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-01-1554-FOF-WU ISSUED: July 27, 2001

The following Commissioners participated in the disposition of this matter:

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

ORDER DENYING RENEWED MOTION FOR SUMMARY FINAL ORDER, MOTION TO STRIKE AND DISMISS, AND MOTION TO STRIKE PORTIONS OF PREFILED TESTIMONY

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 PAA 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.

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. Moreover, 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.

By Order No. PSC-00-2388-AS-WU, issued December 13, 2000, we denied Wedgefield's Motion to Strike and Dismiss and denied, without prejudice, Wedgefield's Motion for Summary Final Order. We found 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)." We stated that "[o]nce testimony is filed in January, Wedgefield may renew its motion for Summary Final Order at that time."

On June 25, 2001, Wedgefield Renewed its Motion to Strike and Dismiss and Motion for Summary Final Order. In addition,

Wedgefield filed a Motion to Strike Portions of Prefiled Direct Testimony of OPC Witnesses Larkin and Biddy, and a Notice of Supplemental Authority in support of that Motion. On July 2, 2001, OPC timely filed its Responses to Wedgefield's Motions.

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

MOTION FOR SUMMARY FINAL ORDER

Motion

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. "Neither the discovery request of OPC, nor the testimony filed by OPC in this case, address the issue of extraordinary circumstances, or allege that we erred in our finding in Order No. PSC-98-1092-FOF-WS that extraordinary circumstances do not exist." (Emphasis in original) 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.

Wedgefield also realleges the allegations contained in its Renewal of its Motion to Strike and Dismiss. The basis of the Motion is that OPC's Petition is barred by the doctrines of res judicata, collateral estoppel, stare decisis and administrative finality.

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)(applying the principle of collateral estoppel to dismiss a complaint without requiring an evidentiary hearing). Under res judicata, a final judgment 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).

Wedgefield argues that 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, we found that no extraordinary circumstances existed and therefore imposed no acquisition adjustment. 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 we apply 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 decisis regarding our 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 judgment or ruling." Reedy Creek Utilities Co. V. FPSC, 418 So. 2d 249, 253 (Fla. 1982). Decisions of the Commission must eventually pass from its control and become final and no longer subject to modification. Order No. 248989, issued August 29, 1992, in Docket No. 910004-EU.

Response

OPC states that there are disputed issues of fact because Wedgefield has not stipulated to any facts and has filed rebuttal to the extent it was able. OPC asserts that these disputed facts relate to how we should treat the acquisition adjustment in this case. OPC also states that there are disputed issues of policy and law and that taking testimony on these issues will aid us in our decision. Moreover, OPC argues that there will be a hearing on the used and useful issues raised by the company, so the disputed issues of policy can easily be addressed at the same time.

OPC alleges that Commission precedent allows us to change our decision about an acquisition adjustment for a company. OPC states that in Order No. 23728, issued as a PAA Order on November 11, 1990, and becoming final and effective without protest, in Docket No. 900291-WS, we declined to recognize a negative acquisition adjustment. OPC asserts that, however, in the utility's subsequent rate proceeding we 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 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.). OPC contends that in that case, we 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.

OPC argues that these decisions are consistent with the principle that the burden of proof in ratemaking cases rests on the utility. FPSC v. Florida Waterworks Association, 731 So. 2d 836 (Fla. 1st DCA 1999); Florida Power Corp. v. Cresse, 413 So. 2d 1187. OPC states that Wedgefield's notice of supplemental authority citing to a string of cases for the proposition that book value established for transfer cases does not include adjustments for working capital or used and useful, does not show that we are forever bound by the book value determined in the transfer case.

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 this Commission.

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 Co. v. FPSC, 705 So. 2d 620 (Fla. 1st DCA 1998), to show that we have the power to change our methodology if our 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 has provided that record evidence in this case and has shown reasons why we should not follow prior practice in this proceeding.

