assets, even though the wastewater plant was next door to the hearing location and the water plant was only a few blocks away.

In addition, Mr. Larkin and Mr. DeWard are not even engineers and were not in a position to judge the condition of the

facilities. [Tr. 248, Larkin Direct Testimony page 1, lines 8-9; Tr. 254, Larkin adopted DeWard Direct Testimony page 8, line 20.]

Mr. Larkin, and Mr. DeWard's original prepared testimony, supported writing off approximately 80% of the utility plant based upon its condition, but they didn't even feel it was "necessary" to inspect the plant to do so. [Tr. 254, Larkin Direct Testimony page 8, lines 18-20; See Seidman, Tr. 354, lines 4-15.]

Therefore, their characterization of the condition of the plant was second-hand, hearsay, and not convincing, and such expressions of opinion by the witness are not authoritative and are not reliable.

Prior to purchase, Utilities, Inc. had the utility system inspected by Mr. Don Rasmussen, Vice President of Utilities Inc. of Florida. [Tr. 172, Wenz Additional Direct Testimony page 9, lines 6-10.]

During the inspection of the Econ system by Mr. Rasmussen, he found that the water and wastewater systems were not in the best of condition, but they were not in extremely poor condition, either. Mr. Rasmussen's finding was that they were typical of developer-owned utilities, in that they were not in violation of any state regulations, but they were not up to the standard which Utilities, Inc. would want to maintain. [Tr. 172, Wenz Additional Direct Testimony page 9, lines 12-19.]

The Econ water and wastewater systems need some additional maintenance, but they are in compliance with regulatory requirements and are not in immediately danger of falling out of

compliance. [Tr. 173, Wenz Additional Direct Testimony page 10, lines 3-6.]

Mr. Seidman made inspections of the plant prior to writing his prepared testimony and again before the hearings held on March 19, 1998. At he first inspection he had with him the prepared testimony of Mr. Larkin.

> . . . I had already read what was then Mr. DeWard's testimony adopted by Mr. larkin. I expected to find that place in a shambles based on what I read. It's not. I wouldn't mind taking you out for an inspection of the place and showing you. [Seidman, Tr. 355, lines 4-12.]

Mr. Seidman summarized, from his prefiled rebuttal testimony, what he found during his inspection. The

> . . . utility is in pretty average condition for utilities that size. It's not [in] violation of anything. It's certainly not perfect. There are things that should be done maintenance-wise. . . . It's not in bad shape. And if we look at the conclusions from the Orange County study, I think you'd come to the same findings as I did.
>
> * * *
>
> The concluding statements [in the Orange County Utility study], and I'll just read these. . . . [For the] water supply system, the report says:
>
> 'It generally appears to be in good operating condition.'
>
> With regard to the water treatment plant,
>
> 'It appears to be in good working condition.'
>
> With regard to the water distribution system,
>
> 'The system appears to be functioning adequately at the present time.'

When we get to the wastewater system it's different. There's nothing in it [the report] that says that the plant is not operating properly, [or] is not functioning well, [or] it's in bad shape in general. But it does indicate that they had an indication of significant inflow infiltration problems. That in itself is not . . . something that puts a system in poor condition. We know that the pipes in this system are old. There's indication that a portion of them are asbestos cement pipe, which represents about 20% of the pipe that's in the ground now. That was the standard at the time they were put in. There's not much you can do with them except take them out. That is not feasible for a system this size.

With regard to the wastewater treatment plant, the report indicated that [there] was sever corrosion along the water line and at the base of the chlorine contact tank. I inspected those. There is corrosion. Corrosion on the external portions of the plant have been taken care of, both at the water plant and the sewer plant. . . . There has been painting done and cleaning up. With regard to the corrosion along the water line, it affects the weirs; it affects the arms of the plant. But in my mind this is not sever because this is something that could be taken care of and will be taken care of with maintenance. It does not affect the operation of the plant. It does not affect the safety of the plant. It is not going to require a plant shutdown to be taken care of[;] just dropping the water level, in order to take care of it. It is not something that is going to result in large capital outlays as a result of not being done right now. . . .

With regard to the effluent disposal system, the only comments [in the County Utility's study] were not with the operation so much, but with the indication of flows . . . during rainy season being in excess or up to the capacity of the plant. The capacity of the effluent disposal system is 200,000 gallons per day, and they found flows in excess of that during the rainy season.

[This] 200,000 gallons per day is an annual average daily flow rating, and you've indicated in other cases that you don't . . .

> match the flows at max during the rainy season against the average to determine whether or not there's excess flows. The flows that occur at rainy season are taken care of by emergency holding ponds that are adequate. The only thing that was indicated along with this was that they had difficulty disposing of the flows on the golf course during the rainy season which you would expect. It's very difficult to dispose of water through spraying during the rainy season. They just can't handle it, and that 's what the ponds are for.
>
> To me, at face value, without even following up on the inspection, these are not conditions I would consider poor, and especially so poor as to warrant some type of an acquisition adjustment because of them.
>
> . . . I also looked at the lift stations. . . . [B]y the time I had looked at them . . . maintenance had been performed on all of them, the six of them, and the master lift station had been rehabilitated. . . . That was done in 1996. In any case, it was not a significant dollar amount to do this work, and they are all functioning adequately. [Seidman, Tr. 355, line 12 to Tr. 359, line 9.]

The amount estimated by the purchaser for anticipated improvements and repairs was $409,000. Of that amount, more than half is related to capacity expansion. [Tr. 330, Seidman Rebuttal Testimony page 15, lines 5-10.]

C. Preventive Maintenance Program

The Orange County Utility report stated that repairs by Econ were made on an "emergency basis" only, and that there was "no preventive maintenance program in effect". However, Mr. Seidman pointed out that the people who did the report couldn't know on what basis the repairs were made. "They don't know that repairs were only done when something broke. And I don't know it. . . . [I]t's not whether they did or didn't." [Seidman, Tr. 387, line 5

to Tr. 388, line 25.] As correctly interpreted by one of the Commissioners, ". . . if you don't have a preventative maintenance program, it doesn't necessarily follow that every repair you do is on an emergency basis." [Tr. 388, lines 13-16.]

After discussing the County Utility's assertion that major portions of Econ Utilities' underground pipes should be replaced, correspondence from Mr. Ispass (See D. Comparison of Standards, below) explained what the County Utility report meant by a "preventive maintenance program":

> You [Mr. Blake, Econ's president] state that your engineer recommended replacing only pipe that breaks. Orange County [utility] takes a more proactive approach to maintenance. A broken or blocked sewer main can cause extensive damage to homes and the environment, and can create health hazards. A broken water main can cause contamination of the water system which can also create a health hazard. The liabilities created by these situations justify the cost of a preventive maintenance program. . . . [Ex. 8, Ispass ltr., page 4, para. 4.]

Therefore, the County Utility report interprets a "preventive maintenance program" to mean not just taking action to prevent an undesired event from occurring or taking action to preserve your assets. The County Utility uses the phrase "preventive maintenance program" to include tearing out pipe that is still performing satisfactorily, and replacing or relocating that pipe just because it is not in the most convenient location or it may eventually wear out! That is a completely different type of "preventive maintenance program" than was applicable to Econ Utilities, and different than the Econ Utilities maintenance program, the alleged

absence of which was discussed so incessantly in Mr. Larkin's testimony.

To Mr. Seidman, "preventive maintenance" is something that is engaged in prior to an event happening, to do two things: prevent some event from happening, and to preserve the condition of your capital assets. [Tr. 383, line 23 to Tr. 384, line 8.]

In regard to the allegations that there was no preventive maintenance program, Mr. Seidman testified that it:

> . . . was mentioned many times, that there's no preventive maintenance program, therefore, the plant is in bad shape. It isn't. So I don't know what the consequence is. The only thing I would mention there is I think you have to look at it in the context of what a utility the size of Orange County considers preventive maintenance versus what a utility that's only 700 customers would consider as economically feasible preventive maintenance . . . . [Seidman, Tr. 361 lines 1-11.]

Wedgefield has a preventive maintenance program [Seidman, Tr. 384, line 22 to Tr. 385, line 12.]. And there was no evidence that Econ Utilities did <u>not</u> engage in preventive maintenance. Mr. Seidman did not find a standard operating procedures manual for Econ Utilities, but then, Wedgefield doesn't have a written preventive maintenance manual, either. [Seidman, Tr. 385, line 13 to Tr. 386, line 1; Tr. 384, lines 22-24.]

There is nothing in the County Utility report to substantiate its statement that repairs were being performed on an "emergency" basis. Maintenance may be performed on an "as needed" basis without it being an emergency. An emergency implies that a crisis will exist if immediate action is not taken. There is nothing in

the report that leads one to reach that conclusion. [Tr. 331, Seidman Rebuttal Testimony page 16, lines 1-18.]

Much of the costs discussed in documents provided to the Commission are related to expanding the system to enable it to serve growth, some of the costs are related to normal near-term maintenance and improvements and preventive maintenance, and some are just a "wish list" contemplated by the Orange County Utility, which also had been reviewing the Econ utility for possible purchase. [Tr. 173, Wenz Additional Direct Testimony page 10, lines 10-18.]

D. Comparison of Standards

The Orange County Utility report was the subject of a letter dated February 27, 1995 from the president of Econ Utilities, Inc. (Mr. Blake) to the director of the Orange County Utility Division (Mr. Ispass), and a return letter dated April 13, 1995 from Mr. Ispass to Mr. Blake. [Composite Ex. 8.] This Mr. Ispass is head of the Orange County Public Utility Division and is the same person who signed off on the Orange County Utility report [Ex. 5]. [Tr. 408, line 25 to Tr. 409, line 5.]

Mr. Blake's letter questioned whether some of the cost estimates and standards applicable to the County Utility system should also be applicable to the stand-alone, Econ system. [Eg., see Ex. 8, Blake ltr., para. 2, 3, 4 and 5.]

The response by Mr. Ispass to Mr. Blake pointed out that the Orange County Utility report intended to apply different standards when evaluating the Econ system.

> . . . Many of the comments in your letter dispute the cost estimates in our report based on comparisons to the costs Econ Utilities has incurred for operation of the system. The analysis contained in our report does not portend that Orange County would acquire the system and immediately assume the historical system characteristics under which Econ Utilities has been operating. Rather, the analysis was based on the assumption that upon acquiring Econ Utilities, the system would assume the characteristics of a facility owned and operated by Orange County. As a result, your comments which relate to the operational costs, capacity charges, the relationship between customers and ERC's, as well as the average revenue generated per ERC must be viewed within the context of the County's utilities system. The cost estimates in the report were based upon the assumption that the system would be operated in accordance with County [Utility system] standards and personnel policies, resulting in costs that will substantially differ from Econ utilities' historical costs. [Emphasis added. Composite Ex. 8, ltr. dtd 4/13/1995, Mr. Ispass to Mr. Blake, page 1.]

Furthermore, the letter from Mr. Ispass acknowledged that: ". . . acquisition of the facilities with the intent to operate them independently was not considered." [Ex. 8, Ispass ltr., page 2, end of para. 1.]

Mr. Seidman testified regarding the completely erroneous procedure of trying to take the "standards" developed by and for the Orange County Public Utilities Division and apply them to a small, stand-alone system:

> . . . Here's a large utility that was asked to look at feasibility of a purchase. It's governmentally operated. . . . But what applies to a 70,000-customer, 900-mile system is not the same thing that applies to 700 customers with 17 miles. You don't have the option of doing some of the things that they are able to do for a full county system like

> that. And when they are talking about applying their standards to the system, and it being indicated that they are going to result in higher costs, I think that's why. It's fine for them. And it may very well [be] economical for them, but it just doesn't necessarily work on a microcosm [like this small Econ system]. [Emphasis added. Seidman, Tr. 405, line 19 to Tr. 407, line 9.]

Mr. Seidman further commented on the comparison of the Orange County system with the Econ (now Wedgefield) system:

> . . . We're talking about an assumption here, operating under the standards and costs associated with a 70,000-customer system. They don't apply to a system [Econ's] size [and which is] run under private funding and regulation. [Seidman, Tr. 409, lines 6-14.]

The utility at Wedgefield operates under the environmental jurisdiction of both the Florida Department of Environmental Protection (DEP) and the Orange County Environmental Protection Department (OCEPD). It is inspected regularly by DEP and by OCEPD. These two agencies provide standards for Wedgefield and determine what is necessary for compliance, based on Federal and Florida laws and regulations. The Orange County Public Utilities Division does not have jurisdiction over this privately owned utility. [Tr. 328, Seidman Rebuttal Testimony page 13, lines 13-22.]

Wedgefield Utilities and its predecessor, Econ Utilities, were and are in compliance with the requirements of DEP and of OCEPD. [Tr. 328-329, Seidman Rebuttal Testimony page 13, line 25 to page 14, line 1.]

The Orange County Public Utilities Division is just another operating utility with no authority over Wedgefield or any other utility, except itself. [Tr. 328, Seidman Rebuttal Testimony page

13, lines 22-25.]

As long as the Wedgefield utility operates as an independent utility and does not become a part of the Orange County Public Utilities Division (PUD), it must comply with state and federal laws, regulations and standards applicable to such a utility. Only if it were to become a part of the Orange County utility would it have to comply with the requirements of that utility. It is those County Utility standards which formed the basis of the Orange County Utility report of Econ Utilities Corporation. [See Ex. 5, the County Utility report.] If the utility continues to operate independently, it does not need to spend the $4.6 million to "bring it up to County [Utility system] standards". [Tr. 329, Seidman Rebuttal Testimony page 14, lines 1-22.]

The County Utility study [Ex. 5.] was conducted and based on standards which the County Utility has imposed upon itself. They are not standards necessarily required for, or even a sound economical undertaking for, an independent utility to provide safe, efficient and sufficient service. [Tr. 329, Seidman Rebuttal Testimony page 14, lines 12-16.]

Of the $4.6 million identified as capital improvements by the County Utility report, $3.3 million was either to relocate mains from rear lot lines to front lot lines or to replace all of the existing C-A pipe or to replace all of the cast iron pipe at once because it is asserted to be "old". There is no requirement on a privately owned utility to engage in such a massive replacement program. The Orange County Environmental Protection Department

(OCEPD) and the DEP are not requiring the utility at Wedgefield to do so. [Tr. 329-330, Seidman Rebuttal Testimony pages 14, line 16 to page 15, line 1.]

Of the remaining $1.3 million in capital improvements identified by the County Utility report, approximately 65% of it is related to expansion. The remaining 35% or approximately $500,000 may be associated with existing facilities, but there is nothing in the analysis that indicates that such needs are immediate. [Tr. 330, Seidman Rebuttal Testimony page 15, lines 12-20.]

The County Utility's practice of moving utility lines from the rear or from the sides of residences to the front, regardless of the condition of the lines, is done merely for easier access. [Ex. 8, Ispass ltr., page 3, para. 4.] It isn't based on need.

E. Comparison of Costs

The letter from Mr. Ispass compared the cost of operating Wedgefield as an integrated part of the County system and stated:

> 3. The operation and maintenance expenses to Orange County Public Utilities will not be comparable to the historic costs incurred by Econ Utilities, but will, in fact, be higher: . . . [Emphasis added. Ex. 8, Ispass ltr., page 2, para. 3.] [See also, Seidman, Tr. 404, line 17 to Tr. 406, line 9.]

In regard to future costs of operating a utility at Wedgefield, the letter from Mr. Ispass stated:

> . . . we believe that future costs will be substantially higher than past costs. [Emphasis added. Ex. 8, Ispass ltr., page 2, para. 1.]

F. The Webb Draft

The engineering firm (John B. Webb and Associates) which did work for Econ Utilities suggested in a draft report (about June, 1995) that the utility ought to start putting away some money to prepare for the eventual replacement of all C-A lines when they reach the end of their useful lives, but that has nothing to do with determining rate base until the lines are actually replaced and a change in rates is considered and rate base reviewed by the Commission. [Tr. 332-333, Seidman Rebuttal Testimony page 17, line 18 to page 18, line 15.]

The engineering firm's draft report was never completed and the section that would have translated any recommended improvements into customer rates and fees was never done. [Tr. 333-334, Seidman Rebuttal Testimony page 18, line 17 to page 19, line 5.]

On cross examination, Mr. Seidman was asked about the partial draft report. [Ex. 17; Tr. 372, line 19.] Page 9 of the draft document listed several possible capital improvements that should be looked at. [Tr. 373, lines 17-24.]

Three items were listed as being solely for existing customers. Of the items on the list that Mr. Webb felt should be looked at in the next 12 months, one of them, addition of a water softener, has been done. [Tr. 376, line 17 to Tr. 377, line 3.] In regard to the new well, Mr. Seidman testified that ". . . there doesn't seem to be any requirement right now from the flows to handle that." [Tr. 377, lines 6-9.] The chemical handling and storage building was considered to be a nice-to-have item, but not

necessary. The utility is currently using a storage building which is a protective frame for the equipment, and it seems to be adequate. However, it is not a solid building (which would cost $80,000). [Seidman, Tr. 377, line 15 to Tr. 378, line 2.]

So, of the three items listed for existing customers (the water softener, a new well, and a permanent storage building), only the water softener has been installed, and it is the only one which appears to be necessary at this time. [Seidman, Tr. 378, lines 3-6.]

Mr. Seidman was asked about the C-A pipes. He testified that they are functioning and not "falling apart". To go ahead and replace them would be a nice program, but expensive. You have to weigh that against the cost of repairing breaks that occur and the inconveniences of that versus an overall addition of plant. That pipe would be replaced, not because there was anything wrong with it, but because it is C-A. It was a good standard when it was put in, but the utility would like to replace it eventually. Wedgefield has no current plans to regularly take out portions and just replace it whether it's needed or not at that particular time. [Seidman, Tr. 378, line 8 to Tr. 380, line 1.]

Mr. Seidman agreed with the position taken by the president of Econ Utilities that the C-A pipe need only be replaced when a section breaks. [Tr. 390, lines 6-9.] Furthermore, ". . . you have to look at it system by system and see what the circumstances are with regard to . . . how the pipe has been situated and whether there's susceptibility to undue settling or anything like that that

would add to [the need for replacement]." [Tr. 391, lines 7-14.]

Mr. Seidman testified that some comments under discussion were generalizations and not necessarily applicable to a particular utility system and whether it is having any particularly type of problem. Furthermore, you have to weigh costs. In the Econ system there is about $2 million gross investment in water and wastewater lines combined, and the County Utility was talking about spending $3 million just to replace the C-A portion, which is only about 20% of the system. You have to take cost and the rate of deterioration into consideration before deciding to replace everything that's eventually going to deteriorate. Mr. Seidman was not aware of any great amount of breaks happening in the system currently that would warrant such an investment. [Tr. 392, line 1 to Tr. 393, line 2.]

Mr. Seidman testified that it was his understanding that the utility could meet its fire flow requirements, although he hadn't investigated it. Furthermore, it wasn't known whether there was a different standard for the County system and for the Econ system. [Tr. 375, lines 3-16.]

G. Plant Condition as a Basis for Purchase Price

Just because a utility is purchased at less than net book value, it does not mean that there is anything wrong with the plant and facilities. In this case, there was an arm's length, negotiated purchase. The seller's motivation for selling could been based upon the fact that a $4 million loss was experienced over an 8 year period. Also, substantial investment would have been needed to meet anticipated growth. The previous owner was

primarily a developer who wants to devote its capital to development. But, based upon the two inspections of the water and wastewater facilities done by Mr. Seidman, and based upon his many years of experience in the water and wastewater industry, he did not believe that the condition of the existing plant would have been a significant factor in the developer's decision to sell the utility at a price less than net book value. [Tr. 340-341, Seidman Rebuttal Testimony page 25, line 7 to page 26, line 2.]

H. Customer Statements Regarding Plant Condition and Service

Customer Witness Bruno stated that a water main break occurred on December 20, 1997, and that she was without water for several days. She also alleged that the pipes were brittle and shattering, that she was not notified to boil her water, and that the water was scummy. [Tr. 87, line 4 to Tr. 88, line 11.] Witness Fleming stated that he heard tanker trucks running, usually during heavy rains, because the utility didn't have sufficient capacity. [Tr. 100, line 21 to Tr. 101, line 1.]

I. Response to Customer Service Statements

During rebuttal testimony on March 25, Mr. Seidman addressed customer concerns about utility condition expressed on March 19:

> There was a complaint about what was characterized as a main break . . . .
> What happened was that late on the evening of December 19th . . . it was noticed that there was water building up at the intersection of Bagdad and Marlin Streets. At that location there are four valves . . . .
> What happened . . . was that apparently, as a result of traffic over a period of time, [due to] some shifting and setting, there was

> a separation of the mains from the valves and causing leakage right at that connection. It wasn't a breakage in itself. The pipes didn't break. It wasn't any settling . . . from water flows or anything that caused that. The pipes just separated from the connection at the valve. The contractor was hired [and] came in that night. They performed a hasty type of repair to get through the night. Then they came back, and over a period of about three days, about 48 man-hours of work, they went ahead and reconnected the lines . . . . They had to work with more than one valve . . . . So during that period, there's approximately 17 customers that were without service for some period of time. . . . A boil water notice was provided to those that would be affected, and that would be anybody with a pressure drop below 20 pounds per square inch, because you have to do that for health reasons just in case something can get into the water. . . . [Seidman, Tr. 363, line 25 to Tr. 365, line 17.]
>
> There was a customer that mentioned that he heard tanker trucks during the night. They thought they were carrying effluent that couldn't be handled by the Company. There is no carting of effluent by the Company. They do have tankers that periodically remove sludge. They do make their hauls at night. My guess is that's what they heard . . . , sludge haulers and saw sludge haulers because that's the area where that would be taking place. [Seidman, Tr. 365, line 20 to Tr. 366, line 3.]
>
> I believe somebody mentioned something about scummy water, and that's probably true too. [I]f they got some scummy water it's because of hardness. There water down there is pretty hard. The Company treats for it. But the way, it's an aesthetic thing. It's not some type of health requirement that you have to treat for under the state provisions.

Sometimes the water is hard, and sometimes it is soft. Mr. Seidman testified that the utility uses water softeners, big machines manufactured by Culligan. It is

. . . just basically an industrial size Culligan softening unit. It's an ion-exchange type softening unit. The media in which ion-exchange takes place is zeolite. The zeolite is now at the end of its useful life in those things, and it has to be changed out. . . . [U]ntil it is changed out the amount of softening that is being done is not adequate to meet the goals of the Company and bring it down to the level that the customers should be expecting. That's something that is in progress, . . . [and] it would be in the order of 30-odd days before the zeolite can be received, changed out, recalibrated to provide the service that they should expect. But that's really where your scum comes from. It's not scum; it's the hardness of the water. [Seidman, Tr. 366, line 4 to Tr. 367, line 11.]

ISSUE 2: Was Econ Utilities Corporation a "troubled" utility?

*****Yes. It was financially troubled, having sustained cumulative net losses in excess of $4 million over the most recent eight year period and lacked either the means or commitment to invest in future capital needs or future maintenance.*****

Even if the system was not in as bad shape as plaintiff's witnesses alleged (which the evidence clearly shows it wasn't), the utility was still a "troubled" utility.

The owner of Econ Utilities was a small developer who was no longer interested in operating a utility or committing funds to it. The owner either did not have the funds or was not willing to commit the funds necessary to operate the utility system in the manner consistent with state requirements. [Tr. 170-171, Wenz Additional Direct Testimony page 7, lines 8-12 and page 8, lines 5-11.]

There was a danger that the condition of plant and quality of service would deteriorate because of the prior owner's expressed disinterest in continuing to fund and operate the utility. [Tr. 173, Wenz Additional Direct Testimony page 10, lines 6-10.]

The utility's annual reports filed with the Commission show that the utility incurred an operating loss in each year 1988 through 1995 and a cumulative loss of over $2 million in operating income and $4 million in net income. Econ was not in a position to increase its maintenance expenses or to actively pursue a capital improvement program or finance capital additions. [Tr. 332, Seidman Rebuttal Testimony page 17, lines 3-16.] These are just the types of "troubles" that acquisition by a stable, adequately

funded utility can solve and the kind of acquisition that the Commission policy was meant to encourage. [Tr. 342, Seidman Rebuttal Testimony page 27, lines 6-20.]

In stark contrast, Utilities, Inc. is not a developer, and its only business is to own and operate water and wastewater utilities. It has the financial ability, and is willing, to commit funds to the operation of Wedgefield Utilities. Utilities, Inc. can attract capital at reasonable costs. [Tr. 170-171, Wenz Additional Direct Testimony page 7, lines 14-16; page 7, line 18 to page 8, line 1; page 8, lines 3-4.] Utilities, Inc. has the necessary professional and experienced utility management. It operates 63 water and wastewater utilities in fifteen states, and it has an established management team and professional operators in Florida. [Tr. 171, Wenz Additional Direct Testimony page 8, line 13-18.]

Utilities, Inc. can benefit from economies of scale in its operation because: 1) it already has experienced management in place in Florida, so no additional management will be required; 2) a portion of the overall management expense of Utilities, Inc. can be allocated to the operated at Wedgefield Utilities; and 3) equipment and supply purchases for Wedgefield will benefit from the established vendor resources already being used for sister systems in Florida. [Tr. 171-172, Wenz Additional Direct Testimony page 8, line 20 to page 9, line 4.]

Econ was a "troubled" utility. Mr. Larkin's testimony goes to great lengths, repeatedly, to allege the poor condition of the utility system and to allege high cost for "bringing it up to

standards". Then he turns to the PSC staff engineer's report which says, well it's not so bad, it needs some improvements, but there is no problem with the water, and the wastewater plant is fine. [Tr. 341, Seidman Rebuttal Testimony page 26, lines 4-18.]

If the OPC witness admitted that the utility is "troubled, that would support the applicability of the Commission's policy of no negative acquisition adjustment for this purchase. [Tr. 341-342, Seidman Rebuttal Testimony page 26, line 21 to page 27, line 4.]

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

*****No. There are no extraordinary circumstances, and there should be no acquisition adjustment.*****

With regard to whether extraordinary circumstances exist in this case, witness Seidman testified that:

> . . . I just don't see any. I don't see anything with regard to the plant condition, or anything about the sale, the arrangements of the sale, that is different from anything else that you see in normal acquisitions in this state.
>
> The only thing that was brought up by Mr. Larkin that was extraordinary to him was the price differential, and it seems to me circular reasoning to determine whether the price differential is an extraordinary circumstance. The price differential is the incentive that the utility gets when it purchases. The Commission has looked at lots of cases and the price differential has varied all over the place. The price differential in this case falls somewhere in the middle to lower cost of those that have been approved without a negative acquisition adjustment. This in itself is not extraordinary. [Seidman, Tr. 361 lines 1-11.]

At the hearing on March 16, one of the Commissioners raised the question, if the purchasing utility were going to get the benefit of stepping into the shoes of the selling utility as far as rate base for transfer purposes is concerned, shouldn't the purchaser be held responsible for "maintenance failures" of the seller? [Tr. 214, line 15 to Tr. 215, line 1.]

At the continuation of the hearing on March 26, Mr. Seidman provided a follow-up response. Whenever the Commission grants a negative acquisition adjustment to rate base, everything has to be written off completely.

> . . . Even if they [the purchaser] are not responsible and even if there are only some little parts of it that might have some impact it's permanent, it [is punitive], it's done. There's no incentive to me under that type of arrangement for anybody to make a purchase.
>
> If you do not include a negative adjustment, the purchaser gets the incentive, but the door is still left open [in] the rate case proceeding to review the condition of the plant, to review what's happened, to review if there is capital having to be put out in future years because something caused that in the past. You can look at it at that time and you can make those decisions at that time, so you have the opportunity to review it. In addition, the purchasing utility is protected because it will have the opportunity at that time to address any of those concerns and give you its story on it. Because not everything is going to be affected, even by past problems. You know there may be an adjustment appropriate in one particular account and not in another, instead of across the board and it's gone forever. . . . I've talked to [Mr. Wenz, Wedgefield's vice president] and he has no problem with that type of an approach. [Seidman, Tr. 369, line 13 to Tr. 370, line 10.]

Mr. Seidman testified that the size of the used and useful adjustment in the last Econ rate case should not have an effect on whether to recognize a negative acquisition adjustment now, but today the plant probably would be found to be more used and useful than in the last rate case (which was in 1985). [Tr. 381, lines 16-24.] [% used and useful, see Tr. 382, line 18 to Tr. 383, line 11.]

Commission Order No. PSC-96-1241-FOF-WS approved the transfer in this case. OPC seems to interpret the Order as suggesting that if used and useful adjustments may be made in the future, that alone justifies not granting a negative acquisition adjustment.

[Eg., see Ex. 13, page 5 of the order approving transfer.] In fact, the two regulatory concepts have separate and uniquely different purposes. They are considered at different times and under different circumstances.

A negative acquisition adjustment is considered at the time of transfer and requires that extraordinary circumstances be found for taking the extreme step of permanently reducing the net original cost as rate base. A used and useful adjustment is used in a rate case for temporarily removing from rate base certain assets which are not currently used and useful in providing utility service to the customers. The two regulatory concepts perform different functions at different times. [Tr. 343-344, Seidman Rebuttal Testimony page 28, line 22 to page 29, line 18.]

In response to questions from PSC Staff, Mr. Seidman agreed that used and useful adjustments reduce the rate base amount, and Wedgefield's rate base amount would be reduced if used and useful adjustments were applied. [Tr. 394, lines 5-18.] Used and useful adjustments would be expected to be made in regard to Wedgefield's rate base, just as used and useful adjustments were made to the Econ rate base. [Tr. 394, line 19 to Tr. 395, line 2.] Wedgefield's rate base amount in its next rate case would be whatever is used and useful of the net assets at the time of the rate case. The adjustments would be made similarly to the adjustments that were made in the Econ rate case. By the time the next rate case comes up, the $2.8 million would be lower anyway due to accumulation of more depreciation and an addition of more CIAC

(assuming no other assets are added). [Seidman, Tr. 395, lines 3-18.]

In the negotiations to acquire the utility, the purchaser discussed the used and useful condition of the utility. [Tr. 395, lines 19-25.] But the purchase price is negotiated and many factors would be considered [Seidman, Tr. 396, lines 14-15.]

The used and useful factors are there for ratemaking purposes, which come later. It is only to be considered when revenue requirements are being determined. [Tr. 396, lines 1-8.]

Wedgefield has already spent about $108,000 on improvements, including $29,000 to redo the master lift station; between $8,000 and $9,000 on repainting the tanks and the major equipment at both the water and wastewater sites; $25,000 to replace both blowers at the wastewater plant; a net of about $8,000 ($38,000 less about $30,000 credits) to install mains in Block 40 (to correct work which the developer had someone do, but improperly); and $7,800 to replace the driveway at the wastewater plant. There was another $15,000 spent so far on the engineering application for the wastewater treatment expansion, but that's for future work. [Tr. 396, line 16 to Tr. 398, line 4.]

Mr. Seidman described the growth potential as "medium": if they get 50 additions a year they would be doing well. [Tr. 398 lines 5-13.] In February, 1995, at the time of the correspondence from Econ's president to Mr. Ispass, the utility had approximately 700 customers. [Composite Ex. 8, ltr. dtd 2/27/1995, Mr. Blake to Mr. Ispass, para. 2; See also, Mr. Seidman's testimony, Tr. 404,

line 17 to Tr. 406, line 9.]

Staff requested that Mr. Seidman prepare a Late Filed Exhibit 18, showing a comparison of the per customer operating costs. The exhibit was prepared and filed. OPC filed an objection and Wedgefield filed a response and motion. As of this writing, no ruling has been entered on that matter. Therefore, the observation is merely made here that Late Filed Exhibit 18 (showing that the per customer operating costs were lower under Wedgefield), confirmed the testimony of Mr. Wenz and Mr. Seidman that they both expected the operating costs under the new owner to be lower than the operating costs under Econ.

Mr. Seidman confirmed that the transfer between Econ and Wedgefield was not a non-taxable exchange, and Wedgefield's purchase of the Econ system was an arms-length transaction. [Tr. 402, line 21 to Tr. 403, line 18.]

Mr. Seidman was also asked, "In your opinion was Wedgefield's purchase of the Econ system prudent?" After first responding "Yes", Mr. Seidman acknowledged that he didn't know what Wedgefield considered in the decision to purchase the system, and he couldn't answer for them. [Tr. 403, line 19 to Tr. 404, line 3.] Just because this is a regulated utility, there is no guarantee that the purchase will be a good investment.

In contrast, the question was not asked of Mr. Seidman whether the purchase was prudent from the customers' perspective. However, that question was answered by the Customer Witness, Mr. Nathan, speaking on behalf of the customers:

> Do the residents of Wedgefield want the sale reversed? No. As we said, we have confidence. They have demonstrated a willingness, the new company, to improve the area, you know, do the necessary improvements to it. . . . [Nathan, Tr. 75, lines 7-11.]
>
> * * *
>
> We do not wish to stop the transfer of the utility to Wedgefield Utilities Incorporated, and [we] support their efforts to invest in improvements. [Nathan, Tr. 77, lines 6-8.]

That question was also answered by the Commission in its approval of the transfer in Order No. PSC-96-1241-FOF-WS:

> Because Wedgefield will have the benefit of Utilities, Inc's extensive operating experience and financial resources, we believe that it has the technical and financial ability to assure continued service to customers of ECON. [96 FPSC 10:88]
>
> * * *
>
> Because of the foregoing, we find the transfer . . . from Econ to Wedgefield is in the public interest and it is approved. [96 FPSC 10:89]

The only mention made in Mr. Larkin's prepared testimony regarding "extraordinary circumstances" was that he believed the purchase price was an extraordinary circumstance. [Tr. 343, Seidman Rebuttal Testimony page 28, lines 4-8, commenting on Tr. 266, Larkin Direct Testimony page 2,lines 12-14; Cf., Attachment "A", Comments on Prior Commission Orders.]

Mr. Larkin's testimony does not identify any "extraordinary circumstance" justifying a negative acquisition adjustment in this case. [Tr. 343-344, Seidman Rebuttal Testimony page 28, line 1 to page 29, line 22.]

No evidence was presented to show extraordinary circumstances

was taken warranting an acquisition adjustment for ratemaking purposes, and none should be made. [Tr. 349, Seidman Rebuttal Testimony page 34, lines 2-5.]

Mr. Nathan stated that he felt a number of items inflated Econ's costs, [Tr. 81, lines 11-18.] That testimony refers to the operating costs of the seller and ignores the testimony of Mr. Wenz regarding reduced costs of the purchaser. Late Filed Exhibit 18 also confirms the testimony of Mr. Wenz that the customers benefit from lower costs (which include lower management fees) under the new owner.

ISSUE 4: How should the Commission treat the contingent portion of the purchase price for rate base purposes?

*****It has no effect on rate base.*****

Based upon the discussion of the purpose and effect of acquisition adjustments elsewhere in this Brief, there is no relationship between a contingent portion of the purchase price and an acquisition adjustment. **It has no effect on rate base.**

Furthermore, the addition to the service area in the Reserve (formerly known as The Commons) is neither speculative nor unlikely to occur. It is already under construction, and several customer witnesses expressed concern about what impact that construction might have on rates. The utility purchase agreement requires contingent payments to be made as soon as each new home is hooked up [Exhibit 11, Application Exhibit B, Purchase Agreement, page 6]. Therefore, concern about "uncertainty" or "speculation" about whether payments will be made is unwarranted. [See also, Seidman, Tr. 367, line 12 to Tr. 368, line 10.]

ISSUE 5: What is the net book value for the water and wastewater systems?

*****As of the date of the transfer, the net book values for the water and wastewater systems are $1,462,487 and $1,382,904, respectively. *****

The net book value of the assets is not in dispute. The CIAC is properly accounted for, the depreciation is properly accounted for, and the net book value is $2,845,391. This agrees with the amounts in the Staff audit ($1,462,487 water plus $1,382,904 wastewater equals $2,845,391). Wedgefield agrees with the Staff audit and OPC takes no exception to it. [Tr. 27, line 24 to Tr. 275, line 8; Tr. 166-168, Wenz Direct Testimony page 3, line 17 to page 5, line 1; Ex. 10.]

ISSUE 6: Should a negative acquisition adjustment be included in the rate base determination, and if so, what is the appropriate amount?

*****No. A negative acquisition adjustment is neither appropriate nor authorized in this case.*****

The Commission's policy is that "absent extraordinary circumstances, the purchase of a utility system at a premium or discount shall not affect rate base." [Tr. 318, Seidman Rebuttal Testimony page 3, lines 14-19.] The burden of proof rests with the party requesting an acquisition adjustment. [Tr. 345, Seidman Rebuttal Testimony page 30, lines 1-10.]

The only proponent of an adjustment in this case is OPC. No evidence has been presented to show extraordinary circumstances warranting an acquisition adjustment. [Tr. 349, Seidman Rebuttal Testimony page 34, lines 1-5.] OPC has shown only a general dissatisfaction with existing Commission policy. [Tr. 344, Seidman

Rebuttal Testimony page 29, lines 18-22.]

No acquisition adjustment should be made to rate base.

ISSUE 7: What is the rate base for the water and wastewater systems, for the purposes of this transfer?

*****The rate base amount should match the net book value of the required assets. Wedgefield accepts the results of the Staff Audit that the rate base for the purposes of this transfer is $1,462,487 and $1,382,904, for the water and wastewater systems, respectively.*****

Utilities, Inc. agrees with the Commission Staff audit finding that the rate base of the utility at the time of transfer was $1,462,487 for the water system and $1,382,904 for the wastewater system, for a combined rate base of 2,845,391. [Tr. 166, Wenz Additional Direct Testimony page 3, lines 17-25; Commission Order No. PSC-96-1241-FOF-WS, page 4.]

These amounts do not reflect any used and useful or other ratemaking adjustments such as an allowance for working capital. [Tr. 167-168, Wenz Additional Direct Testimony page 4, lines 2-8, and page 4, line 21 to page 5, line 1.]

The Staff audit was prepared by Ms. Kathy Welch, a CPA and audit supervisor who has been an employee of the Commission for 19 years. She participated extensively in all four of the Commission audits of Econ. Based on the audits and on her knowledge of the system and its records, she concluded that, for purposes of the transfer, water rate base is $1,462,487.37 and wastewater rate base is $1,382,904.13, and these amounts are supported by invoices. [Welch, Tr. 147, lines 8-19.]

Mr. Larkin asserted that the rate base should be set at the

"value" of the assets which he implies is represented by purchase price. Mr. Larkin further asserted that the seller argued that the value of the assets was the selling price when it attempted to reduce its property taxes. [Tr. 252-254, Larkin Direct Testimony page 6, line 19 to page 8, line 17.] Both of these arguments are irrelevant to the Commission for setting rate base. Under the ratemaking authority granted this Commission in Section 367.081, Fla. Stat., it must set rates based on cost, specifically, the original cost of the utility property when first dedicated to public service. This has been the law since 1971. The Commission recognized this interpretation of the law in its investigation Order No. 25729. [Tr. 323, line 7 to Tr. 326, line 17.]

ISSUE 8: Who bears the burden of proving whether an acquisition adjustment should be included in the rate base?

*****Commission Order Nos. 23376 issued 8/21/90 and 25729 issued 2/17/92, require that the proponent of an acquisition adjustment, either negative or positive, bears the burden of proof. OPC, the only proponent of an acquisition adjustment in this case bears the burden of proof. The dissent in Order No. PSC-96-1241-FOF-WS agrees.*****

Rule 25-30.037(2)(m), F.A.C., Application for Authority to Transfer, sets forth what a utility must file with the Commission when it seeks authority for a utility transfer. The rule requires that an application for transfer must include:

> (m) a statement setting out the reasons for the inclusion of an acquisition adjustment, if one is requested; . . . [Emphasis added.]

Therefore, if, and only if, a utility is seeking an acquisition adjustment, it must justify the adjustment. The rule

does not require the utility applicant to allege or prove why an acquisition adjustment requested by someone else should not be granted by the Commission. There is no rule, statute or order placing the burden of proof on anyone other than the proponent of the acquisition adjustment.

Therefore, the Office of Public Counsel, which is the only entity requesting an acquisition adjustment in this case, bears the exclusive burden of proof to show why a negative acquisition adjustment should be granted. To do otherwise would require the non-requesting party to prove a negative of something for which they are not a proponent and have not requested in the first place.

