



Public Service Commission

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

FROM: DIVISION OF LEGAL SERVICES (FUDGE, CHRISTENSEN)
DIVISION OF ECONOMIC REGULATION (KYLE, MERCHANT)

RE: DOCKET NO. 991437-WU - APPLICATION FOR INCREASE IN WATER RATES IN ORANGE COUNTY BY WEDGEFIELD UTILITIES, INC.

AGENDA: 11/07/2000 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\991437.RCM

CASE 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, 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 the filing. 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

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this case be processed using our Proposed Agency Action (PAA) procedure pursuant to Section 367.081(8), Florida Statutes. We have jurisdiction pursuant to Sections 367.011(2) and 367.081, 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%).

Wedgfield 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) the Commission 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, Wedgfield 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, Wedgfield 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.

This recommendation addresses whether Wedgfield's Motion to Strike and Dismiss should be granted. The Commission has jurisdiction pursuant to Sections 367.011(2) and 367.081, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should Wedgefield's Motion to Strike and Dismiss the Office of Public Counsel's Petition Requesting Section 120.57 Hearing and Protest of Proposed Agency Action be granted?

RECOMMENDATION: Yes. Wedgefield's Motion to Strike and Dismiss should be granted. (FUDGE)

STAFF ANALYSIS: Under Florida law the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." Id.

Wedgefield's Motion to Strike and Dismiss

As stated in the case background, 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.

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) (in which the Court applied the principle of collateral estoppel to dismiss a complaint without requiring an evidentiary hearing). Under res judicata, a final judgement 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).

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, the Commission found that no extraordinary circumstances existed and therefore no acquisition adjustment would be imposed. 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 the Commission applies 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 the Commission's 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 judgement or ruling." Reedy Creek Utilities Co. V. FPSC, 418 So. 2d 249, 253 (Fla. 1982). Decisions of the Commission must eventually pass of its control and become final and no longer subject to modification. Order No. 248989, issued August 29, 1992, in Docket No. 910004-EU.

OPC's Response in Opposition to Wedgefield's Motion to Strike and Dismiss

In response to Wedgefield's motion, OPC states that the case law allows the Commission to recognize a negative acquisition adjustment in this proceeding. OPC cites to cases in which the Commission has changed its policy on used and useful. See Florida Cities Water Co. v. FPSC, 705 So. 2d 620 (Fla. 1st DCA 1998); Southern States Utilities v. Florida Public Service Commission, 714 So. 2d 1046, 1054-1056 (Fla. 1st DCA 1998); Palm Coast Utility Corporation v. FPSC, 742 So. 2d 482, 484-485 (Fla. 1st DCA 1999). OPC argues that the Commission may make 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.

Next, OPC argues that Section 120.68, Florida Statutes, allows the Commission to recognize a negative acquisition adjustment in this proceeding. OPC asserts that Section 120.68(7)(e)3, Florida Statutes, allows an agency to take action inconsistent with prior agency practice as long as the action is supported by record evidence, which OPC claims it will provide in this proceeding to show why the Commission should not follow prior practice in this proceeding.

OPC asserts that Section 350.0611, Florida Statutes, specifically provides that Public Counsel may urge any position whether consistent or inconsistent with positions previously adopted by the Commission. OPC goes on to allege that this statute specifically provides it the power to raise such issues again, even if inconsistent with positions previously adopted by the Commission.

OPC also cites to Order No. PSC-93-1675-FOF-WS, issued November 18, 1993, in Docket No. 920148-WS, in which the Commission decided to recognize a negative acquisition adjustment for the purpose of setting rates for Jasmine Lakes Utilities Corporation. The Commission had previously determined that the circumstances surrounding the transfer of the utility did not appear to be extraordinary, and therefore no acquisition adjustment was included in rate base. See Order No. 23728, issued November 7, 1990, in Docket No. 900291-WS. OPC argues that the facts of Jasmine Lakes are strikingly similar to the facts in the instant case.

Finally, OPC argues that even if the Commission declines to change its policy concerning the acquisition adjustment in this case, the Commission could still recognize the adjustment if it finds a substantial change in circumstances from the last case.

Staff's Analysis

In filing its Motion to Strike and Dismiss, Wedgefield has raised the affirmative defenses of res judicata and collateral estoppel as grounds for dismissing OPC's petition. Wedgefield also raised the claims of administrative finality and stare desis as bases for granting its Motion to Strike and Dismiss.

