ORIGINAL

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, FIRST DISTRICT

Case No. _____
PSC Docket No. 991437-WU

Wedgefield Utilities, Inc.,
Petitioner,

v.

Florida Public Service Commission
and the Office of Public Counsel,
Respondents.
_____/

PETITION FOR WRIT OF CERTIORARI
TO THE
FLORIDA PUBLIC SERVICE COMMISSION

The Petitioner, Wedgefield Utilities, Inc., petitions the Florida District Court of Appeal, First District, for the issuance of a writ of certiorari to reverse Order No. PSC-00-2388-AS-WU of the Florida Public Service Commission (**Appendix A**) in which the Florida Public Service Commission denied Wedgefield's Motion to Strike and Dismiss the issue of negative acquisition adjustment (**Appendix C**). The Order also denied Wedgefield's Motion for Summary Final Order (**Appendix D**).

1. First, Petitioner must apologize to the Court for the length of the Appendix, but with no "record" from below, Petitioner feels that parts of all of these documents are necessary 1) to show that the identical issue of negative acquisition adjustment being raised by the Office of Public Counsel (OPC) in this case (referred to herein as Wedgefield II) is exactly the same issue that OPC also raised in the prior case (referred to herein as Wedgefield I) decided in 1998, 2) to show how extensively the issue was litigated, and 3) to meet the requirements of Fla. R. App. 9.100(h). The final order in the first case (denying the negative acquisition adjustment) was not appealed by OPC or by any other party.

2. References to Parties and to the Agency. References herein may include

Wedgefield Utilities, Inc. (Wedgefield), the Office of Public Counsel (OPC), or the Florida Public Service Commission (the Commission), all of whom were involved in the Wedgefield I case and are now also involved in Wedgefield II. The first case arose from Wedgefield's application to the Commission for authority to acquire and operate the utility system then owned by Econ Utilities Corporation, and that case is referred to herein as Wedgefield I. The second, current case arose from Wedgefield's application to the Commission for an increase in its water rates, and that case is referred to herein as Wedgefield II. OPC intervened in both cases after the Commission had entered its Proposed Agency Action Order in each case, and OPC has sought to have the negative acquisition adjustment imposed in Wedgefield II, just as it did in Wedgefield I.

3. Both of Wedgefield's motions (which were denied in this case by Order No. PSC-00-2388-AS-WU and now before this Court on Petition for Writ of Certiorari), arose from the fact that the issue of negative acquisition adjustment had already been resolved for this same utility in the case two years ago, and there was no material issue of fact remaining to be decided. That decision in the prior case (Wedgefield I) also was consistent with exactly one hundred (100) prior final orders of the Commission, including the decision in the case of Cypress Lakes Utilities, Inc., a sister company of Wedgefield Utilities, Inc., decided after Wedgefield I. Since Wedgefield I, at least 3 other cases have been decided consistently with those prior 100 cases. There has been no change in the Commission's policy since it was first established in 1983.

4. The doctrines of *res judicata*, collateral estoppel, *stare decisis*, and administrative finality require that the Commission's Order be reversed. The parties were the same in both cases, the relative positions of the parties were the same in both cases, and the Office of Public Counsel raised exactly the same issue in both cases. All that has changed in the ensuing period is the membership of the Commission. Well established principles of law should not be changed in this or any other case merely because membership of the decision-making body changes. If the new Commission members want to change the existing policy of the Commission relating to acquisition adjustments, they

must do so only prospectively, in a rule proceeding, and not retroactively as the Commission 's Order is trying to do in this case. In fact, on December 21, 2000,the Commission initiated such a rule proceeding on acquisition adjustments in its Docket No. 001502-WS.

5. **Headquarters**. The Commission's headquarters is located in Tallahassee, Florida.