OPC alleges that we could still recognize the adjustment if it finds a substantial change in circumstances from the last case. OPC states that it has presented evidence showing that the benefits that are supposed to flow from our non-rule policy are not present in this case. OPC also asserts that although the customers are charged higher rates, Wedgefield has spent extremely little on the company. OPC contends that, in fact, rate base has actually declined since the purchase because the amount of investment by the company is less than the amount of depreciation taken by the company. OPC states that the company has no capital budgeting plans and no formal preventative maintenance plan. OPC asserts that complaints by customers have substantially increased under the current ownership. OPC argues that none of these facts were available when we made our decision in the transfer application.

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 summary final order.

The notion of summary decision-making is somewhat new to Florida administrative procedure, but it is certainly no stranger to the courts of the state in the form of summary judgment. We are not aware of any case law explicitly addressing summary decision-making in administrative law which might guide us, but summary judgment is a much-litigated matter in our courts. We find it reasonable to look to the law of summary judgment for guidance in the instant docket.

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 judgment 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).

In Order No. PSC-98-1538-PCO-WS, issued November 20, 1998, in Docket No. 970657-WS, we stated that courts have recognized that

> [t]he granting of a summary judgment, in most instances, brings a sudden and drastic conclusion to a lawsuit, thus foreclosing the litigant from the benefit of and right to a trial on the merits of his or her claim. Coastal Caribbean Corp. v. Rawlings, 361 So. 2d 719, 721 (Fla. 4th DCA 1978). It is for this very reason that caution must be exercised in the granting of summary judgment, and the procedural strictures inherent in the Florida Rules of Civil Procedure governing summary judgment must be observed. Page v. Staley, 226 So. 2d 129, 132 (Fla. 4th DCA 1969); McCraney v. Barberi, 677 So. 2d 355 (Fla. 1st DCA 1996)(finding that summary judgment should be cautiously granted). The procedural strictures are designed to protect the constitutional right of the litigant to a trial on the merits of his or her claim. They are not merely procedural niceties nor technicalities.

OPC has alleged that the customers have not received the benefit of the transfer from Econ to Wedgefield and OPC has filed testimony which, if taken as true, supports this allegation. In its rebuttal testimony, Wedgefield disputes OPC's facts regarding the benefits to the customer flowing from the transfer. Wedgefield also argues persuasively that these issues have been addressed within an earlier Commission decision. OPC argues that it is free to argue for policy changes even in the face of res judicata.

The purpose of a summary final order is to avoid the expense and delay of trial. See National Airlines, Inc. v. Florida

Equipment Co. of Miami, 71 So. 2d 741, 744 (Fla 1954) (The function of the rule authorizing summary judgments is to avoid the expense and delay of trials when all facts are admitted or when a party is unable to support by any competent evidence a contention of fact). See also, Pearson v. St. Paul Fire & Marine Insurance Co., 187 So. 2d 343 (Fla 1st DCA 1966).

We note that this case is scheduled for hearing irrespective of whether the Motion for Summary Final Order is granted or denied. The opportunity in the instant docket to avoid the cost of proceeding to hearing is thus much diminished: the only material cost that could be avoided by granting the summary final order is the incremental cost of addressing the acquisition adjustment issue during the hearing, and in briefs thereafter. The testimony on point is filed, the costs therefore incurred. Indeed each of OPC's witnesses and each of Wedgefield's witnesses are scheduled to testify as to matters both within and without the scope of the summary final order. The incremental delay of addressing the acquisition adjustment is negligible, if that.

Weighing the severity of the remedy sought in the summary final order against the diminutive avoided costs and delay available, we find that the better and more cautious course is to deny the summary final order.

We note that the circumstances presented in the consideration of this summary final order – in terms of res judicata and collateral estoppel issues, in terms of there being filed and controverted testimony on matters of fact, and in terms of there being de minimus opportunity to capture any cost or delay savings – make the denial a very unlikely basis for persuasive authority in future cases where the convergence of such unusual circumstances are unlikely.

For the foregoing reasons, Wedgefield's Motion for Summary Final Order is hereby denied.

MOTION TO STRIKE AND DISMISS

On June 25, 2001, Wedgefield renewed its Motion to Strike and Dismiss stating that the dismissal was without prejudice. However, only the Motion for Summary Final Order was denied without

prejudice. The original Motion to Strike and Dismiss was disposed of by Order No. PSC-00-2388-AS-WU. Because no new grounds are raised and the Commission has previously ruled on this Motion, Wedgefield's renewed Motion to Strike and Dismiss is hereby denied.