At the hearing, one hundred prior orders of the Public Service Commission were given official recognition. Exhibit 6 is a list of the orders submitted by Commission Staff. [Tr. 110, lines 13-15.] Exhibit 7 is the list of orders submitted by Wedgefield Utilities. [Tr. 116, lines 5-10. See also, Tr. 125, line 1 to Tr. 126, line 7.] The orders are part of the record in this case. [Section 120.57(1)(f), Fla. Stat.]

Although the motion to file supplemental direct testimony of Mr. Seidman discussing the facts of the cases was denied [Tr. 130, line 11], it was stated several times that the material therein could be used in the brief:

> I agree that . . . the orders are in the record now pursuant to the request for official notice. They can be used in the briefing. That was also mentioned in the Order [denying the motion to file supplemental testimony]. [Statement by Staff Counsel. Tr. 127, lines 8-11.]

* * *

> . . . in reading the testimony it seems to me the same arguments can be made in the brief. That's where you make these arguments. [Statement by Commissioner. Tr. 129, lines 6-9.]

Accordingly, Attachment "A" to this Brief is a condensed version of points made in the requested supplemental testimony, accompanied by a motion to file post-hearing pages in excess of the number provided by Rule 25-22.056(1)(d), F.A.C.

The Commission's policy is clear that the burden of proof rests solely with the party requesting an acquisition adjustment, whether positive or negative, and that party must show that extraordinary circumstances exist. [Tr. 345, Seidman Rebuttal Testimony page 30, lines 6-10.]

ISSUE 9: Must extraordinary circumstances be shown in order to warrant rate base inclusion of an acquisition adjustment?

*****Yes. The Commission must comply with its own Order Nos. 23376 (8/21/90) and 25729 (2/17/92), which confirmed the requirements for acquisition adjustments. Generic proceedings confirmed prior case-by-case development of the requirement that extraordinary circumstances must be shown before an acquisition adjustment is warranted. The dissent agrees in Order No. PSC-96-1241-FOF-WS.*****

The current Commission policy regarding acquisition adjustments, which has been in effect at least since 1983, is that "absent extraordinary circumstances, the purchase of a utility system at a premium or a discount, shall not affect rate base." [Tr. 318, Seidman Rebuttal Testimony page 3, lines 14-23.]

The Commission's policy is clear that there will be no acquisition adjustment for ratemaking purposes, absent

extraordinary circumstances. [Tr. 345, Seidman Rebuttal Testimony page 30, lines 4-6; See also, Attachment "A", Comments on Prior Commission Orders.]

All the arguments set forth by Mr. Larkin have been made before and have been rejected by this Commission in generic proceedings. [Seidman, Tr. 353, lines 9-12. See also, Order No. 23376 issued 8/21/90 and Order No. 25729 issued 2/17/92.]

In this case, there was nothing extraordinary about Econ Utility or the circumstances leading up to its purchase; the utility and the circumstances surrounding the purchase were pretty much like those of the other utility systems which Utilities, Inc. has purchased in Florida. [Tr. 174, Wenz Additional Direct Testimony page 11, lines 17-21.] OPC is just re-arguing the OPC position rejected by the Commission in Order No. 25729. [Tr. 339, Seidman Rebuttal Testimony page 24, lines 7-9.]

Contrary to the testimony of Mr. Larkin, the utility will not be allowed to recover a return on assets which do not exist. Clearly, the assets do exist. They didn't disappear when ownership changed. [Tr. 339, Seidman Rebuttal Testimony page 24, lines 11-16.] [See also, Tr. 263, Larkin Direct Testimony page 17, lines 13-17.]

A negative acquisition adjustment is an across the board write-down, without the benefit of exploring the condition and functions of plant, item by item, the underlying circumstances, and without the ability for reversal if any circumstance is corrected. [Tr. 344, Seidman Rebuttal Testimony page 29, lines 13-18.]

Mr. Larkin's testimony does not make a case for extraordinary circumstances. He has only shown general dissatisfaction with Commission policy. [Tr. 344, Seidman Rebuttal Testimony page 29, lines 18-22, commenting on Tr. 266, Larkin Direct Testimony page 20, lines 1-20.]

For ratemaking purposes, the proper way to address any inadequate plant condition, if one exists, is in rate case adjustments for prudency and used and useful. [Tr. 344, Seidman Rebuttal Testimony page 29, lines 6-8.]

III. CONCLUSION -

Rate base for purposes of the transfer is $1,462,487 for water and $1,382,904 for wastewater.

The burden of proof is always on the proponent of an acquisition adjustment (whether positive or negative) to show why one should be granted.

Extraordinary circumstances must be shown to warrant an acquisition adjustment, and none were shown to exist in this case. Therefore, established Commission policy requires that no acquisition adjustment be included in the rate base calculation.

ATTACHMENT "A"

Comments on Prior Commission Orders -
Brief of Wedgefield Utilities, Inc.

As requested by Wedgefield Utilities at the hearing on March 19, 1998, the Commission took official notice of 100 prior decisions of the Commission involving acquisition adjustments. Each of the first 99 orders from January, 1988 through December, 1997, were identified as Case No. 1 through Case No. 99 at the top right corner on the first page thereof. These 99 orders were reviewed for applicability, and they make up the statistics for the various categories of orders discussed below. One subsequent order from 1982 (prior to the 10-year period) was found and added to the list as Case No. 0, and it will be discussed separately.

These 100 Commission orders are evidence and are part of the record. [Section 120.57(1)(f), Fla. Stat.; Tr. 114, lines 9-20.] A list of all 100 orders is contained in Exhibit 7. [Tr. 116, lines 5-10.]

The orders which discussed the reasons for deciding a case on acquisition adjustments are set forth below under these headings.

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The review was limited to the ten year period beginning January, 1988, through December, 1997, because current Commission policy was established in generic proceedings by two orders, PAA Order No. 23376, issued 8/21/90 and Final Order No. 25729, issued 2/17/92. The two year period 1988-1989 leading up to the first formal, generic statement of Commission policy in 1990 was included as an indication of how policy was being established on a case-by-case basis. The rest of the orders indicate how the Commission addressed the acquisition adjustment issue after it had formally established its policy on a generic basis.

Despite this long history of the burden of proof always being on the proponent of an acquisition adjustment, Issue No. 8 in the Prehearing Order No. PSC-97-0952-PHO-WS raised the question of "who has the burden of proof" on acquisition adjustments. Based on a survey of all of the water and wastewater orders the Commission issued from 1988 through 1997, and a review of the Commission's decisions in those orders that address acquisition adjustments, the proponent, and only the proponent, of an acquisition adjustment, whether positive or negative, bears the burden of proof. In this case, that is OPC and only OPC.

Issue No. 8 reads, "Who bears the burden of proving whether an acquisition adjustment should be included in the rate base?"

The Staff position was stated in the Order:

> Rate base inclusion of an acquisition adjustment changes rate base and will ultimately affect the utility's rates. While the burden of going forward with the evidence as to the issue of rate base inclusion of an acquisition adjustment may shift in any

particular case, the ultimate burden of proof remains on the applicant utility. [Emphasis added.]

Staff has taken a position on burden of proof, without support of its own testimony and after all testimony deadlines had passed, that is contrary to established Commission policy.

Wedgefield petitioned this Commission to approve the transfer of the water and wastewater certificates of Econ Utilities Corporation to Wedgefield. The Commission approved the transfer and, in a proposed agency action (PAA), established the rate base at the time of transfer as the net original cost of the plant of the selling utility. No acquisition adjustment was requested, and in accordance with Commission policy, in the absence of extraordinary circumstances, none was included in rate base. In other words, the Commission ruled that rate base was not affected by the transfer.

The Office of Public Counsel (OPC) protested the PAA, specifically with regard to the lack of an acquisition adjustment. In presenting its case, Wedgefield directed its testimony to stating Commission policy, establishing that Wedgefield, acting within that policy, had not requested an acquisition adjustment, and to rebutting OPC's testimony regarding extraordinary circumstances and other claims.

In other words, Wedgefield relied upon prior Commission policy that, because it had not requested an adjustment, the burden was on the proponent of the requested acquisition adjustment, OPC, to prove why one should be included. The Staff position, expressed in

response to Issue No. 8, contravenes Commission policy and seeks to place the burden on the utility to prove a negative - that extraordinary circumstances do not exist, and why it is not appropriate to adjust rate base to something other than original cost.

Wedgefield had no reason to believe that it carried any burden of proving why a negative acquisition adjustment should not be included in rate base. In fact, one Commissioner dissented from the majority decision in the PAA regarding the acquisition adjustment but expressed his disagreement with current Commission policy on negative acquisition adjustments and burden of proof. The dissent's reaffirmation of current Commission policy also reaffirmed Wedgefield's understanding of that policy.

The dissent specifically stated:

> Under the current Commission policy, the Commission does not place the burden of proof on the utility to identify extraordinary circumstances. The only 'burden' is on the utility to identify such circumstances if they want the acquisition adjustment recognized." [Emphasis added.]

Wedgefield subsequently requested a full Commission hearing because it appeared that the case might be construed to involve a change in regulatory policy. However, the Commission denied that request. The clear indication to Wedgefield was that "policy change", including burden of proof, was not an issue. But the Staff's position, raised in the prehearing order process, to shift the burden to the utility to prove why no adjustment to rate base is appropriate, would result in a significant change in policy.

Wedgefield strongly disagrees with the Staff's position, but since that position is not supported by Staff testimony, Wedgefield has no opportunity to cross-examine Staff or otherwise rebut it. Therefore, Wedgefield filed a motion to file supplemental testimony to address this matter, but the Prehearing Officer denied that motion. The Commission panel denied Wedgefield's motion for reconsideration.

The Staff's position does not make sense. The premise for that position is that "Rate base inclusion of an acquisition adjustment changes rate base and will ultimately affect the utility's rates." (Emphasis added). But since Wedgefield did not request the inclusion of an acquisition adjustment, it has done nothing that will result in a change to rate base or rates.

Furthermore, what is a utility supposed to prove? Is the burden on the utility to prove why it is not changing rate base and rates? If so, how? Or is the burden on the utility to prove why it is following established Commission policy? Again, how? What are the standards of proof? What is the procedure to be followed if an applicant is to be required to prove a negative? There are no such Commission standards or procedures established for Wedgefield, or any other utility, to follow in a circumstance like this.

The best way to understand the Commission's policy on burden of proof is to review the orders of the Commission in previous cases which addressed acquisition adjustments. Is there some guidance as to what, if anything, the Commission has previously

required of a utility as proof that extraordinary circumstances do not exist and that no adjustment is appropriate? By comparing Wedgefield's situation with those circumstances, it is evident that there is no authority in prior cases for this change of policy.

Acquisition adjustments are not a new issue for the Commission. It cannot now just take action in a vacuum in the Wedgefield case, as if the subject had never been considered before. If Wedgefield had the burden to prove something, it should have the right and the ability look at statutes, rules or orders for guidance. With the exception of Rule 25-30.037(2)(m), F.A.C., Application for Authority to Transfer, the only official position taken by the Commission on this subject is in its orders.

During the ten-year period for which Commission orders were reviewed there were 99 orders, including the PAA in this case, which addressed acquisition adjustments. Of those, 31 specifically addressed negative acquisition adjustments, 33 specifically addressed positive acquisition adjustments, and 35 others appear from the discussion to address positive acquisition adjustments, but that fact was not specifically stated in the orders.

A. NEGATIVE ACQUISITION ADJUSTMENTS (NAA)

Of the 31 orders which addressed negative acquisition adjustments, only three orders included an adjustment in rate base. Of the remaining 28 orders in which a negative acquisition adjustment was not included in rate base, twelve of them relied solely on a statement of the Commission's acquisition adjustment policy as the reason for not including an acquisition adjustment in

rate base. The policy statement in each of those orders was the same as or similar to the language in other orders addressing either positive or negative acquisition adjustments. For example, Order No. 19163 (identified as Case No. 3) reads:

> In the absence of extraordinary circumstances, Commission policy is that the purchase of a utility at a premium or discount shall not effect the rate base calculation. The circumstances in this transfer are not unusual or extraordinary; therefore, no positive acquisition adjustment is included in rate base. Further, the Applicants did not request that an acquisition adjustment be included in rate base. [Emphasis added.]

The remaining 16 orders which did not include a negative acquisition adjustment in rate base did contain some additional discussion (either in the majority opinion or the dissent) that gave some insight into the Commission or Commissioner's reasoning for their decisions in those cases. See Ex. 7, Case Nos. 16, 19, 43, 47, 50, 53, 55, 59, 63, 65, 76, 77, 78, 83, 89 and 91.

B. ORDERS EXPLAINING WHY NO NAA

The following paragraphs summarize each of the 16 orders discussing why a negative acquisition adjustment was not included, and then relate those comments to Wedgefield's situation. This will determine if the orders provide guidance in this case regarding what is necessary to prove to show that rate base not be altered by a negative acquisition adjustment. Each order is identified by its case number (from No. 1 to No. 99).

Case No. 16 was a transfer case between Utility Systems, Inc. and Sunshine Utilities. The purchase price was less than rate

base, but the Commission did not include a negative acquisition adjustment in rate base. The Commission indicated that in other orders related to a negative acquisition adjustment, it had considered whether the system was in such poor condition that it needed replacing and whether the purchase was prudent in light of such factors as jurisdictional status, growth potential and per-customer operating costs.

There was nothing in the order suggesting that it was the utility's burden to prove whether or not these conditions existed or whether they were or were not extraordinary circumstances.

Nevertheless, in Wedgefield's case, the system does not require replacing, the jurisdictional status is known, there is growth potential, and the company has indicated that the system will benefit from certain economies under new ownership. The Wedgefield transfer meets the conditions considered in the Utility Systems, Inc. order. Therefore, there is no basis in these factors for including a negative acquisition adjustment in Wedgefield's rate base or for a change in the burden of proof.

Case No. 19 was a rate case for the Marion County division of Southern States Utilities. In a previous docket for transfer of this utility, the Commission had decided not to include a negative acquisition adjustment. At issue in this case was whether to reverse that ruling based on the testimony in the current record.

The OPC witness testified that the Commission should change its policy and shift to the utility the burden of proving that an adjustment not be included, and why, without an adjustment,

customers would pay a return on the previous owner's rate base plus a return on SSU's improvements.

The SSU witness testified that a negative adjustment should not be included because the customers would benefit by SSU's ability to attract capital at a lower cost and by economies of scale and managerial and operational expertise. He also testified that the revenue requirement associated with the net original cost of the system would be no more than under the previous ownership.

The Commission noted that any improvements that had to be made were in the public interest and that there was no new evidence presented on which to alter its previous decision. The arguments made OPC in the SSU-Marion County case, and rejected by the Commission, are the same arguments made now by OPC in the Wedgefield case. OPC's arguments are the same, its conclusions are still incorrect, and the benefits discussed in that order also accrue to Wedgefield's customers.

The response to OPC's arguments and a discussion of the benefits to Wedgefield's customers was included in testimony by Wedgefield's witnesses, Mr. Seidman and Mr. Wenz. The SSU-Marion County case supports Wedgefield's position that the Commission policy is, absent extraordinary circumstances, not to include a negative acquisition adjustment in rate base and that the burden of proof is on the proponent of an adjustment.

Case No. 43 involved a transfer from Grand Terrace to SSU. The purchase price was approximately 40% of rate base. OPC argued that no incentive to purchase the system was necessary because the

utility was not having any problems. But the Commission responded that its policy on acquisition adjustments did not require the seller to prove hardship. OPC also argued that the seller would show the below-cost sale as a loss on its tax return. The Commission ruled the tax treatment of the seller was irrelevant. In addition, OPC argued that rate base should equal the original cost at the time the assets were dedicated to public service. The Commission agreed with the principle of rate base equal to original cost, but not with OPC's interpretation of when the assets were dedicated to public service. In accordance with Commission policy, a negative acquisition adjustment was not included in rate base.

The Grand Terrace case provides some guidance for the Wedgefield case with regard to the OPC's and the Commission's agreement that rate base recognize the original cost of assets at the time they are dedicated to public service. This is consistent with the Commission's ruling in Order No. 25729 (issued some 16 months following the order in the Grand Terrace case) concluding its investigation and confirming its acquisition adjustment policy.

Wedgefield and the PSC Staff have presented testimony establishing net original cost as rate base. The Grand Terrace case also provides guidance as to what Wedgefield does not have to prove - hardship on the part of the seller. The Grand Terrace case supports Wedgefield's position that the Commission policy is, absent extraordinary circumstances, not to include a negative acquisition adjustment in rate base and that the burden of proof is on the proponent of an adjustment.

Case No. 47 was a transfer from Springside, Inc. to Springside at Manatee. The purchase price was at 12% of rate base. In accordance with its policy, the Commission did not include a negative acquisition adjustment in rate base. The Commission stated that, although a large negative acquisition adjustment resulted, the circumstances did not appear to be extraordinary.

The Springside case provides guidance in that OPC has alleged that a large differential between purchase price and rate base is an extraordinary circumstance. The Springside order does not find a purchase at 12% of rate base to be extraordinary. The Wedgefield differential is not nearly as great as in Springside. Consistent with the Springside order, the Wedgefield price/rate base differential is not extraordinary. The Commission decision in the Springside Manatee case supports Wedgefield's position that the Commission policy is, absent extraordinary circumstances, not to include a negative acquisition adjustment in rate base. There is nothing in this case suggesting there was any burden on the utility to prove why a negative acquisition adjustment should not be included.

Case No. 50 was a transfer from Pine Harbour to Pine Harbour Water Utilities at a price less than rate base. In accordance with its policy, the Commission did not include a negative acquisition adjustment. No additional explanation was given. One Commissioner dissented, asserting that there was no evidence to support the Commission's decision and that the utility should bear the burden of proving why an adjustment should not be included. He also

stated that a negative acquisition adjustment may not be proper in all cases, but the dissenting opinion provided no indications of what situations may be proper.

This case does not provide any guidance to Wedgefield beyond the oft-stated Commission generic policy, nor is there anything in this case suggesting there was any burden on the utility to prove why a negative acquisition adjustment should not be included.

Case No. 53 was a Staff Assisted Rate Case (SARC) for The Woods, a division of Homosassa Utilities. In that case, due to a lack of original cost documentation, the original cost was determined by a Staff-prepared original cost study. The capital structure was composed solely of negative retained earnings. To balance the books, the Commission increased common equity to equal rate base "to reflect the unrecognized negative acquisition adjustment resulting from the purchase of this utility at a discount."

One Commissioner dissented, stating that because the case involved an initial determination of rate base, the purchase price was superior to an engineering estimate. He also stated that the Commission's acquisition adjustment policy was incentive-based, and that since the original cost study was performed after the purchase, there is no evidence that an incentive was needed in the acquisition.

The Homosassa Utilities case provides guidance through both the majority opinion and the dissent. The determination of rate base in the Wedgefield transfer is not an initial determination.

Rate base has been determined by the Commission in an earlier docket. Econ Utilities was purchased by Wedgefield with full knowledge of the Commission's acquisition adjustment policy, and Wedgefield took that policy into consideration, as an incentive, in making the purchase.

The stated concerns of the dissent in the Homosassa case are not applicable to the Wedgefield application. The Homosassa case is supportive of Wedgefield's position that a negative acquisition adjustment not be included in rate base. Also, there is nothing in that case suggesting there was any burden on the utility to prove why a negative acquisition adjustment should not be included.

Case No. 55 was a transfer from Hideaway Services to FIMC Hideaway resulting from a foreclosure. The purchase price was less than rate base. In accordance with PSC policy, a negative acquisition adjustment was not included in rate base. No further explanation was given.

One Commissioner dissented, stating that there was no indication an incentive (i.e., no negative acquisition adjustment included in rate base) was needed or that the buyer was even aware of the Commission's policy on acquisition adjustments. Wedgefield was aware of Commission policy, which was a major consideration in Wedgefield's purchase.

The dissent in the FIMC Hideaway case also noted that the previous owner had failed to maintain the system, that the new owner would have to spend considerable amounts to bring the system into compliance and the customer would "pay twice."

In that case, the Commission specifically noted that, even though the previous owner had failed to maintain the system properly and the new owner had to make considerable expenditures to bring the system into compliance, these events did not appear to be extraordinary.

Similar allegations have been made by OPC in the Wedgefield case. The rebuttal testimony by Mr. Seidman responded to those allegations, and the allegations are neither correct nor applicable. Nevertheless, relying on the FIMC Hideaway decision, even if such allegations relating to maintenance were correct in the Wedgefield case, they do not constitute extraordinary circumstances and are not a basis to include a negative acquisition adjustment in rate base.

Contrary to the dissent's statement, the customers would not have to "pay twice". As long as accounting and ratemaking treatment is consistent, regardless of ownership, the customers pay only for the legitimate cost of assets and expenses incurred and actually paid in their behalf. By <u>not</u> including a negative acquisition adjustment in rate base, neither the rate base nor the rates to customers are affected by the transfer.

Customers will not pay for anything under the new ownership that they would not have been required to pay for under prior ownership. The transfer is customer-neutral, except for the forthcoming <u>benefits</u> to the customers summarized in testimony by Mr. Wenz.

The FIMC Hideaway case is supportive of Wedgefield's position

that the Commission policy is, absent extraordinary circumstances, not to include a negative acquisition adjustment in rate base and that the burden of proof is on the proponent of an adjustment.

Case No. 59 was a transfer of assets from San Pablo to Jacksonville Suburban (Jax). Jax had requested that a negative acquisition adjustment not be included in rate base. The Commission agreed, noting that Jax had made improvements in the system and in its management. Wedgefield also has made improvements to the system it purchased and in the management of that system.

The Jacksonville Suburban case is supportive of Wedgefield's position that a negative acquisition adjustment not be included in rate base. Additionally, there is nothing in this case suggesting there was any burden on the utility to prove why a negative acquisition adjustment should not be included.

Case No. 63 was a transfer of assets from Countryside to Pennbrooke Utilities. The sale was a result of a bankruptcy and foreclosure. In accordance with its policy, the PSC did not include a negative acquisition in rate base. One Commissioner dissented, but gave no reasons in his dissent that would provide guidance. There is nothing in the case which provides any guidance, other than generic policy. Additionally, there is nothing in that case suggesting there was any burden on the utility to prove why a negative acquisition adjustment should not be included.

Case No. 65 was the SSU/Deltona rate case, concluded in 1993.

In its post-hearing brief, OPC had argued that a negative acquisition adjustment be included in rate base. However, it did not specify the adjustments nor did it sponsor or solicit any evidence at hearing supporting its position. The SSU/Deltona case supports Wedgefield's position that the Commission policy is, absent extraordinary circumstances, not to include a negative acquisition adjustment in rate base and that the burden of proof is on the proponent of an adjustment.

Case No. 76 was a case establishing rate base in the transfer from Lake Placid to Lake Placid Utilities, Inc. That system was purchased out of bankruptcy by a subsidiary of Utilities, Inc. at a price less than rate base. In accordance with Commission policy, rate base did not include a negative acquisition adjustment. One Commissioner dissented, but gave no guidance.

That case supports Wedgefield's position that the Commission policy is, absent extraordinary circumstances, not to include a negative acquisition adjustment in rate base. There is nothing in this case suggesting there was any burden on the utility to prove why a negative acquisition adjustment should not be included.

Case No. 77 was the transfer of Lakeside Golf to SSU at a price of approximately 40% of rate base. In accordance with its policy, the PSC did not include a negative acquisition in rate base.

The Commission noted there were no major service problems, no extraordinary circumstances, and that SSU uniform rates would be lower than the stand-alone rates would have been under the prior

owner, had the prior owner been charging for service. SSU, in support of its position that a negative acquisition adjustment was inappropriate, stated that, as a starting point in its purchase negotiations with the seller, it had calculated rate base as if used and useful adjustments had been made. It argued that to reduce rate base by a negative acquisition and then apply used and useful adjustments in the future would be double counting. In the Wedgefield PAA, the Commission did mention that it considered the likely impact of used and useful adjustments.

There is no indication in the SSU order that SSU's argument was a factor in the Commission's decision. Although no estimate of used and useful adjustments has been made for Wedgefield, SSU was correct that to include both a negative acquisition adjustment and used and useful adjustments on the same plant is double counting.

There need not be any correlation between used and useful rate base and purchase price. The Commission, in an earlier order (see Case No. 47) indicated that price/rate base differential is not an extraordinary circumstance. Although estimated used and useful may be a factor considered by a potential purchaser in its negotiations, used and useful adjustments are never a factor in calculating rate base for purposes of a transfer. They will be a factor in any rate case, but the calculation of used and useful is not dependent on who owns the system.

The SSU/Lakeside Golf case supports Wedgefield's position that the Commission policy is, absent extraordinary circumstances, not to include a negative acquisition adjustment in rate base. There

is nothing in this case suggesting there was any burden on the utility to prove why a negative acquisition adjustment should not be included.

Case No. 78 involved a transfer of assets from Lake Utilities, LTD to SSU. That case is similar to Lakeside Golf in Case No. 77. As a starting point in its negotiations, SSU had calculated rate base as if used and useful adjustments had been made and argued that to reduce rate base by a negative acquisition adjustment and then apply used and useful adjustments in the future would be double counting.

In accordance with its policy, and without further explanation, the Commission did not include a negative acquisition adjustment in rate base. One Commissioner dissented, without opinion. There is nothing in this SSU/Lake Utilities, LTD case suggesting there was any burden on the utility to prove why a negative acquisition adjustment should not be included. The case provides no other guidance, other than generic policy.

Case No. 83 involved a transfer of assets from Tamiami Village Utility to Tamiami Village Water. The purchase price was approximately 41% of rate base. In accordance with its policy, the Commission did not include a negative acquisition adjustment in rate base. The order provided no other basis for the decision.

One Commissioner dissented on the basis that the Commission policy was supposed to be an incentive, but this buyer was unaware of the policy and misunderstood the purpose of an acquisition adjustment. Wedgefield was aware of the policy, and it was a major

factor in its considerations.

The only guidance from this case is that Wedgefield showed that Commission policy was a factor in its purchase. It has done that in its testimony. There is nothing in this case suggesting there was any burden on the utility to prove why a negative acquisition adjustment should not be included.

Case No. 89 was a full rate case for SSU's PSC regulated systems. In that case, OPC revisited the issue of acquisition adjustment specifically with regard to the purchase of the Lehigh and Deltona systems and with regard to policy in general. It was pointed out by the Commission that both purchases were stock transfers, and acquisition adjustments were not applicable. Nevertheless, the Commission discussed the Lehigh and Deltona purchases and noted that even a showing that Lehigh was purchased at 45% of book value did not demonstrate that extraordinary circumstances exist.

The Commission went on to reaffirm its generic acquisition adjustment policy. The Commission also reiterated its observation that not including a negative acquisition adjustment does no harm to customers, because, generally, rate base and rates do not change and customers often receive a better quality of service.

This case is supportive of Wedgefield's position that the Commission policy is, absent extraordinary circumstances, not to include a negative acquisition adjustment in rate base. The guidance this case provides is that the PSC's policy is still intact and that the differential between rate base and purchase

price does not demonstrate that extraordinary circumstances exist. One Commissioner dissented, restating his basic position but also seeking to distinguished the SSU case because of the issue of uniform rates and the allegation that uniform rates result in a cross subsidy of the effect of no negative acquisition adjustment.

Uniform rates is not a factor in the Wedgefield case, so there are no special issues in the SSU dissent to which to respond. There is nothing in that case suggesting there was any burden on the utility to prove why a negative acquisition adjustment should not be included.

Case No. 91 was a Staff assisted rate case (SARC) for J&J Water and Sewer. The $32,000 system was purchased for one dollar, or .003% of rate base. The Commission noted that circumstances were extraordinary due to the combination of the $1.00 price and the sale of 91 lots to the new owner at a price of $17,500. However, the Commission did not include a negative acquisition adjustment because of other mitigating circumstances.

The seller had filed for abandonment of the utility system, but the abandonment was put off due to the sale of the system. Furthermore, including a negative acquisition adjustment would have resulted in inadequate operating funds and might possibly have triggered another abandonment proceeding.

One Commissioner dissented, asserting that the transfer did not meet the goals of the Commission's policy because there was no incentive involved and because the sale of the utility was a by-product of the sale of the lots; the purchase was not by a large

utility; and the purchaser had no previous experience.

None of concerns in the dissent are factors in the Wedgefield case. The incentive that flows from the Commission's acquisition adjustment policy was a factor for Wedgefield, the purchaser is a large utility, and the purchaser does have utility experience. The dissent's concerns in the J&J Water and Sewer case do provide guidance and are supportive of Wedgefield's position that there are no extraordinary circumstances in this transfer that would warrant including a negative acquisition adjustment in rate base. There is nothing in that case suggesting there was any burden on the utility to prove why a negative acquisition adjustment should not be included.

Case No. 0 was a transfer of San Carlos Utility to RBN (Order No. 11266, issued 10/25/1982). It denied an acquisition adjustment which, although not stated, appeared to be negative acquisition adjustment. The sales agreement contained a provision that the deal would not go through if the rate base were changed by the Commission. The Commission did not include an adjustment, stating that the buyer steps into the shoes of the seller. Any ratemaking adjustments would have to considered in the context of a rate case.

C. SUMMARY OF 16 ORDERS EXPLAINING WHY NO NAA

As a summary of these 16 cases, the following are factors which the Commission considered when ruling not to include a negative acquisition adjustment in rate base:

1. Is the system in such poor condition that it needs replacing? (Case No. 16)

2. Was the purchase prudent in light of jurisdictional status, growth potential and per customer operating costs? (Case No. 16)

3. Are there benefits due to the purchaser's ability to attract capital at lower costs, economies of scale and managerial and operational expertise? (Case No. 19)

4. Is the purchaser making improvements in the public interest? (Case Nos. 19, 59)

At the hearing, Wedgefield provided testimony regarding each of the above considerations, confirming that there are no extraordinary circumstances in this purchase and that, consistent with current Commission policy and with the decisions of the Commission over the last ten years, a negative acquisition adjustment should not be included in rate base, and the burden of proof is on the proponent of the acquisition adjustment.

In addition to the list of factors set forth above, the Commission also found that it was not necessary to show hardship on the part of the seller (Case No. 43), that the purchase price to rate base relationship was not an extraordinary factor (Case Nos. 47, 89), and that the failure of the previous owner to maintain the system (and considerable expenditures by the new owners) were <u>not</u> extraordinary circumstances and were not reasons to include a negative acquisition adjustment in rate base. (Case No. 55).

Additional concerns raised in dissenting opinions were that the purchaser be aware of, and have considered, the "incentive" purpose of the Commission policy (Case Nos. 53, 55, 83); that

uniform rates not result in cross subsidies (Case No. 89); that the purchaser be a large utility with expertise in utility operations (Case No. 91); and that customers not pay for anything twice (Case No. 55).

Regardless of whether these factors were of concern to the majority in any Commission order, Wedgefield has addressed those concerns in this case, confirming that there are no extraordinary circumstances in this purchase and that, consistent with current Commission policy and with the decisions of the Commission over the last ten years, a negative acquisition adjustment should not be included in rate base. Wedgefield believes it has met all the legitimate burdens of proof it may have had in this case.

In the 16 orders which discussed the decision not to include a negative acquisition adjustment, not a single one suggested that the burden of proof was on the purchaser. Otherwise, the purchaser would have to prove a negative. It would have to show why rate base should not be changed by not including a negative acquisition adjustment.

D. NEGATIVE ACQUISITION ADJUSTMENT APPROVED IN JUST 3 CASES

An acquisition adjustment has very rarely ever been approved. Of the 31 cases which specifically addressed the subject, a negative acquisition adjustment was approved in only 3.

Case No. 36 occurred in 1990 and addressed the purchase of the Beacon 21 water and wastewater utility by Laniger Enterprises. In that case, the Commission had, in a PAA, not included a negative acquisition adjustment in rate base. The PAA was protested by OPC.

Eventually, the Applicant and OPC entered into a settlement in which they agreed that rate base be set at the purchase price. In the order accepting the settlement, the Commission noted that the OPC had alleged extraordinary circumstances. The Commission also noted that recognition of acquisition adjustments for ratemaking purposes goes against its established practice. The Commission did not rule on the allegations, but in the absence of any evidence to the contrary, and with the acquiescence of the utility, it approved the settlement.

Because this was a settlement, no issues of fact were addressed. The only guidance is: 1) the Commission's statement that recognition of acquisition adjustments for ratemaking purposes goes against its established practice, and 2) its seeming reluctance to include the adjustment in rate base. This case suggests that the purchaser does not have to prove that not including a negative acquisition in rate base is necessary. Wedgefield has not requested anything that would cause a change to rate base or rates as a result of the circumstances of the transfer.

Case No. 36 was the second of the three cases in which a negative acquisition adjustment was approved. It was a Staff assisted rate case for CGD Corp. which occurred in 1993. In that case, the Commission explained that the transfer involved an extraordinary circumstance and set rate base equal to the purchase price. The Commission identified the following as extraordinary circumstances: 1) it involved a three-party, nontaxable exchange in

which two of the parties, the initial developer and the final utility owner (developer family trust) were considered virtually the same; 2) the developer fully recovered its investment in the utility through the exchange, and 3) without the adjustment, the developer (i.e., the developer family trust) would allegedly double recover its investment.

None of the circumstances in the CGD Corp. case are applicable to Wedgefield. The Wedgefield transfer involved an arms length transaction between unrelated parties. There are no trusts involved. There is nothing in the CGD order that provides guidance in the Wedgefield case.

Case No. 69 was the third and final case in which a negative acquisition adjustment was approved. It was decided in 1993, and involved a rate application for Jasmine Lakes in which the Commission reversed its prior decision in a 1990 transfer case. In the transfer docket (Case No. 44), the Commission, based on its policy, did not include a negative acquisition adjustment. The rate case order stated that OPC had argued that: 1) the utility was in "bad shape" at purchase; 2) the prior owner did not maintain the utility; 3) the prior management was neglectful; and 4) a negative acquisition adjustment would insulate the customers from the failures of prior management. A majority of the Commission agreed with OPC's position that a negative acquisition adjustment was appropriate. The Commission stated that it based its decision on customer testimony, the need for repairs and improvements at the time of transfer, and the lack of responsibility of (prior)

management. Also, the Commission noted that, at the time of transfer, the utility was already purchasing 80% of its water from the county, yet the utility had earned a return on the water plant components for two years.

A different Commissioner dissented from this decision, and stated three reasons: 1) the Commission had already rendered its decision on this issue in a previous order; 2) the OPC witness had testified that the purchase was not extraordinary; and 3) in the absence of extraordinary circumstances, the prior decision should remain undisturbed. That dissent is consistent with the policy and prior decisions of the Commission.

There is one similarity between the circumstances in the Jasmine Lakes case and the Wedgefield case. There is an allegation in the Wedgefield case that maintenance, by the prior management, was done only on an emergency basis and that significant investment may be needed to bring the utility up to standards. Wedgefield's testimony responded to that allegation, and it is addressed in the main body of this Brief.

If the Commission's decision in Jasmine Lakes (Case No. 69, 11/18/93) were to be construed to include the prior owner's failure to maintain the system as a reason to include a negative acquisition adjustment, then such an interpretation would be inconsistent with its decision in the earlier FIMC Hideaway case discussed above (Case No. 55, 1/18/92). Such an inconsistency would leave affected parties with little guidance as to what the policy of the Commission actually is.

The Jasmine Lakes decision (Case No. 69) is more properly construed to prevent full recovery of the costs associated with water plant components in a system for which 80% of the water was being purchased from another utility system while the utility was still receiving revenues as though based on use of its entire system.

There is no similarity at Wedgefield to the Jasmine Lakes situation wherein allegations were made of earning on unused treatment plant while purchasing most of the water from the county. That situation does not exist in this case. There is nothing in Jasmine Lakes order which would support including a negative acquisition adjustment in rate base or of shifting the burden to Wedgefield to prove why a negative acquisition adjustment is not appropriate.

Even if the circumstances in the Wedgefield case were the same as in Jasmine Lakes with regard to alleged failures of the prior owners, the majority's solution in the Jasmine Lakes case cannot be interpreted to mean that prior poor maintenance is an extraordinary circumstance warranting a negative acquisition adjustment.

If the Jasmine Lakes case were to be interpreted to mean that prior poor maintenance by the previous owner were the basis for the Commission's decision, then it would raise the question as to how a utility under the jurisdiction and surveillance of this Commission for many years would be allowed by the Commission to provide allegedly inadequate maintenance and be negligent in its management, without being subject to a show cause order or subject

to investigation and penalty. If that situation were true, the question also would arise as to why the solution to the Commission's own failure to act would be to penalize a new owner (committed to correcting the situation) by assessing a permanent reduction to the new owner's rate base through a negative acquisition adjustment, especially when the asset transfer had already been found to be in the public interest.

The Commission's regulatory and monitoring programs should prevent that level of poor maintenance from happening. The Commission has issued many orders to show cause to utilities for poor maintenance and poor service, but there is no evidence that the Commission issued a show cause order against Jasmine Lakes. (Nor has the Commission issued a show cause order against Econ, which in fact was in compliance with PSC and DEP standards.) Therefore, the Jasmine Lakes case cannot be interpreted as simply standing for the proposition that prior poor maintenance is an extraordinary circumstance warranting a negative acquisition adjustment. Furthermore, such an interpretation of the Jasmine Lakes case would be totally contrary to decisions made in prior case-by-case and generic proceedings before this Commission.

An asset transfer, without an acquisition adjustment, puts the buyer in the shoes of the seller. Therefore, only solutions to problems that would have been applicable to the seller should be applicable to the buyer. If maintenance were inadequate, could the Commission have permanently reduced the rate base of the seller? No, of course not. What it could do, at the time of a rate case,

would be to make used and useful adjustments for plant that is not properly functioning or reduce expenses for ratemaking purposes, if expenses are found to be inappropriate.

If prior owners were found to be negligent, could the Commission permanently reduce the rate base of those owners as a solution? No, definitely not. But it could reduce its allowed rate of return, or adjust allowed management salaries, or even impose a penalty on that management, if the negligence was willful. Even the condition wherein the utility is purchasing most of its water from another utility while still owning a water plant is usually addressed by applying used and useful adjustments or by retiring the plant.

The point is, the Commission cannot do to the buyer what it could not do to the seller. The acquisition adjustment recognizes extraordinary circumstances in a sale, if they exist. It is not an arbitrary punishment to get back at the seller because of perceived misdeeds against which the Commission failed to act in the past. That procedure results in an arbitrary and capricious punishment against the purchaser.

E. SUMMARY OF THE 3 ORDERS EXPLAINING WHY NAA APPROVED

In summary, there is no guidance in these three cases as to what Wedgefield needed to do to prove why it is being consistent with established policy in not requesting an acquisition adjustment to rate base. One of the three cases involved a settlement which resolved none of the facts in that case. Another case involved a three-party nontaxable exchange with unique circumstances that are

not generally applicable and are specifically not applicable to the Wedgefield case. The third case (Jasmine Lakes) involved a reversal of a prior decision, having circumstances unique to that one case among the 100 cases which have dealt with acquisition adjustments, and resulted in apparent inconsistent treatment of the same facts regarding a prior owner's alleged failure to maintain. But as was discussed, there were other factors involved, so the case provides no guidance.

POSITIVE ACQUISITION ADJUSTMENTS

There were 68 orders which deal with, or appear to deal with, purchase prices above rate base (positive acquisition adjustment). Of these, only three had positive acquisition adjustments included in rate base. All but ten of the orders relied solely on a statement of the Commission's acquisition adjustment policy as the reason for not including an acquisition adjustment in rate base.

In general, the ten orders that included some additional support for the decisions, identified the benefits which customers should be expected to receive if a positive acquisition adjustment is included. For the most part, these are the same benefits identified in the two generic orders arising from the investigation of the acquisition adjustment policy. Wedgefield provided testimony describing those benefits which are anticipated to enure to Wedgefield's customers as a result of the change in ownership. Although those benefits are usually considered the justification for increasing rate base through a positive adjustment, Wedgefield's customers will enjoy those benefits without an

increase in rate base.

G. CONCLUSION

Hearing Exhibit 7 is a list of 100 cases which provide a concise history of the Commission consideration of acquisition adjustment issues for the last ten years (including 1 case from 1982). The Commission has rarely ever included an acquisition adjustment, either positive or negative, in rate base. The 3 cases that included a negative acquisition adjustment involve circumstances that were quite unique. The purchase of Econ by Wedgefield is not unique.