6. **Stay**. The Commission has entered its Order Granting Motion to Abate and Stay Proceedings in this case (Wedgefield II) pending appellate review. ". . . [A]ll discovery efforts and controlling dates held in abeyance and will be reset upon completion of the appellate proceedings." (**Appendix B**, page 2)

7. **References to the Appendix**. Subsequent references to the Appendix are by letter and page numbers, such as (App. C, page 3-4).

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Specifically, the petitioner shows to the Court:

I. BASIS FOR JURISDICTION

This petition for writ of certiorari is brought under Article V, §4(b)(3), of the Florida Constitution and under Fla. R. App. P. 9.030(b)(2)(A), 9.130(a)(1), 9.100, 9.190(b)(2), and 9.220. The method of, and procedure for, review of non-final administrative orders are the same as review by petition for writ of certiorari.

Florida Appellate Practice, 4th ed., §§ 8.29, 8.32.

II. THE FACTS ON WHICH THE PETITIONER RELIES

1. The Respondent, Florida Public Service Commission, entered its order denying Wedgefield's two Motions notwithstanding the fact that between 1996 and 1998 the matter at issue in this appellate review (negative acquisition adjustment) already had been the subject of full administrative proceedings, including notice and hearings, and a final order was entered. OPC conducted extensive discovery, including interrogatories, requests for production, and deposition of Wedgefield's primary witness. After initial pre-hearing pleadings were considered and disposed of in the case, the matter went to hearing before a 3-member Commission panel in the utility's service territory on March 19, 1998. The Commission received testimony and exhibits from several customers. Expert witnesses testified on behalf of Wedgefield, OPC, and Commission Staff, respectively. Additional hearings were held at the Commission headquarters building in Tallahassee on March 26, 1998. The record in that PSC proceeding included three volumes of testimony containing 412 pages; 18 exhibits submitted on behalf of the various parties and accepted into evidence; 100 prior consistent cases decided by the Commission were considered by the Commission; and detailed, prefiled direct and rebuttal testimony was provided by the parties. Post-hearing briefs were filed (see, App. C, Attachment C), and extensive recommendations of findings of fact and conclusions of law were submitted and considered by the Commission. (See, App. C, Attachment E) On August 12, 1998, the Commission entered its final order, Order No. PSC-98-1092-FOF-WS, determining that no negative acquisition adjustment should be imposed. OPC did not seek reconsideration of the final order by the Commission, nor did OPC seek appellate review by the First District Court of Appeal. Nor did anyone else seek reconsideration or appellate review. That was Wedgefield I.

2. The Office of Public Counsel is a party to the current case (Wedgefield II) and was a party to the prior case resulting in the 1998 final order of the Commission on this issue (Wedgefield I). It was upon the intervention and petition of the Office of Public Counsel that the issue of negative acquisition adjustment was raised in both cases. The same

attorney represents OPC in Wedgefield II as in the first case. The same attorney represents Wedgefield in Wedgefield II as in the first case.

3. Wedgefield Utilities, Inc. is a private utility, subject to regulation by the Florida Public Service Commission pursuant to Chapter 367, Florida Statutes. It is a Florida corporation and is a wholly owned subsidiary of Utilities, Inc., an Illinois corporation which owns and operates 76 water and wastewater utility systems in 16 states. Utilities, Inc. currently owns and operates 15 utility systems in Florida subject to the jurisdiction of the Florida Public Service Commission, including both Wedgefield Utilities, Inc. and Cypress Lakes Utilities, Inc. During the past two years, in cases involving the acquisition of both Wedgefield and Cypress Lakes, the Commission has considered the issue of negative acquisition adjustment and has rendered decisions consistent with prior and existing Commission policy and denied a negative acquisition adjustment. In both cases (Cypress Lakes and Wedgefield I), the negative acquisition adjustment had been requested by OPC.