In considering a motion to strike or dismiss a complaint, all matters well pleaded are admitted as true by the movant. It is also fundamental that unless the complaint clearly shows by its allegations that the relief prayed for is barred by res adjudicata, estoppel by judgment or equitable estoppel, such defenses are not available by motion, but must be specifically pleaded as affirmative defenses to the complaint.

Moskovits v. Moskovits, 112 So. 2d 875, 878, (Fla. 1st DCA 1959).

The petition filed by OPC in this case requests a hearing to determine if the utility's rate base should include a negative acquisition adjustment. The petition does not mention the prior proceeding, nor the findings made therein. Moreover, the petition does not cite to the Commission's current practice regarding negative acquisition adjustments. Consequently, OPC's petition does not "affirmatively and clearly" show "the conclusive applicability" of the defenses alleged by Wedgefield. Evans v. Parker, 440 So. 2d 640, 641 (Fla. 1st DCA 1983).

If the defense is not evident from the complaint, courts have taken judicial notice of the record in prior proceedings when granting dismissal on the basis of res judicata. See e.g. All Pro Sports Camp, Inc. v. Walt Disney Company, 727 So. 2d 363, 366 (Fla. 5th DCA 1999); City of Clearwater v. U.S. Steel Corp., 469 So. 2d 915 (Fla. 2d DCA 1985); Lagarde v. Holmes, 428 So. 2d 669, 670 (Fla. 2d DCA 1982); but see Livingston v. Spires, 481 So. 2d 87, 88 (Fla. 1st DCA 1986) (finding dismissal based on res judicata improper when complaint did not show applicability of the defense and noting that the trial court did not take judicial notice of the prior proceeding and that the parties did not stipulate that the court could take such notice). In the instant case, the parties have not requested nor stipulated to the Commission taking judicial notice of the prior proceeding. Moreover, the record and decision in the prior proceeding has not been introduced into evidence in this proceeding.

As stated above, staff believes that the defenses asserted by Wedgefield do not appear within the four corners of OPC's petition. Therefore, the utility's Motion should fail on those grounds.

Nevertheless, assuming that all matters well pled are admitted as true, staff believes that OPC has failed to state a claim upon which relief can be granted. The purpose of a Section 120.57 hearing is to give substantially affected persons an opportunity to change the agency's mind concerning the actions proposed in the PAA Order. See e.g. Capeletti Brothers, Inc. v. State Department of General Services, 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983). In this case, the issue of negative acquisition adjustment was not an issue in the case and thus was not addressed in the PAA Order. Staff notes that issue was raised by OPC at the Agenda Conference and discussed by the Commissioners, but no decision was made. It is inappropriate to request a hearing on a matter upon which no decision was made in the PAA Order being protested.¹

Additionally, staff agrees that the doctrine of administrative finality has attached with respect to the acquisition adjustment issue. Although staff recognizes that the Commission cannot look beyond the four corners of OPC's petition, "[t]he Commission is certainly capable of taking notice of its own orders." Palm Coast Utility Corp. v. FPSC, 742 So. 2d 482, 486 (Fla. 1st DCA 1999) (rejecting the Commission's argument that it was not obligated

¹The Commission's acquisition adjustment policy is the subject of a staff rule recommendation scheduled for the November 7, 2000, Agenda Conference.

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to use the new charges because they were not in the record of the case). By Order No. PSC-98-1092-FOF-WS, the prior transfer Order, after a full hearing was held on the issue, the Commission found no extraordinary circumstances and declined to impose a negative acquisition adjustment. Therefore, the acquisition adjustment issue was decided over two years ago. Consequently, the Order has passed out of the control of the Commission and administrative finality has attached. See Reedy Creek Utilities Co., 418 So. 2d at 253 (finding that the Commission could correct an order when only two and a half months had elapsed); Austin Tupler Trucking, Inc. v. Hawkins, 377 So. 2d 679 (Fla. 1st DCA 1979) (finding that the Commission could not, after two years, amend a prior order).

For the foregoing reasons, staff recommends that Wedgefield's Motion to Strike and Dismiss be granted.

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: No, this docket should remain open pending a hearing and the Commission's final determination of the issues in dispute. (FUDGE)

STAFF ANALYSIS: No, this docket should remain open pending a hearing and the Commission's final determination of the issues in dispute.