In one of the cases reviewed (Jasmine Lakes), the Commission included a negative acquisition adjustment by reversal of a prior order which did not include a negative acquisition adjustment. If all of the factual matters relating to that case were to be construed to be the basis for including a negative acquisition adjustment in rate base, the reasons given would be entirely inconsistent with the Commission's prior decision in the same case, inconsistent with the two decisions rendered in the generic investigation proceedings, and inconsistent with the otherwise consistent policy followed over that ten year period.

There is nothing in the history of acquisition adjustment cases that suggests there was any burden on the utility to prove why a negative acquisition adjustment should not be included in rate base. It has always been the proponent of the adjustment who had to carry the burden.

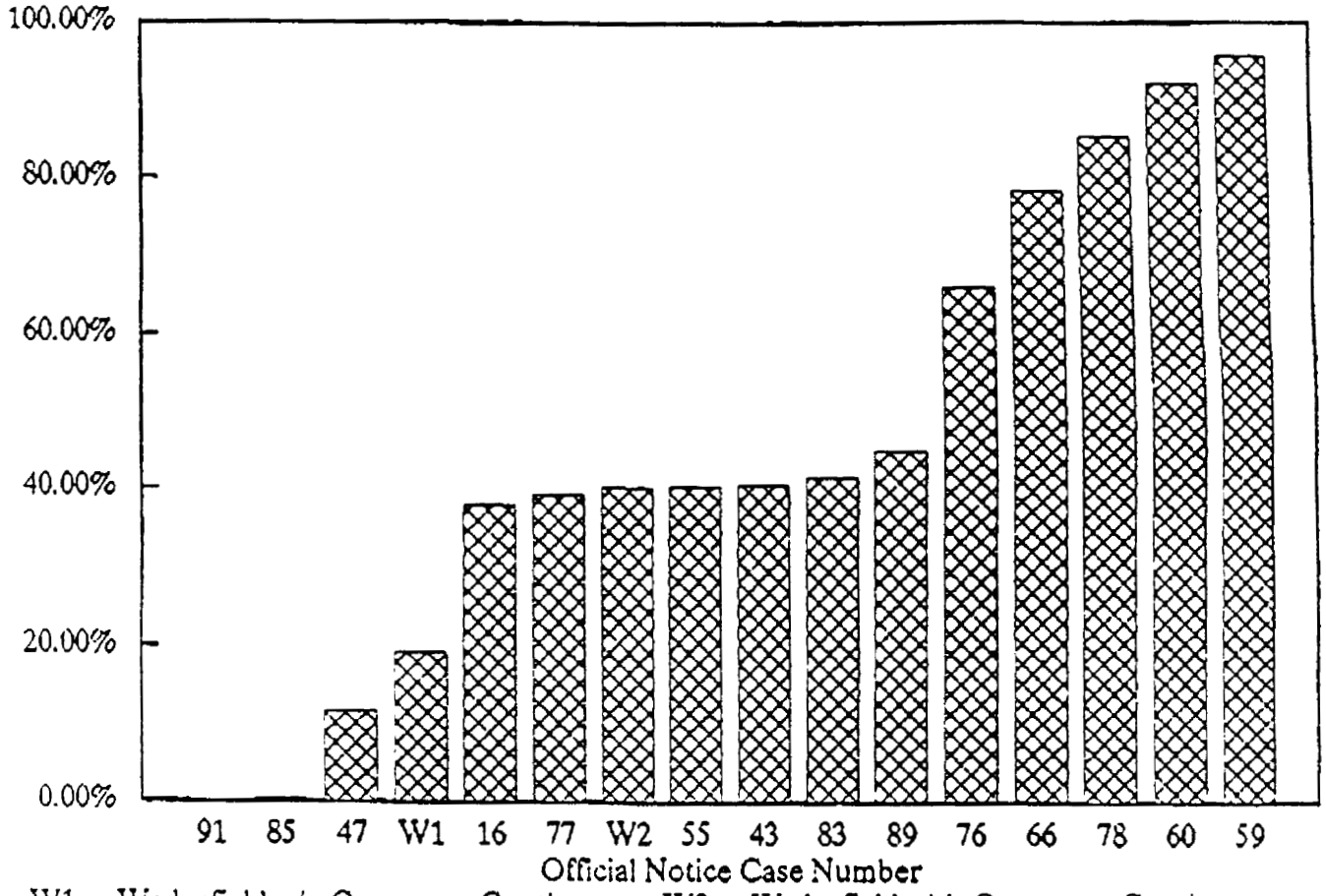
The Staff position on burden of proof in the Wedgefield case

is inconsistent with the Commission's acquisition adjustment policy. An analysis of the cases, in concert with Wedgefield's direct and rebuttal testimony, support Wedgefield's positions that a negative acquisition adjustment not be included in rate base and that the burden of proof resides exclusively on the proponent of the acquisition adjustment, positive or negative.

Issue No. 8 should be decided consistently with the policy of the Commission as developed in policy Order Nos. 23376 and 25729 and consistent with the prior orders of the Commission considering acquisition adjustments over the past ten years. That is, the burden of proof is on the proponent of an acquisition adjustment. There is nothing in the Wedgefield case which is an extraordinary circumstance and there is no justification for a negative acquisition adjustment.

CHART

PURCHASE PRICE AS PERCENT OF RATE BASE



W1 = Wedgefield w/o Commons Contingency; W2 = Wedgefield with Commons Contingency
Case 47 – Per Order, although large neg. acq. adj., the circ. do not appear to be extraordinary.

LIST "B" WITH CASE NOS

HEARING, COMPOSITE EXHIBIT 7

PSC ORDERS ADDRESSING ACQUISITION ADJUSTMENT, 1988-1997

LIST OF ORDERS

Case No.	Adjust. P=Pos. N=Neg. ??	Reporter Cite	Docket No.	Order No.	Date	Short Title
1	??	88 FPSC 2: 288	870915-WU	18900	2/22/88	SSU re Crystal River Highlands
2	??	88 FPSC 2: 318	870810-SU	18907	2/22/88	Indians Springs Utilities re Days Inn Crystal River
3	P	88 FPSC 4: 325	871156-WU	19163	4/18/88	Tropical Park Water
4	N	88 FPSC 4: 406	871139-WU	19192	4/20/88	SSU re Bay Assoc.
5	N	88 FPSC 5: 36	871250-WU	19275	5/03/88	SSU re Locke Well & Pump
6	N	88 FPSC 6: 257	880206-WU	19505	6/16/88	SSU re Central Fla. Util.
7	P	88 FPSC 6: 207	870936-WS	19641	6/22/88	SSU re Sugar Mill Creek
8	??	88 FPSC 6: 241	880204-SU	19656	6/22/88	Security S&L re Harbor Hall
9	P	88 FPSC 6: 272	880557-WS	19667	6/22/88	Royal Utility re University Utility
10	N	88 FPSC 9: 384	870249-WS	20063	9/26/88	Atlantic Util. of Jax
11	P	88 FPSC 9: 543	880352-WU	20088	9/29/88	SSU re Rolling Greens
12	??	88 FPSC 10: 215	880472-WS	20140	10/10/88	SSU re Eli-Ner & C.L. Smith
13	??	88 FPSC 12: 236	880292-WS	20469	12/20/88	SSU re Welaka Utilities
14	??	88 FPSC 12: 458	880486-SU	20518	12/23/88	Homosassa Utilities re Marathon U.S. Utilities
15	??	89 FPSC 1: 268	881011-WU	20647	1/24/89	SSU re Silver Lake Est.
16	N	89 FPSC 2: 44	880907-WU	20707	2/06/89	Sunshine Utilities re Utility Systems, Inc.
17	P	89 FPSC 3: 117	880805-WS	20869	3/09/89	SSU re 2 of W. Volusia Utilities' systems
18	N	89 FPSC 5: 164	881200-WU	21200	5/08/89	SSU re Lake Ajay
19	N	89 FPSC 6: 50	880520-WS	21322	6/05/89	SSU
20	P	89 FPSC 6: 368	890127-WS	21421	6/20/89	Tamiami Village Utility re Tamiami Utility
21	P	89 FPSC 7: 363	890354-WS	21557	7/17/89	King's Cove re Cove Utilities
22	P	89 FPSC 7: 616	881339-WS	21631	8/02/89	SSU re Twin County Utility
23	P	89 FPSC 7: 635	881340-WS	21632	7/31/89	SSU re Burnt Store
24	P	89 FPSC 7: 655	890348-WU	21636	7/31/89	SSU re Imperial Mobile Terr.
25	P	89 FPSC 8: 391	881502-WS	21758	8/21/89	SSU re Fisherman's Haven
26	P	89 FPSC 8: 410	881603-WU	21762	8/21/89	A.P. Utilities re N. Cent. Fla.
27	??	89 FPSC 9: 101	890215-WU	21829	9/05/89	SSU re Inverness Utilities
28	P	89 FPSC 9: 126	881339-WS	21836	9/05/89	SSU re Twin County Utility
29	??	89 FPSC 9: 385	881573-SU	21913	9/19/89	SSU re PIV(Seminole Co.)
30	N	89 FPSC 11: 96	890233-WS	22150	11/06/89	SSU re Point O' Woods
31	N	89 FPSC 11: 336	881500-WS	22203	11/21/89	Lanigar Ent. re Beacon 21
32	??	89 FPSC 12: 332	891016-SU	22345	12/27/89	N. Peninsula Utilities re Shore Utility
33	P	90 FPSC 1: 39	890045-SU	22371	1/08/90	BFF Corp. re LTB Utility
34	??	90 FPSC 5: 111	891317-WU	22915	5/09/90	SSU re Lakeview Villas
35	??	90 FPSC 5: 122	891250-WS	22916	5/09/90	SSU re Leisure Lakes
36	N	90 FPSC 5: 237	881500-WS	22962	5/21/90	Lanigar Ent. re Beacon 21
37	??	90 FPSC 6: 18	891321-WU	23024	6/04/90	SSU re Gospel Island Estates
38	P	90 FPSC 6: 386	891110-WS	23111	6/25/90	Jax Suburban re St. Johns N.
39	??	90 FPSC 8: 312	900106-WS	23378	8/21/90	J. Swiderski re King Cove
40	??	90 FPSC 8: 427	891187-WS	23397	8/23/90	SSU re Silver Lake
41	P	90 FPSC 10: 85	900222-WS	23542	10/01/90	San Pablo re El Agua
42	??	90 FPSC 10: 481	900475-SU	23643	10/22/90	Whiting Waterworks re Mid-County Services
43	N	90 FPSC 10: 536	891320-WU	23656	10/23/90	SSU re Grand Terrace
44	??	90 FPSC 11: 114	900291-WS	23728	11/07/90	Jasmine Lakes Utilities re Jasmine Lake Services
45	??	90 FPSC 12: 399	900312-WU	23880	12/14/90	Windstream re Utility Systems
46	??	90 FPSC 12: 674	900568-WU	23944	12/28/90	Marion Util. re Windgate
47	N	91 FPSC 1: 79	900408-WS	23970	1/08/91	Springside at Marietas re Springside, Inc.
48	??	91 FPSC 1: 163	900527-WS	23974	1/09/91	Crystal Lake Club re Century Group
49	??	91 FPSC 2: 10	900665-WS	24050	2/01/91	Ocean City Utilities re Beverly Beach Surfside
50	N	91 FPSC 3: 585	900525-WU	24273	3/21/91	Pine Harbor Water Utilities re Pine Harbour
51	P	91 FPSC 9: 220	910119-WU	25063	9/13/91	A.P. Utilities re Marico Prop.
52	P	91 FPSC 9: 267	910118-WU	25075	9/17/91	A.P. Utilities re Aqua Pure
53	N	91 FPSC 9 529	900666-WS	25139	9/30/91	The Woods, div. of Homosassa Utilities
54	??	91 FPSC 10: 249	910518-SU	25217	10/14/91	Fairmont Util re Farmer Util.

NOTES: Adjustment ?? - Order did not specify type of adjustment. From text it would appear to be positive.
Negative acquisition adjustments are shaded.

Summary of Adjustments addressed:	Addressed	Allowed	(Item Nos.)
Positive	33	3	38,61,70
??	35	0	
Negative	31	3	38,62,69
Total	99	5	

Brief, Attachment "A"

PSC ORDERS ADDRESSING ACQUISITION ADJUSTMENT, 1988–1997

LIST OF ORDERS

Case No.	Adjust. P=Pos. N=Neg. ??	Reporter Cite	Docket No.	Order No.	Date	Short Title
55	N	92 FPSC 1: 124	910672-WS	25584	1/18/92	RMC Hideaway re Hideaway Services
56	P	92 FPSC 2: 872	910020-WS	25821	2/27/92	Utilities, Inc. of Fla – PPW
57	??	92 FPSC 4: 255	910467-SU	PSC-92-0193	4/13/92	Forest Park POA re Vista Vill.
58	??	92 FPSC 4: 298	910695-WU	PSC-92-0204	4/14/92	C&S Water re chg in org. control fr. Stewart/Chernau to Stewart
59	N	92 FPSC 5: 340	911095-WS	PSC-92-0370	5/14/92	Jax Suburban re San Pablo
60	N	92 FPSC 5: 464	910847-SU	PSC-92-0407	5/28/92	Forty-One re Springs Plaza
61	P	92 FPSC 8: 592	920177-WS	PSC-92-0895	8/27/92	Jax Suburban re Atlantic of Jax
62	N	93 FPSC 1: 70	920397-WS	PSC-93-0011	1/05/93	CGD Corp.
63	N	93 FPSC 2: 280	920598-WS	PSC-93-0194	2/09/93	Pennbrooke re Countryside
64	P	93 FPSC 3: 217	920716-SU	PSC-93-0364	3/09/93	Tierra Verde (Utilities, Inc.) re Seagull Utilities
65	N	93 FPSC 3: 504	920199-WS	PSC-93-0423	3/22/93	SSU/Deltona
66	N	93 FPSC 3: 633	920834-WS	PSC-93-0430	3/22/93	Utilities, Inc. of Fla – PPW
67	P	93 FPSC 4: 76	920717-SU	PSC-93-0508	4/05/93	Harder Hall-Howard
68	??	93 FPSC 6: 278	921260-WS	PSC-93-0900	6/14/93	Tradewinds Utilities & RTC
69	N	93 FPSC 11: 205	920148-WS	PSC-93-1675	11/18/93	Jasmine Lakes
70	P	93 FPSC 12: 390	930204-WS	PSC-93-1819	12/22/93	Jax Suburban in St. Johns Co.
71	P	94 FPSC 1: 282	930592-WU	PSC-94-0085	1/24/94	Rolling Hills re Rolling Acres
72	??	94 FPSC 6: 110	931060-WS	PSC-94-0701	6/06/94	RTC (Tradewinds) re C.F.A.T. H2O
73	P	94 FPSC 8: 284	930960-WU	PSC-94-0988	8/15/94	Ocala Oaks re Bellview Hills Et.
74	N	94 FPSC 9: 336	930763-SU	PSC-94-1163	9/22/94	RHV re Homosassa Utilities
75	??	94 FPSC 12: 302	940453-WU	PSC-94-1543	12/13/94	Harbor Hills re Lake Griffin
76	N	94 FPSC 12: 526	930570-WS	PSC-94-1602	12/27/94	L. Placid Utilities, Inc. Lake Placid Utilities
77	N	95 FPSC 2: 136	931122-WU	PSC-95-0189	2/09/95	SSU re Lakeside Golf
78	N	95 FPSC 2: 423	940091-WS	PSC-95-0268	2/28/9	SSU re Lake Utilities, LTD
79	P	95 FPSC 3: 315	940726-WU	PSC-95-0342	3/13/95	Seven Rivers Utilities
80	??	95 FPSC 5: 375	940850-WS	PSC-95-0622	5/22/95	Colonies Water re same name
81	??	95 FPSC 5: 389	940849-WU	PSC-95-0623	5/22/95	Buccaneer Water re same name
82	P	95 FPSC 10: 516	941151-WS	PSC-95-1325	10/31/95	SSU re Orange/Osceola
83	N	95 FPSC 11: 604	950015-WU	PSC-95-1441	11/28/95	Tamiami Village Water re Tamiami Village Utility
84	??	95 FPSC 11: 616	950193-WS	PSC-95-1444	11/28/95	MHC Systems re FFEC-Six
85	N	96 FPSC 3: 448	950880-WU	PSC-96-0432	3/28/96	J. Swiderski re Forty-Eight Est.
86	P	96 FPSC 3: 547	950959-SU	PSC-96-0446	3/29/96	Utilities, Inc. re Longwood
87	N	96 FPSC 5: 29	950895-WS	PSC-96-0581	5/03/96	Terra Mar Village Utilities re Terra Mar Village
88	N	96 FPSC 10: 87	960283-WS	PSC-96-1241	10/7/96	Wedgefield re Econ
89	N	96 FPSC 10: 386	950495-WS	PSC-96-1320	10/30/96	SSU
90	P	96 FPSC 11: 432	960716-WU	PSC-96-1406	11/20/96	Crystal River Utilities re Ravenswood
91	N	96 FPSC 12: 136	960523-WS	PSC-96-1474	12/04/96	J&J Water & Sewer
92	P	97 FPSC 1: 112	960040-WS	PSC-97-0034	1/07/97	Sun Communities Finance re Water Oaks
93	??	97 FPSC 2: 368	960842-WU	PSC-97-0187	2/18/97	Crystal River Utilities re Seven Rivers Utilities
94	??	97 FPSC 3: 381	960643-WS	PSC-97-0312	3/24/97	Crystal River Utilities re Sumter Ware Co.
95	??	97 FPSC 4: 73	960793-WU	PSC-97-0375	4/07/97	Crystal River Utilities re Hines Creek MH Waterworks
96	P	97 FPSC 5: 405	960696-WS	PSC-97-0579	5/20/97	Clay Utility re S. Broward
97	??	97 FPSC 5: 418	960844-WU	PSC-97-0580	5/20/97	Crystal River Utilities re Lands, Inc. of Rhinelander
98	??	97 FPSC 9: 386	961535-WU	PSC-97-1149	9/30/97	Crystal River Utilities re Lake Osborne
99	P	--- online ---	970822-WU	PSC-97-1613	12/23/97	Lindrick Service re S.H. Utilities

NOTES: Adjustment ?? – Order did not specify type of adjustment. From text it would appear to be positive.
Negative acquisition adjustments are shaded.

Summary of Adjustments addressed:	Addressed	Allowed	(Item Nos.)
Positive	33	3	38,61,70
??	35	0	
Negative	31	3	36,62,69
Total	99	5	

OUT CASE NOS.

LIST OF ORDERS FOR OFFICIAL RECOGNITION

Reporter Cite	Docket No.	Order No.	Date	Short Title
82 FPSC 10 : 179	820280-WS	11266	10/25/82	RBN re San Carlos
88 FPSC 2 : 268	870915-WU	18900	2/22/88	SSU re Crystal River Highlands
88 FPSC 2 : 318	870810-SU	18907	2/22/88	Indians Springs Utilities re Days Inn Crystal River
88 FPSC 4 : 325	871156-WU	19163	4/18/88	Tropical Park Water
88 FPSC 4 : 406	871139-WU	19192	4/20/88	SSU re Bay Assoc.
88 FPSC 5 : 36	871250-WU	19275	5/03/88	SSU re Locke Well & Pump
88 FPSC 6 : 257	880206-WU	19505	6/16/88	SSU re Central Fla. Util.
88 FPSC 8 : 207	870936-WS	19841	8/22/88	SSU re Sugar Mill Creek
88 FPSC 8 : 241	880204-SU	19855	8/22/88	Security S&L re Harder Hall
88 FPSC 8 : 272	880657-WS	19867	8/22/88	Royal Utility re University Utility
88 FPSC 9 : 384	870249-WS	20063	9/26/88	Atlantic Util. of Jax
88 FPSC 9 : 543	880352-WU	20088	9/29/88	SSU re Rolling Greens
88 FPSC 10 : 215	880472-WS	20140	10/10/88	SSU re Ell-Nar & C.L. Smith
88 FPSC 12 : 236	880292-WS	20469	12/20/88	SSU re Welaka Utilities
88 FPSC 12 : 458	880485-SU	20518	12/23/88	Homosassa Utilities re Marathon U.S. Utilities
89 FPSC 1 : 268	881011-WU	20647	1/24/89	SSU re Silver Lake Est.
89 FPSC 2 : 44	880907-WU	20707	2/06/89	Sunshine Utilities re Utility Systems, Inc.
89 FPSC 3 : 117	880605-WS	20869	3/09/89	SSU re 2 of W. Volusia Utilities' systems
89 FPSC 5 : 164	881200-WU	21200	5/08/89	SSU re Lake Ajay
89 FPSC 6 : 50	880520-WS	21322	6/05/89	SSU
89 FPSC 6 : 388	890127-WS	21421	6/20/89	Tamiami Village Utility re Tamiami Utility
89 FPSC 7 : 363	890354-WS	21557	7/17/89	King's Cove re Cove Utilities
89 FPSC 7 : 616	881339-WS	21631	8/02/89	SSU re Twin County Utility
89 FPSC 7 : 635	881340-WS	21632	7/31/89	SSU re Burnt Store
89 FPSC 7 : 655	890348-WU	21636	7/31/89	SSU re Imperial Mobile Terr.
89 FPSC 8 : 391	881502-WS	21758	8/21/89	SSU re Fisherman's Haven
89 FPSC 8 : 410	881603-WU	21762	8/21/89	A.P. Utilities re N. Cent. Fla.
89 FPSC 9 : 101	890215-WU	21829	9/05/89	SSU re Inverness Utilities
89 FPSC 9 : 126	881339-WS	21836	9/05/89	SSU re Twin County Utility
89 FPSC 9 : 385	881573-SU	21913	9/19/89	SSU re PIV(Seminole Co.)
89 FPSC 11 : 98	890233-WS	22150	11/06/89	SSU re Point O' Woods
89 FPSC 11 : 336	881500-WS	22203	11/21/89	Lanlger Ent. re Beacon 21
89 FPSC 12 : 332	891016-SU	22345	12/27/89	N. Peninsula Utilllities re Shore Utility
90 FPSC 1 : 39	890045-SU	22371	1/08/90	BFF Corp. re LTB Utility
90 FPSC 5 : 111	891317-WU	22915	5/09/90	SSU re Lakeview Villas
90 FPSC 5 : 122	891250-WS	22916	5/09/90	SSU re Leisure Lakes
90 FPSC 5 : 237	881500-WS	22962	5/21/90	Lanlger Ent. re Beacon 21
90 FPSC 6 : 18	891321-WU	23024	6/04/90	SSU re Gospel Island Estates
90 FPSC 6 : 386	891110-WS	23111	6/25/90	Jax Suburban re St. Johns N.
90 FPSC 8 : 312	900106-WS	23378	8/21/90	J. Swiderski re King Cove
90 FPSC 8 : 427	891187-WS	23397	8/23/90	SSU re Silver Lake
90 FPSC 10 : 85	900222-WS	23542	10/01/90	San Pablo re El Agua
90 FPSC 10 : 481	900476-SU	23643	10/22/90	Whiting Waterworks re Mid-County Services
90 FPSC 10 : 536	891320-WU	23656	10/23/90	SSU re Grand Terrace
90 FPSC 11 : 114	900291-WS	23728	11/07/90	Jasmine Lakes Utilities re Jasmine Lake Services
90 FPSC 12 : 399	900312-WU	23880	12/14/90	Windstream re Utility Systems
90 FPSC 12 : 674	900558-WU	23944	12/28/90	Marion Util. re Windgate
91 FPSC 1 : 79	900408-WS	23970	1/08/91	Springside at Manatee re Springside, Inc.
91 FPSC 1 : 163	900527-WS	23974	1/09/91	Crystal Lake Club re Century Group
91 FPSC 2 : 10	900665-WS	24050	2/01/91	Ocean City Utilities re Beverly Beach Surfside
91 FPSC 3 : 585	900525-WU	24273	3/21/91	Pine Harbor Water Utilities re Pine Harbour
91 FPSC 9 : 220	910119-WU	25063	9/13/91	A.P. Utilities re Marco Prop.
91 FPSC 9 : 267	910118-WU	25075	9/17/91	A.P. Utilities re Aqua Pure
91 FPSC 9 529	900966-WS	25139	9/30/91	The Woods, div. of Homossasa Utilities
91 FPSC 10 : 249	910518-SU	25217	10/14/91	Fairmont Util re Parmer Util.

LIST OF ORDERS FOR OFFICIAL RECOGNITION

Reporter Cite	Docket No.	Order No.	Date	Short Title
92 FPSC 1 : 124	910672-WS	25584	1/16/92	FIMC Hideaway re Hideaway Services
92 FPSC 2 : 872	910020-WS	25821	2/27/92	Utilities, Inc. of Fla - PPW
92 FPSC 4 : 255	910467-SU	PSC-92-0193	4/13/92	Forest Park POA re Vista Vill.
92 FPSC 4 : 298	910895-WU	PSC-92-0204	4/14/92	C&S Water re chg in org. control fr. Stewart/Chernau to Stewart
92 FPSC 5 : 340	911095-WS	PSC-92-0370	5/14/92	Jax Suburban re San Pablo
92 FPSC 5 : 464	910847-SU	PSC-92-0407	5/26/92	Forty-One re Springs Plaza
92 FPSC 8 : 592	920177-WS	PSC-92-0895	8/27/92	Jax Suburban re Atlantic of Jax
93 FPSC 1 : 70	920397-WS	PSC-93-0011	1/05/93	CGD Corp.
93 FPSC 2 : 280	920588-WS	PSC-93-0194	2/09/93	Pennbrooke re Countryside
93 FPSC 3 : 217	920716-SU	PSC-93-0364	3/09/93	Tierre Verde (Utilities, Inc.) re Seagull Utilities
93 FPSC 3 : 504	920199-WS	PSC-93-0423	3/22/93	SSU/Deltona
93 FPSC 3 : 633	920834-WS	PSC-93-0430	3/22/93	Utilities, Inc. of Fla - PPW
93 FPSC 4 : 76	920717-SU	PSC-93-0508	4/05/93	Harder Hall-Howard
93 FPSC 6 : 278	921260-WS	PSC-93-0900	6/14/93	Tradewinds Utilities & RTC
93 FPSC 11 : 205	920148-WS	PSC-93-1675	11/18/93	Jasmine Lakes
93 FPSC 12 : 390	930204-WS	PSC-93-1819	12/22/93	Jax Suburban in St. Johns Co.
94 FPSC 1 : 262	930582-WU	PSC-94-0083	1/24/94	Rolling Hills re Rolling Acres
94 FPSC 6 : 110	931080-WS	PSC-94-0701	6/08/94	RTC (Tradewinds) re C.F.A.T. H2O
94 FPSC 8 : 264	930950-WU	PSC-94-0988	8/15/94	Ocala Oaks re BelMew Hills Et.
94 FPSC 9 : 336	930763-SU	PSC-94-1163	9/22/94	RHV re Homossasa Utilities
94 FPSC 12 : 302	940453-WU	PSC-94-1543	12/13/94	Harbor Hills re Lake Griffin
94 FPSC 12 : 526	930570-WS	PSC-94-1602	12/27/94	L. Placid Utilites, Inc. Lake Placid Utilities
95 FPSC 2 : 136	931122-WU	PSC-95-0189	2/09/95	SSU re Lakeside Golf
95 FPSC 2 : 423	940091-WS	PSC-95-0268	2/28/9	SSU re Lake Utilities, LTD
95 FPSC 3 : 315	940726-WU	PSC-95-0342	3/13/95	Seven Rivers Utilities
95 FPSC 5 : 375	940850-WS	PSC-95-0622	5/22/95	Colonies Water re same name
95 FPSC 5 : 389	940849-WU	PSC-95-0623	5/22/95	Buccaneer Water re same name
95 FPSC 10 : 518	941151-WS	PSC-95-1325	10/31/95	SSU re Orange/Osceola
95 FPSC 11 : 604	950015-WU	PSC-95-1441	11/28/95	Tamiami Village Water re Tamiami Village Utility
95 FPSC 11 : 616	950193-WS	PSC-95-1444	11/28/95	MHC Systems re FFEC-Six
96 FPSC 3 : 448	950880-WU	PSC-96-0432	3/28/96	J. Swiderski re Forty-Eight Est.
96 FPSC 3 : 547	950959-SU	PSC-96-0448	3/29/96	Utilities, Inc. re Longwood
96 FPSC 5 : 29	950696-WS	PSC-96-0581	5/03/96	Terra Mar Village Utilities re Terra Mar Village
96 FPSC 10 : 87	960283-WS	PSC-96-1241	10/7/96	Wedgefield re Econ
96 FPSC 10 : 386	950495-WS	PSC-96-1320	10/30/96	SSU
96 FPSC 11 : 432	960716-WU	PSC-96-1409	11/20/96	Crystal River Utilities re Ravenswood
96 FPSC 12 : 136	960523-WS	PSC-96-1474	12/04/96	J&J Water & Sewer
97 FPSC 1 : 112	960040-WS	PSC-97-0034	1/07/97	Sun Communities Finance re Water Oaks
97 FPSC 2 : 368	960642-WU	PSC-97-0187	2/18/97	Crystal River Utilities re Seven Rivers Utilities
97 FPSC 3 : 381	960643-WS	PSC-97-0312	3/24/97	Crystal River Utilities re Sumter Ware Co.
97 FPSC 4 : 73	960793-WU	PSC-97-0375	4/07/97	Crystal River Utilities re Hines Creek MH Waterworks
97 FPSC 5 : 405	960695-WS	PSC-97-0579	5/20/97	Clay Utility re S. Broward
97 FPSC 5 : 418	960644-WU	PSC-97-0580	5/20/97	Crystal River Utilities re Lands, Inc. of Rhinelander
97 FPSC 9 : 386	961535-WU	PSC-97-1149	9/30/97	Crystal River Utilities re Lake Osborne
--- online ---	970822-WU	PSC-97-1613	12/23/97	Lindrick Service re S.H. Utilities

RESPECTFULLY SUBMITTED, this 28th day of April, 1998.

Ben E. Girtman
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Attorney for Utilities, Inc.
and Wedgefield Utilities, Inc.

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 Corporation, 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 28th day of April, 1998.

Ben E. Girtman

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
	Filed: April 28, 1998

MOTION

by
WEDGEFIELD UTILITIES, INC.

TO FILE POST-HEARING DOCUMENTS
IN EXCESS OF THOSE
PERMITTED BY RULE 25-22.056(1)(d), F.A.C.

COMES NOW Utilities, Inc. and its wholly owned subsidiary, Wedgefield Utilities, Inc., (hereinafter collectively referred to as "Wedgefield") and in support of its Motion for Continuance of Hearing state:

1. Although Wedgefield's pre-hearing motion to file supplemental direct testimony of Mr. Seidman discussing the facts of the cases was denied [Hearing Tr. 130, line 11], it was stated several times at the hearing that the material therein should and could be used in the brief:

> I agree that . . . the orders are in the record now pursuant to the request for official notice. They can be used in the briefing. That was also mentioned in the Order [denying the motion to file supplemental testimony]. [Statement by Staff Counsel. Tr. 127, lines 8-11.]

* * *

> . . . in reading the testimony it seems to me the same arguments can be made in the brief. That's where you make these arguments. [Statement by Commissioner. Tr. 129, lines 6-9.]

2. Accordingly, a condensed version of points made in the requested supplemental testimony is attached as Attachment "A" to the Brief. Because the analysis causes the total number of pages of post-hearing documents to exceed 60, it is requested that an order be entered to authorize the filing of Attachment "A" consisting of approximately 37 pages.

3. The undersigned counsel has contacted Mr. Charles Beck by telephone, and he wishes to reserve possible objection until examining the document.

WHEREFORE, it is requested that an order be entered authorizing in the filing of Attachment "A" to Wedgefield's post-hearing documents.

Respectfully submitted this 28th day of April, 1998

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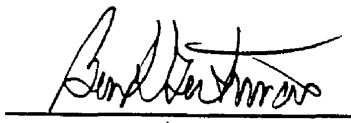
Attorney for Utilities, Inc.
and Wedgefield Utilities, Inc.

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 Corporation, 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.



Ben E. Girtman

$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
	Filed: April 28, 1998

POST-HEARING

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

of

WEDGEFIELD UTILITIES, INC.

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

Utilities, Inc., submits the following proposed findings of fact and conclusions of law.

FINDINGS OF FACT

1. Utilities, Inc. is a privately owned public utility engaged solely in the business of owning and operating water and wastewater systems and has no developer relationships. It owns and operates 63 subsidiaries in fifteen states, including twelve in Florida where it maintains experienced management and professional operators. It is adequately financed, has access to capital at reasonable costs, and is capable of reducing costs of operation due to economies of scale. [Tr. 157, Wenz Direct Testimony page 1, lines 17-18 and 24-25; Tr. 173-174, Wenz Additional Direct Testimony page 10, line 23 to page 11, line 15; Ex. 11, Application for Transfer, and its Exhibit A.

2. Through Wedgefield Utilities, Inc., its wholly owned subsidiary, Utilities, Inc. has the ability and commitment to make the necessary improvements in this utility. It has the potential to reduce costs through the allocation of administrative expenses and through access to an established purchasing system, and it is familiar with, and has the ability to comply with, state and federal regulations. [Ex. 11, Application for Transfer, Part I, Para. E. and Part II, Para. A.; Tr. 173-174, Wenz Additional Direct Testimony page 10, line 23 to page 11, line 15.]

3. Econ Utilities Corporation was a small, developer-owned utility with financial pressures due to sustained losses that made it difficult to attract capital at a reasonable cost and to operate

and maintain the systems which put it in danger of not being able to expend the necessary capital to meet its obligations. The former owners either do not have, or are not willing to commit, the funds necessary to continue to operate and finance the utility. [Tr. 172, Wenz Additional Direct Testimony page 9, lines 12-19; Tr. 340-341, Seidman Rebuttal Testimony page 25, line 7 to page 26, line 2.]

4. In its negotiations to purchase Econ Utilities, Utilities, Inc. was fully aware of, and relied on, this Commission's acquisition adjustment policy stated in Commission Order Nos. 25729 and 23376. [Tr. 168-169, Wenz Additional Direct Testimony page 5, line 20 to page 6, line 20.]

5. The Orange County Utilities Division has no authority over Wedgefield or any other utility, whether privately or publicly owned, and its "standards" are applicable only to its own operations. [Composite Ex. 8, ltr. dtd 4/13/1995, Mr. Ispass to Mr. Blake, page 1.]

6. Econ operated (and now Wedgefield operates) under the jurisdiction of the Florida Department of Environmental Protection (DEP), the Orange County Environmental Protection Department (OCEPD), and the Florida Public Service Commission. It is inspected regularly by DEP and by OCEPD. These three agencies provide standards for Wedgefield and determine what is necessary for compliance, based on Federal and Florida laws and regulations. [Tr. 328, Seidman Rebuttal Testimony page 13, lines 13-22; Ex. 11, Application.]

CONCLUSIONS OF LAW

1. It is the policy of this Commission that, absent extraordinary circumstances, the purchase of a utility at a premium or discount shall not effect the rate base calculation and the proponent of an acquisition adjustment, either positive or negative, bears the burden of proof.

2. There is no extraordinary circumstances in this purchase, and no acquisition adjustment should be included in the rate base calculation.

3. For purposes of this transfer, the rate base is equal to the net book value of the assets, excluding ratemaking adjustments such as working capital or used and useful adjustments, and is $1,462,487 for water and $1,382,904 for wastewater.

4. Econ was (and now Wedgefield is) in compliance with the requirements of the Florida Department of Environmental Protection (DEP) and by the Orange County Environmental Protection Department (OCEPD).

5. Imposing a NAA would discourage the purchase of a system such as Econ, and that thwarts Commission policy and is a detrimental consequence to customers.

6. At the time of sale, the Econ assets were all functioning and not in violation of any state regulations. They were typical of developer-owned utilities, not in the best condition and not up to the standard which Utilities, Inc. would want to maintain, but not in extremely poor condition, either.

7. All the arguments set forth by Mr. Larkin have been made

before and have been rejected by this Commission in generic proceedings and in prior, case-specific orders of the Commission.

8. The utility will not be allowed to recover a return on assets which do not exist. Clearly, the assets do exist. They didn't disappear when ownership changed.

9. A NAA is considered at the time of transfer and requires that extraordinary circumstances be found for taking the extreme step of permanently reducing the net original cost as rate base. A used and useful adjustment is used in a rate case for temporarily removing from rate base certain assets which are not currently used and useful in providing utility service to the customers. The two regulatory concepts perform different functions at different times.

10. The contingent portion of the purchase price has no effect on rate base. In addition, the service area in the Reserve (formerly The Commons) is already under construction. The contract requires contingent payments to be made as soon as each new home is hooked up, so any "uncertainty" or "speculation" about whether payments will be made is unwarranted.

11. A major purpose of Commission policy on acquisition adjustments is to create an incentive for larger utilities to acquire small, troubled utilities. If a benefit to the purchaser results from the purchase price being lower than book value, it is at the expense of the seller, not at the expense of the customer. In fact, rate base is unchanged, and, because of this, there is no harm to the customer.

12. Commission Order No. 25729 listed several beneficial changes

due to a change in ownership, which the current Commission policy is intended to encourage. It also found that the customers of utilities acquired under its policy are not harmed, and indeed benefit from a better quality of service at reasonable cost.

13. To change the policy now not only would be a denial of due process but it also would defeat the purposes of the policy as originally developed and implemented by the Commission.

14. Rate base must recognize the original cost of assets at the time they were dedicated to public service.

15. Based on a review of prior Commission orders, including the dissenting opinions, the following factors either are not relevant to the Wedgefield transfer, are not "extraordinary circumstances", or do not otherwise authorize, require or warrant a negative acquisition adjustment.

The system does not require replacing, the jurisdictional status is known, there is growth potential, and the system will benefit from certain economies under new ownership. The improvements that have to be made are in the public interest. The revenue requirement associated with the net original cost of the system would be no more than under the previous ownership. There is no requirement to prove hardship on the part of the seller. The tax treatment of the seller is irrelevant. A large differential between purchase price and rate base is not, of itself, an "extraordinary circumstance". The determination of rate base in this case is not an initial determination; rate base was determined by the Commission in 1984, and there was no lack of original cost

documentation. Even when a previous owner failed to maintain a system properly and the new owner had to make considerable expenditures to bring the system into compliance, these events are not "extraordinary circumstances". The customers do not have to "pay twice" because, regardless of ownership, the customers pay only for the legitimate cost of assets and expenses incurred and actually paid in their behalf. Customers will not pay for anything under the new ownership that they would not have been required to pay for under prior ownership. The transfer is customer-neutral, except for benefits the customers will receive due to new ownership. The sale did not result from a bankruptcy of foreclosure. The purchaser does not have uniform rates among its systems. To include both a negative acquisition adjustment and used and useful adjustments on the same plant would be double counting. Regardless of whether a purchasing utility includes a consideration of used and useful adjustments in its negotiations for acquisition or for setting the purchase price, a NAA is not warranted. In the public interest, the purchaser has already made improvements in the system and in its management. Only utility property, and no lots or other assets, were bought or sold in the transaction between seller and purchaser. Seller had not filed to abandon the utility system. The seller has not been purchasing water or any other utility service from any other utility, and it has not been earning on unused plant components. Any ratemaking adjustments would have to considered in the context of a rate case. Not including a negative acquisition adjustment does no harm to

customers. Rate base and monthly rates will not change as a result of the transfer. The sale of the utility does not involved a three-party or a nontaxable exchange, there are no family trusts or other trusts involved in the sale, and even without a negative acquisition adjustment, the seller will not recover, much less double recover, its investment. There has been no agreement or settlement of this transfer docket for any transfer rate base less than full net book value, and Wedgefield has not requested anything that would cause a change to rate base or rates as a result of the transfer.

RESPECTFULLY SUBMITTED, this 28th day of April, 1998.

Ben E. Girtman
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1020 E. Lafayette St.
Suite 207
Tallahassee, FL 32301

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

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 Corporation, 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 28th day of April, 1998.