4. If the regulatory climate remains acceptable and if the incentives are right, Utilities, Inc. plans to purchase and rehabilitate additional small to moderate-sized utility systems in Florida. The Commission's policy on acquisition adjustments has been a significant incentive for taking on the task of acquiring and rehabilitating these systems. However, if Utilities, Inc. cannot rely on the stability inherent in the finality of Commission orders, then it will be forced to re-evaluate the degree, if any, to which it would be willing to participate further in Florida. It currently operates in 15 other states and continues to expand and upgrade its utility systems, its personnel, and its operations, which are cost effective for Utilities, Inc., for its subsidiaries (like Wedgefield), and for the customers of its subsidiaries. Uncertainty increases risk, even for a regulated utility, and nothing creates more uncertainty that not being able to rely upon prior decisions of the state regulatory commission. Hopefully, some additional background of the Wedgefield acquisition in Wedgefield I will help the Court understand the importance of finality and reliability of Commission orders.

5. Based upon prior evaluation of the incentives and risks in Florida regulation,

Utilities, Inc. filed a petition with the Florida Public Service Commission seeking approval to acquire Econ Utilities, whose certificated operating area was east of Orlando, Florida. Econ was a financially troubled, developer-owned utility.

6. Econ Utility was the only utility system which the developer owned, and he started the utility because he needed it to be able to build houses in the Wedgefield residential development. Otherwise, he would not have been in the utility business. Utilities, Inc. was able to purchase the assets of the utility system for less than rate base. Rate base is the original cost of the utility assets net of depreciation and contributions.

7. Long ago, the Florida Public Service Commission established and has followed the policy that, "**Absent evidence of extraordinary circumstances, the rate base calculation should not include an acquisition adjustment.**" (App. I, Final Order Establishing Rate Base for Purposes of Transfer, Declining to Include a Negative Acquisition Adjustment in the Calculation of Rate Base and Closing Docket, Docket No. 960283-WS, Order No. PSC-98-1092-FOF-WS issued August 12, 1998, re Wedgefield Utilities, Inc.) At page 16 of that Order, the Commission also cited several other prior orders of the Commission confirming the same policy. In that Wedgefield transfer case (Wedgefield I), OPC alleged but did not prove that any extraordinary circumstances existed. Of that 32-page Order, 26 pages (beginning at App. I, page 6) deal with the acquisition adjustment issue, so the issue, relating to this utility, these parties, these customers, this Commission, and OPC, has been fully litigated. Furthermore, in the Order Approving Transfer (App. H, page 3, 3rd ¶), the Commission had already found that it was in the public interest to approve the transfer to Wedgefield. Wedgefield Utilities, Inc. had been created as a wholly owned subsidiary of Utilities, Inc. for that purpose, and Wedgefield took title to, and began operating, the utility.

8. That same principle requiring a finding of "extraordinary circumstances" has now been followed in over one hundred (100) cases decided by the Commission since 1983. That requirement was reaffirmed by the Commission on a case-by-case basis and in a generic proceeding resulting in two orders from the Commission in the same generic

docket. In 1989, OPC filed a request for the Commission to initiate rulemaking proceedings regarding negative acquisition adjustments. In the Commission's Proposed Agency Action Order on OPC's request, the Commission stated:

> By Order No. 22361, issued January 2, 1990, we rejected OPC's petition to initiate rulemaking but granted its request to initiate an investigation into our acquisition adjustment policy.
>
> As part of the investigation, Staff invited all interested persons to submit written comments regarding the acquisition adjustment policy. Staff also held an informal workshop to discuss the current policy and the changes recommended by OPC. Comments were submitted by, and the workshop was attended by representatives of, Jacksonville Suburban Utilities Corporation (JSUC), Southern States Utilities, Inc. (Southern States) and OPC. [App. J, page 2.]
>
> * * *
>
> Upon consideration of the above, we do not believe that it would be appropriate to amend our acquisition adjustment policy. Not only might OPC's proposed change not benefit the customers of troubled utilities, it might actually be detrimental, by removing any incentive for larger utility companies to acquire distressed systems. . . . [App. J, page 3.]

