

ORIGINAL



JACK SHREVE
PUBLIC COUNSEL

STATE OF FLORIDA
OFFICE OF THE PUBLIC COUNSEL

c/o The Florida Legislature
111 West Madison St.
Room 812
Tallahassee, Florida 32399-1400
850-488-9330

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RECORDS AND
REPORTING

October 13, 2000

Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Docket No. 991437-WU

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket are the original and 15 copies of Citizens' Response to Wedgefield's Motion to Strike Citizens' Protest of Proposed Agency Action. A diskette in Word format is also submitted.

Please indicate the time and date of receipt on the enclosed duplicate of this letter and return it to our office.

Sincerely,

Charles J. Beck,
Deputy Public Counsel

- APP _____
- CAF _____
- CMP _____
- COM 3
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- OPC _____
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- SER _____
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J. B. Willis

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FPSC-RECORDS/REPORTING

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 September 13, 2000

**CITIZENS' RESPONSE TO WEDGEFIELD'S MOTION TO STRIKE
CITIZENS' PROTEST OF PROPOSED AGENCY ACTION**

The Citizens of Florida ("Citizens"), by and through Jack Shreve, Public Counsel, file this response in opposition to the pleading filed by Wedgefield Utilities, Inc. ("Wedgefield" or "Wedgefield Utilities") on October 3, 2000, entitled "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."

BACKGROUND

In the latter part of 1995, Wedgefield Utilities, Inc., entered into an agreement to purchase the assets of Econ Utilities, Inc. The agreement required Wedgefield to make a cash payment of \$545,000 to Econ Utilities and to pay contingent amounts equal to every other service availability charge in an area known as the Commons. Wedgefield then filed an application with the Commission to transfer the certificates of authority held by Econ Utilities to Wedgefield.

By order dated August 12, 1998, the Commission issued a final order establishing the rate base of Wedgefield Utilities for the purpose of transferring the

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assets of Econ Utilities, Inc., to Wedgefield. In doing so, the Commission decided by a vote of two to one that it would not recognize a negative acquisition adjustment in calculating the rate base. The Commission applied non-rule policy that required Citizens to show "extraordinary circumstances" in order to establish rate base at the actual purchase price paid by Wedgefield. Commissioners Clark and Garcia found that there were no extraordinary circumstances, while Chairman Deason found that this standard had been met. Accordingly, the rate base for purpose of transfer was found to be the amount on the books of the seller Econ Utilities (\$2,845,391) rather than the amount actually paid by Wedgefield of \$545,000 plus any contingent payments that might be paid later.

On November 12, 1999, Wedgefield Utilities filed an application to increase water rates by \$144,838. The Commission issued a proposed agency action order on August 23, 2000, granting Wedgefield a revenue increase of \$82,897, equivalent to a 31.97% increase in existing rates. Wedgefield and Citizens filed protests of this order on September 13, 2000. The Citizens' protest raised the issue of whether the Commission should recognize a negative acquisition adjustment in determining the rate base in this case for the purpose of setting rates.

On October 3, 2000, Wedgefield filed a motion to strike and dismiss the Citizens' protest. In its motion Wedgefield contends that the principles of res judicata, collateral estoppel, stare decisis, and administrative finality prevent the Commission from recognizing a negative acquisition adjustment in this proceeding.

CASE LAW ALLOWS THE COMMISSION TO RECOGNIZE A NEGATIVE ACQUISITION ADJUSTMENT IN THIS PROCEEDING

Wedgefield's motion wholly ignores recent case law concluding 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 appropriate to the nature of the issue involved. We intend to provide that evidence in this proceeding.

In Florida Cities Water Company v. Florida Public Service Commission, 705 So.2d 620 (1st DCA 1998), the Court reviewed this Commission's decision to change the methodology used to determine used and useful plant for a wastewater treatment facility. Before this case, the Commission had calculated the used and useful plant by comparing the facility's capacity (stated in terms of average daily flow over a year's time) to the peak month daily average flow at the facility. During the Florida Cities case, the Commission determined the amount of used and useful plant by comparing the plant's capacity (still stated in terms of average daily flow over a year's time) to the average daily flow calculated on an annual basis. It made this change in order to insure that the numerator and denominator of the fraction used to determine used and useful plant had consistent units (average daily flow over a year's time).

The Court reversed the Commission's decision, not because the Commission was powerless to correct the mismatch in the numerator and denominator of the used

and useful calculation, but instead because the Commission did not have evidence in the record to support the change in policy. The change ordered by the Commission in the *Florida Cities* case reflected a considered break with a long line of prior Commission policy. In order to implement such a change in policy, the Court stated that there must be expert testimony, documentary evidence, or other evidence appropriate to the nature of the issue involved. *Florida Cities* at 626. The Court remanded the case to the Commission to give a reasonable explanation, if it could, supported by record evidence showing why the Commission used average daily flow over a year's time instead of the peak month. *Id.* See also *Southern States Utilities v. Florida Public Service Commission*, 714 So.2d 1046, 1054-1056 (1st DCA 1998); *Palm Coast Utility Corporation v. Florida Public Service Commission*, 742 So.2d 482, 484-485 (1st DCA 1999).

These Court decisions make it crystal clear that the Commission may implement 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.

SECTION 120.68, FLORIDA STATUTES, ALLOWS THE COMMISSION TO RECOGNIZE A NEGATIVE ACQUISITION ADJUSTMENT IN THIS PROCEEDING

In the *Florida Cities* case the Court noted that the provisions of section 120.68, Florida Statutes (Supp. 1996) required the Court to remand a case to the agency if the agency's exercise of discretion was inconsistent with a prior agency practice, if the deviation is not explained by the agency.