Ben E. Girtman

D

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for increase in water rates in Orange County by Wedgefield Utilities, Inc.	DOCKET NO. 991437-WU Filed: November 3, 1999

RECORDS AND REPORTING
99 NOV -3 PM 4:54

WEDGEFIELD UTILITIES, INC.'S

MOTION FOR SUMMARY FINAL ORDER

AND

MOTION TO AMEND
WEDGEFIELD'S
MOTION TO STRIKE AND DISMISS
THE OFFICE OF PUBLIC COUNSEL'S
PETITION REQUESTING SECTION 120.57 HEARING AND
PROTEST OF PROPOSED AGENCY ACTION

A TRUE COPY
ATTEST _____
Chief, Bureau of Records

Wedgefield Utilities, Inc. ("Wedgefield" or "the Utility") hereby files its Motion for Summary Final Order and its Motion to Amend Wedgefield's Motion to Strike and Dismiss the Office of Public Counsel's Petition Requesting Section 120.57 Hearing and Protest of Proposed Agency Action, and in support thereof states:

BACKGROUND

1. On August 12, 1998, the Florida Public Service Commission issued its final Order No. PSC-98-1092-FOF-WS in Docket No. 960235-WS approving the transfer of the Utility from Econ Utilities Corporation to Wedgefield Utilities, Inc. Attachment "A" hereto is a certified copy of that Order.

2. As a part of that transfer proceeding (originally filed in 1996 and decided in 1998) the issue of negative acquisition adjustment was raised by the Office of Public

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FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE
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FPSC-RECORDS/REPORTING

Counsel (OPC). That issue was fully litigated, hearings were held thereon, customer and expert witnesses testified, 18 exhibits were submitted on behalf of the various parties, and the issues were the subject of extensive post-hearing briefs. The Commission's final Order approving the transfer denied OPC's petition for a negative acquisition adjustment.

3. The Office of Public Counsel did not seek reconsideration of that final Order No. PSC-98-1092-FOF-WS by the Commission, nor did OPC seek appellate review of that final Order of any other order of the Commission in that case. The Order is 32 pages in length, and the issue of negative acquisition adjustment was considered and discussed on pages 5 through 22, inclusive, of that Order.

4. On November 12, 1999, over a year after Order No. PSC-98-1092-FOF-WS was issued by the Commission, Wedgefield Utilities filed its petition for a rate increase for its water system at Wedgefield. The current Docket (No. 991437-WU) was opened, and on August 23, 2000, the Commission entered its Proposed Agency Action Order No. PSC-00-1528-PAA-WU (the PAA Order) in this Docket.

5. On September 13, 2000, the Office of Public Counsel (OPC) filed its Notice of Intervention and its Petition Requesting Section 120.57 Hearing and Protest of Proposed Agency Action. The only matter which OPC attempted to raise for resolution as a "disputed issue" in this second case was "Should the Utility's rate base include a negative acquisition adjustment?" The OPC Petition also stated the obvious fall-out question "What other changes, such as changes to depreciation expense, should be made to reflect a negative acquisition adjustment?" See OPC Petition, paragraph 5.

6. On October 3, 2000, Wedgefield Utilities, Inc. filed its Motion to Strike and Dismiss the Office of Public Counsel's Petition Requesting Section 12.057 Hearing and Protest of Proposed Agency Action (hereinafter referred to as the Motion to Strike and Dismiss). In support thereof, Wedgefield relied upon res judicata, collateral estoppel, stare decisis, and administrative finality.

7. After due consideration, on October 26, 2000, the Staff of the Florida Public Service Commission filed its written Recommendation on Wedgefield's Motion to Strike and Dismiss. Staff recommended that Wedgefield's Motion be granted. (Recommendation, Issue 1, Page 3.) Five days later, on October 31, 2000, Commission Staff filed a second written recommendation on Wedgefield's Motion to Strike and Dismiss. Staff took the almost unprecedented action of making changes in a Staff recommendation. Staff went even further and reversed its previous recommendation to grant Wedgefield's motion, and in the second recommendation Staff recommended denial of that Motion.

8. Wedgefield adopts, as if set forth verbatim herein, the allegations set forth in its Motion to Strike and Dismiss the Office of Public Counsel's Petition Requesting Section 120.57 Hearing and Protest of Proposed Agency Action which was filed on October 3, 2000.

MOTION FOR SUMMARY FINAL ORDER

9. For the purposes of its Motion for Summary Final Order, Wedgefield adopts the allegations set forth in the Background, paragraphs 1 - 8 above, including the allegations set forth in its Motion to Strike and Dismiss.

10. In regard to negative acquisition adjustment, there is no genuine issue as to any material fact set forth in the OPC Petition and Protest.. None has been alleged by OPC. None has been stated in its Petition and Protest filed on September 13, 2000. None has been raised in any other matter before the Commission in this proceeding. All disputed issues of material fact in relation to the negative acquisition adjustment, the only issue raised by OPC in its current Petition and Protest, were fully litigated in the prior transfer proceeding, Docket No. 960235-WS, in which final Order No. PSC-98-1092-FOF-WS was issued on August 12, 1998, denying OPC's request to impose a negative acquisition adjustment.

11. Rule 28-106.204(4) states that:

> Any party may move for Summary Final Order whenever there is no genuine issue as to material fact. . . .

The rule does not set any time limit on the filing of a motion for summary final order.

12. The factual basis for the OPC Protest and Petition in this case has been resolved previously by the Commission in its Final Order Approving Transfer to Wedgefield Utilities, Inc. See Final Order No. PSC-98-1092-FOF-WS issued on August 12, 1998. The OPC Protest and Petition makes no allegations of grounds justifying a negative acquisition adjustment, much less meeting the requirements of showing that extraordinary

circumstances exist which might otherwise justify a negative acquisition adjustment. That matter has already been litigated, and no extraordinary circumstances were found to exist. There was no factual or legal basis for imposing a negative acquisition adjustment.

13. In an effort to re-try the case in this proceeding, the Office of Public Counsel has previously and informally requested Wedgefield to stipulate to the introduction of the entire record from the prior proceeding. Such request begs the question of whether or not this case should be retried again on the same issue.

14. In its Motion to Strike and Dismiss, Wedgefield discussed at length the prior proceeding in which the issue of negative acquisition adjustment was raised by OPC, was fully litigated, and was decided by the Commission. The docket number and final order number were cited in the Motion. A similar case, Cypress Lakes Utilities, Inc. in which OPC intervened and raised the issue of negative acquisition adjustment, was also cited in the Motion by Docket number and final order number. Both cases were discussed in significant detail in their applicability to the current case. The Motion to Strike and Dismiss also referenced over 100 other cases which had been decided by the Public Service Commission on this issue of acquisition adjustment.

15. There is no genuine issue as to any material fact in this proceeding relating to negative acquisition adjustment. Therefore the entry of a summary final order on the issue of negative acquisition of adjustment is appropriate in this case. In re Bonita Country Club Utilities, Inc., Docket No. 990975-WU, Order No. PSC-00-0341-PCO-SU, 00 FPSC 2:353, issued February 18, 2000.

16. Filed herewith is a certified copy of the Commission's Order determining that no negative acquisition adjustment was appropriate for this utility (Order No. PSC-98-1092-FOF-WS issued August 12, 1998 in Docket No. 960235-WS).

WHEREFORE, Wedgefield Utilities, Inc. moves for the entry of a summary final order in Docket No. 991437-WU, which would determine that there is no material issue of fact set forth in the OPC Petition and Protest.

MOTION TO AMEND
WEDGEFIELD'S MOTION TO STRIKE AND DISMISS
THE OFFICE OF PUBLIC COUNSEL'S
PETITION REQUESTING SECTION 120.57 HEARING AND
PROTEST OF PROPOSED AGENCY ACTION

17. For the purposes of its Motion to Strike and Dismiss the Office of Public Counsel's Petition Requesting Section 120.57 Hearing and Protest of Proposed Agency Action, Wedgefield adopts the allegations set forth in the Background, paragraphs 1 - 8 above, the allegations set forth in paragraphs 9 - 16 above, and, except as modified herein, adopts the allegations and prayer for relief set forth in its Motion to Strike and Dismiss.

18. In the current docket (991437-WU) the Office of Public Counsel has previously requested that Wedgefield stipulate to the adoption of the entire record from the prior transfer proceeding (Docket No. 960235-WS) in which the Commission denied OPC's request for a negative acquisition adjustment. Wedgefield has objected on the grounds that the case has already been tried, and to introduce all that record again in this proceeding would merely beg the procedural questions at issue and obviate the necessity of considering the legal principles of res judicata, collateral estoppel, stare decisis, and administrative finality. There is no basis for retrying that case again, or for having to expend the time, effort and money necessary to re-litigate the issues and all the evidence that was considered and ruled upon in that proceeding.

19. However, upon considering Wedgefield's Motion to Strike and Dismiss, both the Staff recommendation dated October 26 and the reversed Staff recommendation dated October 31, 2000 asserted that:

> . . . In the instant case, the parties have not requested nor stipulated to the Commission taking judicial notice of the prior proceeding. Moreover, the record and decision in the prior proceeding has not been introduced into evidence in this proceeding. (Recommendation, page 7.)

Based upon that procedural matter, Staff concludes that the Commission should find the Motion deficient. However, that is not the case.

20. The Commissioners and the Staff have repeatedly stated in proceedings before the Commission that it is not necessary for the Commission to take official notice of its own orders. Even in the Wedgefield transfer hearing on March 19, 1998, Wedgefield's undersigned counsel had a difficult time getting the Commissioners to acknowledge the desirability of taking official notice of the approximately 100 prior decisions of the Commission on the subject of acquisition adjustments. Even the OPC attorney argued that it was unnecessary for the Commissioners to take official notice of its own decisions.

> Commissioner, I have no objection to taking official notice, In fact, I have no objection to taking official notice of any orders of the Commission. I do not see the purpose of it. I think it's a – I think that official notice of an order solely replaces having the Clerk of the commission coming in under oath and testifying that these are, in fact, the orders of the Commission. That's all official notice does. It serves no purpose. It doesn't make them any different that any order of the Commission. I certainly have not objection to taking notice of all theses, these orders. I don't think it serves any purpose. [Transcript of hearing, March 19, 1998, page 11,. In re Wedgefield Utilities, Inc., Order No. PSC-98-1092-FOF-WS in Docket No. 960235-WS , quoting the OPC attorney.]]

21. The Motion to Strike and Dismissed discussed the Wedgefield transfer case in detail. The Motion included as Attachments C, D, and E the Post-Hearing Statement of Issues and Positions and Brief - filed by Wedgefield on April 28, 1998; the Motion by

Wedgefield Utilities, Inc. to File Post-Hearing Documents in Excess of Those Permitted by Rule 25-22.056)1)(d), F.A.C. - filed by Wedgefield on April 28, 1998; and the Post - Hearing Proposed Findings of Fact and Conclusions of Law of Wedgefield Utilities, Inc. - filed by Wedgefield on April 28, 1998. All those documents were from the Wedgefield transfer case. If the Commission will take official notice of the order alone (or "judicial" notice as mentioned in the Staff recommendation), without accepting any portion of the prior record into these proceedings, then that concern can be eliminated. However, Wedgefield does not feel it is either judicially or administratively appropriate to require parties to retry the same issues, based on the same evidence, from prior cases.

22. Upon motion of a party or upon its own motion, the Commission can take official notice of its own orders.

WHEREFORE, Wedgefield Utilities, Inc. amends its Motion to Strike and Dismiss and requests that the Commission take official notice (judicial notice) of its own Order No. PSC-98-1092-FOF-WS issued on August 12, 1998, in Docket No. 960235-WS, but limiting that notice to the order only and not include the record of the prior proceeding. A certified copy of that order is attached.

23. As required by Rule 28-106-204(3), F.A.C., the undersigned counsel has contacted Mr. Charles Beck for OPC and Ms. Patty Christensen for PSC Staff, and both reserve objections to the filing of the motions until they have had an opportunity to review them.

Respectfully submitted,

Ben E. Girtman
FL Bar No. 186039
1020 E. Lafayette St.
Suite 207
Tallahassee, FL 32301

Attorney for
Wedgefield Utilities, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent to the following by U.S. mail (or by facsimile#) this 3rd day of November, 2000.

Patty Christensen, Esq.#
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
(850)413-6220

Charles Beck, Esq.#
Office of Public Counsel
111 W. Madison St., Rm. 812
Tallahassee, FL 32399-6588
(850) 488-9330

Ben E. Girtman

Note: Due to the length and ready availability of Order No. PSC-98-1092-FOF-WS , a copy is not being served herewith as Attachment "A". The certified copy is being filed with the Commission Clerk with original Motions. If a copy is needed, please contact Wedgefield's counsel and a copy will be provided.

STATE OF FLORIDA

CAPITAL CIRCLE OFFICE CENTER
2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FL 32399-0850

Public Service Commission

CERTIFICATE

I, BLANCA S. BAYÓ, Director of Records and Reporting, Florida Public Service Commission, do certify that I am the duly appointed custodian of the official records of said Commission and, in that capacity, do certify that the attached pages (listed and described below) are true and correct copies from Docket No. 960235-WS - Application for Transfer of Certificates Nos. 404-W and 341-S in Orange County from Econ Utilities Corporation to Wedgefield Utilities, Inc. that are within the Commission's jurisdiction, as shown in the records of the Commission.

WITNESS my hand and the seal of the Florida Public Service Commission this 3rd day of November, 2000.

Document No.	Description
08570-98	Final Order Establishing Rate Base for Purposes of the Transfer, Declining to Include a Negative Acquisition Adjustment in the Calculation of Rate Base and Closing Docket, Order No. PSC-98-1092-FOF-WS, issued on August 12, 1998 (pages 1-32).

BLANCA S. BAYÓ

By: Kay Flynn

Kay Flynn, Chief of Bureau of Records

(SEAL)

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-98-1092-FOF-WS ISSUED: August 12, 1998

The following commissioners participated in the disposition of this matter:

J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA

APPEARANCES:

Ben E. Girtman, Esquire, 1020 East Lafayette Street, Suite 207, Tallahassee, Florida 32301-4552.
On behalf of Wedgefield Utilities, Inc.

Jack Shreve, Public Counsel, and Charles J. Beck, Deputy Public Counsel, Office of Public Counsel, 111 West Madison Street, Room 812, Tallahassee, Florida 32399-1400.
On behalf of the Citizens of the State of Florida.

Jennifer Brubaker, Esquire, and Bobbie Reyes, Esquire, Florida Public Service Commission, Gerald L. Gunter Building, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850.
On behalf of the Commission Staff.

FINAL ORDER ESTABLISHING RATE BASE FOR PURPOSES OF THE TRANSFER, DECLINING TO INCLUDE A NEGATIVE ACQUISITION ADJUSTMENT IN THE CALCULATION OF RATE BASE AND CLOSING DOCKET

BY THE COMMISSION:

BACKGROUND

On February 27, 1996, Wedgefield Utilities, Inc. (Wedgefield or utility) filed an application to transfer 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 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. The Prehearing Conference was held on August 4, 1997, in Tallahassee, Florida. Prehearing Order No. PSC-97-0952-PHO-WS, was issued August 11, 1997.

On February 17, 1998, the utility filed a motion to file supplemental prefiled testimony on behalf of utility witness Seidman. Order No. PSC-98-0392-PCO-WS, issued March 16, 1998, denied Wedgefield's motion, stating that the information contained in the proposed supplemental testimony would be appropriately discussed in the utility's post-hearing brief.

On March 19, 1998, the Commission held the technical hearing in Wedgefield, Florida. The hearing was continued and concluded on March 26, 1998, in Tallahassee, Florida. At the hearing, Wedgefield objected to the admission of Exhibit 4 into the record. The exhibit consisted of several letters written by local officials on behalf of their constituents. Wedgefield's objection was overruled and the letters were admitted. Official notice was taken of certain prior Commission Orders, on behalf of both Wedgefield and staff. Exhibit 8, consisting of letters related to a study performed by Orange County, was stipulated to by the parties and admitted into the record.

Wedgefield made an oral motion to strike certain portions from the prefiled testimony of OPC witness Larkin, arguing that the testimony called for the witness to reach conclusions beyond his expertise. Upon hearing the arguments of the parties and comments from staff, the Commission denied Wedgefield's motion, stating that the utility's objection appeared to go more to the weight that the Commission would give to the testimony as opposed to its admissibility. Wedgefield also made an oral motion for reconsideration of Order No. PSC-98-0392-PCO-WS, which denied the utility's request to file supplemental prefiled testimony. After hearing the arguments of parties and staff's comments, the Commission found that the utility had not demonstrated any mistake of fact or law and denied Wedgefield's motion for reconsideration.

Customer Testimony

Customer testimony was taken at the beginning of the technical hearing on March 19. One customer testified that customers generally support transferring the utility to Wedgefield subject to these conditions: rate base should be equal to the purchase price, and a new development, referred to as either the Commons or the Reserve, should not increase rates. A second customer testified that the utility's rates exceed comparative rates for several local utilities. The second customer's rate study confirmed this rate disparity. A third customer also testified that her bills were exceedingly large. A fourth testified that any increase in rates should be shifted to the developer of the Reserve. A fifth customer presented several letters from public officials who opposed increased rates on behalf of their constituents and spoke in favor of the purchase price relative to retention of the seller's rate base value.

A fifth customer testified that water service to her home was interrupted from December 20 through December 22, 1997. She testified that she was told by utility personnel that the utility's pipes were brittle and shattering and should be fully replaced. In response, Utility Witness Seidman testified that the reported break occurred at a location where 10-inch and 6-inch mains intersect and several valves are found close to or under the pavement. He testified that shifting and settling may occur over time because of traffic patterns. He reported that the pipes did not break, but instead, separated from the valves. A repair crew began work when the problem was discovered and, over a 48-hour period, completed the reconnection work. According to the utility, about 17 customers experienced a water outage and customers whose water pressure fell below 20 pounds per square inch were issued a boil water notice.

A sixth customer testified that customers asked Orange County to examine this system for possible acquisition. According to this customer, the County found that acquiring this system was not economically feasible for various reasons. The customer reported that the Department of Environmental Protection (DEP) informed the customers that the utility was meeting minimum standards with "very, very hard water." He also testified that although he recognized that this proceeding was not a rate case, his principle concern was:

> [I]f, in fact, the Commission allows the Company to depreciate at a rate of 2.8 million and then use that as a basis of cost, there's no question in our minds that the Utility Company will then come forward and say that they are not making any money, and, therefore, they will initiate a rate case. That is our major, major concern.

The customer asked the Commission to deny Wedgefield's requested rate base amount since the "the low purchase price . . . truly established the worth of the facility." He explained that he did not oppose the proposed transfer to Wedgefield but opposed the proposition that the acquiring company should stand in the seller's shoes with respect to rate base.

Pursuant to Rule 25-22.056(3)(a), Florida Administrative Code, each party is required to file a post-hearing statement including a summary of each position. On April 28, 1998, Wedgefield and OPC each filed their Statement of Issues and Positions and Post-Hearing Briefs. On April 28, 1998, counsel for Wedgefield also filed proposed findings of fact and conclusions of law. We include our ruling on each of Wedgefield's proposed findings of fact and conclusions of law in Attachment A to this Order, incorporated hereto by reference.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND POLICY

Having heard the evidence presented at the hearing in this proceeding and having reviewed the recommendation of the Commission staff, as well as the briefs of the parties, we now enter our findings and conclusions.

STIPULATIONS

In Prehearing Order No. PSC-97-0952-PHO-WS, all parties and staff agreed the following stipulations were reasonable. However, these proposed stipulations were not ruled upon at hearing. We have reviewed the stipulations, which are set forth below, and find

them to be reasonable. Accordingly, the stipulations are hereby approved.

1. Wedgefield Utilities, Inc., paid cash of $545,000 for the utility's assets. In addition, it agreed to make contingent payments equal to every other service availability charge in the area known as The Commons if and when it is developed.

2. The applicant utility has not requested rate base inclusion of any acquisition adjustment.

Additionally, all parties and staff agreed to the exhibit entitled "Acquisition Feasibility Analysis of Econ Utilities Corporation," dated June 1995 and prepared under the control and supervision of Alan B. Ispass, Director, Orange County Utilities, being entered into the record without objection. Because the exhibit was offered as a stipulated exhibit and moved into the record without objection at the hearing, it is unnecessary for us to rule on this stipulation.

OBJECTION TO LATE-FILED EXHIBIT NO. 18

During the hearing, staff requested that the utility provide as a late-filed exhibit "a per customer operating and maintenance expense analysis for Econ Utilities Corporation for the years 1992 through 1997." This exhibit was identified as Late-Filed Exhibit No. 18. By motion filed on April 14, 1998, OPC objected to this exhibit. In its objection, OPC argued that had the exhibit been offered at the hearing, OPC would have conducted extensive cross-examination concerning the contents of the exhibit.

Upon review of the exhibit, staff determined that the exhibit was unnecessary and, therefore, decided to withdraw its request for the exhibit. Based on this withdrawal, it is unnecessary for us to address the merits of either OPC's or Wedgefield's arguments contained in their respective pleadings. Accordingly, we find that OPC's objection and the parties' subsequent pleadings are moot.

ACQUISITION ADJUSTMENT

As stated previously, OPC protested Order No. PSC-96-1241-FOF-WS, in which the Commission, by proposed agency action, found it appropriate not to include a negative acquisition adjustment in the calculation of rate base. Our findings with respect to the acquisition adjustment issue, and a discussion of the pertinent elements, are set forth below.

Burden of Proof

In its brief, the utility argues that Rule 25-30.037(2), Florida Administrative Code, sets forth what a utility must file with the Commission when it seeks authority for a transfer of its facilities. The rule requires, in pertinent part, that an application for transfer must include a statement setting out the reasons for the inclusion of an acquisition adjustment, if one is requested. Wedgefield argues that, therefore, if and only if a utility is seeking an acquisition adjustment, it (the utility) must justify the adjustment; the rule does not require the utility applicant to allege or prove why an acquisition adjustment requested by someone else should not be granted by the Commission. The utility asserts that there is no rule, statute or order which places the burden of proof on anyone other than the proponent of the acquisition adjustment. Wedgefield argues that OPC, as the only entity requesting an acquisition adjustment in this case, bears the exclusive burden to show why a negative acquisition adjustment should be granted.

Although OPC raised the issue of burden of proof in this proceeding, it did not address the issue substantively in its brief or in the overview to its brief. OPC merely recited its position on the issue, that the utility has the burden of justifying why its actual purchase price should not be used to establish its rate base.

After an extensive review of prior Commission Orders, it appears that the issue of burden of proof regarding the rate base inclusion of an acquisition adjustment, either positive or negative, is one of first impression before the Commission. Neither the utility nor OPC cited to any precedent directly on point.

Because the inclusion of an acquisition adjustment, either positive or negative, will ultimately have an impact on rates, we find it appropriate to analogize this issue to the issue of who bears the burden of proof in a rate proceeding. In Florida Power Corporation v. Cresse, 413 So.2d 1187, 1191 (Fla. 1982), the Florida Supreme Court stated that the burden of proof in a Commission proceeding is always on a utility seeking a rate change. See also Order No. PSC-96-0499-FOF-WS, issued April 9, 1996, in Docket No. 951258-WS. In previous cases, we have held that in any rate case, the utility has the burden of proof. Order No. PSC-92-0266-FOF-SU, issued April 28, 1992, in Docket No. 910477-SU. See also Order No. PSC-95-1376-FOF-WS, issued November 6, 1995, in Docket No. 940847-WS; Order No. PSC-93-1288-FOF-SU, issued September 7, 1993, in Docket No. 920808-SU; Order No. PSC-93-1070-

WS, issued July 23, 1993, in Docket No. 920655-WS; Order No. PSC-93-0423-FOF-WS, issued March 22, 1993, in Docket No. 920199-WS; Order No. PSC-92-0594-FOF-SU, issued July 1, 1992, in Docket No. 910756-SU.

In Order No. PSC-93-1023-FOF-WS, issued July 12, 1993, in Docket No. 911188-WS, we found that the utility at all times bears the burden of proof in a rate proceeding. Although the underlying case involved the granting of a certificate of public convenience and necessity, the Florida Supreme Court in Stewart Bonded Warehouse v. Bevis noted that while the burden of going forward with the evidence as to an issue may shift in any particular case, the burden of proof remains with the applicant, and it is the applicant who must carry the burden of proof. 294 So. 2d 315, 317-18 (Fla. 1974).

We note the issuance of a recent opinion from the Florida First District Court of Appeal, Southern States Utilities n/k/a Florida Water Services Corporation v. Florida Public Service Commission, et al., Case No. 96-4227, Commission Docket No. 950495-WS, issued July 10, 1998. In the facts underlying the case, Florida Water Services Corporation (FWSC) acquired the water and wastewater utility serving Lehigh Acres for less than what it cost the original owner to build the used and useful infrastructure. See the court's opinion at page 17. In the order on appeal, we had declined a request from OPC to include a negative acquisition adjustment in the rate base to reflect the price FWSC paid. Id. In affirming this portion of the Commission's Order, the court concluded that OPC had made no showing of exceptional or extraordinary circumstances, and that we therefore lawfully exercised our discretion in declining to make the requested adjustment. Id. The First District Court of Appeal opinion is silent as to the issue of burden of proof with respect to the acquisition adjustment; however, we do not believe that the opinion is consistent with our position on this issue. Similar to the opinion referenced above, we believe that OPC was unsuccessful in demonstrating the existence of extraordinary circumstances in the instant case. Because OPC did not carry its burden of persuasion and there was no subsequent shift in the burden of proof, it was not required in either case that the utility rebut OPC's allegations and carry the ultimate burden of proof.

As stated previously, Wedgefield contends that Rule 25-30.037(2), Florida Administrative Code, is controlling on this issue and does not require the utility applicant to allege or prove why an acquisition adjustment requested by someone else should not be granted by the Commission. However, Rule 25-30.037(2), Florida Administrative Code, sets forth the items which must be filed in a

transfer application and does not address, either explicitly or implicitly, any legal standards on burden of proof. Although Wedgefield contends that there is a "long history of the burden of proof always being on the proponent of an acquisition adjustment," it fails to cite to any case law or previous Commission Orders which are on point as to the issue.

We find that in the instant case, as in rate proceedings, the ultimate burden of proof rests upon the utility. As stated previously, the utility always has the ultimate burden of proof with regard to its rates. Because the imposition of an acquisition adjustment will eventually affect the utility's rates, we find that the utility must carry the ultimate burden of proof as to why an acquisition adjustment should or should not be included in the rate base determination. As discussed in greater detail below, we find that a showing of extraordinary circumstances must be made to warrant a rate base inclusion of an acquisition adjustment. Once the utility makes an initial showing that there are no extraordinary circumstances, the burden of persuasion shifts to the opposing party to demonstrate that extraordinary circumstances are present. If the opposing party meets the burden of persuasion, the ultimate burden of rebutting the opposing party's allegations rests upon the utility.

Condition Of Assets

In this case, the condition of the acquired assets is of special concern because it was presented as a rationale for rate base inclusion of an acquisition adjustment. OPC and some customers contend that the assets were so poorly maintained that the purchase price, not the seller's net book value, is the proper rate base amount.

In its brief, Wedgefield argues that erroneous allegations were made with respect to the condition of Econ's facilities. Wedgefield contends that statements from the Orange County Public Utilities Division (OCPUD) report were taken out of context and misapplied to a "stand-alone, privately owned system which operates under different regulatory requirements and a substantially different operating situation." Wedgefield alleges that Mr. Larkin, who is not a professional engineer and never visited the utility, is unable to evaluate this system. Wedgefield further contends that Mr. Larkin's characterization of the condition of the utility is "second-hand, hearsay, and not convincing," and that such expressions of opinion are neither authoritative nor reliable.

In its brief, OPC argues that the utility's assets were in poor condition because Econ did not have a preventative maintenance

program. OPC contends that this observation is meaningful since it is repeated throughout the OCPUD report. According to OPC, the utility's repair expenses will increase as its facilities age, particularly those associated with maintaining asbestos cement lines. Thus, OPC contends that historical costs are not indicative of future costs.

Utility Witness Wenz testified that this utility was in compliance with regulatory requirements and not in any immediate danger of falling out of compliance. Mr. Wenz testified that, based on his personal observations and discussions with other local company personnel:

> this appeared to be just a typical developer-owned system, whose attention was diverted to developing, and he didn't maintain this like a professional utility company would. There was some maintenance things that had to be taken care of . . . Just your typical troubled developer-owned utility company.

During cross-examination, Mr. Wenz testified that Econ's facilities were not up to his company's standards in some respects. He explained that painting was needed as an aesthetic measure and to prevent corrosion, some lift stations needed to be reworked, and some pumps needed to be replaced. He agreed that the condition of the assets played some role in Wedgefield's purchase negotiations. He acknowledged that infiltration, the entry of groundwater into a wastewater system, was probably a problem, but he was uncertain whether the problem was excessive or cost efficient to replace. However, he explained that looking for infiltration was a routine part of maintaining a sewer system.

During the initial two years that Wedgefield has operated this system, approximately $125,000 has been spent for plant facilities. This includes $29,000 to refit a master-lift station, $8,000-$9,000 to repaint utility tanks and equipment, $25,000 to replace blowers at the wastewater plant, $8,000 to replace a driveway at the wastewater plant, and $15,000 for engineering work for expansion of the wastewater plant. Also, about $38,000 was spent to replace lines improperly installed by the developer, which was offset by a $30,000 developer payment. By comparison, the gross plant value of the acquired plant facilities was $6,712,055 at December 31, 1995. Thus, we believe that Wedgefield's recent additions to plant are neither abnormal nor indicative of major problems.

OPC Witness Larkin testified that Econ was a functioning utility that was not in "dire need" of being taken over, although it was not properly maintained. Mr. Larkin never visited the

utility to personally evaluate its plant facilities. Instead, he used documents produced by others to support his position. One such document, titled "Acquisition Feasibility Analysis of Econ Utilities Corporation," was prepared by the OCPUD in January of 1995. As noted previously, the customers asked Orange County to evaluate this system for possible acquisition. Mr. Larkin testified that a "prevalent comment" in that report was that maintenance and repairs were only performed on an emergency basis since Econ did not have a preventative maintenance program.

In its report, the OCPUD stated that rehabilitation and improvement costs of $4,642,367 were anticipated for the water and wastewater systems. Estimated improvements to the water treatment facility totaled $489,555, while rehabilitation of the distribution system totaled $577,612. Improvements to the water plant included installing a new well and pumping equipment, as well as softening and scrubbing equipment. The softener was replaced sometime in 1996. The major rehabilitation cost for the distribution system involved replacing asbestos-cement pipes that were installed between 1962 and 1970. Projected improvements to the wastewater collection plant totaled $839,960, while rehabilitation of the collection system totaled $2,734,755. Improvements for the wastewater treatment plant mostly involved projected expansion costs. But for the collection system, OCPUD concluded that all of the asbestos-cement pipes would need to be replaced, that lines should be moved from the rear to the front of houses, and that substantial repaving costs would be incurred.

Interconnection of this utility with OCPUD's utility system was deemed impractical for various reasons. A significant concern was the cost of installing water and wastewater transmission lines to interconnect Econ's facilities with OCPUD, which was estimated to be $6,096,035 for the water system and $5,084,288 for the wastewater system. OCPUD's water and wastewater facilities are about 10 miles from Wedgefield.

Further, Mr. Larkin noted that Econ's own engineer commented that asbestos-cement pipe would eventually need to be replaced. We note, however, that the quoted portion of that draft report does not identify when replacement would be needed. Mr. Larkin also testified that Econ failed to adequately maintain its facilities: "(t)he obvious reason for the low purchase price in relationship to the net book value is that many of the assets will have to be replaced or repaired."

Utility Witness Seidman testified that Mr. Larkin's characterization of this utility was "second-hand opinion." Mr. Seidman testified that he inspected the utility's facilities prior

to writing his testimony and just prior to the hearing in Orlando. He testified that Mr. Larkin's prefiled testimony led him to believe the system was in "shambles." Instead, he testified that the system was in relatively average condition for a small system, that everything was "functioning" and there were no violations, but there was maintenance which should be done. He testified that while the OCPUD report indicated severe corrosion was present at Econ's water and wastewater plants, the visible corrosion has been corrected and other corrosion problems can and will be corrected through normal maintenance.

Mr. Seidman testified that this system operates under the environmental jurisdiction of DEP and the Orange County Environmental Protection Department, which regularly inspect the utility and establish compliance standards. He further testified that the system is not subject to OCPUD jurisdiction or standards, and that OCPUD has imposed standards on its own systems that may not be required or economically feasible for an independent utility in order for it to provide safe, efficient and sufficient service.

Mr. Seidman testified that the OCPUD report concluded that Econ's water supply, treatment, and distribution systems were basically in good condition, but that there were problems with the wastewater system. He said while the report did not find that the plant was malfunctioning, it indicated that there were significant inflow and infiltration problems. However, he explained:

> That in itself is not some type of -- something that puts a system in poor condition. We know that the pipes in this system are old. There's indication that a portion of them are asbestos cement pipe, which represents about 20% of the pipe that's in the ground now. That was the standard at the time they were put in. There's not much you can do with them except take them out. That is not feasible for a system this size.

Mr. Seidman testified that OCPUD's report suggests that $3.3 million of its estimated $4.6 million capital improvement cost is needed to relocate mains from rear lot to front lot lines, to replace asbestos lines, or to replace "old" cast iron pipes. He testified that: "(t)here is no requirement on a privately owned utility to engage in such a massive replacement program, nor is Orange County or the DEP requiring the utility to do so." Instead, he said that OCPUD evaluated this system under the assumption that it would be integrated into the county's water and wastewater system. He explained:

> The analysis then details some $4.6 million in "costs" allegedly needed to bring the system up to County "standards." There is an inference that this amount of money must be spent because the utility system is "substandard." That is an incorrect inference and it is misleading.

Mr. Seidman testified that statements from the OCPUD report that maintenance was only performed on an "emergency basis" were conjectures not otherwise explained or substantiated in that report. He testified that maintenance may be performed on an "as-needed" basis without every instance being an emergency. As Econ incurred cumulative net operating losses of $2 million and net income losses of $4 million from 1988 to 1995, Mr. Seidman said he would not be surprised that a preventative maintenance program was not in place. In addition, Mr. Wenz testified that the prior owner was not interested in operating a utility or committing funds to it. However, Mr. Seidman testified that Wedgefield can actively pursue a capital improvement program and finance capital additions, which is the intended benefit of the Commission's acquisition adjustment policy.

Based upon the evidence in the record, we find that the acquired assets were in fair condition. As stated previously, Mr. Wenz testified that the facilities are in compliance with regulatory requirements and are not operating in violation of any DEP standards. Any significant problems which may exist appear to relate to the use of asbestos-cement pipes for distribution and collection lines, which was not an uncommon practice when those lines were installed. While replacement of these lines will eventually be necessary, immediate replacement is not economically feasible. We believe the record shows that the acquired assets were relatively typical for a developer-owned system. For this reason, we find that the utility's facilities were in fair condition, were typical of other utilities, and were not extraordinary in nature.

Econ As A "Troubled" Utility

Generally, absent extraordinary circumstances, it has been Commission policy that a subsequent purchase of a utility system at a premium or a discount shall not affect the rate base balance. As stated in Order No. 23376, issued August 21, 1990, the purpose of this policy is to create an incentive for larger utilities to acquire small, "troubled" systems.

In its brief, Wedgefield argues that Econ was a financially troubled utility, having sustained cumulative net losses in excess

of $4 million over the most recent eight-year period and that it lacked either the means or commitment to invest in future capital needs or future maintenance. Wedgefield argues that, unlike Econ, it has the financial ability and capacity to commit funds to operation of this utility. Wedgefield further contends that if OPC's witness admitted that this system was troubled, that would support the applicability of the Commission's policy of excluding the acquisition adjustment.

In its brief, OPC argued in its brief that Econ's assets were poorly maintained. OPC further argues that while Econ was able to meet environmental standards, it did not have a formal preventative maintenance program, only doing what was necessary to facilitate housing development. In its feasibility study, OCPUD reported that repairs were performed on an emergency basis and that there was no regular preventative maintenance program. Nonetheless, OPC argues that Econ was not a "troubled" utility because it was able to meet regulatory standards by providing maintenance on an emergency basis.

With regard to OPC witness Larkin's apparent inability to conclude that Econ was a "troubled utility," Mr. Seidman testified that:

> [Mr. Larkin] used a substantial part of his testimony to imply that this utility was like a car about to lose its wheels, that the expense to just keep it running would be enormous, and that the previous owner did practically nothing to maintain it. Then, when it comes to determining whether the utility is troubled, he turns to the PSC staff Engineers' report which says, well it's not so bad, it needs some improvements, but there is no problem with the water, and the wastewater plant is fine.

Mr. Seidman stated that Mr. Larkin balked at concluding that the utility was "troubled" because he "knows the purpose of the Commission's acquisition policy is to give large utilities an incentive to purchase small, 'troubled' utilities."

Mr. Wenz testified that the previous owner confided that: "although he wanted to continue to develop property, he was no longer interested in operating a utility or committing funds to it." In contrast, Mr. Wenz testified that Wedgefield's parent company only operates utility systems. With this affiliation, Wedgefield will be able to attract capital at a reasonable cost and benefit from economies of scale through sharing common vendor and management resources. He testified that Utilities, Inc. is probably the largest active company acquiring troubled water and

wastewater systems in Florida and that it relied upon this Commission's acquisition adjustment policy to bargain for and purchase these systems.

We believe these conditions are characteristic of a financially "troubled" utility. The record indicates that Econ was not in a position to increase its maintenance costs, to actively pursue a capital improvement program, or to finance capital additions. Conversely, Wedgefield appears able to assume these obligations. Based on the foregoing, we believe the record indicates that although Econ was a functioning utility, it was economically "troubled." Accordingly, we find that Econ was a "troubled" system.

Requirement to Show Extraordinary Circumstances

On November 17, 1989, OPC asked the Commission to initiate rulemaking or, alternatively, to investigate its policy regarding acquisition adjustments. Since at least 1983, we have consistently held that the rate base calculation should not include an acquisition adjustment absent evidence of extraordinary circumstances. We reviewed this issue in Docket No. 891309-WS. By Order No. 22361, issued January 2, 1990, we rejected OPC's petition to initiate rulemaking but granted its request to investigate this topic. Thereafter, we invited interested parties to submit written comments and conducted workshops to discuss this subject. By Order No. 23376, issued August 21, 1990, as a proposed agency action, we concluded that it would not be appropriate to amend our policy regarding acquisition adjustments. In that order, we stated that not only might OPC's proposed change not benefit the customers of troubled utilities, it might actually be detrimental, by removing any incentive for larger utility companies to acquire distressed systems. On September 11, 1990, OPC filed a protest to Order No. 23376.

Thereafter, pursuant to Section 120.57(2), Florida Statutes, we invited all interested parties to appear and be heard during an oral presentation on July 29, 1991. During this hearing, OPC argued that by failing to impose a negative acquisition adjustment on the buyer, the Commission was creating a "mythical" investment that exceeded the buyer's actual commitment of capital. OPC further argued that the Commission did not have the statutory authority to give the buyer the rate base of the seller. Conversely, utility companies argued that the Commission has broad authority to interpret its statutory authority in a manner which best serves the long-term interests of the ratepayers.

Reviewing our acquisition adjustment policy in Docket No. 891309-WS, we heard contrasting positions regarding use of the purchase price or the seller's rate base for subsequent rate case proceedings. In Order No. 25729, issued on February 17, 1992, we concluded the investigation and confirmed our acquisition adjustment policy. In that Order, we stated:

> We still believe that our current policy provides a much needed incentive for acquisitions. The buyer earns a return on not just the purchase price but the entire rate base of the acquired utility. The buyer also receives the benefit of depreciation on the full rate base. Without these benefits, large utilities would have no incentive to look for and acquire small, troubled systems. The customers of the acquired utility are not harmed by this policy because, generally, upon acquisition, rate base has not changed, so rates have not changed. Indeed, we think the customers receive benefits which amount to a better quality of service at a reasonable rate. With new ownership, there are beneficial changes: the elimination of financial pressure on the utility due to its inability to obtain capital, the ability to attract capital, a reduction in the high cost of debt due to lower risk, the elimination of substandard operating conditions, the ability to make necessary improvements, the ability to comply with the Department of Environmental Regulation and the Environmental Protection Agency requirements, reduced costs due to economies of scale and the ability to buy in bulk, the introduction of more professional and experienced management, and the elimination of general disinterest in utility operations in the case of developer owned systems.