Therefore, the Commission denied OPC 's request to initiate rulemaking (Order No. 22361 issued January 2, 1990), initiated an investigation, received written comments, held a workshop attended by OPC and by industry representatives, and entered its PAA Order reaffirming its policy on acquisition adjustments. (Docket No. 891309-WS, PAA Order No. 23376 issued August 21, 1990. (See, App. J)

9. OPC protested the PAA order. At the hearing on OPC's protest, OPC presented testimony, and later, at the Commission agenda conference on the matter, OPC presented oral argument. Regulated utility companies also participated

10. The Commission then issued its final order in that generic docket, again reaffirming its acquisition adjustment policy which had been in effect at least since 1983. (Docket No. 891309-WS, Order No. 25729 issued February 17, 1992). (See, App. K) In that final order reaffirming its policy on acquisition adjustments, the Commission stated:

> OPC seems to view positive and negative acquisition adjustments somewhat differently. For positive acquisition adjustments, OPC believes that appropriate standards mut be established for the buyer to show, and for the Commission to evaluate, the prudence of the acquisition at a premium so the sale of a utility does not increase customer rates without any new assets being devoted to utility service. But for negative acquisition adjustments, OPC believes that the Commission has no alternative except to automatically impose an adjustment. [App K, page 2.]
>
> * * *
>
> We still believe that our current policy provides a much needed incentive for acquisitions. The buyer earns a return on not only the purchase price but the entire rate base of the acquired utility. The buyer also receives the benefit of depreciation on the full rate base. Without those benefits, large utilities would have no incentive to look for and acquire small, troubled systems. <u>The customers of the acquired utility are not harmed by this policy because, generally, upon acquisition, rate base has not changed, so rates have not changed. Indeed, we think the customers receive benefits which amount to a better quality of service at a reasonable rate</u> . . . . [Emphasis added. App. K, page 3, Order Concluding Investigation and Confirming Acquisition Adjustment Policy]

11. It is this same policy which the Commission has followed consistently, at least since 1983, and upon which regulated utilities <u>have relied</u> in making decisions.

III. THE NATURE OF THE RELIEF SOUGHT

The Petitioner requests that this Court issue an order to show cause to the Respondent Florida Public Service Commission, and to the Intervenor/Respondent Office of Public Counsel, and ultimately issue its writ of certiorari to the Commission requiring that the Commission grant Wedgefield's Motion to Strike and Dismiss and/or to grant Wedgefield's Motion for Summary Final Order dismissing the issue of negative acquisition adjustment from this proceeding.

IV. ARGUMENT

A. Order to Show Cause

1. An order to show cause should be issued in this case, because writ of certiorari is the appropriate method to review Order No. PSC-00-2388-AS-WU, issued December 13, 2000. The order is a non-final order, and review is by the discretionary writ of certiorari pursuant to Fla. R. App. P. 9.030(b)(2)(A), 9.130(a)(1), 9.100, 9.190(b)(2), and 9.220. As shown by the facts and argument set forth herein, the Petition meets the standards necessary for issuance of the order to show cause, and ultimate, the discretionary writ of certiorari.

B. Basis for entering an order to show cause, and ultimately a writ of certiorari

2. The doctrine of administrative res judicata is applicable in this state. Hays v. State Dept. of Business Regulatioin, Div. of Pari-Mutuel Wagering, 418 So.2d 331 (Fla. 3rd DCA 1982). Administrative proceedings are subject to the doctrine of res judicata. Rubin v. Sanford, 168 So.2d 774 (Fla. 3rd DCA 1964). The doctrine of res judicata is equally applicable to decisions of administrative tribunals and courts. Flesche v. Interstate Warehouse, 411 So.2d 919 (Fla. 1st DCA 1982). Where an administrative agency acting in a judicial capacity has resolved disputed issues of fact which were properly before it and which parties have had an adequate opportunity to litigate, a court will apply the doctrine of res judicata or collateral estoppel. Jet Air Freight v. Jet Air Freight Delivery, Inc., 264 So.2d 35 (Fla. 3rd DCA1972). These judicial principles are well known. The legal arguments showing that those judicial principles apply in this case were presented to the Commission in Wedgefield's Motion to Strike and Dismiss (App. C, pages 9-14) based on the case background set forth at pages 1-8 thereof.

