

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for transfer) DOCKET NO. 960235-WS
of Certificates Nos. 404-W and)
341-S in Orange County from Econ)
Utilities Corporation to)
Wedgefield Utilities, Inc.)
_____))
In Re: Application for) DOCKET NO. 960283-WS
amendment of Certificates Nos.) ORDER NO. PSC-97-0104-FOF-WS
404-W and 341-S in Orange County) ISSUED: January 27, 1997
by Wedgefield Utilities, Inc.)
_____))

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK
J. TERRY DEASON
JOE GARCIA

ORDER GRANTING OPC'S MOTION TO STRIKE AND
DENYING WEDGEFIELD'S MOTION TO DISMISS OR STRIKE

BY THE COMMISSION:

BACKGROUND

On February 27, 1996, Wedgefield Utilities, Inc. (Wedgefield or utility) filed an application with this Commission for the transfer of Certificates Nos. 404-W and 341-S from Econ Utilities Corporation (Econ) to Wedgefield. Wedgefield is a wholly-owned subsidiary of Utilities, Inc. Utilities, Inc. focuses on ownership and operation of small systems, and provides centralized management, accounting and financial assistance to small utilities that were commonly built by development companies. On March 5, 1996, Wedgefield filed an application for amendment of Certificates Nos. 404-W and 341-S to include additional territory in Orange County. In Order No. PSC-96-1241-FOF-WS, issued October 7, 1996, this Commission, by final agency action, approved the transfer and granted the amendment of the certificates to include the additional territory requested. By that same order, the Commission, by proposed agency action, established rate base for purposes of the transfer.

On October 28, 1996, Wedgefield filed a Contingent Request for Hearing On Order No. PSC-96-1241-FOF-WS, Including the Approval of Transfer and the Grant of Additional Territory, in anticipation of a timely request for hearing by the Office of Public Counsel (OPC).

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FPSC-RECORDS/REPORTING

Also on October 28, 1996, OPC did, in fact, file a timely Petition for Section 120.57(1) Hearing and Protest of Proposed Agency Action. Accordingly, in Order No. PSC-96-1533-PCO-WS, issued December 17, 1996, this matter was set for hearing.

On November 12, 1996, OPC filed a Motion to Strike Wedgefield's Contingent Request for Hearing. On November 22, 1996, Wedgefield filed a Response to OPC's Motion to Strike Wedgefield's Contingent Request for Hearing and Motion to Dismiss or Strike OPC's Petition for Hearing. On November 26, 1996, OPC filed a Response in Opposition to Wedgefield's Motion to Dismiss or Strike OPC's Petition for Hearing. On December 6, 1996, Wedgefield filed a Motion to Dismiss or Strike OPC's Response in Opposition and a Request for Oral Argument. On December 13, 1996, OPC filed Citizens' Response in Opposition to Wedgefield's Motion to Dismiss or Strike.

OPC'S MOTION TO STRIKE

On October 28, 1996, Wedgefield filed a Contingent Request for Hearing (Wedgefield's Request for Hearing), wherein it states that in the event that OPC or any other person or entity timely files a request for hearing, such a request shall automatically trigger its contingent request for hearing. According to Wedgefield, in the event of a timely request for hearing, a hearing should be held on all portions of Order No. PSC-96-1241-FOF-WS, including but not limited to those portions approving the transfer because any matters contained in the Order must be subject to the proposed agency action (PAA) process, not just the establishment of rate base.

On November 12, 1996, OPC filed a Motion to Strike Wedgefield's Contingent Request for Hearing (OPC's Motion to Strike). In its Motion, OPC argues that Wedgefield's request for hearing lacks any allegation disputing the findings contained in Order No. PSC-96-1241-FOF-WS. According to OPC, Rule 25-22.036(7), Florida Administrative Code, requires an initial pleading to show, among other things, 1) an explanation of how the petitioner's substantial interests will be affected by Commission determination, 2) a statement of all known disputed issues of material fact, or if there are none, to so indicate, and 3) a concise statement of the ultimate facts alleged. OPC argues that Wedgefield has not complied with these requirements. OPC also states that to the extent Wedgefield could show that it was adversely affected by Order No. PSC-96-1241-FOF-WS, its proper remedy would have been to file a motion for reconsideration within 15 days of the issuance of the Order, and the time for such has expired, and was expired at the time Wedgefield filed its request for a contingent hearing.

On November 22, 1996, Wedgefield filed a Response to OPC's Motion to Strike (Wedgefield's Response) and Motion to Dismiss or Strike. In its Response, Wedgefield argues that because it alleged an improper bifurcation of this proceeding in its contingent request, it did, indeed, allege a disputed issue of fact, and therefore, the requirements of Rule 25-22.036(7), Florida Administrative Code, are met. Further, Wedgefield argues that the Order did not grant the relief sought by it, since, in its transfer application, it requested that no acquisition adjustment be made.

