



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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RECORDS AND REPORTING

DATE: NOVEMBER 16, 2000

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

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

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

AGENDA: 11/28²⁸/2000 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS:

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, (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,

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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 the Commission's 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, the Commission 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.

The Commission also ordered Wedgfield 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). Wedgfield filed a timely response to the order to show cause on September 13, 2000.

On September 13, 2000, Wedgfield 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, 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. A recommendation to be considered at the November 7, 2000, Agenda Conference, was filed October 26, 2000 and subsequently revised on October 31, 2000. Staff requested a deferral of the item, which was granted on November 6, 2000.

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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.

This recommendation addresses whether Wedgefield's Motion to Strike and Dismiss and Motion for Summary Final Order should be granted; and what action should be taken on Wedgefield's response to the order to show cause. The Commission has jurisdiction pursuant to Sections 367.011(2) and 367.081, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should Wedgefield's Motion for Summary Final Order be granted?

RECOMMENDATION: Yes, Wedgefield's Motion for Summary Final Order should be granted. (FUDGE)

STAFF ANALYSIS: 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"

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 summary final order is appropriate in this case.

OPC's Response to Wedgefield's Motion for Summary Final Order

OPC asserts 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, 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 the Commission has power to change its methodology if its decision is supported by record evidence. Likewise, OPC alleges that it is entitled to the opportunity to present evidence that will show the Commission why it should change its policy.

OPC next cites to Section 120.68, Florida Statutes, for the proposition that the Commission 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 the Commission should not

follow prior practice in this proceeding. 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 the Commission.

OPC alleges that Commission precedent allows the Commission to change its decision about an acquisition adjustment for a company. In Order No. 23728, issued as a PAA Order November 11, 1990, and becoming final and effective without protest, in Docket No. 900291-WS, the Commission declined to recognize a negative acquisition adjustment. However, in the utility's subsequent rate proceeding the Commission 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 the Commission 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, the 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 the Commission could still recognize the adjustment if it finds a substantial change in circumstances from the last case. OPC is pursuing this issue through discovery.

Staff 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.

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 the utility's rate base should include a negative acquisition adjustment was addressed with respect to the acquisition adjustment at issue here in Order No. PSC-98-1092-FOF-WS, issued August 12, 1998, in Docket No. 960235-WS (transfer docket). By that Order, the Commission found that no extraordinary circumstances existed and held that no negative acquisition adjustment would be imposed. The Commission 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 Commission policy. However, in Florida Cities, the appeal and subsequent evidentiary hearing on remand arose from the Order stating the Commission's used and useful methodology. In the instant case, Order No. PSC-96-1241-FOF-WS, issued October 7, 1996, in Docket No. 960235-WS, stated the Commission's 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 through the Commission's latest PAA Order.

Staff agrees that Section 350.0611(1), Florida Statutes, gives OPC standing to urge any position consistent or inconsistent with positions previously adopted by the Commission. However, the Statute does not give OPC the ability to overcome a Motion For Summary Final Order without alleging more than an inconsistent position. OPC has fully litigated its position on negative acquisition adjustment for this utility in the transfer docket. What it seeks to do now is to revisit that decision under the guise of protesting the current PAA Order. OPC has not alleged any facts or circumstances to show that a genuine issue of material fact exists.

OPC also cites to Order No. PSC-93-1675-FOF-WS, in which the Commission reversed a previous finding by deciding to recognize a

negative acquisition adjustment. The Commission reached its 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 upon which the Commission held that a negative acquisition adjustment would not be imposed. Moreover, there has been no showing of any change in circumstances.

Next, OPC cites to Order No. 23166, in which the Commission removed a positive acquisition adjustment after a 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 the Commission found that the savings had not materialized, it removed the adjustment. The Commission's decision in the transfer proceeding was not contingent upon the materialization of certain facts. Moreover, OPC has not alleged that any facts have changed since that decision was made.

In conclusion, staff believes that because this issue was fully litigated just two years ago, Wedgefield has met its "initial burden of demonstrating the nonexistence of any genuine issue of material fact." Landers v. Milton, 370 So. 2d 368, 370 (Fla. 1979). The burden then shifts to OPC to demonstrate the existence of a genuine issue of material fact. Although OPC alleges throughout its response that it will present evidence in this proceeding, no supporting documentation has been provided to meet OPC's burden. "It is not enough for the opposing party to merely assert that an issue does exist." Id. 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). Therefore, staff recommends that Wedgefield's Motion for Summary Final Order be granted.