C. Cases distinguished

3. In its Response to Wedgefield's Motion to Abate and Stay in this case, OPC argued that "denial of the motions does not qualify for a writ of certiorari" and that ". . . litigation of a non-issue will always be inconvenient and entail considerable expense of time and money for all parties in the case. . . .", citing *Martin-Johnson, Inc. v. Savage*, 509 So.2d

1097 (Fla. 1987) and *Jaye v. Royal Saxon, Inc.*, 720 So.2d 214 (Fla. 1998). However, an examination of those cases shows that they do not bar the issuance of a writ of certiorari in this case.

4. In the *Martin-Johnson* case, an employee filed a wrongful discharge action, seeking compensatory and punitive damages. The employer's motion to strike the punitive damages claim was denied, and the employer petitioned for writ of certiorari. The District Court of Appeal denied the petition and certified the question to the Florida Supreme Court. The Supreme Court held that "ordinarily", orders on motions to strike or dismiss claims do not qualify for review by certiorari, and that certiorari was not a proper vehicle for testing the denial of a motion to strike a claim for punitive damages.

5. A case decided on such an inapplicable set of facts as *Martin-Johnson* cannot be determinative of the outcome of the instant case. In *Martin-Johnson*, there had never been a prior hearing or trial on the issue, with expert testimony, exhibits, briefs, proposed findings of fact and conclusions of law, and a final order which was not appealed. To the contrary, in a case such as Wedgefield II, the denial of a motion to strike or dismiss is just the sort of problem the writ was designed to alleviate.

6. OPC's Response to Wedgefield's Motion to Abate and Stay also cited the *Jaye* case, *supra*. Again, a case decided on such an inapplicable set of facts cannot be determinative of the outcome of the instant case.

7. Wedgefield does not herein raise as grounds for the writ of certiorari that it will be expensive to re-litigate the same issue all over again, although it certainly will. Nor does Wedgefield raise as grounds that the expense of re-litigating the same issue is a legitimate rate case expense which must be paid by the utility customers, OPC's client, although they certainly will. (See, § 367.0816, Fla. Stat. (2000) To the contrary, the grounds raised by Wedgefield are set forth and discussed below.

8. In *Jaye*, the Supreme Court denied a petition for writ of certiorari to review the trial court's order striking a party's demand for a jury trial. The problems brought on in Wedgefield II by the Commission's Order denying the motions to strike and dismiss and for

summary final order pose not a procedural problem, but a substantive one. Furthermore, just as in the *Martin-Johnson* case discussed *supra*, in *Jaye* there had never been a prior hearing or trial on the issue, with expert testimony, exhibits, briefs, proposed findings of fact and conclusions of law, and a final order which was not appealed. Conversely, in Wedgefield I there had been such a hearing and final order, which was not appealed by OPC.

9. OPC did not cite any other cases in opposition to Wedgefield's Motion to Abate and Stay which Wedgefield filed based upon the stated intent to seek appellate review of the order. Even so, it is instructive to analyze the inapplicability of case citations which are bandied about in opposition to a petition for writ of certiorari.

10. Granted, certiorari is a discretionary writ, and is frequently not allowed. However, under the appropriate circumstances it can alleviate inappropriate decisions from a lower tribunal where no other remedy is available.

