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

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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.