In its brief, the utility argues that the Commission's policy regarding acquisition adjustments, which has been in effect at least since 1983, is that absent extraordinary circumstances, the purchase of a utility system at a premium or discount, shall not affect rate base. Wedgefield further contends that all of the arguments set forth by Witness Larkin have been heard and rejected by the Commission in Docket No. 891309-WS.

In its brief, OPC argues that because the Commission does not have a rule regarding acquisition adjustments, it cannot have in place a policy which requires a showing of extraordinary circumstances in order to warrant the recognition of an acquisition adjustment. If the Commission had such a policy, Section

120.54(1)(a), Florida Statutes, would require the Commission to have a rule reflecting that policy.

Section 120.54(1)(a), Florida Statutes, provides that rulemaking is not a matter of agency discretion, and that each agency statement defined as a rule by Section 120.52, Florida Statutes, shall be adopted by the rulemaking procedure as soon as feasible and practicable. Rulemaking shall be presumed feasible unless the agency proves that (1) the agency has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking, or (2) related matters are not sufficiently resolved to enable the agency to address a statement by rulemaking. Section 120.54(1)(a)1.a.-b., Florida Statutes.

In its brief, OPC contends that, unless the Commission is violating the Administrative Procedure Act, either the Commission has not acquired the knowledge and experience reasonably necessary to address a statement about acquisition adjustments by rulemaking, or the Commission has not sufficiently resolved related matters to enable the Commission to address a statement by rulemaking:

OPC contends in its brief that, although there is no requirement for a showing of extraordinary circumstances, such circumstances have been shown by the combination of a lack of maintenance of Econ's facilities by the prior owner and the magnitude of difference between the net book value and the purchase price. In summary, OPC argues in the "overview" portion of its brief that

> the facts and circumstances in this case meet the "extraordinary circumstances" test described in Commission orders dealing with the purchase of other water and wastewater utilities. This unadopted rule policy, however, is not binding on this proceeding. All of the facts and circumstances in this case, along with the inevitable consequences of the Commission's actions, must take precedence over unadopted rule policy if the Commission decides that the "extraordinary circumstances" test has not been met in this case.

Although the Commission has no rule regarding the rate base inclusion of an acquisition adjustment, previous Commission orders have consistently stated that, absent evidence of extraordinary circumstances, the rate base calculation should not include an acquisition adjustment. See Order No. 20707, issued February 6, 1989, in Docket No. 880907-WU; Order No. 23970, issued January 1, 1991, in Docket No. 900408-WS; Order No. 25584, issued January 8,

1992, in Docket No. 910672-WS; Order No. PSC-95-0268-FOF-WS, issued February 28, 1995, in Docket No. 940091-WS; Order No. PSC-96-1320-FOF-WS, issued October 30, 1996, in Docket No. 950495-WS.

As discussed previously, a recent opinion from the Florida First District Court of Appeal, Southern States Utilities n/k/a Florida Water Services Corporation v. Florida Public Service Commission, et al., Case No. 96-4227, PSC Docket No. 950495-WS, issued July 10, 1998, is instructive. In the Order on appeal, the Commission had declined a request from the Office of Public Counsel to make a downward adjustment in rate base, ruling that:

> This Commission has acknowledged that absent extraordinary circumstances, the purchase of a utility system at a premium or discount should not affect rate base.

See the court's opinion at page 17, citing Order No. PSC-96-1320-FOF-WS, issued October 30, 1996, in Docket No. 950495-WS. The First District Court of Appeal concluded that OPC had made no showing of exceptional or extraordinary circumstances, and that the Commission therefore lawfully exercised its discretion in declining to make the requested adjustment. Id.

We agree with Wedgefield's contention that the current Commission practice regarding acquisition adjustments is that, absent extraordinary circumstances, the purchase of a utility system at a premium or discount, shall not affect rate base. Although what constitutes "extraordinary circumstances" must be determined on a case-by-case basis, extraordinary circumstances must be shown to warrant rate base inclusion of an acquisition adjustment. This is consistent with the investigation conducted as to our acquisition adjustment policy in Docket No. 891309-WS, and subsequent Commission Orders in which acquisition adjustments are at issue.

At the August 4, 1997 Prehearing Conference, an issue was raised by OPC regarding the effect of prior orders to the instant proceeding. 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, noting that the issue was essentially phrased as a rule challenge that would be more appropriately brought before the Division of Administrative Hearings in a proceeding pursuant to a Section 120.54, Florida Statutes.

The matters raised in OPC's brief regarding whether the Commission's policy on acquisition adjustments constitutes an

umpromulgated rule are substantially similar to those raised with regard to the proposed issue which was stricken during the Prehearing Conference. Although the matter was not at issue in this case, we note that the acquisition adjustment issue is part of an on-going Commission staff project on viability and capacity development in the water and wastewater industry. We are not prepared to go to rulemaking until the overall project reaches some conclusion. We further note that the issue has been considered in past rulemaking cases, in which we were unable to reach a consensus on the issue of extraordinary circumstances.

Existence Of Extraordinary Circumstances

Wedgefield contends that rate base inclusion of an acquisition adjustment is not appropriate since there are no extraordinary circumstances in this case. It argues that OPC misunderstands Order No. PSC-96-1241-FOF-WS, if OPC believes this issue only depends upon used and useful adjustments. Instead, Wedgefield argues that a used and useful adjustment "temporarily" removes the disputed balance in a rate proceeding, whereas rate-base inclusion of the acquisition adjustment "permanently" reduces the original cost balance.

In its brief, OPC argues that the disparity between the purchase price and the seller's net book value, together with the absence of preventative maintenance, are just reasons for rate base inclusion of the negative acquisition adjustment. OPC Witness Larkin testified that extraordinary circumstances are present in this case. First, he testified that Wedgefield's cash payment for Econ's assets was $545,000, whereas Econ's rate base at December 31, 1995, was $2,845,391. Additional payments to Econ are expected if development of the Reserve or Commons proceeds. Mr. Larkin testified that Econ's assets were only worth $545,000 because of "the condition of the assets and the amount of improvements necessary to bring the assets to an acceptable condition." Mr. Larkin testified that the extraordinary circumstances for this case were:

> Wedgefield was able to purchase this utility for approximately 20 cents on the dollar. And if an acquisition adjustment is not recognized, that these ratepayers will be asked to pay a rate of return on whatever portion of that 2.8 million is eventually used and useful. And our feeling is it's probably pretty high now. Plus, whatever repairs and maintenance expenses are necessary to bring this up -- this utility up to a standard that would be acceptable for the consumption of the customers.

However, Mr. Larkin acknowledged under cross-examination that, absent this sale, Econ would have been allowed to earn a return on its net original cost, plus depreciation, subject to used and useful adjustments. Also, Mr. Larkin stated that he would not be troubled by the sale if Wedgefield had paid $2.8 million to acquire Econ's assets if that was an arm's length transaction.

Mr. Larkin prepared two schedules that illustrate relative income requirements under two investment alternatives: the purchase price before future payments, or $545,000, and the seller's net investment at December 31, 1995, or $2,845,391. He first calculated that allowing a 12.95% pre-tax return on the seller's investment would yield a 67.61% return on the purchase price. Second, he calculated that allowing a 6% return on a $2,800,000 investment would yield a 30.83% return on $545,000.

We believe that these calculations only show that the acquiring company may realize an enhanced return on its investment that exactly corresponds to the price differential: the larger the price difference, the larger the expected return. However, when used-and-useful measures are considered, the income differential is accordingly reduced. Further, Mr. Larkin's equations do not show that Wedgefield's revenues would exceed Econ's comparative revenues. If operating expenses are reduced, the assumed expansion of earnings may be offset by a reduction in expenses. If cost of capital charges are reduced, other savings may result.

Utility Witness Seidman testified that he believed the price difference was the only condition that Mr. Larkin characterized as extraordinary. He argued that using this argument to justify inclusion of the acquisition adjustment was an exercise in circular reasoning. Instead, according to Mr. Seidman, the price difference is the incentive that the acquiring company obtains for buying the utility. On an overall basis, Mr. Seidman said the Commission should examine its policy from two perspectives: first, that Mr. Larkin's arguments have all been made before and rejected in a generic proceeding, and second, that the acquiring company relied upon the Commission's policy to bargain for and purchase this system.

In Docket No. 891309-WS, we reviewed our policy concerning acquisition adjustments. In Order No. 25729, issued February 17, 1992, we acknowledged that the buyer not only earns a return on the acquired utility's rate base but also depreciation on that balance. We concluded that without these benefits, "large utilities would have no incentive to look for and acquire small, troubled systems."

We concluded that, absent extraordinary circumstances, the seller's net book value should be retained.

Upon consideration of the parties' arguments, the evidence in the record, and our review of prior Commission orders on the matter, we believe that there are no extraordinary circumstances that warrant rate base inclusion of an acquisition adjustment in this case. As discussed previously in this Order, the acquired assets were in fair condition, neither extremely good nor extremely poor. Some water and wastewater lines were installed using asbestos-cement pipes, but there are no immediate plans to replace those facilities. Instead, the evidence shows that the estimated cost just to replace those lines would exceed the net book value of all of the utility's existing facilities.

We do not believe that the acquisition adjustment issue should depend upon the magnitude of the price differential. In other cases, we have encountered larger price and percentage differences while approving retention of the seller's net book value. Based upon certain underlying assumptions, including a 100% used-and-useful finding, Mr. Larkin calculated that Wedgefield would realize a 67.71% pretax return on its initial $545,000 investment. However, used-and-useful adjustments, if any, will reduce Wedgefield's income requirement. Further, any savings due to reduced expenses and cost of capital features are ignored in Mr. Larkin's model.

Interconnection with OCPUD's utility system was deemed impractical for various reasons, including significant costs to replace Econ's asbestos-cement lines and even larger expenditures to install transmission lines between Econ and Orlando's service areas. In other respects, Mr. Seidman testified that the OCPUD report indicated that severe corrosion was present at Econ's water and wastewater plants, but he explained that visible corrosion has already been corrected and other corrosion problems would be corrected through normal maintenance.

Accordingly, we find that there are no extraordinary circumstances in this proceeding which warrant a rate base inclusion of an acquisition adjustment.

Negative Acquistion Adjustment

In its brief, Wedgefield argues that because it has not requested rate base inclusion of a negative acquisition adjustment, the burden of proving that such an adjustment should be made rests with the party requesting such treatment, which in this case is OPC. In its brief, OPC argues that a $2,300,394 negative

acquisition adjustment, or Econ's net book balance of $2,845,394 less the $545,000 cash purchase price, should be included in rate base.

During the hearing, Mr. Wenz was asked whether Wedgefield should assume some of the burdens as well as some of the benefits of "stepping in the shoes" of the former company. Mr. Wenz indicated that if Wedgefield incurred costs to correct infiltration problems, Wedgefield would expect to recover those costs even if those problems were due to the previous owner's neglect of maintenance. However, Mr. Wenz responded that Wedgefield would not expect full recovery of similar costs if it had always owned the system and failed to maintain its lines. Asked to explain the seeming incongruity of those positions, Mr. Wenz testified that Econ had $7 million in accumulated operating losses on its books and, therefore, insufficient funds to better maintain its system. Further, as the acquirer of a troubled utility system, Wedgefield would expect to recover its costs and not be held responsible for the previous owner's omissions. Asked whether the previous owner's failure to properly maintain the system would qualify as an extraordinary circumstance, Mr. Wenz testified that it "hasn't been historically."

Mr. Larkin suggested that the Commission should use the actual purchase price and avoid subsequent sorting out of what was paid to correct this or that problem. If the Commission uses the purchase price, "we've got a number we can deal with. We won't have to deal with in the future about what may or may not be disallowed. Let them recover everything in the future that they pay to bring it up to snuff." We believe that Mr. Larkin's proposal goes to the heart of the many concerns that have been expressed over time about the Commission's policy regarding acquisition adjustments. However, it effectively removes the incentive factor for Wedgefield's acquisition of Econ's facilities.

Mr. Seidman also addressed the issue concerning the acquiring company's responsibility for problems caused by the seller. He testified that he believed Mr. Wenz was probably too careful in his remarks, and that some intermediate position was needed. He testified that when the Commission makes a negative acquisition adjustment, the buyer is held responsible since everything is written off, whether the impact is large or small: "(t)here's no incentive to me under that type of arrangement for anybody to make a purchase." If the negative acquisition adjustment is not made, "the purchaser gets the incentive, but the door is still left open" in a rate case to evaluate whether improvements are needed to compensate for prior neglect. Since the Commission can review the

problem in the future, the purchaser is protected because it has an opportunity to address those concerns at that time. He explained:

> You know there may be an adjustment appropriate in one particular account and not in another, instead of across the board and it's gone forever. To me that's fair. I've talked to Mr. Wenz, and he has no problem with that type of approach.

As noted previously, we do not believe any extraordinary circumstances have been shown in this case. Further, we do not believe that the price differential, alone, constitutes an extraordinary circumstance. Therefore, in accordance with our past practice, a negative acquisition adjustment will not be imposed in this proceeding.

NET BOOK VALUE

In its brief, Wedgefield explains that there is no dispute regarding the net book value of the acquired assets, which was $1,462,487 for the water system and $1,392,904 for the wastewater system. In its brief, OPC concurs that the original cost balance was about $2,845,394 for the combined water and wastewater systems.

The accounting records for Econ Utilities were reviewed by Staff Witness Welch, for the calendar year ended December 31, 1995. Staff Witness Welch is the Regulatory Analyst Supervisor for the Commission's Miami District Office. Based upon her inspection and her reliance on previous audits, Ms. Welch concluded that the original cost value for the acquired facilities was $1,462,487 for the water system and $1,382,904 for the wastewater system. Ms. Welch testified that she examined Econ's books but did not inspect its facilities and was uncertain whether an engineer from Tallahassee may have visited the utility. However, she testified that she was not expressing an opinion on whether rate base inclusion of an acquisition adjustment was proper.

Utility Witness Wenz testified that the rate base balances calculated in staff's audit correctly reflect the original cost of plant in service, net of accumulated depreciation and unamortized CIAC, at the time of transfer. OPC Witness Larkin testified that he was not taking exception to the audit report, which showed a net book value of $2,845,391 for the combined systems.

In light of the foregoing, and because the audit conclusions were not disputed, we find that the net book values for the acquired water and wastewater systems, at December 31, 1995, were $1,462,487 and $1,382,904, respectively.

RATE BASE

In its brief, Wedgefield argues that, pursuant to Section 367.081, Florida Statutes, the Commission must establish rates using the original cost of the company who dedicated that property to public service. In its brief, OPC argues that because of neglect by the previous owner, the $545,000 purchase price is the proper rate base amount.

As discussed previously, staff's audit reflected recommended rate base values of $1,462,487 and $1,382,904 for the respective water and wastewater systems, based upon Econ's net plant investment in the facilities. We determined previously herein that the rate base determination shall not include a negative acquisition adjustment. We believe that Wedgefield's rate base balance should match Econ's net book balance at the transfer date, which is consistent with Commission policy. Accordingly, we find that the rate base balances for the water and wastewater systems are $1,462,487 and $1,382,904, respectively.

CONTINGENT PORTION OF THE PURCHASE PRICE

In its brief, Wedgefield argues that there is no relationship between its payment of the contingent liability and Econ's rate base value and, thus, this topic is irrelevant. In its brief, OPC argues that the contingent payments should only be recognized when actually paid, and only if those payments do not collaterally increase the cost of service for existing customers.

By the terms of the purchase agreement, dated January 17, 1996, Econ agreed to sell its water and wastewater facilities to Wedgefield's parent company for an immediate $545,000 cash payment plus future payments based on expected development of the Commons. Pursuant to the agreement, all distribution and collection facilities within the Commons will be contributed to Wedgefield. The agreement also reflects that the added consideration will be 50% of the expected connection fees for the Commons. Four hundred housing units were originally planned for the Commons. At the hearing, Mr. Wenz testified that he believed the expected hookups had been reduced to 328. Under either condition, using the present $3,000 per unit connection fee, these future payments will increase Wedgefield's overall purchase price.

In Order No. PSC-96-1241-FOF-WS, issued October 7, 1996, Econ's per book investment of $2,845,391 was compared with Wedgefield's projected total investment ($545,000 plus $600,000) to disclose an excluded acquisition adjustment of $1,700,391. Using updated information, Wedgefield's projected investment will be

about $1,037,000 ($545,000 plus $492,000) and the acquisition adjustment will be $1,808,391. However, from a policy perspective, derivation of the acquisition adjustment balance is largely a balancing measure since the real issue is its inclusion or exclusion.

In its brief, Wedgefield comments that this issue is not relevant since it does not affect Econ's historical investment in plant facilities. OPC and its witness, Mr. Larkin, advocate recognition of the additional payments only after those payments are made. Then, their proposed accounting treatment for the additional payments would be a credit entry to contributions-in-aid-of-construction (CIAC) offset by an equivalent debit entry to the acquisition adjustment account. We agree that this method properly reflects the gradual nature of the contingent payments. At the hearing, Mr. Wenz testified that Wedgefield will fully account for any CIAC due from development of the Commons and recognize a contingent liability to Econ to reflect any subsequent payments, which is consistent with the accounting treatment proffered by OPC.

Over time, Wedgefield's purchase price will likely increase, thereby changing and reducing the negative acquisition adjustment. However, Order No. PSC-96-1241-FOF-WS did not explain that this change would be gradual. Instead, that order focused on a full accounting for future CIAC balances to preclude any understatement of CIAC due to retention of connection fees by the seller. That comparison in that Order produced a price differential based upon Wedgefield's prospective investment, not the current amount. If we were to approve Wedgefield's purchase price as the rate base amount, then Mr. Larkin's proposal to initially eliminate future payments would be proper.

As an alternative, Mr. Larkin proposed waiting until the cost of serving the Commons is known to evaluate whether the additional payments should be charged to the acquisition adjustment. Because that option involves uncertainty regarding future cost efficiencies, we decline to adopt Mr. Larkin's alternative proposal at this time.

As noted previously, Wedgefield contends that Econ's net book value should be the rate base amount, which does not depend upon subsequent payments to Econ. Conversely, OPC advocates use of the purchase price for future ratemaking purposes. It appears that both parties agree as to the proper accounting treatment for the contingent payments; the disagreement arises from different perspectives relative to retention of the seller's net book value versus the purchase price.

While we support retention of the original cost balance as the rate base amount from an accounting standpoint, we find that the contingent portion of the purchase price should only be recognized when the actual payments are made. However, for ratemaking purposes, the contingent payment element would only be an issue if we approved the purchase price as the rate base balance. However, as discussed subsequently in this Order, because we approve the seller's net plant balance as the rate base balance, that calculation is not affected by any contingent payment issues.

CLOSING OF DOCKET

Upon expiration of the time for filing an appeal, no further action will be necessary and this docket shall be closed. If a party files a notice of appeal, this docket shall be closed upon resolution thereof by the appellate court.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that each of the findings made in the body of this Order is hereby approved in every respect. It is further

ORDERED that all matters contained in the attachment appended to this Order are by reference incorporated herein. It is further

ORDERED that rate base for Econ Utilities Corporation, which for transfer purposes reflect the net book value, is $1,462,487 for the water system and $1,382,904 for the wastewater system. It is further

ORDERED that there shall be no rate base inclusion of an acquisition adjustment for the purposes of the transfer. It is further

ORDERED that upon expiration of the time for filing an appeal, or upon resolution of any appeal filed in this matter, this docket shall be closed.

By ORDER of the Florida Public Service Commission this 12th day of August, 1998.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

JSB

Commissioner J. Terry Deason dissented in the Commission's decision in this docket with the following opinion:

I respectfully dissent from the majority's decision not to recognize a negative acquisition adjustment in this case. The Commission's policy has been that, absent extraordinary circumstances, there will be no rate base inclusion of an acquisition adjustment, either positive or negative. In my opinion, the Commission's standard has been met in this case and as such a negative acquisition should have been recognized.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

ATTACHMENT A

PROPOSED FINDINGS OF FACT

1. Utilities, Inc. is a privately owned public utility engaged solely in the business of owning and operating water and wastewater systems and has no developer relationships. It owns and operates 63 subsidiaries in fifteen states, including twelve in Florida where it maintains experienced management and professional operators. It is adequately financed, has access to capital at reasonable costs, and is capable of reducing costs of operation due to economies of scale. [Tr. 157, Wenz Direct Testimony page 1, lines 17-18 and 24-25; Tr. 173-174, Wenz Additional Direct Testimony page 10, line 23 to page 11, line 15; Ex. 11, Application for Transfer, and its Exhibit A].

   RULING: Rejected as argumentative or conclusory.

2. Through Wedgefield Utilities, Inc., its wholly owned subsidiary, Utilities, Inc. has the ability and commitment to make the necessary improvements in this utility. It has the potential to reduce costs through the allocation of administrative expenses and through access to an established purchasing system, and it is familiar with, and has the ability to comply with, state and federal regulations. [Ex. 11, Application for Transfer, Part I, Para. E. and Part II, Para. A.; Tr. 173-174, Wenz Additional Direct Testimony page 10, line 23 to page 11, line 15].

   RULING: Accepted.

3. Econ Utilities Corporation was a small, developer-owned utility with financial pressures due to sustained losses that made it difficult to attract capital at a reasonable cost and to operate and maintain the systems which put it in danger of not being able to expend the necessary capital to meet its obligations. The former owners either do not have, or are not willing to commit, the funds necessary to continue to operate and finance the utility. [Tr. 172, Wenz Additional Direct Testimony page 9, lines 12-19; Tr. 340-341, Seidman Rebuttal Testimony page 25, line 7 to page 26, line 2].

   RULING: Rejected as argumentative or conclusory.

4. In its negotiations to purchase Econ Utilities, Utilities, Inc. was fully aware of, and relied on, this Commission's

acquisition adjustment policy stated in Commission Order Nos. 25729 and 23376. [Tr. 168-169, Wenz Additional Direct Testimony page 5, line 20 to page 6, line 20.]

RULING: Accepted.

5. The Orange County Utilities Division has no authority over Wedgefield or any other utility, whether privately or publicly owned, and its "standards" are applicable only to its own operations. [Composite Ex. 8, ltr. dtd 4/13/1995, Mr. Ispass to Mr. Blake, page 1].

RULING: Rejected as argumentative or conclusory.

6. Econ operated (and now Wedgefield operates) under the jurisdiction of the Florida Department of Environmental Protection (DEP), the Orange County Environmental Protection Department (OCEPD), and the Florida Public Service Commission. It is inspected regularly by DEP and by OCEPD. These three agencies provide standards for Wedgefield and determine what is necessary for compliance, based on Federal and Florida laws and regulations. [Tr. 328, Seidman Rebuttal Testimony page 13, lines 13-22; Ex. 11, Application].

RULING: Accepted.

PROPOSED CONCLUSIONS OF LAW

1. It is the policy of this Commission that, absent extraordinary circumstances, the purchase of a utility at a premium or discount shall not effect the rate base calculation and the proponent of an acquisition adjustment, either positive or negative, bears the burden of proof.

RULING: Rejected as unsupported.

2. There is no extraordinary circumstances in this purchase, and no acquisition adjustment should be included in the rate base calculation.

RULING: Rejected as not constituting a conclusion of law.

3. For purposes of this transfer, the rate base is equal to the net book value of the assets, excluding ratemaking adjustments such as working capital or used and useful adjustments, and is $1,462,487 for water and $1,382,904 for wastewater.

RULING: Rejected as not constituting a conclusion of law.

4. Econ was (and now Wedgefield is) in compliance with the requirements of the Florida Department of Environmental Protection (DEP) and by the Orange County Environmental Protection Department (OCEPD).

RULING: Rejected as not constituting a conclusion of law.

5. Imposing a NAA would discourage the purchase of a system such as Econ, and that thwarts Commission policy and is a detrimental consequence to customers.

RULING: Rejected as not constituting a conclusion of law.

6. At the time of sale, the Econ assets were all functioning and not in violation of any state regulations. They were typical of developer-owned utilities, not in the best condition and not up to the standard which Utilities, Inc. would want to maintain, but not in extremely poor condition, either.

RULING: Rejected as not constituting a conclusion of law.

7. All the arguments set forth by Mr. Larkin have been made before and have been rejected by this Commission in generic proceedings and in prior, case-specific orders of the Commission.

RULING: Rejected as not constituting a conclusion of law.

8. The utility will not be allowed to recover a return on assets which do not exist. Clearly, the assets do exist. They didn't disappear when ownership changed.

RULING: Rejected as not constituting a conclusion of law.

9. A NAA is considered at the time of transfer and requires that extraordinary circumstances be found for taking the extreme step of permanently reducing the net original cost as rate base. A used and useful adjustment is used in a rate case for temporarily removing from rate base certain assets which are not currently used and useful in providing utility service to the customers. The two regulatory concepts perform different functions at different times. a) The contingent portion of the purchase price has no effect on rate base. In addition, the service area in the Reserve (formerly The Commons) is already under construction. The contract requires contingent payments to be made as soon as each new home is hooked up, so any "uncertainty" or "speculation" about whether payments will be made is unwarranted.

RULING: Rejected as not constituting a conclusion of law.

10. A major purpose of Commission policy on acquisition adjustments is to create an incentive for larger utilities to acquire small, troubled utilities. If a benefit to the purchaser results from the purchase price being lower than book value, it is at the expense of the seller, not at the expense of the customer. In fact, rate base is unchanged, and, because of this, there is no harm to the customer.

RULING: Rejected as not constituting a conclusion of law.

11. Commission Order No. 25729 listed several beneficial changes due to a change in ownership, which the current Commission policy is intended to encourage. It also found that the customers of utilities acquired under its policy are not harmed, and indeed benefit from a better quality of service at reasonable cost.

RULING: Rejected as not constituting a conclusion of law.

12. To change the policy now not only would be a denial of due process but it also would defeat the purposes of the policy as originally developed and implemented by the Commission.

RULING: Rejected as not constituting a conclusion of law.

13. Rate base must recognize the original cost of assets at the time they were dedicated to public service.

RULING: Rejected as unsupported.

14. Based on a review of prior Commission orders, including the dissenting opinions, the following factors either are not relevant to the Wedgefield transfer, are not "extraordinary circumstances", or do not otherwise authorize, require or warrant a negative acquisition adjustment.

The system does not require replacing, the jurisdictional status is known, there is growth potential, and the system will benefit from certain economies under new ownership. The improvements that have to be made are in the public interest. The revenue requirement associated with the net original cost of the system would be no more than under the previous ownership. There is no requirement to prove hardship on the part of the seller. The tax treatment of the seller is irrelevant. A large differential between purchase price and rate base is not, of itself, an "extraordinary circumstance".

The determination of rate base in this case is not an initial determination; rate base was determined by the Commission in 1984, and there was no lack of original cost documentation. Even when a previous owner failed to maintain a system properly and the new owner had to make considerable expenditures to bring the system into compliance, these events are not "extraordinary circumstances." The customers do not have to "pay twice" because, regardless of ownership, the customers pay only for the legitimate cost of assets and expenses incurred and actually paid in their behalf. Customers will not pay for anything under the new ownership that they would not have been required to pay for under prior ownership. The transfer is customer-neutral, except for benefits the customers will receive due to new ownership. The sale did not result from a bankruptcy of foreclosure. The purchaser does not have uniform rates among its systems. To include both a negative acquisition adjustment and used and useful adjustments on the same plant would be double counting. Regardless of whether a purchasing utility includes a consideration of "used" and "useful" adjustments in its negotiations for acquisition or for setting the purchase price, a NAA is not warranted. In the public interest, the purchaser has already made improvements in the system and in its management. Only utility property, and no lots or other assets, were bought or sold in the transaction between seller and purchaser. Seller had not filed to abandon the utility system. The seller has not been purchasing water or any other utility service from any other utility, and it has not been earning on unused plant components. Any ratemaking adjustments would have to considered in the context of a rate case. Not including a negative acquisition adjustment does no harm to customers. Rate base and monthly rates will not change as a result of the transfer. The sale of the utility does not involved a three-party or a nontaxable exchange, there are no family trusts or other trusts involved in the sale, and even without a negative acquisition adjustment, the seller will not recover, much less double recover, its investment. There has been no agreement or settlement of this transfer docket for any transfer rate base less than full net book value, and Wedgefield has not requested anything that would cause a change to rate base or rates as a result of the transfer.

RULING: Rejected as not constituting a conclusion of law.

E

State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: OCTOBER 26, 2000

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

FROM: DIVISION OF LEGAL SERVICES (FUDGE, CHRISTENSEN)
DIVISION OF ECONOMIC REGULATION (KYLE, MERCHANT)

RE: DOCKET NO. 991437-WU - APPLICATION FOR INCREASE IN WATER RATES IN ORANGE COUNTY BY WEDGEFIELD UTILITIES, INC.

AGENDA: 11/07/2000 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\991437.RCM

CASE BACKGROUND

Wedgefield Utilities, Inc. (Wedgefield or utility) is a Class B utility which serves approximately 840 water and wastewater customers in Orange County, Florida. Wedgefield is a wholly-owned subsidiary of Utilities, Inc. In its annual report for 1998, the utility reported operating revenues of $252,903.

Rate base was last established for Wedgefield's water facilities by Order No. PSC-98-1092-FOF-WS, issued August 12, 1998, in Dockets Nos. 960235-WS and 960283-WS, pursuant to a transfer of the utility's assets from Econ Utilities Corporation.

On November 12, 1999, Wedgefield filed an application for an increase in water rates. The utility was notified of several deficiencies in the filing. Those deficiencies were corrected and the official filing date was established as February 29, 2000, pursuant to Section 367.083, Florida Statutes. The utility's requested test year for final and interim purposes is the historical year ended June 30, 1999. The utility requested that

A TRUE COPY
ATTEST
Chief, Bureau of Records

this case be processed using our Proposed Agency Action (PAA) procedure pursuant to Section 367.081(8), Florida Statutes. We have jurisdiction pursuant to Sections 367.011(2) and 367.081, Florida Statutes.

By Order No. PSC-00-0910-PCO-WU, issued May 8, 2000, we suspended the rates requested by the utility pending final action and approved interim rates subject to refund and secured by a corporate undertaking. The interim rates were designed to allow the utility the opportunity to generate additional annual operating revenues of $103,394 for its water operations (an increase of 40.19%).

Wedgefield requested water rates designed to generate annual operating revenues of $404,098. Those revenues exceed test year revenues by $144,889 or 55.87 percent. By Proposed Agency Action Order No. PSC-00-1528-PAA-WU, issued August 23, 2000, (PAA Order) the Commission proposed a $342,157 water revenue requirement for this utility, which represented an annual increase in revenue of $82,897 or 31.97 percent.

On September 13, 2000, Wedgefield timely filed a petition protesting the PAA Order. On that same day, the Office of Public Counsel (OPC) timely filed a Notice of Intervention in this matter and a petition protesting the PAA Order. On September 13, 2000, OPC's Notice of Intervention was acknowledged by Order No. PSC-00-1755-PCO-WU, issued September 26, 2000.

On October 3, 2000, Wedgefield filed a Motion to Strike and Dismiss the Office of Public Counsel's Petition Requesting Section 120.57 Hearing and Protest of Proposed Agency Action.

This recommendation addresses whether Wedgefield's Motion to Strike and Dismiss should be granted. The Commission has jurisdiction pursuant to Sections 367.011(2) and 367.081, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should Wedgefield's Motion to Strike and Dismiss the Office of Public Counsel's Petition Requesting Section 120.57 Hearing and Protest of Proposed Agency Action be granted?

RECOMMENDATION: Yes. Wedgefield's Motion to Strike and Dismiss should be granted. (FUDGE)

STAFF ANALYSIS: Under Florida law the purpose 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 order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." Id.

Wedgefield's Motion to Strike and Dismiss

As stated in the case background, on October 3, 2000, Wedgefield filed a Motion to Strike and Dismiss. The basis of the Motion is that OPC's Petition is barred by the doctrines of res judicata and collateral estoppel. OPC filed a timely response on October 13, 2000.

Wedgefield first argues that the doctrines of res judicata and collateral estoppel may be applied in this case because both are equally applicable to the decisions of administrative tribunals. Flesche v. Interstate Warehouse, 411 So. 2d 919, 924 (Fla. 1st DCA 1982); Brown v. Dept. Of Professional Regulation, 602 So. 2d 1337 (Fla. 1st DCA 1992)(in which the Court applied the principle of collateral estoppel to dismiss a complaint without requiring an evidentiary hearing). Under res judicata, a final judgement precludes a subsequent lawsuit on the same cause of action because it is conclusive on all matters germane thereto that were or could have been raised in the first action. Collateral estoppel applies when there are two different causes of action in order to prevent common issues from being re-litigated. Res judicata applies to proceedings unless there has been "a substantial change in circumstances relating to the subject matter with which the ruling

was concerned, sufficient to prompt a different or contrary determination." Miller v. Booth, 702 So. 2d 290 (Fla. 3d DCA 1997).

The determination of the applicability of res judicata and whether or not a substantial change in circumstances has occurred lies primarily with the administrative body. Miller, 702 So. 2d at 291; Coral Reef Nurseries, Inc. v. Babcock Company, 410 So. 2d 648, 655 (Fla. 3d DCA 1982). Therefore, Wedgefield contends that it is proper to apply the doctrines of res judicata and collateral estoppel in this situation.

Wedgefield cites to the previous transfer proceeding in which, after a hearing on the issue of negative acquisition adjustment, the Commission found that no extraordinary circumstances existed and therefore no acquisition adjustment would be imposed. See Order No. PSC-98-1092-FOF-WS, issued August 12, 1998, in Docket No. 960235-WS.

Next, Wedgefield argues that OPC's petition should be dismissed because

> There has been no substantial change of circumstances, relating to the substance of OPC's petition to impose a negative acquisition adjustment. The mere change of membership of the Florida Public Service Commission is not a sufficient "change of circumstances" to ignore the requirements of res judicata. . . . By participating in both the Wedgefield Utility transfer case and the Cypress Lakes Utility case and failing to seek reconsideration or to appeal the final orders of the Commission in either case, OPC is now precluded by both res judicata and by collateral estoppel from now raising the same issues in the instant case.

Wedgefield alleges that unless the Commission applies the principles of res judicata or collateral estoppel, it will be forcing the parties to engage in expensive and time-consuming re-litigation of issues already resolved.

Next, Wedgefield argues that OPC is bound by stare desis regarding the Commission's final orders in over 100 cases on negative acquisition adjustments. Although Wedgefield recognizes the courts' power to refuse to apply the principle of stare decisis, departure from precedent should generally not be made. The law of the case on negative acquisition adjustment is that: "Absent evidence of extraordinary circumstances, the rate base

calculation should not include an acquisition adjustment." Order No. PSC-98-1092-FOF-WS, issued August 12, 1998, in Docket No. 960283-WS.

Finally, Wedgefield argues that because this issue was decided in the transfer docket, the doctrine of administrative finality applies. Wedgefield states that " . . . an underlying purpose of the doctrine of administrative finality is to protect those who rely on a judgement or ruling." Reedy Creek Utilities Co. V. FPSC, 418 So. 2d 249, 253 (Fla. 1982). Decisions of the Commission must eventually pass of its control and become final and no longer subject to modification. Order No. 248989, issued August 29, 1992, in Docket No. 910004-EU.

OPC's Response in Opposition to Wedgefield's Motion to Strike and Dismiss

In response to Wedgefield's motion, OPC states that the case law allows the Commission to recognize a negative acquisition adjustment in this proceeding. OPC cites to cases in which the Commission has changed its policy on used and useful. See Florida Cities Water Co. v. FPSC, 705 So. 2d 620 (Fla. 1st DCA 1998); Southern States Utilities v. Florida Public Service Commission, 714 So. 2d 1046, 1054-1056 (Fla. 1st DCA 1998); Palm Coast Utility Corporation v. FPSC, 742 So. 2d 482, 484-485 (Fla. 1st DCA 1999). OPC argues that the Commission may make a change in policy, even if the change in policy reduces rate base, as long as the change in policy is supported by record evidence.

Next, OPC argues that Section 120.68, Florida Statutes, allows the Commission to recognize a negative acquisition adjustment in this proceeding. OPC asserts that Section 120.68(7)(e)3, Florida Statutes, allows an agency to take action inconsistent with prior agency practice as long as the action is supported by record evidence, which OPC claims it will provide in this proceeding to show why the Commission should not follow prior practice in this proceeding.

OPC asserts that Section 350.0611, Florida Statutes, specifically provides that Public Counsel may urge any position whether consistent or inconsistent with positions previously adopted by the Commission. OPC goes on to allege that this statute specifically provides it the power to raise such issues again, even if inconsistent with positions previously adopted by the Commission.

OPC also cites to Order No. PSC-93-1675-FOF-WS, issued November 18, 1993, in Docket No. 920148-WS, in which the Commission decided to recognize a negative acquisition adjustment for the purpose of setting rates for Jasmine Lakes Utilities Corporation. The Commission had previously determined that the circumstances surrounding the transfer of the utility did not appear to be extraordinary, and therefore no acquisition adjustment was included in rate base. See Order No. 23728, issued November 7, 1990, in Docket No. 900291-WS. OPC argues that the facts of Jasmine Lakes are strikingly similar to the facts in the instant case.

Finally, OPC argues that even if the Commission declines to change its policy concerning the acquisition adjustment in this case, the Commission could still recognize the adjustment if it finds a substantial change in circumstances from the last case.

Staff's Analysis

In filing its Motion to Strike and Dismiss, Wedgefield has raised the affirmative defenses of res judicata and collateral estoppel as grounds for dismissing OPC's petition. Wedgefield also raised the claims of administrative finality and stare desis as bases for granting its Motion to Strike and Dismiss.

> In considering a motion to strike or dismiss a complaint, all matters well pleaded are admitted as true by the movant. It is also fundamental that unless the complaint clearly shows by its allegations that the relief prayed for is barred by res adjudicata, estoppel by judgment or equitable estoppel, such defenses are not available by motion, but must be specifically pleaded as affirmative defenses to the complaint.

Moskovits v. Moskovits, 112 So. 2d 875, 878, (Fla. 1st DCA 1959).

The petition filed by OPC in this case requests a hearing to determine if the utility's rate base should include a negative acquisition adjustment. The petition does not mention the prior proceeding, nor the findings made therein. Moreover, the petition does not cite to the Commission's current practice regarding negative acquisition adjustments. Consequently, OPC's petition does not "affirmatively and clearly" show "the conclusive applicability" of the defenses alleged by Wedgefield. Evans v. Parker, 440 So. 2d 640, 641 (Fla. 1st DCA 1983).

If the defense is not evident from the complaint, courts have taken judicial notice of the record in prior proceedings when granting dismissal on the basis of res judicata. See e.g. All Pro Sports Camp, Inc. v. Walt Disney Company, 727 So. 2d 363, 366 (Fla. 5th DCA 1999); City of Clearwater v. U.S. Steel Corp., 469 So. 2d 915 (Fla. 2d DCA 1985); Lagarde v. Holmes, 428 So. 2d 669, 670 (Fla. 2d DCA 1982); but see Livingston v. Spires, 481 So. 2d 87, 88 (Fla. 1st DCA 1986)(finding dismissal based on res judicata improper when complaint did not show applicability of the defense and noting that the trial court did not take judicial notice of the prior proceeding and that the parties did not stipulate that the court could take such notice). In the instant case, the parties have not requested nor stipulated to the Commission taking judicial notice of the prior proceeding. Moreover, the record and decision in the prior proceeding has not been introduced into evidence in this proceeding.

As stated above, staff believes that the defenses asserted by Wedgefield do not appear within the four corners of OPC's petition. Therefore, the utility's Motion should fail on those grounds.