Section 120.68(7)(e)3, Florida Statutes (2000) states that the court shall remand a case to the agency for further proceedings consistent with the court's decision or set aside agency action, as appropriate, when it finds that the agency's exercise of discretion was inconsistent with officially stated agency policy or a prior agency practice, if the deviation is not explained by the agency. The statute notes that the court shall not substitute its judgment for that of the agency on an issue of discretion.

By necessary implication, the statute contemplates the ability of an agency to take action inconsistent with prior agency practice. All that is required is for the agency to explain the action and have evidence in the record to support it. We will provide that record evidence in this case showing the reasons why the Commission should not follow prior practice in this proceeding.

SECTION 350.0611, FLORIDA STATUTES, ALLOWS THE COMMISSION TO RECOGNIZE A NEGATIVE ACQUISITION ADJUSTMENT IN THIS PROCEEDING

Section 350.0611, Florida Statutes created the Office of Public Counsel to provide legal representation to the people of the state in proceedings before the Commission. It specifically provides the Public Counsel the power to appear before the Commission in any proceeding or action and to urge any position which he or she deems to be in the public interest, whether consistent or inconsistent with positions previously adopted by the Commission. Section 350.0611(1), Florida Statutes (2000)(emphasis supplied). Wedgefield may not like addressing the position previously taken by the Commission on its acquisition adjustment, but this statute specifically provides the Public Counsel the power to raise such issues again, even if inconsistent with positions previously adopted by the Commission.

COMMISSION PRECEDENT ALLOWS THE COMMISSION TO RECOGNIZE A NEGATIVE ACQUISITION ADJUSTMENT IN THIS PROCEEDING

Not only *may* the Commission change its decision about an acquisition adjustment for a company; it has actually done so in the past.

In a 1990 transfer application decision, the Commission declined to recognize a negative acquisition adjustment for Jasmine Lakes Utility.¹ In 1993 the Commission

¹ Commission order number 23728 issued November 11, 1990.

reversed that decision in a rate case proceeding by deciding to recognize the negative acquisition adjustment for the purpose of setting rates.²

The similarities between that case and this case are striking. Like Jasmine Lakes, the Commission declined to recognize a negative acquisition adjustment in the transfer application of Wedgefield Utilities. Like Jasmine Lakes, the Office of Public Counsel is raising an issue in this rate case about recognizing a negative acquisition adjustment. Yet in this case, the utility claims the Commission lacks the power even to address the issue, while in Jasmine Lakes the Commission not only addressed the issue, but also reversed its decision from the transfer application proceeding. Commission precedent shows that Wedgefield Utilities is wrong in its claim that the Commission has no power to address the issue in this proceeding.

There is another area where Commission precedent shows that the Commission has the power to change policy on matters affecting rate base. Margin reserve has a long history with the Commission. Over a period of time the Commission changed the time period it uses to calculate margin reserve. Changed time periods directly affect the amount of used and useful plant found in rate cases, even if there are no changes whatsoever in the physical plant. Both changes in the time period used to calculate margin reserve and changes in an acquisition adjustment affect the amount of plant in

² Commission order no. PSC-93-1675-FOF-WS issued November 18, 1993. The Commission's decision is discussed, without naming the utility, at page 5 of attachment B to the staff's October 5, 2000 recommendation in docket 001502-WS.

rate base without any physical changes in plant. The Commission has the power to make the changes in both cases

THE COMMISSION MAY ALSO RECOGNIZE A NEGATIVE ACQUISITION ADJUSTMENT IF THERE IS A SUBSTANTIAL CHANGE IN CIRCUMSTANCES

Even if the Commission should decline to change its policy concerning the acquisition adjustment in this case, the Commission could still recognize the adjustment if it finds a substantial change of circumstances from the last case. Wedgefield's motion to strike concedes this fact³, but ignores the implication that the Commission therefore has power to address the issue. Citizens are pursuing this issue through discovery.

CONCLUSION

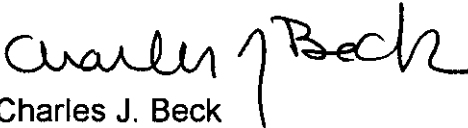
If there were ever a case warranting another look at negative acquisition adjustments, this is it. Prior to filing this rate case, Wedgefield's rates were producing a return on equity of about 25% on the company's actual investment in Wedgefield Utilities. The rate increase granted by the proposed agency action raised that return on actual investment to over 50%. Yet the utility company, whose monopoly is secured by a certificate by this Commission, was not satisfied with that return, so it protested the order in an attempt to charge customers even more.

³ See Wedgefield's motion to strike at page 9.

The Commission's previous decision on the acquisition adjustment in the transfer proceeding has not brought benefits to Wedgefield's customers. The customers of Wedgefield are highly dissatisfied with the product and service provided by the company even after four years of new ownership. The Commission should change its policy on the acquisition adjustment in this case, thereby providing the company only a fair return on its actual investment.

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

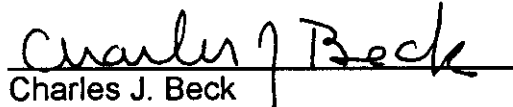
(850) 488-9330

Attorney 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 October, 2000.


Charles J. Beck

Patrica Cristensen
Division of Legal Services
Fla. Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Ben Girtman, Esq.
1020 E. Lafayette St., #207
Tallahassee, FL 32301-4552

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