ISSUE 2: Should Wedgefield's Motion to Amend its Motion to Strike and Dismiss be granted? If so, 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: If the Commission approves staff's recommendation in Issue 1 above, then no ruling is necessary on the Motion to Amend Wedgefield's Motion to Strike and Dismiss and Wedgefield's Motion to Strike and Dismiss because they are moot. However, if the Commission denies the utility's Motion for Summary Final Order, then Wedgefield's Motion to Amend its Motion to Strike and Dismiss and its Motion to Strike and Dismiss should also be denied. (FUDGE)

STAFF ANALYSIS: On November 3, 2000, Wedgefield filed a Motion to Amend its Motion to Strike and Dismiss. It requests that the Commission take official notice of Order No. PSC-98-1092-FOF-WS. OPC did not file a response. Staff recommends that if the Commission approves staff's recommendation in Issue 1, then no ruling is necessary on the Motion to Amend Wedgefield's Motion to Strike and Dismiss and Wedgefield's Motion to Strike and Dismiss because they are moot.

If the Commission denies staff's recommendation in Issue 1, then staff believes that the Motion to Amend and the Motion to Strike and Dismiss should also be denied. In reviewing a Motion for Summary Final Order, the Commission may consider all documents in the record in reaching its decision. However, in a Motion to Dismiss, the Commission is confined to the four corners of the initial pleading. Consequently, staff recommends that if the Commission denies Wedgefield's Motion for Summary Final Order, the Motion to Strike and Dismiss should also fail.

ISSUE 3: Should the Commission accept Wedgefield's settlement offer contained in its response to Order No. PSC-00-1528-PAA-WU, which required 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?

RECOMMENDATION: Yes. The Commission should accept Wedgefield's settlement offer contained in its response to Order No. PSC-00-1528-PAA-WU, which required 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. The utility should be ordered to correct any remaining areas of noncompliance with the USOA by January 31, 2001. Therefore, staff also recommends that the \$3,000 fine be permanently suspended. Further, the utility and its parent should be ordered to file, in future proceedings before this Commission, MFRs which begin with utility book balances, and to show all adjustments to book balances after the "per book" column in the MFRs. The utility should also be ordered to file, with its MFRs, a statement which affirms that the MFRs begin with actual book balances. (KYLE, FUDGE, CHRISTENSEN, VANDIVER)

STAFF ANALYSIS: By Order No. PSC-00-1528-PAA-WU, the Commission 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 the Commission:

- (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;
- (c) 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.

(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 staff, but that staff did not remain at the utility's office for any longer than the two-week period originally allotted by 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 the audit staff.

Staff disagrees with certain allegations made in Wedgefield's response. First, the auditors noted that the length of time they needed to complete the Wedgefield audit report was not limited to the amount of time the auditors spent at the utility's offices. The auditors spent a considerable amount of time reconciling the MFRs to its books and records before going to the utility's office and during its on-site investigation.

The auditors also disputed the assertion that the Electronic Data Processing (EDP) tapes were provided on a timely basis. The 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, staff held an informal meeting with the utility and OPC. At this meeting, 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. Staff also addressed its belief 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, staff sent a letter to the utility outlining the above information.

On October 26, 2000, the utility sent a letter, which was filed in this docket on October 31, 2000, stating that while it acknowledges that some additional time was required for the

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 the staff auditor's 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 the significant good faith effort made to modify its books and records to bring it into compliance with the Commission's 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 with NARUC USOA. On October 30, 2000, the utility filed its direct testimony, which is consistent with its response and its October 26, 2000 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 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 staff to correct any specific issues raised in the future.

Staff concurs that the staff auditors should be permitted to provide guidance to the utility to correct the differences between its books and records and the NARUC USOA. However, staff believes that such guidance should not be used to preclude a finding of noncompliance with Commission rules in a future proceeding before the Commission. Furthermore, staff believes that the utility and its parent company should be required to begin its MFRs with the utility's book balances with all adjustments made after this "per book" column. Moreover, staff agrees that a compliance audit should 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.

Staff notes 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, staff has analyzed the utility's response, the utility's October 26, 2000 letter and the utility's direct testimony on this issue. Based upon this analysis, staff believes that the utility has made substantial progress in correcting the problems identified in previous orders. Therefore, staff believes that the utility's actions and commitments are sufficient to achieve the desired goals of efficient analysis of its MFRs and efficient audits. Therefore, staff does not believe that a

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monetary fine is necessary to ensure future compliance with Commission Rules and Orders.

Based on the foregoing, staff recommends that the Commission 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, staff also recommends that the \$3,000 fine be permanently suspended. The utility should be ordered to correct any remaining areas of noncompliance with the USOA by January 31, 2001. Further, the utility and its parent should be ordered to file, in future proceedings before this Commission, MFRs which begin with utility book balances, and to show all adjustments to book balances after the "per book" column in the MFRs. The utility should also be ordered to file with its MFRs, a statement which affirms that the MFRs begin with actual book balances.

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ISSUE 4: 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.