Nevertheless, assuming that all matters well pled are admitted as true, staff believes that OPC has failed to state a claim upon which relief can be granted. The purpose of a Section 120.57 hearing is to give substantially affected persons an opportunity to change the agency's mind concerning the actions proposed in the PAA Order. See e.g. Capeletti Brothers, Inc. v. State Department of General Services, 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983). In this case, the issue of negative acquisition adjustment was not an issue in the case and thus was not addressed in the PAA Order. Staff notes that issue was raised by OPC at the Agenda Conference and discussed by the Commissioners, but no decision was made. It is inappropriate to request a hearing on a matter upon which no decision was made in the PAA Order being protested.[1]

Additionally, staff agrees that the doctrine of administrative finality has attached with respect to the acquisition adjustment issue. Although staff recognizes that the Commission cannot look beyond the four corners of OPC's petition, "[t]he Commission is certainly capable of taking notice of its own orders." Palm Coast Utility Corp. v. FPSC, 742 So. 2d 482, 486 (Fla. 1st DCA 1999)(rejecting the Commission's argument that it was not obligated

[1]The Commission's acquisition adjustment policy is the subject of a staff rule recommendation scheduled for the November 7, 2000, Agenda Conference.

to use the new charges because they were not in the record of the case). By Order No. PSC-98-1092-FOF-WS, the prior transfer Order, after a full hearing was held on the issue, the Commission found no extraordinary circumstances and declined to impose a negative acquisition adjustment. Therefore, the acquisition adjustment issue was decided over two years ago. Consequently, the Order has passed out of the control of the Commission and administrative finality has attached. See Reedy Creek Utilities Co., 418 So. 2d at 253 (finding that the Commission could correct an order when only two and a half months had elapsed); Austin Tupler Trucking, Inc. v. Hawkins, 377 So. 2d 679 (Fla. 1st DCA 1979)(finding that the Commission could not, after two years, amend a prior order).

For the foregoing reasons, staff recommends that Wedgefield's Motion to Strike and Dismiss be granted.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: No, this docket should remain open pending a hearing and the Commission's final determination of the issues in dispute. (FUDGE)

STAFF ANALYSIS: No, this docket should remain open pending a hearing and the Commission's final determination of the issues in dispute.

F

State of Florida

Revised Recommendation

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: OCTOBER 31, 2000

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

FROM: DIVISION OF LEGAL SERVICES (FUDGE, CHRISTENSEN)
DIVISION OF ECONOMIC REGULATION (KYLE, MERCHANT)

RE: DOCKET NO. 991437-WU - APPLICATION FOR INCREASE IN WATER RATES IN ORANGE COUNTY BY WEDGEFIELD UTILITIES, INC.

AGENDA: 11/07/2000 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: REVISED PAGES 3, 7 AND 8.

FILE NAME AND LOCATION: S:\PSC\LEG\WP\991437.RCM

CASE BACKGROUND

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this case be processed using our Proposed Agency Action (PAA) procedure pursuant to Section 367.081(8), Florida Statutes. We have jurisdiction pursuant to Sections 367.011(2) and 367.081, Florida Statutes.

By Order No. PSC-00-0910-PCO-WU, issued May 8, 2000, we suspended the rates requested by the utility pending final action and approved interim rates subject to refund and secured by a corporate undertaking. The interim rates were designed to allow the utility the opportunity to generate additional annual operating revenues of $103,394 for its water operations (an increase of 40.19%).

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This recommendation addresses whether Wedgefield's Motion to Strike and Dismiss should be granted. The Commission has jurisdiction pursuant to Sections 367.011(2) and 367.081, Florida Statutes.

REVISED 10/31/00

DISCUSSION OF ISSUES

ISSUE 1: Should Wedgefield's Motion to Strike and Dismiss the Office of Public Counsel's Petition Requesting Section 120.57 Hearing and Protest of Proposed Agency Action be granted?

RECOMMENDATION: No ~~Yes~~. Wedgefield's Motion to Strike and Dismiss should be denied ~~granted~~. (FUDGE)

STAFF ANALYSIS: Under Florida law the purpose 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 order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." Id.

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Wedgefield first argues that the doctrines of res judicata and collateral estoppel may be applied in this case because both are equally applicable to the decisions of administrative tribunals. Flesche v. Interstate Warehouse, 411 So. 2d 919, 924 (Fla. 1st DCA 1982); Brown v. Dept. Of Professional Regulation, 602 So. 2d 1337 (Fla. 1st DCA 1992)(in which the Court applied the principle of collateral estoppel to dismiss a complaint without requiring an evidentiary hearing). Under res judicata, a final judgement precludes a subsequent lawsuit on the same cause of action because it is conclusive on all matters germane thereto that were or could have been raised in the first action. Collateral estoppel applies when there are two different causes of action in order to prevent

common issues from being re-litigated. Res judicata applies to proceedings unless there has been "a substantial change in circumstances relating to the subject matter with which the ruling was concerned, sufficient to prompt a different or contrary determination." Miller v. Booth, 702 So. 2d 290 (Fla. 3d DCA 1997).

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Next, Wedgefield argues that OPC's petition should be dismissed because

> There has been no substantial change of circumstances, relating to the substance of OPC's petition to impose a negative acquisition adjustment. The mere change of membership of the Florida Public Service Commission is not a sufficient "change of circumstances" to ignore the requirements of res judicata. . . . By participating in both the Wedgefield Utility transfer case and the Cypress Lakes Utility case and failing to seek reconsideration or to appeal the final orders of the Commission in either case, OPC is now precluded by both res judicata and by collateral estoppel from now raising the same issues in the instant case.

Wedgefield alleges that unless the Commission applies the principles of res judicata or collateral estoppel, it will be forcing the parties to engage in expensive and time-consuming re-litigation of issues already resolved.

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decisis, departure from precedent should generally not be made. The law of the case on negative acquisition adjustment is that: "Absent evidence of extraordinary circumstances, the rate base calculation should not include an acquisition adjustment." Order No. PSC-98-1092-FOF-WS, issued August 12, 1998, in Docket No. 960283-WS.

Finally, Wedgefield argues that because this issue was decided in the transfer docket, the doctrine of administrative finality applies. Wedgefield states that " . . . an underlying purpose of the doctrine of administrative finality is to protect those who rely on a judgement or ruling." Reedy Creek Utilities Co. V. FPSC, 418 So. 2d 249, 253 (Fla. 1982). Decisions of the Commission must eventually pass of its control and become final and no longer subject to modification. Order No. 248989, issued August 29, 1992, in Docket No. 910004-EU.

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OPC asserts that Section 350.0611, Florida Statutes, specifically provides that Public Counsel may urge any position whether consistent or inconsistent with positions previously adopted by the Commission. OPC goes on to allege that this statute specifically provides it the power to raise such issues again, even

if inconsistent with positions previously adopted by the Commission.

OPC also cites to Order No. PSC-93-1675-FOF-WS, issued November 18, 1993, in Docket No. 920148-WS, in which the Commission decided to recognize a negative acquisition adjustment for the purpose of setting rates for Jasmine Lakes Utilities Corporation. The Commission had previously determined that the circumstances surrounding the transfer of the utility did not appear to be extraordinary, and therefore no acquisition adjustment was included in rate base. See Order No. 23728, issued November 7, 1990, in Docket No. 900291-WS. OPC argues that the facts of Jasmine Lakes are strikingly similar to the facts in the instant case.

Finally, OPC argues that even if the Commission declines to change its policy concerning the acquisition adjustment in this case, the Commission could still recognize the adjustment if it finds a substantial change in circumstances from the last case.

Staff's Analysis

In filing its Motion to Strike and Dismiss, Wedgefield has raised the affirmative defenses of res judicata and collateral estoppel as grounds for dismissing OPC's petition. Wedgefield also raised the claims of administrative finality and stare desis as bases for granting its Motion to Strike and Dismiss.

> In considering a motion to strike or dismiss a complaint, all matters well pleaded are admitted as true by the movant. It is also fundamental that unless the complaint clearly shows by its allegations that the relief prayed for is barred by res adjudicata, estoppel by judgment or equitable estoppel, such defenses are not available by motion, but must be specifically pleaded as affirmative defenses to the complaint.

Moskovits v. Moskovits, 112 So. 2d 875, 878, (Fla. 1st DCA 1959).

The petition filed by OPC in this case requests a hearing to determine if the utility's rate base should include a negative acquisition adjustment. The petition does not mention the prior proceeding, nor the findings made therein. Moreover, the petition does not cite to the Commission's current practice regarding negative acquisition adjustments. Consequently, OPC's petition does not "affirmatively and clearly" show "the conclusive

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applicability" of the defenses alleged by Wedgefield. Evans v. Parker, 440 So. 2d 640, 641 (Fla. 1st DCA 1983).

If the defense is not evident from the complaint, courts have taken judicial notice of the record in prior proceedings when granting dismissal on the basis of res judicata. See e.g. All Pro Sports Camp, Inc. v. Walt Disney Company, 727 So. 2d 363, 366 (Fla. 5th DCA 1999); City of Clearwater v. U.S. Steel Corp., 469 So. 2d 915 (Fla. 2d DCA 1985); Lagarde v. Holmes, 428 So. 2d 669, 670 (Fla. 2d DCA 1982); but see Livingston v. Spires, 481 So. 2d 87, 88 (Fla. 1st DCA 1986)(finding dismissal based on res judicata improper when complaint did not show applicability of the defense and noting that the trial court did not take judicial notice of the prior proceeding and that the parties did not stipulate that the court could take such notice). In the instant case, the parties have not requested nor stipulated to the Commission taking judicial notice of the prior proceeding. Moreover, the record and decision in the prior proceeding has not been introduced into evidence in this proceeding.

As stated above, staff believes that the defenses asserted by Wedgefield do not appear within the four corners of OPC's petition. Therefore, the utility's Motion to Strike and Dismiss should be denied. However, this does not preclude the utility from raising these defenses, or others, as appropriate, in this proceeding. ~~should fail on those grounds.~~

~~Nevertheless, assuming that all matters well pled are admitted as true, staff believes that OPC has failed to state a claim upon which relief can be granted. The purpose of a Section 120.57 hearing is to give substantially affected persons an opportunity to change the agency's mind concerning the actions proposed in the PAA Order. See e.g. Capeletti Brothers, Inc. v. State Department of General Services, 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983). In this case, the issue of negative acquisition adjustment was not an issue in the case and thus was not addressed in the PAA Order. Staff notes that issue was raised by OPC at the Agenda Conference and discussed by the Commissioners, but no decision was made. It is inappropriate to request a hearing on a matter upon which no decision was made in the PAA Order being protested.~~[1]

[1]The Commission's acquisition adjustment policy is the subject of a proposed rule ~~staff rule recommendation scheduled for the November 7, 2000, Agenda Conference.~~

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~~Additionally, staff agrees that the doctrine of administrative finality has attached with respect to the acquisition adjustment issue. Although staff recognizes that the Commission cannot look beyond the four corners of OPC's petition, "[t]he Commission is certainly capable of taking notice of its own orders." Palm Coast Utility Corp. v. FPSC, 742 So. 2d 482, 486 (Fla. 1st DCA 1999)(rejecting the Commission's argument that it was not obligated to use the new charges because they were not in the record of the case). By Order No. PSC-98-1092-FOF-WS, the prior transfer Order, after a full hearing was held on the issue, the Commission found no extraordinary circumstances and declined to impose a negative acquisition adjustment. Therefore, the acquisition adjustment issue was decided over two years ago. Consequently, the Order has passed out of the control of the Commission and administrative finality has attached. See Reedy Creek Utilities Co., 418 So. 2d at 253 (finding that the Commission could correct an order when only two and a half months had elapsed), Austin Tupler Trucking, Inc. v. Hawkins, 377 So. 2d 679 (Fla. 1st DCA 1979)(finding that the Commission could not, after two years, amend a prior order).~~

~~For the foregoing reasons, staff recommends that Wedgefield's Motion to Strike and Dismiss be granted.~~

ISSUE 2: Should this docket be closed?

RECOMMENDATION: No, this docket should remain open pending a hearing and the Commission's final determination of the issues in dispute. (FUDGE)

STAFF ANALYSIS: No, this docket should remain open pending a hearing and the Commission's final determination of the issues in dispute.

G

State of Florida

Revised Recommendation

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: NOVEMBER 16, 2000

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

FROM: DIVISION OF LEGAL SERVICES (FUDGE/CHRISTENSEN)
DIVISION OF ECONOMIC REGULATION (KYLE/MERCHANT)
DIVISION OF REGULATORY OVERSIGHT (VANDIVER)

RE: DOCKET NO. 991437-WU - APPLICATION FOR INCREASE IN WATER RATES IN ORANGE COUNTY BY WEDGEFIELD UTILITIES, INC.

AGENDA: 11/~~28~~29/2000 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS:

FILE NAME AND LOCATION: S:\PSC\LEG\WP\991437.RCM

CASE BACKGROUND

Wedgefield Utilities, Inc. (Wedgefield or utility) is a Class B utility which serves approximately 840 water and wastewater customers in Orange County, Florida. Wedgefield is a wholly-owned subsidiary of Utilities, Inc. In its annual report for 1998, the utility reported operating revenues of $252,903.

Rate base was last established for Wedgefield's water facilities by Order No. PSC-98-1092-FOF-WS, (Transfer Order) issued August 12, 1998, in Dockets Nos. 960235-WS and 960283-WS, pursuant to a transfer of the utility's assets from Econ Utilities Corporation.

On November 12, 1999, Wedgefield filed an application for an increase in water rates. The utility was notified of several deficiencies in its minimum filing requirements (MFRs). Those deficiencies were corrected and the official filing date was established as February 29, 2000, pursuant to Section 367.083,

A TRUE COPY
ATTEST _____
Chief, Bureau of Records

Florida Statutes. The utility's requested test year for final and interim purposes is the historical year ended June 30, 1999. The utility requested that this case be processed using the Commission's Proposed Agency Action (PAA) procedure pursuant to Section 367.081(8), Florida Statutes.

By Order No. PSC-00-0910-PCO-WU, issued May 8, 2000, the Commission suspended the rates requested by the utility pending final action and approved interim rates subject to refund and secured by a corporate undertaking. The interim rates were designed to allow the utility the opportunity to generate additional annual operating revenues of $103,394 for its water operations (an increase of 40.19%).

Wedgefield requested water rates designed to generate annual operating revenues of $404,098. Those revenues exceed test year revenues by $144,889 or 55.87 percent. By Proposed Agency Action Order No. PSC-00-1528-PAA-WU, issued August 23, 2000, (PAA Order) the Commission proposed a $342,157 water revenue requirement for this utility, which represented an annual increase in revenue of $82,897 or 31.97 percent.

The Commission also ordered Wedgefield to show cause, in writing within 21 days, why it should not be fined $3,000 for its apparent violation of Rule 25-30.115, Florida Administrative Code, and Order No. PSC-97-0531-FOF-WU, issued May 9, 1995, in Docket No. 960444-WU, for its failure to maintain its books and records in conformance with the National Association of Regulatory Utility Commissioners (NARUC) Uniform System of Accounts (USOA). Wedgefield filed a timely response to the order to show cause on September 13, 2000.

On September 13, 2000, Wedgefield also timely filed a petition protesting the PAA Order. On that same day, the Office of Public Counsel (OPC) timely filed a Notice of Intervention in this matter and a petition protesting the PAA Order. On September 13, 2000, OPC's Notice of Intervention was acknowledged by Order No. PSC-00-1755-PCO-WU, issued September 26, 2000.

On October 3, 2000, Wedgefield filed a Motion to Strike and Dismiss the Office of Public Counsel's Petition Requesting Section 120.57 Hearing and Protest of Proposed Agency Action. A recommendation to be considered at the November 7, 2000, Agenda Conference, was filed October 26, 2000 and subsequently revised on October 31, 2000. Staff requested a deferral of the item, which was granted on November 6, 2000.

On November 3, 2000, Wedgefield filed a Motion for Summary Final Order and Motion to Amend its Motion to Strike and Dismiss. OPC filed a timely response on November 10, 2000.

This recommendation addresses whether Wedgefield's Motion to Strike and Dismiss and Motion for Summary Final Order should be granted; and what action should be taken on Wedgefield's response to the order to show cause. The Commission has jurisdiction pursuant to Sections 367.011(2) and 367.081, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should Wedgefield's Motion for Summary Final Order be granted?

RECOMMENDATION: Yes, Wedgefield's Motion for Summary Final Order should be granted. (FUDGE)

STAFF ANALYSIS: Rule 28-106.204(4), Florida Administrative Code, states that "[a]ny party may move for Summary Final Order whenever there is no genuine issue as to material fact . . . ."

Wedgefield's Motion for Summary Final Order

Wedgefield alleges that there is no genuine issue as to any material fact set forth in OPC's Petition and Protest regarding negative acquisition adjustment. Wedgefield further alleges that the negative acquisition adjustment issue, as well as the factual basis for OPC's Protest and Petition in this case, were fully litigated in the prior transfer proceeding. Wedgefield states that OPC makes no allegations of grounds justifying a negative acquisition adjustment, nor the existence of extraordinary circumstances. Therefore, Wedgefield argues that the entry of a summary final order on the issue of negative acquisition adjustment is appropriate in this case. Wedgefield summarily cites to Order No. PSC-00-0341-PCO-SU, issued February 18, 2000, in Docket No. 990975-SU, to support its proposition that the entry of summary final order is appropriate in this case.

OPC's Response to Wedgefield's Motion for Summary Final Order

OPC asserts that the Commission may change its policy affecting items in rate base as long as the Commission bases the change in policy on expert testimony, documentary, opinion, or other evidence, which OPC intends to provide in this proceeding. OPC cites to Florida Cities Water Company v. FPSC, 705 So. 2d 620 (Fla. 1st DCA 1998), to show that the Commission has power to change its methodology if its decision is supported by record evidence. Likewise, OPC alleges that it is entitled to the opportunity to present evidence that will show the Commission why it should change its policy.

OPC next cites to Section 120.68, Florida Statutes, for the proposition that the Commission can take action inconsistent with prior agency practice if there is evidence in the record to support the change. OPC asserts that it will provide that record evidence in this case showing the reasons why the Commission should not

follow prior practice in this proceeding. OPC also cites to Section 350.0611, Florida Statutes, to show that it has the power to raise the issue of negative acquisition adjustment again, even if inconsistent with positions previously adopted by the Commission.

OPC alleges that Commission precedent allows the Commission to change its decision about an acquisition adjustment for a company. In Order No. 23728, issued as a PAA Order November 11, 1990, and becoming final and effective without protest, in Docket No. 900291-WS, the Commission declined to recognize a negative acquisition adjustment. However, in the utility's subsequent rate proceeding the Commission reversed the prior decision by deciding to recognize the negative acquisition adjustment for the purpose of setting rates. See Order No. PSC-93-1675-FOF-WS, issued November 18, 1993, in Docket No. 920148-WS.

OPC also argues that the Commission reversed a previous decision to allow a positive acquisition adjustment. See Order No. 23166, issued July 10, 1990, in Docket No. 891179-GU (Chesapeake Utilities Corp). In that case, the Commission found that the predicted savings upon which the positive acquisition adjustment was granted had not materialized and therefore, based on this new information, removed the acquisition adjustment from rate base.

Finally, OPC alleges that the Commission could still recognize the adjustment if it finds a substantial change in circumstances from the last case. OPC is pursuing this issue through discovery.

Staff Analysis

Pursuant to Section 120.57(1)(h), Florida Statutes, a summary final order shall be rendered if it is determined from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final summary order.

Under Florida law "the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact, and . . . every possible inference must be drawn in favor of the party against whom a summary judgement is sought." Green v. CSX Transportation, Inc., 626 So. 2d 974 (Fla. 1st DCA 1993)(citing Wills v. Sears, Roebuck & Co., 351 So. 2d 29 (Fla. 1977)). Furthermore, "A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law." Moore v. Morris, 475 So. 2d 666 (Fla. 1985).

OPC's Protest and Petition for hearing submitted the following disputed issue of material fact, policy and law:

> Should the utility's rate base include a negative acquisition adjustment?
>
> And what other changes, such as changes to depreciation expense, should be made to reflect a negative acquisition adjustment?

The issue of whether the utility's rate base should include a negative acquisition adjustment was addressed with respect to the acquisition adjustment at issue here in Order No. PSC-98-1092-FOF-WS, issued August 12, 1998, in Docket No. 960235-WS (transfer docket). By that Order, the Commission found that no extraordinary circumstances existed and held that no negative acquisition adjustment would be imposed. The Commission fully examined: the condition of the assets, Econ as a "troubled utility," and whether any extraordinary circumstances existed.

OPC asserts that like the Florida Cities case, it has the right to an evidentiary hearing to support a change in Commission policy. However, in Florida Cities, the appeal and subsequent evidentiary hearing on remand arose from the Order stating the Commission's used and useful methodology. In the instant case, Order No. PSC-96-1241-FOF-WS, issued October 7, 1996, in Docket No. 960235-WS, stated the Commission's decision on the acquisition adjustment at issue here and an evidentiary hearing was held upon OPC's protest of that decision, which culminated in Order No. PSC-98-1092-FOF-WS. What OPC now seeks is to revisit that decision through the Commission's latest PAA Order.

Staff agrees that Section 350.0611(1), Florida Statutes, gives OPC standing to urge any position consistent or inconsistent with positions previously adopted by the Commission. However, the Statute does not give OPC the ability to overcome a Motion For Summary Final Order without alleging more than an inconsistent position. OPC has fully litigated its position on negative acquisition adjustment for this utility in the transfer docket. What it seeks to do now is to revisit that decision under the guise of protesting the current PAA Order. OPC has not alleged any facts or circumstances to show that a genuine issue of material fact exists.

OPC also cites to Order No. PSC-93-1675-FOF-WS, in which the Commission reversed a previous finding by deciding to recognize a

negative acquisition adjustment. The Commission reached its conclusion based on customer testimony, the need for repairs and improvements to the system at the time of the transfer, and the lack of responsibility in management. In Wedgefield's transfer docket, an evidentiary hearing was held upon which the Commission held that a negative acquisition adjustment would not be imposed. Moreover, there has been no showing of any change in circumstances.

Next, OPC cites to Order No. 23166, in which the Commission removed a positive acquisition adjustment after a finding that the predicted savings had not materialized. Clearly, the approval of the original acquisition adjustment was based on predicted savings, and thus contingent upon those savings materializing. Once the Commission found that the savings had not materialized, it removed the adjustment. The Commission's decision in the transfer proceeding was not contingent upon the materialization of certain facts. Moreover, OPC has not alleged that any facts have changed since that decision was made.

In conclusion, staff believes that because this issue was fully litigated just two years ago, Wedgefield has met its "initial burden of demonstrating the nonexistence of any genuine issue of material fact." Landers v. Milton, 370 So. 2d 368, 370 (Fla. 1979). The burden then shifts to OPC to demonstrate the existence of a genuine issue of material fact. Although OPC alleges throughout its response that it will present evidence in this proceeding, no supporting documentation has been provided to meet OPC's burden. "It is not enough for the opposing party to merely assert that an issue does exist." Id. See also Almand Construction Co. v. Evans, 547 So. 2d 626, 628 (Fla. 1989)(holding that counsel's mere assertion was insufficient to create an issue). Therefore, staff recommends that Wedgefield's Motion for Summary Final Order be granted.

ISSUE 2: Should Wedgefield's Motion to Amend its Motion to Strike and Dismiss be granted? If so, should Wedgefield's Motion to Strike and Dismiss the Office of Public Counsel's Petition Requesting Section 120.57 Hearing and Protest of Proposed Agency Action be granted?

RECOMMENDATION: If the Commission approves staff's recommendation in Issue 1 above, then no ruling is necessary on the Motion to Amend Wedgefield's Motion to Strike and Dismiss and Wedgefield's Motion to Strike and Dismiss because they are moot. However, if the Commission denies the utility's Motion for Summary Final Order, then Wedgefield's Motion to Amend its Motion to Strike and Dismiss and its Motion to Strike and Dismiss should also be denied. (FUDGE)

STAFF ANALYSIS: On November 3, 2000, Wedgefield filed a Motion to Amend its Motion to Strike and Dismiss. It requests that the Commission take official notice of Order No. PSC-98-1092-FOF-WS. OPC did not file a response. Staff recommends that if the Commission approves staff's recommendation in Issue 1, then no ruling is necessary on the Motion to Amend Wedgefield's Motion to Strike and Dismiss and Wedgefield's Motion to Strike and Dismiss because they are moot.

If the Commission denies staff's recommendation in Issue 1, then staff believes that the Motion to Amend and the Motion to Strike and Dismiss should also be denied. In reviewing a Motion for Summary Final Order, the Commission may consider all documents in the record in reaching its decision. However, in a Motion to Dismiss, the Commission is confined to the four corners of the initial pleading. Consequently, staff recommends that if the Commission denies Wedgefield's Motion for Summary Final Order, the Motion to Strike and Dismiss should also fail.

ISSUE 3: Should the Commission accept Wedgefield's settlement offer contained in its response to Order No. PSC-00-1528-PAA-WU, which required the utility to show cause as to why it should not be fined $3,000 for its apparent violation of Rule 25-30.115, Florida Administrative Code, and Order No. PSC-97-0531-FOF-WU?

RECOMMENDATION: Yes. The Commission should accept Wedgefield's settlement offer contained in its response to Order No. PSC-00-1528-PAA-WU, which required the utility to show cause as to why it should not be fined $3,000 for its apparent violation of Rule 25-30.115, Florida Administrative Code, and Order No. PSC-97-0531-FOF-WU. The utility should be ordered to correct any remaining areas of noncompliance with the USOA by January 31, 2001. Therefore, staff also recommends that the $3,000 fine be permanently suspended. Further, the utility and its parent should be ordered to file, in future proceedings before this Commission, MFRs which begin with utility book balances, and to show all adjustments to book balances after the "per book" column in the MFRs. The utility should also be ordered to file, with its MFRs, a statement which affirms that the MFRs begin with actual book balances. (KYLE, FUDGE, CHRISTENSEN, VANDIVER)

STAFF ANALYSIS: By Order No. PSC-00-1528-PAA-WU, the Commission ordered Wedgefield to show cause, in writing within 21 days, why it should not be fined $3,000 for its apparent violation of Rule 25-30.115, Florida Administrative Code, and Order No. PSC-97-0531-FOF-WU, issued May 9, 1995, in Docket No. 960444-WU, for its failure to maintain its books and records in conformance with the NARUC USOA.

On September 13, 2000, the utility filed its Response and Petition on Final Order Initiating A Show Cause (response). In its response, the utility requested that the Commission:

> (a) Waive the $3,000 fine imposed by this Order to Show Cause;
>
> (b) Allow the utility to work with staff to resolve any discrepancies remaining after the 1998 modifications of its accounting system, and direct staff to perform a compliance audit of the books and records as they exist as of January 31, 2001;
>
> (c) If (a) is not approved by the Commission, the Commission is hereby requested to hold a formal hearing pursuant to §120.57(1), Florida Statutes, on the show cause portions of the above-referenced Order.

(d) Grant such other and further relief as the Commission may deem appropriate.

In its response, the utility acknowledged that some additional time may have been required by staff, but that staff did not remain at the utility's office for any longer than the two-week period originally allotted by staff to perform the audit. Moreover, the use of any accounting system that may require conversion of the format of certain accounts does not necessarily violate the requirements to keep information readily available. However, the utility did recognize that a few accounts, especially Accounts Nos. 620 and 675, may not be in total compliance with the NARUC USOA. Although the utility believes that its books and records are in substantial compliance with the NARUC USOA, it promised to sufficiently correct these differences by January 31, 2001, if given some guidance by the audit staff.

Staff disagrees with certain allegations made in Wedgefield's response. First, the auditors noted that the length of time they needed to complete the Wedgefield audit report was not limited to the amount of time the auditors spent at the utility's offices. The auditors spent a considerable amount of time reconciling the MFRs to its books and records before going to the utility's office and during its on-site investigation.

The auditors also disputed the assertion that the Electronic Data Processing (EDP) tapes were provided on a timely basis. The auditors requested the tapes on November 4, 1999, and the utility did not provide a usable copy until March 1, 2000. Moreover, the use of EDP information to reconcile the utility's MFRs to its books and records is of limited use because many of the account balances contained in the MFRs are adjusted book balances which were calculated specifically for the current filing.

On October 20, 2000, staff held an informal meeting with the utility and OPC. At this meeting, staff informed the utility of specific deficiencies which need to be corrected to bring the books of the utility and Utilities, Inc., its parent company, into compliance. Staff also addressed its belief that the utility should be willing to pay a monetary fine in the amount of at least $1,000 because of its parent company's history of non-compliance with the NARUC USOA. In addition, on October 23, 2000, staff sent a letter to the utility outlining the above information.

On October 26, 2000, the utility sent a letter, which was filed in this docket on October 31, 2000, stating that while it acknowledges that some additional time was required for the

auditors to reconcile various accounts, it does not believe that this resulted in a delay in issuing the audit report. Further, the utility disagrees with the staff auditor's assertion that EDP tapes were not provided in a timely manner. Moreover, the utility maintains its position that any monetary penalty should be waived because the significant good faith effort made to modify its books and records to bring it into compliance with the Commission's interpretation of NARUC USOA. While Wedgefield has acknowledged that there are still several accounts which are not in compliance with NARUC USOA, it believes that its books and records are in substantial compliance with NARUC USOA. On October 30, 2000, the utility filed its direct testimony, which is consistent with its response and its October 26, 2000 letter.

The utility has agreed that in future rate cases it will begin its MFRs with the actual book balances and adjust from those amounts. Further, the utility requested that staff be directed to perform a compliance audit of the utility's books and records as of January 31, 2001. The utility has further committed to work with staff to correct any specific issues raised in the future.

Staff concurs that the staff auditors should be permitted to provide guidance to the utility to correct the differences between its books and records and the NARUC USOA. However, staff believes that such guidance should not be used to preclude a finding of noncompliance with Commission rules in a future proceeding before the Commission. Furthermore, staff believes that the utility and its parent company should be required to begin its MFRs with the utility's book balances with all adjustments made after this "per book" column. Moreover, staff agrees that a compliance audit should be performed on the utility's parent company operations and on a representative sample of its Florida operations after the utility's books are closed and its financial statements have been issued for the fiscal year end.

Staff notes that in Order No. PSC-00-1528-PAA-WU, the utility did not respond to Audit Exception No. 1, which states that the utility did not maintain its accounts in compliance with NARUC accounting. However, staff has analyzed the utility's response, the utility's October 26, 2000 letter and the utility's direct testimony on this issue. Based upon this analysis, staff believes that the utility has made substantial progress in correcting the problems identified in previous orders. Therefore, staff believes that the utility's actions and commitments are sufficient to achieve the desired goals of efficient analysis of its MFRs and efficient audits. Therefore, staff does not believe that a

monetary fine is necessary to ensure future compliance with Commission Rules and Orders.

Based on the foregoing, staff recommends that the Commission accept Wedgefield's offer of settlement made in response to Order No. PSC-00-1528-PAA-WU, requiring the utility to show cause as to why it should not be fined $3,000 for its apparent violation of Rule 25-30.115, Florida Administrative Code, and Order No. PSC-97-0531-FOF-WU. Therefore, staff also recommends that the $3,000 fine be permanently suspended The utility should be ordered to correct any remaining areas of noncompliance with the USOA by January 31, 2001. Further, the utility and its parent should be ordered to file, in future proceedings before this Commission, MFRs which begin with utility book balances, and to show all adjustments to book balances after the "per book" column in the MFRs. The utility should also be ordered to file with its MFRs, a statement which affirms that the MFRs begin with actual book balances.

ISSUE 4: Should this docket be closed?

RECOMMENDATION: No, this docket should remain open pending a hearing and the Commission's final determination of the issues in dispute. (FUDGE)

STAFF ANALYSIS: No, this docket should remain open pending a hearing and the Commission's final determination of the issues in dispute.

H

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-96-1241-FOF-WS ISSUED: October 7, 1996

The following Commissioners participated in the disposition of this matter:

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

ORDER APPROVING TRANSFER AND GRANTING
AMENDMENT OF CERTIFICATES TO INCLUDE ADDITIONAL TERRITORY

AND

NOTICE OF PROPOSED AGENCY ACTION
ORDER ESTABLISHING RATE BASE FOR PURPOSES
OF THE TRANSFER

BY THE COMMISSION:

NOTICE IS HEREBY GIVEN by the Florida Public Service Commission that the action discussed herein regarding the establishment of rate base for purposes of the transfer is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

Background

On February 27, 1996, Wedgefield Utilities, Inc. (Wedgefield) 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, which was incorporated on January 23, 1996, as a Florida corporation, is a wholly-owned subsidiary of Utilities, Inc. Econ is a Class B utility providing service in Orange County to approximately 725 customers.

An interim closing of the transfer occurred on February 8, 1996, at which time operating records and ownership documents were exchanged. The final closing is scheduled to take place within ten days of this Commission's approval of the transfer. Wedgefield has provided interim management of the utility system pending approval of the transfer.

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. Wedgefield has requested to add three parcels consisting of a shopping center, the Bancroft Boulevard area and a community to be known as the Commons. Wedgefield is already serving the shopping center and the Bancroft Boulevard area. The Commons is a planned community of 400 single-family homes.

Econ has been serving the shopping center and homes in the Bancroft Boulevard area for about fifteen years. According to the application, those areas were inadvertently omitted when the utility filed the legal description for its initial service area. Because Econ has been providing service to the area without Commission approval, it is in apparent violation of Section 367.045, Florida Statutes. The violation will be addressed later in this Order.

Transfer Application

The transfer application is in compliance with Section 367.071, Florida Statutes, and other pertinent statutes and administrative rules, except for the requirement to provide proof of ownership of the land upon which the utility's facilities are located, as required by Rule 25-30.037(1)(o), Florida Administrative Code. Wedgefield shall file a recorded warranty deed showing ownership of the land upon which the utility facilities are located within 60 days of the date of this Order.

The application included a filing fee in the amount of $3,000, in accordance with the requirements of Rule 25-30.020, Florida Administrative Code. In addition, Wedgefield provided proof of compliance with the noticing provisions set forth in Rule 25-30.030, Florida Administrative Code, including notice to the customers of the system being transferred. No objections to the application have been received and the time for filing such has

expired. The territory served by Econ is shown on Attachment A of this Order, which by reference is incorporated herein.

As stated previously, Wedgefield is a wholly-owned subsidiary of Utilities, Inc., which was formed in 1965. Currently, Utilities, Inc. provides water and wastewater service to about 150,000 customers in thirteen states, including Florida. Through its subsidiaries, Utilities, Inc. provides water and/or wastewater service to approximately 30,000 customers in Florida. 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. Because Wedgefield will have the benefit of Utilities, Inc.'s extensive operating experience and financial resources, we believe that it has the technical and financial ability to assure continued service to the customers of Econ.

According to the Department of Environmental Protection (DEP), there are no outstanding notices of violation against Econ. However, in its application, Wedgefield stated that an engineering study of the water and wastewater systems conducted in 1995 indicated that several improvements would be needed to maintain regulatory compliance and adequate service. Based on preliminary engineering estimates, Wedgefield has budgeted about $160,000 for a new well and water softener, and $249,000 to improve the wastewater system's percolation, equalization and irrigation systems.

Based on the foregoing, we find that the transfer of Certificates Nos. 404-W and 341-S from Econ to Wedgefield is in the public interest and it is approved. Wedgefield shall file a copy of a recorded warranty deed as proof that it owns the land upon which the utility's facilities are located within 60 days of the date of this Order. Econ was unable to locate the original certificates; therefore, replacement certificates reflecting the change in ownership will be prepared and issued to Wedgefield.

Rate Base

According to Wedgefield's transfer application, the proposed net book value of the combined water and wastewater systems was $2,930,836, as of December 31, 1994. This amount matches the rate base balance proposed by the Commission's audit staff in 1995. The Commission staff recommended adjustments to the rate bases for the water and wastewater systems including removal of unauthorized AFUDC (allowance-for-funds-used-during-construction); reclassification of expenses that should have been charged to plant-in service or construction-work-in-progress; adjustments to

reflect adoption of guideline depreciation rates and amortization charges; and various adjustments required by prior Commission decisions.

Econ's books and records were also audited during an undocketed investigation to determine whether it was overearning The investigation disclosed that Econ was actually incurring operating losses.

Econ's rate base was last formally established by this Commission in Docket No. 840368-WS. According to Order No. 15459, issued on December 18, 1985, in that docket, Econ's rate base as of June 30, 1984 was $236,777 for the water system and $422,507 for the wastewater system. Substantial used and useful reductions were required in that docket.

Econ's records were audited by the Commission Staff in the instant docket to determine rate base (net book value) as of December 31, 1995. Using the audited balances for the calendar year ended December 31, 1994, which were subsequently adopted by Econ, rate base was found to be $1,462,487 for the water system and $1,382,904 for the wastewater system as of December 31, 1995. These rate base calculations do not include used and useful reductions. Because Econ adopted all of the adjustments proposed in the overearnings investigation, and amended its records accordingly, there are no further audit adjustments in this docket

Therefore, we find Econ's rate base for the water and wastewater systems to be $1,462,487 and $1,382,904, respectively Our calculations of rate base for the water and wastewater systems are shown on attached Schedules Nos. 1 and 2, respectively.

The rate base calculations are used purely to establish the net book value of the property being transferred. These calculations do not include the normal ratemaking adjustment of working capital calculations and used and useful adjustments.

Acquisition Adjustment

An acquisition adjustment results when the purchase price differs from the original cost calculation. In this proceeding, the original construction cost, $2,845,391, exceeds the initial purchase price, $545,000, and the future payment. The future payment involves the payment by Wedgefield of every other service availability charge from proposed development of the Commons to Econ.

According to the purchase agreement, 50 percent of expected proceeds from service availability charges for the Commons will be given to Econ as additional payment for purchased assets. The transfer should not, however, diminish the amount of contributions-in aid-of-construction (CIAC) that the utility should record for ratemaking purposes. Because development of the Commons seems probable, our calculation of the anticipated acquisition adjustment includes a provision for projected CIAC equal to 50 percent of the payments from the Commons community. Based upon the utility's plant capacity charges of $750 for water and $2,250 for wastewater, the added payment totals $600,000. Therefore, the acquisition adjustment resulting from the transfer is $1,700,391.

The purchase agreement also provides for increasing the purchase price to include any current and/or accrued customer accounts receivable balances and reducing the price for all assumed liabilities. A review of the interim closing statement indicates that the opposing debits and credits are not material and are nearly offsetting. The assumed credits include customer deposits of $18,030. For the purpose of defining the approximate acquisition adjustment balance, the slight difference between the current assets and assumed liabilities is disregarded.

Although there is a substantial difference between the original construction cost and the purchase price, used and useful adjustments have not been made. In the past, the calculation of rate base has included substantial used and useful reductions. In Docket No. 840368-WS, Econ's reported investment for its combined water and wastewater systems was $3,103,373, but the approved rate base amount was $659,280, due in large measure to used and useful reductions. Also, in Docket No. 871208-WS, a case that was ultimately settled by a stipulation, the rate base requested by Econ was $745,593 for its water and wastewater systems. Rate base in that proceeding was found to be $564,340. Both amounts included substantial used and useful reductions.

In the absence of extraordinary circumstances, it has been Commission policy that the purchase of a utility at a premium or discount shall not affect the rate base calculation. Considering the likely impact of used and useful adjustments for this utility, the circumstances in this instance do not appear to be extraordinary. Therefore, no acquisition adjustment is included in the rate base calculation.

Rates and Charges - Transfer

The utility's approved rates and charges became effective January 13, 1995, pursuant to a price index rate adjustment. Rule 25-9.044(1), Florida Administrative Code, requires the new owner of a utility to adopt and use the rates, classifications and regulations of the former owner unless authorized to change by this Commission. Wedgefield has not requested a change in the rates and charges and we see no reason to change them at this time. Wedgefield shall continue to charge the rates and charges approved in Econ's tariff until authorized to change by this Commission in a subsequent proceeding. Wedgefield has filed a tariff reflecting the change in ownership. The tariff shall be effective for service rendered or connections made on or after the stamped approval date on the tariff sheets.

Application for Amendment

As stated previously, 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. Except as discussed herein, the application is in compliance with Section 367.045, Florida Statutes, and other pertinent statutes and administrative rules. In particular, the application contains a filing fee in the amount of $2,000, in accordance with Rule 25-30.020, Florida Administrative Code.

As discussed previously, Wedgefield has not provided evidence that it owns the land upon which the utility's facilities are located as required by Rule 25-30.036(1)(d), Florida Administrative Code. This Order requires that Wedgefield file a copy of a recorded warranty deed showing proof of ownership of the land upon which the utility's facilities are located within 60 days.