MOTION TO STRIKE PORTIONS OF PREFILED DIRECT TESTIMONY OF OPC WITNESSES LARKIN AND BIDDY

Motion

On June 25, 2001, Wedgefield filed its Motion to Strike Portions of Prefiled Direct Testimony of OPC Witnesses Larkin and Biddy and a Notice of Supplemental Authority in support of that Motion. Wedgefield states that two portions of OPC's testimony should be stricken. Those portions related to rate base components prior to December 31, 1995 and negative acquisition adjustment should be stricken. Wedgefield states that rate base for the purposes of transfer was established by Order No. PSC-98-1092-FOF-WS. The only difference between rate base at the time of transfer and rate base in a rate case, is that for purposes of transfer, ratemaking adjustments such as working capital and used and useful are not included.

Rate base was established based on the undisputed testimony of our auditor and four undisputed audits, and the testimony of OPC witness Larkin that OPC was not disputing the audits. Consequently, Wedgefield argues that because rate base was established in the transfer docket, and that decision was not appealed, the following portions of witness Larkin's testimony should be stricken:

a. Page 8, lines 3 through 6, delete in their entirety.

Wedgefield argues that the following portions of the prefiled testimony of witness Biddy should also be stricken:

a. Page 2, line 12 through 16, line 6.
b. Table of Contents lines listing Tabs 1 through 21.
c. Exhibits TLB-1 through TLB-6, in their entirety.

Wedgefield states that if either the Motion to Strike and Dismiss or the Motion for Summary Final Order is granted, those

portions of witnesses Larkin and Biddy's testimonies relating to negative acquisition adjustment should also be stricken.

Those portions of witness Larkin's testimony that should be stricken are:

a. Table of Contents - Strike through "Negative Acquisition Adjustment."
b. Page 2, line 5 through Page 2, line 6, delete the words "negative acquisition adjustment issues and."
c. Page 2, line 11, delete the words "Exhibit ___ (HL-1)" and "Exhibit ___ (HL-3)".
d. Page 2, line 12 and line 13, delete in their entirety.
e. Page 2, line 22, delete in its entirety.
f. Page 2, line 16 through Page 2, line 19, delete in their entirety.
g. Page 2, line 23, delete the word "Second".
h. Page 2, line 24 through Page 3, line 1, delete the sentence beginning with "Finally, I will address..." in its entirety.
i. Page 3, line 3 through Page 16, line 15, delete in their entirety.
j. Page 18, line 1 through Page 19, line 14, delete in their entirety.
k. Exhibit HL-1 in its entirety.
l. Exhibit HL-3, in its entirety.

Similarly, if either Motion is granted the following portions of witness Biddy's prefiled testimony relating to negative acquisition adjustment should be stricken:

a. Page 2, line 12 through page 16, line 6.
b. Table of Contents lines listing Tabs 1 through 21.
c. Exhibits TLB-1 through TLB-6, in their entirety.

Response

OPC states that because neither the Motion to Strike nor the Motion for Summary Final Order are meritorious, the Motion to strike prefiled testimony cannot be granted. The prefiled testimony relates to disputed issues of fact, law, and policy concerning negative acquisition adjustment.

Analysis

The testimony cited by Wedgefield relates to the issue of negative acquisition adjustment. Wedgefield's Motion for Summary Final Order is denied and the issue of negative acquisition adjustment remains at issue. Therefore, the Motion to Strike Portions of Prefiled Direct Testimony of OPC Witnesses Larkin and Biddy is hereby denied.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Wedgefield Utilities, Inc.'s Renewed Motion to for Summary Final Order is hereby denied. It is further

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

ORDERED that Wedgefield Utilities, Inc.'s Motion to Strike portions of Prefiled Testimony is hereby denied. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission this 27th day of July, 2001.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing
Services

(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.

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 the Commission Clerk and Administrative Services, 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 the Commission Clerk and Administrative Services 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.