We agree with OPC that Rule 25-22.036(7), Florida Administrative Code, is the applicable rule in this instance. With regard to requesting a hearing on the proposed agency action portion of Order No. PSC-96-1241-FOF-WS, the Order states:

[O]ur 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.** (emphasis added).

Rule 25-22.036(7)(a), Florida Administrative Code, states, in pertinent part:

Generally . . . each initial pleading should contain . . . **a statement of all known disputed issues of material fact. If there are none, the petition must so indicate.** . . . A concise statement of the ultimate facts alleged, as well as the rules and statutes which entitle the petitioner to relief; . . . A demand for relief; (emphasis added)

Therefore, to be entitled to a hearing, a petitioner must demonstrate that he or she meets the requirements of Rule 25-22.036(7), Florida Administrative Code. In other words, a petitioner must allege disputed issues of material fact within the twenty-one day protest period to be entitled to a hearing. One cannot preserve the opportunity to protest and thereby attempt to extend the protest period. The rule, therefore, does not contemplate a contingent request for hearing, dependent on the

later filing of another person or entity, as requested by Wedgefield in this case.

Wedgefield states that OPC may petition for hearing to use this case as a vehicle for challenging the Commission's long-standing policy of not granting positive or negative acquisition adjustments absent exceptional circumstances. According to Wedgefield, such a decision would be a retroactive change of the rules, which would require Utilities, Inc. to re-evaluate the prudence of acquiring the Wedgefield utility system. This allegation, however, does not sufficiently state a disputed issue of material fact because, at the time of Wedgefield's request, the Commission Order did not include an acquisition adjustment in the rate base calculation. The Order clearly states:

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.** (emphasis added)

If OPC's petition for hearing is granted, the utility may participate as a substantially affected party. The utility, however, is not entitled to a hearing on this basis, independent of OPC's protest.

Wedgefield also cannot allege a disputed issue of material fact on the basis of what it calls a "bifurcated order," as this issue presents a question of law, and not fact. Wedgefield argues that since there was no request for a rate increase in the transfer application and the utility rates would remain the same, there is an issue as to whether the Commission can bifurcate the matters in the transfer application and issue a final order on some of those matters, without hearing, and issue only a proposed agency action on the matters relevant to the rate base in the same application. First, as stated in the Order, the rate base calculations are used purely to establish the net book value of the property being transferred, and do not include the normal ratemaking adjustment of working capital calculations and used and useful adjustments. Therefore, the fact that the utility did not request a rate increase bears no relevance to the establishment of rate base in the case.

Second, the Commission, consistent with agency practice, appropriately issued its approval of the transfer and amendment applications as final agency action and the establishment of rate base for purposes of transfer as proposed agency action. See Order

No. PSC-96-1409-FOF-WU, issued November 20, 1996 in Docket No. 960716, In Re: Application for transfer of Certificate No. 123-W in Lake County from Theodore S. Jansen d/b/a Ravenswood Water System to Crystal River Utilities, Inc.; Order No. PSC-96-0448-FOF-SU, issued March 29, 1996 in Docket No. 950959, In Re: Application for Transfer of Facilities and Certificate No. 232-S in Seminole County from Longwood Utilities, Inc. to Utilities, Inc. of Longwood.

The Commission's approval of Wedgefield's transfer and amendment applications were issued as final agency action because, in compliance with Rule 25-30.030, Florida Administrative Code, the utility provided notice of its applications and no objections were received prior to the expiration of the time for filing such. The portion of the Order establishing rate base for purposes of transfer was issued under a Notice of Proposed Agency Action to provide substantially affected persons a clear point of entry to protest. See Florida Optometric Association v. Department of Professional Regulation, 567 So. 2d 928 (Fla. 1st DCA 1990); Capeletti Brothers, Inc. v. State Department of Transportation, 362 So. 2d 346 (Fla. 1st DCA 1978).

OPC's Motion to Strike is essentially a motion to dismiss. A motion to dismiss will be granted if, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief may be had. See Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). Wedgefield's Request for Hearing, when viewed in the light most favorable to the utility, fails to allege any disputed issues of material fact, and therefore, the utility does not set forth a claim that is cognizable by the Commission in this case. We agree with OPC that to the extent Wedgefield can show that it is adversely affected, its proper remedy would have been to 1) seek reconsideration of the final agency action within fifteen days of the issuance of the Order, or 2) seek judicial review by the First District Court of Appeal within 30 days of the issuance of the Order, as set forth in the section of the Order entitled "Notice of Further Proceedings or Judicial Review."