Wedgefield has provided adequate service territory and system maps, as required by Rule 25-30.036(1)(e), (f) and (I), Florida Administrative Code. However, the description of the territory that Wedgefield has requested to serve, which was provided with the application, contained discrepancies. Therefore, Wedgefield shall provide a corrected description of the territory it has requested to add to its service area within 30 days of the date of this Order.

Wedgefield has provided proof of compliance with the noticing provisions of Rule 25-30.030, Florida Administrative Code, including notice to the customers in the proposed territory. No objections to the application have been received and the time for filing such has expired.

The territory which Wedgefield has requested to serve includes three parcels of land: a shopping center, the Bancroft Boulevard area, and a proposed community known as the Commons. Econ has been providing service to customers in the shopping center and the Bancroft Boulevard area for about fifteen years. The territory was inadvertently omitted from its service area when the original certificates were granted. The Commons is currently undeveloped, but about 400 single-family homes are tentatively planned for the area.

From information provided with the application, it appears that Wedgefield has the financial and technical ability to provide service to the additional territory. The utility has been providing service to a portion of the requested territory for about fifteen years. There are no other utilities in the area who could provide service to the additional territory. Based on the foregoing, we find that it is in the public interest to grant Wedgefield's request to amend Certificates Nos. 404-W and 341-S to include the additional territory in Orange County. Wedgefield shall file a corrected description of the additional territory within 30 days of the date of this Order. As stated previously, Wedgefield has been unable to locate the original certificates. Accordingly, replacement certificates will be issued reflecting the additional territory. Wedgefield has filed revised tariff sheets reflecting the amendment.

Show Cause

As stated previously, Econ is in apparent violation of Section 367.045, Florida Statutes, which states, in part, that "[a] utility may not delete or extend its service outside the area described in its certificate of authorization until it has obtained an amended certificate of authorization from the commission" Econ has been providing water and wastewater service to a shopping center and the Bancroft Boulevard area for approximately 15 years without approval of the Commission. Such action is "willful" in the sense intended by Section 367.161, Florida Statutes. Section 367.161, Florida Statutes, authorizes the Commission to assess a penalty of not more than $5,000 for each offense, if a utility is found to have knowingly refused to comply with, or to have willfully violated any provision of Chapter 367, Florida Statutes. In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, titled In Re: Investigation into the Proper Application of Rule 25-14.003, Florida Administrative Code, Relating to Tax Savings Refund for 1988 and 1989 for GTE Florida, Inc., the Commission, having found that the company had not intended to violate the rule, nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "[i]n our view, 'willful' implies an intent to

do an act, and this is distinct from an intent to violate a statute or rule." Id. at 6.

Econ's failure to obtain Commission approval prior to extending its service area appears to be due to an oversight. When the utility was first certificated, the description of the service area submitted with its application and approved by this Commission inadvertently omitted an area within which lines had been installed and service provided for some time. It should also be noted that revenues from the area in question have been included in two subsequent rate cases. The area includes a shopping center and a strip of lots on the west side of Bancroft Boulevard. The omission was discovered during negotiations for the sale of the utility to Wedgefield.

Although Econ failed to obtain prior approval to serve the shopping center and the area along Bancroft Boulevard, we do not believe that the violation of Section 367.045, Florida Statutes, rises in these circumstances to the level of warranting initiation of show cause proceedings. An application for an amendment of the utility's service area was filed immediately upon discovering the omission. Therefore, we will not order Econ to show cause for failing to obtain Commission approval prior to serving the area in question.

Rates and Charges - Amendment

As discussed previously in this Order, Econ's current rates were approved pursuant to a price index rate adjustment and became effective on January 13, 1995. Wedgefield shall charge the customers in the additional territory the rates and charges approved in Econ's tariff until authorized to change by this Commission in a subsequent proceeding.

It is, therefore,

ORDERED by the Florida Public Service Commission that the transfer of Certificates Nos. 404-W and 341-S from Econ Utilities Corporation, 1301 West Copan Road, Pompano Beach, Florida 33061, to Wedgefield Utilities, Inc., 200 Weathersfield Avenue, Altamonte Springs, Florida 32714, is hereby approved. It is further

ORDERED that Wedgefield Utilities, Inc. shall file a recorded warranty deed as proof that it owns the land upon which the utility's facilities are located within 60 days of the date of this Order. It is further

ORDERED that rate base for Econ Utilities Corporation, which for transfer purposes reflects the net book value, is $1,462,487 for the water system and $1,382,904 for the wastewater system. It is further

ORDERED that Wedgefield Utilities, Inc. shall continue to charge the rates and charges approved in Econ Utilities Corporation's tariff until authorized to change by this Commission in a subsequent proceeding. The tariff shall be effective for service rendered or connections made on or after the stamped approval date on the tariff sheets. It is further

ORDERED that Wedgefield Utilities, Inc.'s request to amend Certificates Nos. 404-W and 341-S to include additional territory in Orange County is hereby approved. It is further

ORDERED that Wedgefield Utilities, Inc. shall file a corrected description of the additional territory within 30 days of the date of this Order. It is further

ORDERED that Wedgefield Utilities, Inc. shall charge the customers in the additional territory the rates and charges approved in Econ Utilities Corporation's tariff until authorized to change by this Commission in a subsequent proceeding. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective unless an appropriate petition, in the form provided by Rule 25-22.036, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings or Judicial Review" attached hereto. It is further

ORDERED that in the event this Order becomes final, these Dockets shall be closed.

By ORDER of the Florida Public Service Commission, this 7th day of October, 1996.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

ALC

Commissioner J. Terry Deason dissented in the Commission's decision in this docket with the following opinion:

I respectfully dissent from the majority's decision to ignore the negative acquisition adjustment (NAA) created by the sale of Econ Utilities to Utilities, Inc. Furthermore, I dissent from that portion of the decision determining the new owners' actual investment in the acquired assets of Econ Utilities, Inc.

The NAA resulting from this transaction is especially troublesome due both to the magnitude of it as well as the basis for ignoring it. Our staff has recommended that the rate base of $2,845,391 be recognized for ratemaking purposes even though Utilities, Inc. presently has only $545,000 invested in this company. Apparently the purchase agreement requires that the buyer remit quarterly the plant capacity charge for every other connection of the plant capacity charges for every connection of a possible future development of up to 400 single family homes. Despite the contingency of the payment requirements the full amount of the payments through buildout have been added to the buyer's investment basis for purposes of calculating the NAA.

With regard to the NAA, I should state my basic position that the appropriate regulatory approach is to squarely place the burden on the company to justify why the purchaser's actual investment should not be utilized in setting rates. When the utility investment level exceeds the original cost of the assets (positive acquisition adjustment), the burden of proof concept would still require the utility to justify the imposition of additional costs on the customers. There is no explicit positive acquisition

adjustment issue here. I make the point in order to complete the theoretical framework that I believe is most fair. I continue to adhere to the proposition that our policy improperly relieves the utility of its burden of proof in cases where negative acquisition adjustments result. However, I will also address my concerns with the application of the Commission's existing policy.

In the instant case the only rationale advanced for ignoring the NAA is that used and useful determinations have historically yielded large disallowances for non-used and useful assets. Under the Commission's traditional ratemaking approach this usually is a product of the initial developer's decision regarding the sizing of the utility -- especially the distribution assets. Traditionally concepts of used and useful and ratemaking recognition of NAA have never been considered together. I believe this is for good reason. Theoretically, the NAA impact on rate base functions as a source of funds. Thus, to the extent that a used and useful adjustment is made, the proportionate NAA applicable to the non-used and useful assets follows those assets. To confuse the concepts the way the majority has done does not make ratemaking sense -- even in the context of the Commission policy to ignore all acquisition adjustments absent extraordinary circumstances.

Here, the staff recommends that the "likely impact of used and useful adjustments" be recognized to negate the existence of extraordinary circumstances. I do not understand the majority's adoption of this rationale. There is no discussion of exactly what extraordinary circumstances may exist. [1] The existence of the used and useful adjustment should not constitute a basis for ignoring whatever extraordinary circumstances may exist. If the shoe was on the other foot and a positive acquisition adjustment was being requested, it hardly seems likely that historically low used and

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[1]Under the current Commission policy, the Commission does not place the burden of proof on the utility to identify extraordinary circumstances. The only "burden" is on the utility to identify such circumstances if they want the acquisition adjustment recognized. Predictably, very few applicants ask for the Commission to grant them a lower earnings base in the case of a NAA. Under these circumstances, the Commission cannot make a determination of the existence of extraordinary circumstances. It is interesting to note that the application makes note of some $409,000 (or 14% of the prior owner's book value) in needed improvements. whether these are indicative of below standard operation by the seller is unknown under the procedural posture of this case. Appropriately, of course, this portion of the decision is a Proposed Agency Action.

useful allowances would be raised as a reason to defeat the granting of a larger rate base. Unless the used and useful issue impacts the "extraordinary circumstances" concept, the symmetry or "two-way street" underpinning the present policy would be seriously undermined. Furthermore, to the extent the two concepts are linked, any change in the used and useful determination in future rate cases would require that the propriety of ignoring the acquisition adjustment be revisited.

Turning to the determination of the NAA, I have a concern about its calculation. I believe that, at a minimum, the contingent payments for future connections should be discounted to represent the time value of the money. Preferably, recognition should be given to the contingent payments only when made, consistent with the need to establish a reasonable estimation of the owner's true investment.

The majority's assumption that all 400 connections will occur ignores the fact that they will almost certainly not occur anytime soon. The application filed by the utility even states that The Commons "has not been designed as yet" (Exh. D,H); that "the only area where lines have not been installed is that area referred to as 'The Commons'" [and] "there is no definite plan for installing the lines" (Exh. M); and, finally, that "there are no definite plans to develop the Commons at the present time" (Exh.R). Clearly there is some doubt as to the probability, certainty and measurability of this aspect of the future consideration.

The $600,000 figure representing future connections was calculated by multiplying half of the 400 projected connections in The Commons by the current plant capacity charges. If all the connections are made and if made at the current tariffed rate, then the true cost in today's dollars will be significantly less. What that amount should be, I cannot say at this time. However, even based on the most optimistic assumptions of a full build-out, the $600,000 appears overstated. Under these circumstances, I am not certain that our determination of the buyer's investment comports with generally accepted accounting principles.

In sum, I would recognize the acquisition adjustment absent a showing by the buyer that its return should be based on anything other than its investment in the utility. Furthermore, I also question the amount of that investment due to the contingent nature of the payments related to the possible Commons development. It would be preferable to update the calculation of the adjustment as it becomes more certain. If it is appropriate to give full recognition to the full level of payments, then the contingent

purchase portion of the buyer's "investment" needs to be discounted.

(Note: The exhibits mentioned in this dissent refer to exhibits contained in the application.)

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.

As identified in the body of this order, our action establishing rate base for purposes of the transfer is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, at 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on October 28, 1996. In the absence of such a petition, this order shall become effective on the date subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If the relevant portion of this order becomes final and effective on the date described above, any party adversely affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the effective date of this

order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

Any party adversely affected by the Commission's final action in this matter may request: (1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

ATTACHMENT A

ECON UTILITIES CORPORATION

TERRITORY DESCRIPTION

The following described lands located in portions of Sections 1 and 12, Township 23 South, Range 32 East, Orange County, Florida:

SECTION 1

The Southwest 1/4 of said Section 1 and the Southeast 1/4 of said Section 1 LESS AND EXCEPT that portion lying Northeast of State Road 520.

SECTION 12

The North ½ of said Section 12.

SCHEDULE NO. 1

ECON UTILITIES CORPORATION

SCHEDULE OF WATER RATE BASE

AS OF 12/31/95

Description	Balance per Utility	Adjustment	Balance Per Commission
Utility Plant in Service	$2,615,949	$0	$2,615,949
Land	2,007	0	2,007
Accumulated Depreciation	(727,428)	0	(727,428)
CIAC	(554,441)	0	(554,441)
Accumulated Amortization	126,400	0	126,400
Totals	$1,462,487	$0	$1,462,487

SCHEDULE NO. 2

ECON UTILITIES CORPORATION

SCHEDULE OF WASTEWATER RATE BASE

AS OF 12/31/95

Description	Balance Per Utility	Adjustment	Balance Per Commission
Utility Plant in Service	$3,997,599	$0	$3,997,599
Land	96,500	0	96,500
Construction Work In Progress	330,893	0	330,893
Accumulated Depreciation	(1,926,905)	0	(1,926,905)
CIAC	(1,560,842)	0	(1,560,842)
Accumulated Amortization	445,659	0	445,659
Totals	$1,382,904	$0	$1,382,904

H1

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-98-1092-FOF-WS ISSUED: August 12, 1998

The following commissioners participated in the disposition of this matter:

J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA

APPEARANCES:

Ben E. Girtman, Esquire, 1020 East Lafayette Street, Suite 207, Tallahassee, Florida 32301-4552.
On behalf of Wedgefield Utilities, Inc.

Jack Shreve, Public Counsel, and Charles J. Beck, Deputy Public Counsel, Office of Public Counsel, 111 West Madison Street, Room 812, Tallahassee, Florida 32399-1400.
On behalf of the Citizens of the State of Florida.

Jennifer Brubaker, Esquire, and Bobbie Reyes, Esquire, Florida Public Service Commission, Gerald L. Gunter Building, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850.
On behalf of the Commission Staff.

FINAL ORDER ESTABLISHING RATE BASE FOR PURPOSES OF THE TRANSFER, DECLINING TO INCLUDE A NEGATIVE ACQUISITION ADJUSTMENT IN THE CALCULATION OF RATE BASE AND CLOSING DOCKET

BY THE COMMISSION:

BACKGROUND

On February 27, 1996, Wedgefield Utilities, Inc. (Wedgefield or utility) filed an application to transfer 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 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. The Prehearing Conference was held on August 4, 1997, in Tallahassee, Florida. Prehearing Order No. PSC-97-0952-PHO-WS, was issued August 11, 1997.

On February 17, 1998, the utility filed a motion to file supplemental prefiled testimony on behalf of utility witness Seidman. Order No. PSC-98-0392-PCO-WS, issued March 16, 1998, denied Wedgefield's motion, stating that the information contained in the proposed supplemental testimony would be appropriately discussed in the utility's post-hearing brief.

On March 19, 1998, the Commission held the technical hearing in Wedgefield, Florida. The hearing was continued and concluded on March 26, 1998, in Tallahassee, Florida. At the hearing, Wedgefield objected to the admission of Exhibit 4 into the record. The exhibit consisted of several letters written by local officials on behalf of their constituents. Wedgefield's objection was overruled and the letters were admitted. Official notice was taken of certain prior Commission Orders, on behalf of both Wedgefield and staff. Exhibit 8, consisting of letters related to a study performed by Orange County, was stipulated to by the parties and admitted into the record.

Wedgefield made an oral motion to strike certain portions from the prefiled testimony of OPC witness Larkin, arguing that the testimony called for the witness to reach conclusions beyond his expertise. Upon hearing the arguments of the parties and comments from staff, the Commission denied Wedgefield's motion, stating that the utility's objection appeared to go more to the weight that the Commission would give to the testimony as opposed to its admissibility. Wedgefield also made an oral motion for reconsideration of Order No. PSC-98-0392-PCO-WS, which denied the utility's request to file supplemental prefiled testimony. After hearing the arguments of parties and staff's comments, the Commission found that the utility had not demonstrated any mistake of fact or law and denied Wedgefield's motion for reconsideration.

Customer Testimony

Customer testimony was taken at the beginning of the technical hearing on March 19. One customer testified that customers generally support transferring the utility to Wedgefield subject to these conditions: rate base should be equal to the purchase price, and a new development, referred to as either the Commons or the Reserve, should not increase rates. A second customer testified that the utility's rates exceed comparative rates for several local utilities. The second customer's rate study confirmed this rate disparity. A third customer also testified that her bills were exceedingly large. A fourth testified that any increase in rates should be shifted to the developer of the Reserve. A fifth customer presented several letters from public officials who opposed increased rates on behalf of their constituents and spoke in favor of the purchase price relative to retention of the seller's rate base value.

A fifth customer testified that water service to her home was interrupted from December 20 through December 22, 1997. She testified that she was told by utility personnel that the utility's pipes were brittle and shattering and should be fully replaced. In response, Utility Witness Seidman testified that the reported break occurred at a location where 10-inch and 6-inch mains intersect and several valves are found close to or under the pavement. He testified that shifting and settling may occur over time because of traffic patterns. He reported that the pipes did not break, but instead, separated from the valves. A repair crew began work when the problem was discovered and, over a 48-hour period, completed the reconnection work. According to the utility, about 17 customers experienced a water outage and customers whose water pressure fell below 20 pounds per square inch were issued a boil water notice.

A sixth customer testified that customers asked Orange County to examine this system for possible acquisition. According to this customer, the County found that acquiring this system was not economically feasible for various reasons. The customer reported that the Department of Environmental Protection (DEP) informed the customers that the utility was meeting minimum standards with "very, very hard water." He also testified that although he recognized that this proceeding was not a rate case, his principle concern was:

> [I]f, in fact, the Commission allows the Company to depreciate at a rate of 2.8 million and then use that as a basis of cost, there's no question in our minds that the Utility Company will then come forward and say that they are not making any money, and, therefore, they will initiate a rate case. That is our major, major concern.

The customer asked the Commission to deny Wedgefield's requested rate base amount since the "the low purchase price . . . truly established the worth of the facility." He explained that he did not oppose the proposed transfer to Wedgefield but opposed the proposition that the acquiring company should stand in the seller's shoes with respect to rate base.

Pursuant to Rule 25-22.056(3)(a), Florida Administrative Code, each party is required to file a post-hearing statement including a summary of each position. On April 28, 1998, Wedgefield and OPC each filed their Statement of Issues and Positions and Post-Hearing Briefs. On April 28, 1998, counsel for Wedgefield also filed proposed findings of fact and conclusions of law. We include our ruling on each of Wedgefield's proposed findings of fact and conclusions of law in Attachment A to this Order, incorporated hereto by reference.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND POLICY

Having heard the evidence presented at the hearing in this proceeding and having reviewed the recommendation of the Commission staff, as well as the briefs of the parties, we now enter our findings and conclusions.

STIPULATIONS

In Prehearing Order No. PSC-97-0952-PHO-WS, all parties and staff agreed the following stipulations were reasonable. However, these proposed stipulations were not ruled upon at hearing. We have reviewed the stipulations, which are set forth below, and find

them to be reasonable. Accordingly, the stipulations are hereby approved.

1. Wedgefield Utilities, Inc., paid cash of $545,000 for the utility's assets. In addition, it agreed to make contingent payments equal to every other service availability charge in the area known as The Commons if and when it is developed.

2. The applicant utility has not requested rate base inclusion of any acquisition adjustment.

Additionally, all parties and staff agreed to the exhibit entitled "Acquisition Feasibility Analysis of Econ Utilities Corporation," dated June 1995 and prepared under the control and supervision of Alan B. Ispass, Director, Orange County Utilities, being entered into the record without objection. Because the exhibit was offered as a stipulated exhibit and moved into the record without objection at the hearing, it is unnecessary for us to rule on this stipulation.

OBJECTION TO LATE-FILED EXHIBIT NO. 18

During the hearing, staff requested that the utility provide as a late-filed exhibit "a per customer operating and maintenance expense analysis for Econ Utilities Corporation for the years 1992 through 1997." This exhibit was identified as Late-Filed Exhibit No. 18. By motion filed on April 14, 1998, OPC objected to this exhibit. In its objection, OPC argued that had the exhibit been offered at the hearing, OPC would have conducted extensive cross-examination concerning the contents of the exhibit.

Upon review of the exhibit, staff determined that the exhibit was unnecessary and, therefore, decided to withdraw its request for the exhibit. Based on this withdrawal, it is unnecessary for us to address the merits of either OPC's or Wedgefield's arguments contained in their respective pleadings. Accordingly, we find that OPC's objection and the parties' subsequent pleadings are moot.

ACQUISITION ADJUSTMENT

As stated previously, OPC protested Order No. PSC-96-1241-FOF-WS, in which the Commission, by proposed agency action, found it appropriate not to include a negative acquisition adjustment in the calculation of rate base. Our findings with respect to the acquisition adjustment issue, and a discussion of the pertinent elements, are set forth below.

Burden of Proof

In its brief, the utility argues that Rule 25-30.037(2), Florida Administrative Code, sets forth what a utility must file with the Commission when it seeks authority for a transfer of its facilities. The rule requires, in pertinent part, that an application for transfer must include a statement setting out the reasons for the inclusion of an acquisition adjustment, if one is requested. Wedgefield argues that, therefore, if and only if a utility is seeking an acquisition adjustment, it (the utility) must justify the adjustment; the rule does not require the utility applicant to allege or prove why an acquisition adjustment requested by someone else should not be granted by the Commission. The utility asserts that there is no rule, statute or order which places the burden of proof on anyone other than the proponent of the acquisition adjustment. Wedgefield argues that OPC, as the only entity requesting an acquisition adjustment in this case, bears the exclusive burden to show why a negative acquisition adjustment should be granted.

Although OPC raised the issue of burden of proof in this proceeding, it did not address the issue substantively in its brief or in the overview to its brief. OPC merely recited its position on the issue, that the utility has the burden of justifying why its actual purchase price should not be used to establish its rate base.

After an extensive review of prior Commission Orders, it appears that the issue of burden of proof regarding the rate base inclusion of an acquisition adjustment, either positive or negative, is one of first impression before the Commission. Neither the utility nor OPC cited to any precedent directly on point.

Because the inclusion of an acquisition adjustment, either positive or negative, will ultimately have an impact on rates, we find it appropriate to analogize this issue to the issue of who bears the burden of proof in a rate proceeding. In Florida Power Corporation v. Cresse, 413 So.2d 1187, 1191 (Fla. 1982), the Florida Supreme Court stated that the burden of proof in a Commission proceeding is always on a utility seeking a rate change. See also Order No. PSC-96-0499-FOF-WS, issued April 9, 1996, in Docket No. 951258-WS. In previous cases, we have held that in any rate case, the utility has the burden of proof. Order No. PSC-92-0266-FOF-SU, issued April 28, 1992, in Docket No. 910477-SU. See also Order No. PSC-95-1376-FOF-WS, issued November 6, 1995, in Docket No. 940847-WS; Order No. PSC-93-1288-FOF-SU, issued September 7, 1993, in Docket No. 920808-SU; Order No. PSC-93-1070-

WS, issued July 23, 1993, in Docket No. 920655-WS; Order No. PSC-93-0423-FOF-WS, issued March 22, 1993, in Docket No. 920199-WS; Order No. PSC-92-0594-FOF-SU, issued July 1, 1992, in Docket No. 910756-SU.

In Order No. PSC-93-1023-FOF-WS, issued July 12, 1993, in Docket No. 911188-WS, we found that the utility at all times bears the burden of proof in a rate proceeding. Although the underlying case involved the granting of a certificate of public convenience and necessity, the Florida Supreme Court in Stewart Bonded Warehouse v. Bevis noted that while the burden of going forward with the evidence as to an issue may shift in any particular case, the burden of proof remains with the applicant, and it is the applicant who must carry the burden of proof. 294 So. 2d 315, 317-18 (Fla. 1974).

We note the issuance of a recent opinion from the Florida First District Court of Appeal, Southern States Utilities n/k/a Florida Water Services Corporation v. Florida Public Service Commission, et al., Case No. 96-4227, Commission Docket No. 950495-WS, issued July 10, 1998. In the facts underlying the case, Florida Water Services Corporation (FWSC) acquired the water and wastewater utility serving Lehigh Acres for less than what it cost the original owner to build the used and useful infrastructure. See the court's opinion at page 17. In the order on appeal, we had declined a request from OPC to include a negative acquisition adjustment in the rate base to reflect the price FWSC paid. Id. In affirming this portion of the Commission's Order, the court concluded that OPC had made no showing of exceptional or extraordinary circumstances, and that we therefore lawfully exercised our discretion in declining to make the requested adjustment. Id. The First District Court of Appeal opinion is silent as to the issue of burden of proof with respect to the acquisition adjustment; however, we do not believe that the opinion is consistent with our position on this issue. Similar to the opinion referenced above, we believe that OPC was unsuccessful in demonstrating the existence of extraordinary circumstances in the instant case. Because OPC did not carry its burden of persuasion and there was no subsequent shift in the burden of proof, it was not required in either case that the utility rebut OPC's allegations and carry the ultimate burden of proof.

As stated previously, Wedgefield contends that Rule 25-30.037(2), Florida Administrative Code, is controlling on this issue and does not require the utility applicant to allege or prove why an acquisition adjustment requested by someone else should not be granted by the Commission. However, Rule 25-30.037(2), Florida Administrative Code, sets forth the items which must be filed in a

transfer application and does not address, either explicitly or implicitly, any legal standards on burden of proof. Although Wedgefield contends that there is a "long history of the burden of proof always being on the proponent of an acquisition adjustment," it fails to cite to any case law or previous Commission Orders which are on point as to the issue.

We find that in the instant case, as in rate proceedings, the ultimate burden of proof rests upon the utility. As stated previously, the utility always has the ultimate burden of proof with regard to its rates. Because the imposition of an acquisition adjustment will eventually affect the utility's rates, we find that the utility must carry the ultimate burden of proof as to why an acquisition adjustment should or should not be included in the rate base determination. As discussed in greater detail below, we find that a showing of extraordinary circumstances must be made to warrant a rate base inclusion of an acquisition adjustment. Once the utility makes an initial showing that there are no extraordinary circumstances, the burden of persuasion shifts to the opposing party to demonstrate that extraordinary circumstances are present. If the opposing party meets the burden of persuasion, the ultimate burden of rebutting the opposing party's allegations rests upon the utility.

Condition Of Assets

In this case, the condition of the acquired assets is of special concern because it was presented as a rationale for rate base inclusion of an acquisition adjustment. OPC and some customers contend that the assets were so poorly maintained that the purchase price, not the seller's net book value, is the proper rate base amount.

In its brief, Wedgefield argues that erroneous allegations were made with respect to the condition of Econ's facilities. Wedgefield contends that statements from the Orange County Public Utilities Division (OCPUD) report were taken out of context and misapplied to a "stand-alone, privately owned system which operates under different regulatory requirements and a substantially different operating situation." Wedgefield alleges that Mr. Larkin, who is not a professional engineer and never visited the utility, is unable to evaluate this system. Wedgefield further contends that Mr. Larkin's characterization of the condition of the utility is "second-hand, hearsay, and not convincing," and that such expressions of opinion are neither authoritative nor reliable.

In its brief, OPC argues that the utility's assets were in poor condition because Econ did not have a preventative maintenance

program. OPC contends that this observation is meaningful since it is repeated throughout the OCPUD report. According to OPC, the utility's repair expenses will increase as its facilities age, particularly those associated with maintaining asbestos cement lines. Thus, OPC contends that historical costs are not indicative of future costs.

Utility Witness Wenz testified that this utility was in compliance with regulatory requirements and not in any immediate danger of falling out of compliance. Mr. Wenz testified that, based on his personal observations and discussions with other local company personnel:

> this appeared to be just a typical developer-owned system, whose attention was diverted to developing, and he didn't maintain this like a professional utility company would. There was some maintenance things that had to be taken care of . . . Just your typical troubled developer-owned utility company.

During cross-examination, Mr. Wenz testified that Econ's facilities were not up to his company's standards in some respects. He explained that painting was needed as an aesthetic measure and to prevent corrosion, some lift stations needed to be reworked, and some pumps needed to be replaced. He agreed that the condition of the assets played some role in Wedgefield's purchase negotiations. He acknowledged that infiltration, the entry of groundwater into a wastewater system, was probably a problem, but he was uncertain whether the problem was excessive or cost efficient to replace. However, he explained that looking for infiltration was a routine part of maintaining a sewer system.

During the initial two years that Wedgefield has operated this system, approximately $125,000 has been spent for plant facilities. This includes $29,000 to refit a master-lift station, $8,000-$9,000 to repaint utility tanks and equipment, $25,000 to replace blowers at the wastewater plant, $8,000 to replace a driveway at the wastewater plant, and $15,000 for engineering work for expansion of the wastewater plant. Also, about $38,000 was spent to replace lines improperly installed by the developer, which was offset by a $30,000 developer payment. By comparison, the gross plant value of the acquired plant facilities was $6,712,055 at December 31, 1995. Thus, we believe that Wedgefield's recent additions to plant are neither abnormal nor indicative of major problems.

OPC Witness Larkin testified that Econ was a functioning utility that was not in "dire need" of being taken over, although it was not properly maintained. Mr. Larkin never visited the

utility to personally evaluate its plant facilities. Instead, he used documents produced by others to support his position. One such document, titled "Acquisition Feasibility Analysis of Econ Utilities Corporation," was prepared by the OCPUD in January of 1995. As noted previously, the customers asked Orange County to evaluate this system for possible acquisition. Mr. Larkin testified that a "prevalent comment" in that report was that maintenance and repairs were only performed on an emergency basis since Econ did not have a preventative maintenance program.

In its report, the OCPUD stated that rehabilitation and improvement costs of $4,642,367 were anticipated for the water and wastewater systems. Estimated improvements to the water treatment facility totaled $489,555, while rehabilitation of the distribution system totaled $577,612. Improvements to the water plant included installing a new well and pumping equipment, as well as softening and scrubbing equipment. The softener was replaced sometime in 1996. The major rehabilitation cost for the distribution system involved replacing asbestos-cement pipes that were installed between 1962 and 1970. Projected improvements to the wastewater collection plant totaled $839,960, while rehabilitation of the collection system totaled $2,734,755. Improvements for the wastewater treatment plant mostly involved projected expansion costs. But for the collection system, OCPUD concluded that all of the asbestos-cement pipes would need to be replaced, that lines should be moved from the rear to the front of houses, and that substantial repaving costs would be incurred.

Interconnection of this utility with OCPUD's utility system was deemed impractical for various reasons. A significant concern was the cost of installing water and wastewater transmission lines to interconnect Econ's facilities with OCPUD, which was estimated to be $6,096,035 for the water system and $5,084,288 for the wastewater system. OCPUD's water and wastewater facilities are about 10 miles from Wedgefield.

Further, Mr. Larkin noted that Econ's own engineer commented that asbestos-cement pipe would eventually need to be replaced. We note, however, that the quoted portion of that draft report does not identify when replacement would be needed. Mr. Larkin also testified that Econ failed to adequately maintain its facilities: "(t)he obvious reason for the low purchase price in relationship to the net book value is that many of the assets will have to be replaced or repaired."

Utility Witness Seidman testified that Mr. Larkin's characterization of this utility was "second-hand opinion." Mr. Seidman testified that he inspected the utility's facilities prior

to writing his testimony and just prior to the hearing in Orlando. He testified that Mr. Larkin's prefiled testimony led him to believe the system was in "shambles." Instead, he testified that the system was in relatively average condition for a small system, that everything was "functioning" and there were no violations, but there was maintenance which should be done. He testified that while the OCPUD report indicated severe corrosion was present at Econ's water and wastewater plants, the visible corrosion has been corrected and other corrosion problems can and will be corrected through normal maintenance.

Mr. Seidman testified that this system operates under the environmental jurisdiction of DEP and the Orange County Environmental Protection Department, which regularly inspect the utility and establish compliance standards. He further testified that the system is not subject to OCPUD jurisdiction or standards, and that OCPUD has imposed standards on its own systems that may not be required or economically feasible for an independent utility in order for it to provide safe, efficient and sufficient service.

Mr. Seidman testified that the OCPUD report concluded that Econ's water supply, treatment, and distribution systems were basically in good condition, but that there were problems with the wastewater system. He said while the report did not find that the plant was malfunctioning, it indicated that there were significant inflow and infiltration problems. However, he explained:

> That in itself is not some type of -- something that puts a system in poor condition. We know that the pipes in this system are old. There's indication that a portion of them are asbestos cement pipe, which represents about 20% of the pipe that's in the ground now. That was the standard at the time they were put in. There's not much you can do with them except take them out. That is not feasible for a system this size.

Mr. Seidman testified that OCPUD's report suggests that $3.3 million of its estimated $4.6 million capital improvement cost is needed to relocate mains from rear lot to front lot lines, to replace asbestos lines, or to replace "old" cast iron pipes. He testified that: "(t)here is no requirement on a privately owned utility to engage in such a massive replacement program, nor is Orange County or the DEP requiring the utility to do so." Instead, he said that OCPUD evaluated this system under the assumption that it would be integrated into the county's water and wastewater system. He explained:

> The analysis then details some $4.6 million in "costs" allegedly needed to bring the system up to County "standards." There is an inference that this amount of money must be spent because the utility system is "substandard." That is an incorrect inference and it is misleading.

Mr. Seidman testified that statements from the OCPUD report that maintenance was only performed on an "emergency basis" were conjectures not otherwise explained or substantiated in that report. He testified that maintenance may be performed on an "as-needed" basis without every instance being an emergency. As Econ incurred cumulative net operating losses of $2 million and net income losses of $4 million from 1988 to 1995, Mr. Seidman said he would not b surprised that a preventative maintenance program was not in place. In addition, Mr. Wenz testified that the prior owner was not interested in operating a utility or committing funds to it. However, Mr. Seidman testified that Wedgefield can actively pursue a capital improvement program and finance capital additions, which is the intended benefit of the Commission's acquisition adjustment policy.

Based upon the evidence in the record, we find that the acquired assets were in fair condition. As stated previously, Mr. Wenz testified that the facilities are in compliance with regulatory requirements and are not operating in violation of any DEP standards. Any significant problems which may exist appear to relate to the use of asbestos-cement pipes for distribution and collection lines, which was not an uncommon practice when those lines were installed. While replacement of these lines will eventually be necessary, immediate replacement is not economically feasible. We believe the record shows that the acquired assets were relatively typical for a developer-owned system. For this reason, we find that the utility's facilities were in fair condition, were typical of other utilities, and were not extraordinary in nature.

Econ As A "Troubled" Utility

Generally, absent extraordinary circumstances, it has been Commission policy that a subsequent purchase of a utility system at a premium or a discount shall not affect the rate base balance. As stated in Order No. 23376, issued August 21, 1990, the purpose of this policy is to create an incentive for larger utilities to acquire small, "troubled" systems.

In its brief, Wedgefield argues that Econ was a financially troubled utility, having sustained cumulative net losses in excess

of $4 million over the most recent eight-year period and that it lacked either the means or commitment to invest in future capital needs or future maintenance. Wedgefield argues that, unlike Econ, it has the financial ability and capacity to commit funds to operation of this utility. Wedgefield further contends that if OPC's witness admitted that this system was troubled, that would support the applicability of the Commission's policy of excluding the acquisition adjustment.

In its brief, OPC argued in its brief that Econ's assets were poorly maintained. OPC further argues that while Econ was able to meet environmental standards, it did not have a formal preventative maintenance program, only doing what was necessary to facilitate housing development. In its feasibility study, OCPUD reported that repairs were performed on an emergency basis and that there was no regular preventative maintenance program. Nonetheless, OPC argues that Econ was not a "troubled" utility because it was able to meet regulatory standards by providing maintenance on an emergency basis.

With regard to OPC witness Larkin's apparent inability to conclude that Econ was a "troubled utility," Mr. Seidman testified that:

> [Mr. Larkin] used a substantial part of his testimony to imply that this utility was like a car about to lose its wheels, that the expense to just keep it running would be enormous, and that the previous owner did practically nothing to maintain it. Then, when it comes to determining whether the utility is troubled, he turns to the PSC staff Engineers' report which says, well it's not so bad, it needs some improvements, but there is no problem with the water, and the wastewater plant is fine.

Mr. Seidman stated that Mr. Larkin balked at concluding that the utility was "troubled" because he "knows the purpose of the Commission's acquisition policy is to give large utilities an incentive to purchase small, 'troubled' utilities."

Mr. Wenz testified that the previous owner confided that: "although he wanted to continue to develop property, he was no longer interested in operating a utility or committing funds to it." In contrast, Mr. Wenz testified that Wedgefield's parent company only operates utility systems. With this affiliation, Wedgefield will be able to attract capital at a reasonable cost and benefit from economies of scale through sharing common vendor and management resources. He testified that Utilities, Inc. is probably the largest active company acquiring troubled water and

wastewater systems in Florida and that it relied upon this Commission's acquisition adjustment policy to bargain for and purchase these systems.

We believe these conditions are characteristic of a financially "troubled" utility. The record indicates that Econ was not in a position to increase its maintenance costs, to actively pursue a capital improvement program, or to finance capital additions. Conversely, Wedgefield appears able to assume these obligations. Based on the foregoing, we believe the record indicates that although Econ was a functioning utility, it was economically "troubled." Accordingly, we find that Econ was a "troubled" system.

Requirement to Show Extraordinary Circumstances

On November 17, 1989, OPC asked the Commission to initiate rulemaking or, alternatively, to investigate its policy regarding acquisition adjustments. Since at least 1983, we have consistently held that the rate base calculation should not include an acquisition adjustment absent evidence of extraordinary circumstances. We reviewed this issue in Docket No. 891309-WS. By Order No. 22361, issued January 2, 1990, we rejected OPC's petition to initiate rulemaking but granted its request to investigate this topic. Thereafter, we invited interested parties to submit written comments and conducted workshops to discuss this subject. By Order No. 23376, issued August 21, 1990, as a proposed agency action, we concluded that it would not be appropriate to amend our policy regarding acquisition adjustments. In that order, we stated that not only might OPC's proposed change not benefit the customers of troubled utilities, it might actually be detrimental, by removing any incentive for larger utility companies to acquire distressed systems. On September 11, 1990, OPC filed a protest to Order No. 23376.

Thereafter, pursuant to Section 120.57(2), Florida Statutes, we invited all interested parties to appear and be heard during an oral presentation on July 29, 1991. During this hearing, OPC argued that by failing to impose a negative acquisition adjustment on the buyer, the Commission was creating a "mythical" investment that exceeded the buyer's actual commitment of capital. OPC further argued that the Commission did not have the statutory authority to give the buyer the rate base of the seller. Conversely, utility companies argued that the Commission has broad authority to interpret its statutory authority in a manner which best serves the long-term interests of the ratepayers.

Reviewing our acquisition adjustment policy in Docket No. 891309-WS, we heard contrasting positions regarding use of the purchase price or the seller's rate base for subsequent rate case proceedings. In Order No. 25729, issued on February 17, 1992, we concluded the investigation and confirmed our acquisition adjustment policy. In that Order, we stated:

> We still believe that our current policy provides a much needed incentive for acquisitions. The buyer earns a return on not just the purchase price but the entire rate base of the acquired utility. The buyer also receives the benefit of depreciation on the full rate base. Without these benefits, large utilities would have no incentive to look for and acquire small, troubled systems. The customers of the acquired utility are not harmed by this policy because, generally, upon acquisition, rate base has not changed, so rates have not changed. Indeed, we think the customers receive benefits which amount to a better quality of service at a reasonable rate. With new ownership, there are beneficial changes: the elimination of financial pressure on the utility due to its inability to obtain capital, the ability to attract capital, a reduction in the high cost of debt due to lower risk, the elimination of substandard operating conditions, the ability to make necessary improvements, the ability to comply with the Department of Environmental Regulation and the Environmental Protection Agency requirements, reduced costs due to economies of scale and the ability to buy in bulk, the introduction of more professional and experienced management, and the elimination of general disinterest in utility operations in the case of developer owned systems.

In its brief, the utility argues that the Commission's policy regarding acquisition adjustments, which has been in effect at least since 1983, is that absent extraordinary circumstances, the purchase of a utility system at a premium or discount, shall not affect rate base. Wedgefield further contends that all of the arguments set forth by Witness Larkin have been heard and rejected by the Commission in Docket No. 891309-WS.

In its brief, OPC argues that because the Commission does not have a rule regarding acquisition adjustments, it cannot have in place a policy which requires a showing of extraordinary circumstances in order to warrant the recognition of an acquisition adjustment. If the Commission had such a policy, Section

120.54(1)(a), Florida Statutes, would require the Commission to have a rule reflecting that policy.

Section 120.54(1)(a), Florida Statutes, provides that rulemaking is not a matter of agency discretion, and that each agency statement defined as a rule by Section 120.52, Florida Statutes, shall be adopted by the rulemaking procedure as soon as feasible and practicable. Rulemaking shall be presumed feasible unless the agency proves that (1) the agency has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking, or (2) related matters are not sufficiently resolved to enable the agency to address a statement by rulemaking. Section 120.54(1)(a)1.a.-b., Florida Statutes.

