

FLORIDA PUBLIC SERVICE COMMISSION
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M E M O R A N D U M

DECEMBER 26, 1996

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

FROM: DIVISION OF LEGAL SERVICES (CYRUS-WILLIAMS) *DCW*
DIVISION OF WATER & WASTEWATER (WALKER) *W* *AS* *BL*

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

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

COUNTY: ORANGE COUNTY

AGENDA: JANUARY 7, 1997 - REGULAR AGENDA - INTERESTED PERSONS MAY
PARTICIPATE

CRITICAL DATES: NONE

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

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

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CASE 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 No.s 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). 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, 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.

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DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant OPC's Motion to Strike Wedgefield's Contingent Request for Hearing and Wedgefield's Request for Oral Argument on this matter?

RECOMMENDATION: The Commission should grant OPC's Motion to Strike Wedgefield's Contingent Request for Hearing and deny Wedgefield's Request for Oral Argument on the matter. (CYRUS-WILLIAMS)

STAFF ANALYSIS: 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.

Also 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 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

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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 Contingent Request for Hearing and Motion to Dismiss or Strike OPC's Petition for Hearing (Wedgefield's Response and Motion to Dismiss). 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. Wedgefield also 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 Wedgefield since in its transfer application, it requested that no acquisition adjustment be made.

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 Motion to Dismiss, OPC's Response, and Wedgefield's Second Motion to Dismiss. Rule 25-22.058, Florida Administrative Code, requires a request for oral argument to accompany the pleading upon which argument is requested. Therefore, Wedgefield's request for oral argument is untimely with regard to all but its Second Motion to Dismiss, and for reasons stated later in this Recommendation, this pleading is impermissible, and thus, cannot be the basis for a request for oral argument. Further, staff does not

believe that oral argument in this case would aid the Commission in comprehending and evaluating the issues stated herein, and is therefore, unnecessary to the resolution of these issues.

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). Staff believes that 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. Staff believes that Wedgefield's argument 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. A reply to a response is not 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.

Wedgefield's Motion to Dismiss will be discussed in Issue 2 of this Recommendation.

OPC's Motion to Strike

As stated previously, on October 28, 1996, Wedgefield filed a Request for Hearing on Order No. PSC-96-1241-FOF-WS, which 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. On November 12, 1996, OPC filed a Motion to Strike Wedgefield's Request for Hearing. Staff agrees 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

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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. Therefore, staff believes that the rule 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.

The only reason Wedgefield provides for its request is 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. Staff believes that this allegation 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.

Wedgefield, in its November 22, 1996 Response, argues that disputed issues of material fact do in fact exist because 1) the Order did not grant the relief sought by Wedgefield since in its transfer application, it requested that no acquisition adjustment be made, and 2) it alleged an improper bifurcation of this

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proceeding. However, as previously stated, Wedgefield cannot allege a disputed issue of material fact on the basis that it would be adversely affected by an acquisition adjustment because the Commission did not include an acquisition adjustment in the calculation of rate base. 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 issue 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-POF-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.

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Finally, 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). Staff believes that 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. Staff agrees 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, staff recommends that the Commission deny Wedgefield's Request for Oral Argument and grant OPC's Motion to Strike Wedgefield's Request for Contingent Hearing.

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ISSUE 2: Should the Commission grant Wedgefield's Motion to Dismiss or Strike OPC's Petition for Hearing?

RECOMMENDATION: No. The Commission should deny Wedgefield's Motion to Dismiss or Strike OPC's Petition for Hearing. (CYRUS-WILLIAMS)

STAFF ANALYSIS: On October 28, 1996, OPC filed a timely Petition for Section 120.57(1) Hearing and Protest of Proposed Agency Action. On November 22, 1996, Wedgefield filed a Motion to Dismiss. 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. In its November 26, 1996 Response, 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. OPC also states that even if there were such a requirement, its petition for hearing showed such exceptional circumstances because since the assets of Econ were worth much less than value at which Econ carried the assets on its books, and Wedgefield planned to spend a substantial amount of money to bring the utility up to standards, the customers would wrongly be required to pay for the same thing twice.

As discussed in Issue 1 of this Recommendation, 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. In its Petition, OPC alleges that Order No. PSC-96-1241-FOF-WS adversely affects the substantial interests of the Citizens by granting Wedgefield a rate base far in excess of the amount paid by Wedgefield for the utility's assets, and that if allowed to stand, the decision would require the Citizens to pay a rate of return to Wedgefield on an investment never made by the company. Staff believes that OPC has sufficiently alleged 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, staff believes that the hearing is a more appropriate forum to address these issues.

Accordingly, staff recommends that the Commission deny Wedgefield's Motion to Dismiss or Strike OPC's Petition for Hearing.

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ISSUE 3: Should this docket be closed?

RECOMMENDATION: No. If staff's recommendation is approved in Issue 2, this docket should remain open pending final disposition of this case. (CYRUS-WILLIAMS)

STAFF ANALYSIS: If staff's recommendation is approved in Issue 2, this docket should remain open pending final disposition of this case.