Accordingly, OPC's Motion to Strike Wedgefield's Request for Contingent Hearing is hereby granted.

WEDGEFIELD'S MOTION TO DISMISS OR STRIKE

On October 28, 1996, OPC timely filed a Petition for a Section 120.57(1) Hearing and Protest of Proposed Agency Action (OPC's Petition for Hearing). In its Petition, OPC states that Order No.

PSC-96-1241-FOF-WS adversely affects the substantial interest of the Citizens by granting Wedgefield a rate base far in excess of the amount paid by Wedgefield for the utility's assets. OPC states that it does not contest the sale and transfer of assets from Econ to Wedgefield, or the transfer of certificates approved by the Commission in Order No. PSC-96-1241-FOF-WS.

On November 22, 1996, Wedgefield filed a Motion to Dismiss or Strike OPC's Petition for Hearing. Wedgefield argues that OPC does not specifically state whether exceptional circumstances exist under the current Commission policy on acquisition adjustments, or whether it seeks to change the current policy.

On November 26, 1996, OPC filed a Response in Opposition to Wedgefield's Motion to Dismiss or Strike OPC's Petition for Hearing (OPC's Response). In this Response, OPC states that Wedgefield presents no sufficient basis for denying OPC's request for hearing for several reasons. First, OPC states that there is no rule or other requirement necessitating an allegation of exceptional circumstances in order to be entitled to a hearing, and to the extent such a policy exists, it has been enunciated on a case by case basis and is, therefore, applicable only to those cases. Second, OPC states that even if there were such a requirement, its petition for hearing showed such exceptional circumstances. According to OPC, because the assets of Econ were worth much less than the book value, and Wedgefield plans to spend a substantial amount to bring the utility up to standard, the customers will wrongly be required to pay for the same thing twice.

On December 6, 1996, Wedgefield filed a Motion to Dismiss or Strike OPC's Response (Wedgefield's Second Motion to Dismiss) and Request for Oral Argument on OPC's Petition for Hearing, Wedgefield's First Motion to Dismiss, OPC's Response, and Wedgefield's Second Motion to Dismiss. On December 13, 1996, OPC filed Citizens' Response in Opposition to Wedgefield's Motion to Dismiss or Strike OPC's Response (OPC's Second Response).

Both Wedgefield's Second Motion to Dismiss and OPC's Second Response to same are impermissible. Wedgefield, in its Second Motion to Dismiss, states that its challenge is appropriate because it is filed pursuant to Rule 1.100(b), Florida Rules of Civil Procedure, and the Commission's own Rule 25-22.037(2), Florida Administrative Code, both of which allow a motion to be filed in opposition to the proceedings. Wedgefield states that because its challenge is in opposition to OPC's Response in Opposition, it is

appropriate. Wedgefield's argument, however, is without merit. Wedgefield's December 6 challenge, although cleverly disguised as a motion, is nothing more than a reply to a response, and OPC's December 13 pleading a response to a reply to a response, neither of which are contemplated by Commission rules. Rule 25-22.037(2), Florida Administrative Code, permits parties to file motions in opposition to a motion within seven days, but that rule does not allow parties to file a reply to a response. The pleading cycle must stop at a reasonable point, and the rule reflects that.

As discussed previously, Rule 25-22.036(7), Florida Administrative Code, requires a substantially affected person to allege disputed issues of material fact to be entitled to a hearing on a proposed agency action. OPC's allegation that Order No. PSC-96-1241-FOF-WS adversely affects the substantial interests of the Citizens because it would require the Citizens to pay a rate of return to Wedgefield on an investment never made by the company sufficiently states a disputed issue of material fact. Rule 25-22.036(7), Florida Administrative Code, states no other requirement. Therefore, OPC has stated a cause of action for which relief may be granted. With regard to the negative acquisition issue, the hearing is a more appropriate forum to address these issues.

Accordingly, Wedgefield's Motion to Dismiss or Strike OPC's Petition for Hearing is hereby denied, and this matter shall proceed to hearing.

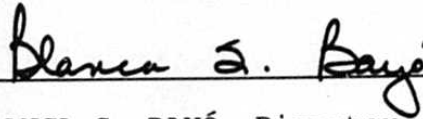
Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Office of Public Counsel's Motion to Strike Wedgefield's Request for Contingent Hearing is hereby granted. It is further

ORDERED that Wedgefield Utilities, Inc.'s Motion to Dismiss or Strike OPC's Petition for Hearing is hereby denied. It is further

ORDERED that this docket shall remain open pending resolution of the substantive issues in the case.

By ORDER of the Florida Public Service Commission, this 27th
day of January, 1997.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

DCW

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 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.