In its brief, OPC contends that, unless the Commission is violating the Administrative Procedure Act, either the Commission has not acquired the knowledge and experience reasonably necessary to address a statement about acquisition adjustments by rulemaking, or the Commission has not sufficiently resolved related matters to enable the Commission to address a statement by rulemaking.

OPC contends in its brief that, although there is no requirement for a showing of extraordinary circumstances, such circumstances have been shown by the combination of a lack of maintenance of Econ's facilities by the prior owner and the magnitude of difference between the net book value and the purchase price. In summary, OPC argues in the "overview" portion of its brief that

> the facts and circumstances in this case meet the "extraordinary circumstances" test described in Commission orders dealing with the purchase of other water and wastewater utilities. This unadopted rule policy, however, is not binding on this proceeding. All of the facts and circumstances in this case, along with the inevitable consequences of the Commission's actions, must take precedence over unadopted rule policy if the Commission decides that the "extraordinary circumstances" test has not been met in this case.

Although the Commission has no rule regarding the rate base inclusion of an acquisition adjustment, previous Commission orders have consistently stated that, absent evidence of extraordinary circumstances, the rate base calculation should not include an acquisition adjustment. See Order No. 20707, issued February 6, 1989, in Docket No. 880907-WU; Order No. 23970, issued January 1, 1991, in Docket No. 900408-WS; Order No. 25584, issued January 8,

1992, in Docket No. 910672-WS; Order No. PSC-95-0268-FOF-WS, issued February 28, 1995, in Docket No. 940091-WS; Order No. PSC-96-1320-FOF-WS, issued October 30, 1996, in Docket No. 950495-WS.

As discussed previously, a recent opinion from the Florida First District Court of Appeal, Southern States Utilities n/k/a Florida Water Services Corporation v. Florida Public Service Commission, et al., Case No. 96-4227, PSC Docket No. 950495-WS, issued July 10, 1998, is instructive. In the Order on appeal, the Commission had declined a request from the Office of Public Counsel to make a downward adjustment in rate base, ruling that:

> This Commission has acknowledged that absent extraordinary circumstances, the purchase of a utility system at a premium or discount should not affect rate base.

See the court's opinion at page 17, citing Order No. PSC-96-1320-FOF-WS, issued October 30, 1996, in Docket No. 950495-WS. The First District Court of Appeal concluded that OPC had made no showing of exceptional or extraordinary circumstances, and that the Commission therefore lawfully exercised its discretion in declining to make the requested adjustment. Id.

We agree with Wedgefield's contention that the current Commission practice regarding acquisition adjustments is that, absent extraordinary circumstances, the purchase of a utility system at a premium or discount, shall not affect rate base. Although what constitutes "extraordinary circumstances" must be determined on a case-by-case basis, extraordinary circumstances must be shown to warrant rate base inclusion of an acquisition adjustment. This is consistent with the investigation conducted as to our acquisition adjustment policy in Docket No. 891309-WS, and subsequent Commission Orders in which acquisition adjustments are at issue.

At the August 4, 1997 Prehearing Conference, an issue was raised by OPC regarding the effect of prior orders to the instant proceeding. 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, noting that the issue was essentially phrased as a rule challenge that would be more appropriately brought before the Division of Administrative Hearings in a proceeding pursuant to a Section 120.54, Florida Statutes.

The matters raised in OPC's brief regarding whether the Commission's policy on acquisition adjustments constitutes an

unpromulgated rule are substantially similar to those raised with regard to the proposed issue which was stricken during the Prehearing Conference. Although the matter was not at issue in this case, we note that the acquisition adjustment issue is part of an on-going Commission staff project on viability and capacity development in the water and wastewater industry. We are not prepared to go to rulemaking until the overall project reaches some conclusion. We further note that the issue has been considered in past rulemaking cases, in which we were unable to reach a consensus on the issue of extraordinary circumstances.

Existence Of Extraordinary Circumstances

Wedgefield contends that rate base inclusion of an acquisition adjustment is not appropriate since there are no extraordinary circumstances this case. It argues that OPC misunderstands Order No. PSC-96-1241-FOF-WS, if OPC believes this issue only depends upon used and useful adjustments. Instead, Wedgefield argues that a used and useful adjustment "temporarily" removes the disputed balance in a rate proceeding, whereas rate-base inclusion of the acquisition adjustment "permanently" reduces the original cost balance.

In its brief, OPC argues that the disparity between the purchase price and the seller's net book value, together with the absence of preventative maintenance, are just reasons for rate base inclusion of the negative acquisition adjustment. OPC Witness Larkin testified that extraordinary circumstances are present in this case. First, he testified that Wedgefield's cash payment for Econ's assets was $545,000, whereas Econ's rate base at December 31, 1995, was $2,845,391. Additional payments to Econ are expected if development of the Reserve or Commons proceeds. Mr. Larkin testified that Econ's assets were only worth $545,000 because of "the condition of the assets and the amount of improvements necessary to bring the assets to an acceptable condition." Mr. Larkin testified that the extraordinary circumstances for this case were:

> Wedgefield was able to purchase this utility for approximately 20 cents on the dollar. And if an acquisition adjustment is not recognized, that these ratepayers will be asked to pay a rate of return on whatever portion of that 2.8 million is eventually used and useful. And our feeling is it's probably pretty high now. Plus, whatever repairs and maintenance expenses are necessary to bring this up -- this utility up to a standard that would be acceptable for the consumption of the customers.

However, Mr. Larkin acknowledged under cross-examination that, absent this sale, Econ would have been allowed to earn a return on its net original cost, plus depreciation, subject to used and useful adjustments. Also, Mr. Larkin stated that he would not be troubled by the sale if Wedgefield had paid $2.8 million to acquire Econ's assets if that was an arm's length transaction.

Mr. Larkin prepared two schedules that illustrate relative income requirements under two investment alternatives: the purchase price before future payments, or $545,000, and the seller's net investment at December 31, 1995, or $2,845,391. He first calculated that allowing a 12.95% pre-tax return on the seller's investment would yield a 67.61% return on the purchase price. Second, he calculated that allowing a 6% return on a $2,800,000 investme. would yield a 30.83% return on $545,000.

We believe that these calculations only show that the acquiring company may realize an enhanced return on its investment that exactly corresponds to the price differential: the larger the price difference, the larger the expected return. However, when used-and-useful measures are considered, the income differential is accordingly reduced. Further, Mr. Larkin's equations do not show that Wedgefield's revenues would exceed Econ's comparative revenues. If operating expenses are reduced, the assumed expansion of earnings may be offset by a reduction in expenses. If cost of capital charges are reduced, other savings may result.

Utility Witness Seidman testified that he believed the price difference was the only condition that Mr. Larkin characterized as extraordinary. He argued that using this argument to justify inclusion of the acquisition adjustment was an exercise in circular reasoning. Instead, according to Mr. Seidman, the price difference is the incentive that the acquiring company obtains for buying the utility. On an overall basis, Mr. Seidman said the Commission should examine its policy from two perspectives: first, that Mr. Larkin's arguments have all been made before and rejected in a generic proceeding, and second, that the acquiring company relied upon the Commission's policy to bargain for and purchase this system.

In Docket No. 891309-WS, we reviewed our policy concerning acquisition adjustments. In Order No. 25729, issued February 17, 1992, we acknowledged that the buyer not only earns a return on the acquired utility's rate base but also depreciation on that balance. We concluded that without these benefits, "large utilities would have no incentive to look for and acquire small, troubled systems."

We concluded that, absent extraordinary circumstances, the seller's net book value should be retained.

Upon consideration of the parties' arguments, the evidence in the record, and our review of prior Commission orders on the matter, we believe that there are no extraordinary circumstances that warrant rate base inclusion of an acquisition adjustment in this case. As discussed previously in this Order, the acquired assets were in fair condition, neither extremely good nor extremely poor. Some water and wastewater lines were installed using asbestos-cement pipes, but there are no immediate plans to replace those facilities. Instead, the evidence shows that the estimated cost just to replace those lines would exceed the net book value of all of the utility's existing facilities.

We do not believe that the acquisition adjustment issue should depend upon the magnitude of the price differential. In other cases, we have encountered larger price and percentage differences while approving retention of the seller's net book value. Based upon certain underlying assumptions, including a 100% used-and-useful finding, Mr. Larkin calculated that Wedgefield would realize a 67.71% pretax return on its initial $545,000 investment. However, used-and-useful adjustments, if any, will reduce Wedgefield's income requirement. Further, any savings due to reduced expenses and cost of capital features are ignored in Mr. Larkin's model.

Interconnection with OCPUD's utility system was deemed impractical for various reasons, including significant costs to replace Econ's asbestos-cement lines and even larger expenditures to install transmission lines between Econ and Orlando's service areas. In other respects, Mr. Seidman testified that the OCPUD report indicated that severe corrosion was present at Econ's water and wastewater plants, but he explained that visible corrosion has already been corrected and other corrosion problems would be corrected through normal maintenance.

Accordingly, we find that there are no extraordinary circumstances in this proceeding which warrant a rate base inclusion of an acquisition adjustment.

Negative Acquistion Adjustment

In its brief, Wedgefield argues that because it has not requested rate base inclusion of a negative acquisition adjustment, the burden of proving that such an adjustment should be made rests with the party requesting such treatment, which in this case is OPC. In its brief, OPC argues that a $2,300,394 negative

acquisition adjustment, or Econ's net book balance of $2,845,394 less the $545,000 cash purchase price, should be included in rate base.

During the hearing, Mr. Wenz was asked whether Wedgefield should assume some of the burdens as well as some of the benefits of "stepping in the shoes" of the former company. Mr. Wenz indicated that if Wedgefield incurred costs to correct infiltration problems, Wedgefield would expect to recover those costs even if those problems were due to the previous owner's neglect of maintenance. However, Mr. Wenz responded that Wedgefield would not expect full recovery of similar costs if it had always owned the system and failed to maintain its lines. Asked to explain the seeming incongruity of those positions, Mr. Wenz testified that Econ had $7 million in accumulated operating losses on its books and, therefore, insufficient funds to better maintain its system. Further, as the acquirer of a troubled utility system, Wedgefield would expect to recover its costs and not be held responsible for the previous owner's omissions. Asked whether the previous owner's failure to properly maintain the system would qualify as an extraordinary circumstance, Mr. Wenz testified that it "hasn't been historically."

Mr. Larkin suggested that the Commission should use the actual purchase price and avoid subsequent sorting out of what was paid to correct this or that problem. If the Commission uses the purchase price, "we've got a number we can deal with. We won't have to deal with in the future about what may or may not be disallowed. Let them recover everything in the future that they pay to bring it up to snuff." We believe that Mr. Larkin's proposal goes to the heart of the many concerns that have been expressed over time about the Commission's policy regarding acquisition adjustments. However, it effectively removes the incentive factor for Wedgefield's acquisition of Econ's facilities.

Mr. Seidman also addressed the issue concerning the acquiring company's responsibility for problems caused by the seller. He testified that he believed Mr. Wenz was probably too careful in his remarks, and that some intermediate position was needed. He testified that when the Commission makes a negative acquisition adjustment, the buyer is held responsible since everything is written off, whether the impact is large or small: "(t)here's no incentive to me under that type of arrangement for anybody to make a purchase." If the negative acquisition adjustment is not made, "the purchaser gets the incentive, but the door is still left open" in a rate case to evaluate whether improvements are needed to compensate for prior neglect. Since the Commission can review the

problem in the future, the purchaser is protected because it has an opportunity to address those concerns at that time. He explained:

> You know there may be an adjustment appropriate in one particular account and not in another, instead of across the board and it's gone forever. To me that's fair. I've talked to Mr. Wenz, and he has no problem with that type of approach.

As noted previously, we do not believe any extraordinary circumstances have been shown in this case. Further, we do not believe that the price differential, alone, constitutes an extraordinary circumstance. Therefore, in accordance with our past practice, a negative acquisition adjustment will not be imposed in this proceeding.

NET BOOK VALUE

In its brief, Wedgefield explains that there is no dispute regarding the net book value of the acquired assets, which was $1,462,487 for the water system and $1,392,904 for the wastewater system. In its brief, OPC concurs that the original cost balance was about $2,845,394 for the combined water and wastewater systems.

The accounting records for Econ Utilities were reviewed by Staff Witness Welch, for the calendar year ended December 31, 1995. Staff Witness Welch is the Regulatory Analyst Supervisor for the Commission's Miami District Office. Based upon her inspection and her reliance on previous audits, Ms. Welch concluded that the original cost value for the acquired facilities was $1,462,487 for the water system and $1,382,904 for the wastewater system. Ms. Welch testified that she examined Econ's books but did not inspect its facilities and was uncertain whether an engineer from Tallahassee may have visited the utility. However, she testified that she was not expressing an opinion on whether rate base inclusion of an acquisition adjustment was proper.

Utility Witness Wenz testified that the rate base balances calculated in staff's audit correctly reflect the original cost of plant in service, net of accumulated depreciation and unamortized CIAC, at the time of transfer. OPC Witness Larkin testified that he was not taking exception to the audit report, which showed a net book value of $2,845,391 for the combined systems.

In light of the foregoing, and because the audit conclusions were not disputed, we find that the net book values for the acquired water and wastewater systems, at December 31, 1995, were $1,462,487 and $1,382,904, respectively.

RATE BASE

In its brief, Wedgefield argues that, pursuant to Section 367.081, Florida Statutes, the Commission must establish rates using the original cost of the company who dedicated that property to public service. In its brief, OPC argues that because of neglect by the previous owner, the $545,000 purchase price is the proper rate base amount.

As discussed previously, staff's audit reflected recommended rate base values of $1,462,487 and $1,382,904 for the respective water and wastewater systems, based upon Econ's net plant investment in the facilities. We determined previously herein that the rate base determination shall not include a negative acquisition adjustment. We believe that Wedgefield's rate base balance should match Econ's net book balance at the transfer date, which is consistent with Commission policy. Accordingly, we find that the rate base balances for the water and wastewater systems are $1,462,487 and $1,382,904, respectively.

CONTINGENT PORTION OF THE PURCHASE PRICE

In its brief, Wedgefield argues that there is no relationship between its payment of the contingent liability and Econ's rate base value and, thus, this topic is irrelevant. In its brief, OPC argues that the contingent payments should only be recognized when actually paid, and only if those payments do not collaterally increase the cost of service for existing customers.

By the terms of the purchase agreement, dated January 17, 1996, Econ agreed to sell its water and wastewater facilities to Wedgefield's parent company for an immediate $545,000 cash payment plus future payments based on expected development of the Commons. Pursuant to the agreement, all distribution and collection facilities within the Commons will be contributed to Wedgefield. The agreement also reflects that the added consideration will be 50% of the expected connection fees for the Commons. Four hundred housing units were originally planned for the Commons. At the hearing, Mr. Wenz testified that he believed the expected hookups had been reduced to 328. Under either condition, using the present $3,000 per unit connection fee, these future payments will increase Wedgefield's overall purchase price.

In Order No. PSC-96-1241-FOF-WS, issued October 7, 1996, Econ's per book investment of $2,845,391 was compared with Wedgefield's projected total investment ($545,000 plus $600,000) to disclose an excluded acquisition adjustment of $1,700,391. Using updated information, Wedgefield's projected investment will be

about $1,037,000 ($545,000 plus $492,000) and the acquisition adjustment will be $1,808,391. However, from a policy perspective, derivation of the acquisition adjustment balance is largely a balancing measure since the real issue is its inclusion or exclusion.

In its brief, Wedgefield comments that this issue is not relevant since it does not affect Econ's historical investment in plant facilities. OPC and its witness, Mr. Larkin, advocate recognition of the additional payments only after those payments are made. Then, their proposed accounting treatment for the additional payments would be a credit entry to contributions-in-aid-of-construction (CIAC) offset by an equivalent debit entry to the acquisition adjustment account. We agree that this method properly reflects the gradual nature of the contingent payments. At the hearing, Mr. Wenz testified that Wedgefield will fully account for any CIAC due from development of the Commons and recognize a contingent liability to Econ to reflect any subsequent payments, which is consistent with the accounting treatment proffered by OPC.

Over time, Wedgefield's purchase price will likely increase, thereby changing and reducing the negative acquisition adjustment. However, Order No. PSC-96-1241-FOF-WS did not explain that this change would be gradual. Instead, that order focused on a full accounting for future CIAC balances to preclude any understatement of CIAC due to retention of connection fees by the seller. That comparison in that Order produced a price differential based upon Wedgefield's prospective investment, not the current amount. If we were to approve Wedgefield's purchase price as the rate base amount, then Mr. Larkin's proposal to initially eliminate future payments would be proper.

As an alternative, Mr. Larkin proposed waiting until the cost of serving the Commons is known to evaluate whether the additional payments should be charged to the acquisition adjustment. Because that option involves uncertainty regarding future cost efficiencies, we decline to adopt Mr. Larkin's alternative proposal at this time.

As noted previously, Wedgefield contends that Econ's net book value should be the rate base amount, which does not depend upon subsequent payments to Econ. Conversely, OPC advocates use of the purchase price for future ratemaking purposes. It appears that both parties agree as to the proper accounting treatment for the contingent payments; the disagreement arises from different perspectives relative to retention of the seller's net book value versus the purchase price.

While we support retention of the original cost balance as the rate base amount from an accounting standpoint, we find that the contingent portion of the purchase price should only be recognized when the actual payments are made. However, for ratemaking purposes, the contingent payment element would only be an issue if we approved the purchase price as the rate base balance. However, as discussed subsequently in this Order, because we approve the seller's net plant balance as the rate base balance, that calculation is not affected by any contingent payment issues.

CLOSING OF DOCKET

Upon expiration of the time for filing an appeal, no further action will be necessary and this docket shall be closed. If a party files a notice of appeal, this docket shall be closed upon resolution thereof by the appellate court.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that each of the findings made in the body of this Order is hereby approved in every respect. It is further

ORDERED that all matters contained in the attachment appended to this Order are by reference incorporated herein. It is further

ORDERED that rate base for Econ Utilities Corporation, which for transfer purposes reflect the net book value, is $1,462,487 for the water system and $1,382,904 for the wastewater system. It is further

ORDERED that there shall be no rate base inclusion of an acquisition adjustment for the purposes of the transfer. It is further

ORDERED that upon expiration of the time for filing an appeal, or upon resolution of any appeal filed in this matter, this docket shall be closed.

By ORDER of the Florida Public Service Commission this 12th day of August, 1998.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

JSB

Commissioner J. Terry Deason dissented in the Commission's decision in this docket with the following opinion:

I respectfully dissent from the majority's decision not to recognize a negative acquisition adjustment in this case. The Commission's policy has been that, absent extraordinary circumstances, there will be no rate base inclusion of an acquisition adjustment, either positive or negative. In my opinion, the Commission's standard has been met in this case and as such a negative acquisition should have been recognized.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

ATTACHMENT A

PROPOSED FINDINGS OF FACT

1. Utilities, Inc. is a privately owned public utility engaged solely in the business of owning and operating water and wastewater systems and has no developer relationships. It owns and operates 63 subsidiaries in fifteen states, including twelve in Florida where it maintains experienced management and professional operators. It is adequately financed, has access to capital at reasonable costs, and is capable of reducing costs of operation due to economies of scale. [Tr. 157, Wenz Direct Testimony page 1, lines 17-18 and 24-25; Tr. 173-174, Wenz Additional Direct Testimony page 10, line 23 to page 11, line 15; Ex. 11, Application for Transfer, and its Exhibit A].

RULING: Rejected as argumentative or conclusory.

2. Through Wedgefield Utilities, Inc., its wholly owned subsidiary, Utilities, Inc. has the ability and commitment to make the necessary improvements in this utility. It has the potential to reduce costs through the allocation of administrative expenses and through access to an established purchasing system, and it is familiar with, and has the ability to comply with, state and federal regulations. [Ex. 11, Application for Transfer, Part I, Para. E. and Part II, Para. A.; Tr. 173-174, Wenz Additional Direct Testimony page 10, line 23 to page 11, line 15].

RULING: Accepted.

3. Econ Utilities Corporation was a small, developer-owned utility with financial pressures due to sustained losses that made it difficult to attract capital at a reasonable cost and to operate and maintain the systems which put it in danger of not being able to expend the necessary capital to meet its obligations. The former owners either do not have, or are not willing to commit, the funds necessary to continue to operate and finance the utility. [Tr. 172, Wenz Additional Direct Testimony page 9, lines 12-19; Tr. 340-341, Seidman Rebuttal Testimony page 25, line 7 to page 26, line 2].

RULING: Rejected as argumentative or conclusory.

4. In its negotiations to purchase Econ Utilities, Utilities, Inc. was fully aware of, and relied on, this Commission's

acquisition adjustment policy stated in Commission Order Nos. 25729 and 23376. [Tr. 168-169, Wenz Additional Direct Testimony page 5, line 20 to page 6, line 20.]

RULING: Accepted.

5. The Orange County Utilities Division has no authority over Wedgefield or any other utility, whether privately or publicly owned, and its "standards" are applicable only to its own operations. [Composite Ex. 8, ltr. dtd 4/13/1995, Mr. Ispass to Mr. Blake, page 1].

RULING: Rejected as argumentative or conclusory.

6. Econ operated (and now Wedgefield operates) under the jurisdiction of the Florida Department of Environmental Protection (DEP), the Orange County Environmental Protection Department (OCEPD), and the Florida Public Service Commission. It is inspected regularly by DEP and by OCEPD. These three agencies provide standards for Wedgefield and determine what is necessary for compliance, based on Federal and Florida laws and regulations. [Tr. 328, Seidman Rebuttal Testimony page 13, lines 13-22; Ex. 11, Application].

RULING: Accepted.

PROPOSED CONCLUSIONS OF LAW

1. It is the policy of this Commission that, absent extraordinary circumstances, the purchase of a utility at a premium or discount shall not effect the rate base calculation and the proponent of an acquisition adjustment, either positive or negative, bears the burden of proof.

RULING: Rejected as unsupported.

2. There is no extraordinary circumstances in this purchase, and no acquisition adjustment should be included in the rate base calculation.

RULING: Rejected as not constituting a conclusion of law.

3. For purposes of this transfer, the rate base is equal to the net book value of the assets, excluding ratemaking adjustments such as working capital or used and useful adjustments, and is $1,462,487 for water and $1,382,904 for wastewater.

RULING: Rejected as not constituting a conclusion of law.

4. Econ was (and now Wedgefield is) in compliance with the requirements of the Florida Department of Environmental Protection (DEP) and by the Orange County Environmental Protection Department (OCEPD).

RULING: Rejected as not constituting a conclusion of law.

5. Imposing a NAA would discourage the purchase of a system such as Econ, and that thwarts Commission policy and is a detrimental consequence to customers.

RULING: Rejected as not constituting a conclusion of law.

6. At the time of sale, the Econ assets were all functioning and not in violation of any state regulations. They were typical of developer-owned utilities, not in the best condition and not up to the standard which Utilities, Inc. would want to maintain, but not in extremely poor condition, either.

RULING: Rejected as not constituting a conclusion of law.

7. All the arguments set forth by Mr. Larkin have been made before and have been rejected by this Commission in generic proceedings and in prior, case-specific orders of the Commission.

RULING: Rejected as not constituting a conclusion of law.

8. The utility will not be allowed to recover a return on assets which do not exist. Clearly, the assets do exist. They didn't disappear when ownership changed.

RULING: Rejected as not constituting a conclusion of law.

9. A NAA is considered at the time of transfer and requires that extraordinary circumstances be found for taking the extreme step of permanently reducing the net original cost as rate base. A used and useful adjustment is used in a rate case for temporarily removing from rate base certain assets which are not currently used and useful in providing utility service to the customers. The two regulatory concepts perform different functions at different times. a) The contingent portion of the purchase price has no effect on rate base. In addition, the service area in the Reserve (formerly The Commons) is already under construction. The contract requires contingent payments to be made as soon as each new home is hooked up, so any "uncertainty" or "speculation" about whether payments will be made is unwarranted.

RULING: Rejected as not constituting a conclusion of law.

10. A major purpose of Commission policy on acquisition adjustments is to create an incentive for larger utilities to acquire small, troubled utilities. If a benefit to the purchaser results from the purchase price being lower than book value, it is at the expense of the seller, not at the expense of the customer. In fact, rate base is unchanged, and, because of this, there is no harm to the customer.

RULING: Rejected as not constituting a conclusion of law.

11. Commission Order No. 25729 listed several beneficial changes due to a change in ownership, which the current Commission policy is intended to encourage. It also found that the customers of utilities acquired under its policy are not harmed, and indeed benefit from a better quality of service at reasonable cost.

RULING: Rejected as not constituting a conclusion of law.

12. To change the policy now not only would be a denial of due process but it also would defeat the purposes of the policy as originally developed and implemented by the Commission.

RULING: Rejected as not constituting a conclusion of law.

13. Rate base must recognize the original cost of assets at the time they were dedicated to public service.

RULING: Rejected as unsupported.

14. Based on a review of prior Commission orders, including the dissenting opinions, the following factors either are not relevant to the Wedgefield transfer, are not "extraordinary circumstances", or do not otherwise authorize, require or warrant a negative acquisition adjustment.

The system does not require replacing, the jurisdictional status is known, there is growth potential, and the system will benefit from certain economies under new ownership. The improvements that have to be made are in the public interest. The revenue requirement associated with the net original cost of the system would be no more than under the previous ownership. There is no requirement to prove hardship on the part of the seller. The tax treatment of the seller is irrelevant. A large differential between purchase price and rate base is not, of itself, an "extraordinary circumstance".

The determination of rate base in this case is not an initial determination; rate base was determined by the Commission in 1984, and there was no lack of original cost documentation. Even when a previous owner failed to maintain a system properly and the new owner had to make considerable expenditures to bring the system into compliance, these events are not "extraordinary circumstances". The customers do not have to "pay twice" because, regardless of ownership, the customers pay only for the legitimate cost of assets and expenses incurred and actually paid in their behalf. Customers will not pay for anything under the new ownership that they would not have been required to pay for under prior ownership. The transfer is customer-neutral, except for benefits the customers will receive due to new ownership. The sale did not result from a bankruptcy of foreclosure. The purchaser does not have uniform rates among its systems. To include both a negative acquisition adjustment and used and useful adjustments on the same plant would be double counting. Regardless of whether a purchasing utility includes a consideration of used and useful adjustments in its negotiations for acquisition or for setting the purchase price, a NAA is not warranted. In the public interest, the purchaser has already made improvements in the system and in its management. Only utility property, and no lots or other assets, were bought or sold in the transaction between seller and purchaser. Seller had not filed to abandon the utility system. The seller has not been purchasing water or any other utility service from any other utility, and it has not been earning on unused plant components. Any ratemaking adjustments would have to considered in the context of a rate case. Not including a negative acquisition adjustment does no harm to customers. Rate base and monthly rates will not change as a result of the transfer. The sale of the utility does not involved a three-party or a nontaxable exchange, there are no family trusts or other trusts involved in the sale, and even without a negative acquisition adjustment, the seller will not recover, much less double recover, its investment. There has been no agreement or settlement of this transfer docket for any transfer rate base less than full net book value, and Wedgefield has not requested anything that would cause a change to rate base or rates as a result of the transfer.

RULING: Rejected as not constituting a conclusion of law.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into Acquisition Adjustment policy.	DOCKET NO. 891309-WS ORDER NO. 23370 ISSUED: 8-21-90

The following Commissioners participated in the disposition of this matter:

MICHAEL McK. WILSON, Chairman
THOMAS M. BEARD
BETTY EASLEY
GERALD L. GUNTER
FRANK S. MESSERSMITH

NOTICE OF PROPOSED AGENCY ACTION

ORDER DISAPPROVING PROPOSED AMENDMENT TO ACQUISITION ADJUSTMENT POLICY

BY THE COMMISSION:

NOTICE IS HEREBY GIVEN by the Florida Public Service Commission that the actions discussed herein are preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding pursuant to Rule 25-22.029, Florida Administrative Code.

On November 17, 1989, the Office of Public Counsel (OPC) filed a petition to initiate rulemaking or, in the alternative, to initiate an investigation into this Commission's policy regarding acquisition adjustments. Our policy is that, absent extraordinary circumstances, the purchase of a utility system at a premium or discount shall not affect the rate base calculation. The purpose of this policy is to create an incentive for larger utilities to acquire small, troubled utilities. This has been our policy since approximately 1983 and, since that time, few utilities have had their rate bases changed as the result of a purchase at a premium or a discount.

The incentive that our policy provides to the acquiring utility is that we will let it earn a return on not just the purchase price, but on the rate base of the acquired utility. The acquiring utility also receives the benefit of depreciation

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Chief, Bureau of Records

on the full rate base. The customers of the acquired utility are not harmed by this policy because rate base has not changed. In fact, the customers should derive certain benefits from the acquisition, such as:

1. increased quality of service;
2. lowered operating costs;
3. increased ability to attract capital for improvements;
4. a lower overall cost of capital; and
5. more professional and experienced managerial, financial, technical and operational resources.

Those utilities that are actively acquiring distressed utilities have found that our policy gives them the flexibility to make some purchases at a premium and still receive rate base treatment because of the balancing effect created by purchases made at a discount. In other words, multiple purchases at a discount have created a new incentive to purchase those troubled utilities that can only be purchased at a premium.

In its petition, OPC argued that our policy inappropriately places the burden upon Staff or OPC to justify why rate base should be established as the purchase price rather than net book value. OPC suggested that, when a system is purchased at a discount, absent a showing by the acquiring utility that recognizing any amount of rate base in excess of the actual purchase price is in the public interest, we should establish rate base at the purchase price. OPC argues that this would shift the burden of proof to the acquiring utility, where it rightfully belongs.

By Order No. 22361, issued January 2, 1990, we rejected OPC's petition to initiate rulemaking but granted its request to initiate an investigation into our acquisition adjustment policy.

As part of the investigation, Staff invited all interested persons to submit written comments regarding the acquisition adjustment policy. Staff also held an informal workshop to discuss the current policy and the changes recommended by OPC. Comments were submitted by, and the workshop was attended by representatives of, Jacksonville Suburban Utilities Corporation (JSUC), Southern States Utilities, Inc. (Southern States), and OPC.

Southern States and JSUC each supported our current policy and suggested that OPC's proposed change would have a negative effect on future acquisitions of distressed utilities. Southern States also stated that the policy does, in fact, act as a powerful incentive to acquire these systems.

OPC, on the other hand, questioned whether we need to provide an extra incentive for utilities to pick up distressed systems. OPC suggested that a fair return on the acquiring utility's actual investment should be enough of an incentive. However, even assuming that an extra incentive is needed, OPC argued that we should place the burden on the acquiring utility to demonstrate whether the nonrecognition of a negative acquisition adjustment is the appropriate incentive and, if so, that the benefits discussed above will flow to the ratepayers.

OPC also argued that our current policy might actually harm the customers of an acquired utility, especially if the former owners have allowed the utility systems to become dilapidated. OPC argued that this would result in the customers paying a return on both the dilapidated plant and any plant constructed to replace it. OPC also argued that our policy is unfair because, not only do we allow the customers to pay a return on the difference between the purchase price and net book value, we also allow the acquiring utility to recover the full book value of the system from the customers through depreciation expense.

Upon consideration of the above, we do not believe that it would be appropriate to amend our acquisition adjustment policy. Not only might OPC's proposed change not benefit the customers of troubled utilities, it might actually be detrimental, by removing any incentive for larger utility companies to acquire distressed systems. Further, it appears that OPC is most concerned with our not recognizing a negative acquisition adjustment when the prior owner has allowed the plant to become dilapidated. It may, therefore, not be our policy, but the transfer filing requirements that need to be amended. In the meantime, however, we believe that these matters may be adequately addressed and developed through the use of interrogatories and other discovery methods.

It is, therefore,

ORDERED by the Florida Public Service Commission that the Office of Public Counsel's proposed amendment to this Commission's acquisition adjustment policy is hereby disapproved. It is further

ORDERED that this Order is issued as proposed agency action, but will become final unless an appropriate petition is filed with the Division of Records and Reporting by the close of business on the date indicated in the Notice of Further Proceedings or Judicial Review. It is further

ORDERED that, subsequent to the expiration of the protest period, this Commission will issue either a notice of further proceedings, or an order indicating that the provisions of this Order have become final and effective and closing this docket.

By ORDER of the Florida Public Service Commission this 21st day of AUGUST, 1990.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

RJP

ORDERED by the Florida Public Service Commission that the Office of Public Counsel's proposed amendment to this Commission's acquisition adjustment policy is hereby disapproved. It is further

ORDERED that this Order is issued as proposed agency action, but will become final unless an appropriate petition is filed with the Division of Records and Reporting by the close of business on the date indicated in the Notice of Further Proceedings or Judicial Review. It is further

ORDERED that, subsequent to the expiration of the protest period, this Commission will issue either a notice of further proceedings, or an order indicating that the provisions of this Order have become final and effective and closing this docket.

By ORDER of the Florida Public Service Commission this 21st day of August, 1990.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

RJP

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.

The action proposed herein is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting at his office at 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on September 11, 1990.

In the absence of such a petition, this order shall become effective on the day subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code, and as reflected in a subsequent order.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If this order becomes final and effective on the date described above, any party adversely affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation of Acquisition Adjustment Policy	)	DOCKET NO. 891309-WS
	)	ORDER NO. 25729
	)	ISSUED: 2/17/92

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
BETTY EASLEY

ORDER CONCLUDING INVESTIGATION AND CONFIRMING ACQUISITION ADJUSTMENT POLICY

BY THE COMMISSION:

CASE BACKGROUND

On November 17, 1989, the Office of Public Counsel (OPC) filed a Petition to Initiate Rulemaking Proceedings or Alternatively to Issue an Order Initiating Investigation. OPC proposed a specific amendment to Rule 25-30.040(3)(o), Florida Administrative Code, regarding the treatment of acquisition adjustments in rate base.

By Order No. 22361, issued January 2, 1990, we denied OPC's request to initiate rulemaking and instead initiated an investigation of our policy on acquisition adjustments. As part of our investigation, we requested and received written comments from interested persons and held an informal workshop on March 28, 1990, to discuss the Commission's current policy and OPC's proposed changes. By proposed agency action (PAA) Order No. 23376 issued August 21, 1990, we declined to make any changes to our acquisition adjustment policy. On September 11, 1990, OPC filed a protest to Order No. 23376. Pursuant to Section 120.57(2), Florida Statutes, we afforded all parties the opportunity to be heard on this matter at an oral presentation on July 29, 1991. This Order contains our final disposition of this proceeding.

ACQUISITION ADJUSTMENT POLICY

Our policy on acquisition adjustments since approximately 1983 has been that absent extraordinary circumstances, the purchase of a utility system at a premium or discount shall not affect rate base. The purpose of this policy, as stated in PAA Order No. 23376, has been to create an incentive for larger utilities to

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acquire small, troubled utilities. We believe that this policy has done exactly what it was designed to do. Since its implementation, many small utilities have in fact been acquired by larger utilities, and we have changed rate base in only a few cases.

OPC charges that the relationship between rate base and utility investment is broken upon the sale of a utility. An acquiring utility must therefore establish the extent to which its own investment is prudent without regard to the seller's rate base or investment level. OPC believes that investors in the selling utility recover their investment through the sale of the utility; the buyer's investment is represented by the purchase price. By not allowing the buyer to increase rate base to equal the purchase price through a positive acquisition adjustment, OPC claims, the Commission is not allowing the buyer to earn a return on imprudent investment.

OPC seems to view positive and negative acquisition adjustments somewhat differently. For positive acquisition adjustments, OPC believes that appropriate standards must be established for the buyer to show, and for the Commission to evaluate, the prudence of the acquisition at a premium so the sale of a utility does not increase customer rates without any new assets being devoted to utility service. But for negative acquisition adjustments, OPC believes that the Commission has no alternative except to automatically impose an adjustment.

OPC asserts that if the negative acquisition adjustment is not imposed upon the buyer, the Commission is creating a mythical investment above the actual commitment of capital by the buyer. This error, OPC argues, is further compounded by the buyer's recovering depreciation expense on this mythical investment.

OPC also argues that this Commission does not have the statutory authority to give the buyer the rate base of the seller. Section 367.081(2)(a), Florida Statutes, refers to "the investment of the utility." OPC claims that the seller is not the "utility" referred to in this definition, the buyer is. Therefore, OPC concludes, the "investment of the utility" must be the prudent investment made by the buyer.

The other parties to this proceeding, Southern States Utilities, Inc., Deltona Utilities, Inc., United Florida Utilities Corporation, and Jacksonville Suburban Utilities Corporation

(collectively, the utility companies) make several arguments in response to OPC. First, they point out that OPC suggests an inconsistent use of purchase price. Where a negative acquisition adjustment pertains, the investment of the utility means the purchase price paid by the buyer, but where a positive acquisition adjustment is considered, the investment of the utility means the net book value, or rate base, of the seller. The utility companies also argue that if the Commission were to adopt OPC's view, the incentive for larger utilities to rescue small, distressed utilities would be erased. Further, the utility companies assert that OPC's position conflicts with prior unchallenged Commission decisions allowing positive acquisition adjustments. In conclusion, the utility companies also argue that our current policy comports with our broad authority to interpret and implement our statutory authority in a manner which best serves the long term interests of the ratepayers.

On the point of statutory interpretation, we disagree with OPC. We do not think that Section 367.081(2)(a), Florida Statutes, limits us from including in rate base only that which an acquiring utility has invested in the system, i.e., the purchase price, as OPC asserts. This Commission has consistently interpreted the "investment of the utility" as contained in Section 367.081(2)(a), Florida Statutes to be the original cost of the property when first dedicated to public service, not only in the context of acquisition adjustments, but elsewhere as well. In our current policy on acquisition adjustments, we do not deviate from this interpretation, nor do we exceed our statutory authority. Furthermore, OPC has cited no authority to support its contention that we have misinterpreted the statute.

We still believe that our current policy provides a much needed incentive for acquisitions. The buyer earns a return on not just the purchase price but the entire rate base of the acquired utility. The buyer also receives the benefit of depreciation on the full rate base. Without these benefits, large utilities would have no incentive to look for and acquire small, troubled systems. The customers of the acquired utility are not harmed by this policy because, generally, upon acquisition, rate base has not changed, so rates have not changed. Indeed, we think the customers receive benefits which amount to a better quality of service at a reasonable rate. With new ownership, there are beneficial changes: the elimination of financial pressure on the utility due to its inability to obtain capital, the ability to attract capital, a

reduction in the high cost of debt due to lower risk, the elimination of substandard operating conditions, the ability to make necessary improvements, the ability to comply with the Department of Environmental Regulation and the Environmental Protection Agency requirements, reduced costs due to economies of scale and the ability to buy in bulk, the introduction of more professional and experienced management, and the elimination of a general disinterest in utility operations in the case of developer owned systems.

Some utilities that are actively acquiring troubled utilities have found that our policy has given them the ability to make some purchases at a premium because of the balancing effect created by purchases made at a discount. Thus, our current policy offers enough incentive for utilities to make multiple purchases at a discount and still purchase a troubled utility that can only be purchased at a premium.

At the July 29, 1991, oral presentations, OPC stated that any incentive for acquisition should be in the form of a higher rate of return. We do not believe that this would create the necessary incentive. To illustrate, if an acquired system with a net book value of $100,000 was purchased for $80,000 and we raised the return on equity by 200 basis points, a utility with 50% equity would benefit after taxes by approximately $470. If the award were 400 basis points, the incentive after taxes would be approximately $940. We do not think that this is an adequate incentive for the acquisition of any troubled system.

In consideration of the foregoing, we conclude this investigation of our acquisition adjustment policy without making any change thereto. We note that our staff has opened a docket, Docket No. 911082-WS, wherein rules on acquisition adjustments will be addressed.

It is, therefore

ORDERED by the Florida Public Service Commission that this investigation of current Commission policy on acquisition adjustments is concluded and that policy, as described in the body of this Order, is hereby confirmed. It is further

ORDERED that this docket is closed.

By ORDER of the Florida Public Service Commission, this 17th day of FEBRUARY, 1992.

STEVE TRIBBLE, Director,
Division of Records and Reporting

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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.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.