11. Numerous cases have been found where the denial of a motion to dismiss or strike was held not to be the basis for a writ of certiorari. However, the cases reviewed did not deal with the same circumstances as are involved in this case, having broad impact on all regulated utilities and creating a significant change in the general legal principals governing all administrative and potentially all judicial proceedings. Also in this case, a full and complete hearing was held on, and a final order issued on, the same issue between the same parties in a prior, independent proceeding. *Cf.*, *Marlowe. v. Ferreira*, 211 So.2d 228 (Fla. 2d DCA 1968) [lower court's grant of motion to amend complaint in the original trial to add a count for negligence and damages held not subject to writ of certiorari]; *Ford Motor Co. v. Nelson*, 355 So.2d 158 (Fla. 4th DCA 1978) [auto manufacturer's affirmative defense in original trial was stricken by the trial court, held not subject to writ of certiorari]. Neither one of those cases involved a prior trial or hearing, with a final order based thereon and not appealed by the party to the prior proceeding.

12. There was another interesting, and distinguishing, fact about the *Ford Motor* case. On appellate review, Ford raised as grounds for a writ of certiorari the possible expense of

two trials 1) if the writ were denied, and 2) if Ford was then successful on appeal of that issue from the final order, and then 3) if it had to try the case again. In contrast, the rate case expense of Wedgefield II is a legitimate rate case expense which will be billed to the utility customers and amortized over four years. (§ 367.0816, Fla. Stat. (2000), mentioned *supra*.) That does not mean that Wedgefield does not care about the duplicate rate case expense. It does mean that Wedgefield customers (OPC's clients), and not Wedgefield Utilities, Inc., will be required by statute to pay the cost of the duplicate litigation on the same issue.

13. Without further burdening the Court with cases which are not applicable or controlling, suffice it to say that each case must be examined on its own facts to determine whether it applies to the instant case.

D. The "sliding scale"

14. Some courts in the past have found circumstances which warranted some variation from the strict adherence to precedent. A review of those circumstances shows, essentially, that the more serious a problem is for a party or for the preservation of judicial principles, the more likely the court is to grant the writ of certiorari. A discussion of that "sliding scale" of importance relating to the precedential value of *stare decisis* is set forth in Florida Appellate Practice, 4th ed., § 7.17;

> Guidelines have been adopted to assist the courts and litigants in determining how much weight should be given to precedent. If the precedent affects the validity of a method of transacting business or of passing title to property, the court generally avoids making a change. *In re Seaton's Estate,* 154 Fla. 446, 18 So.2d 20 (1944). On the other hand, if the rule of law ordinarily is not considered by the parties before their action, such as whether contributory negligence is a complete defense or only reduces damages, the court is not as reluctant to change the rule. See *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973), 78 A.L.R.3d 321, *modified* 457 So.2d 467. If the rule involved is procedural rather than substantive, the court will not refrain from changing it. *In the Interest of J.H.,* 596 So.2d 453 (Fla. 1992); *Shingleton v. Bussey*, 223 So.2d 713 (Fla. 1969). [Florida Appellate Practice, 4th ed., § 7.17.]

E. Proceedings before the Commission, or "How We Got Here From There"

15. On November 12, 1999, Wedgefield Utilities, Inc. filed its application for an increase in its water rates. Its minimum filing requirements were met, and the official date of filing was set as February 29, 2000. By Order No. PSC-00-0910-PCO-WU issued May 8, 2000, the Commission set interim rates which would allow Wedgefield to collect a portion of its requested amount on an interim basis, subject to possible refund if the final rates were determined to be less than that approved for the interim amount. By Proposed Agency Action Order No. PSC-00-1528-PAA-WU issued August 23, 2000, the Commission proposed final water rates at an amount below the interim rates.

16. On September 13, 2000, Wedgefield filed a petition pursuant to § 120.57, Fla. Stat., protesting the PAA Order. On that same day, OPC filed a Notice of Intervention and a petition protesting the PAA Order. In OPC's protest, the only "issue" stated was "Should the utility's rate base include a negative acquisition adjustment?" The OPC petition also stated the fall-out question, "What other charges, such as changes to depreciation expense, should be made to reflect a negative acquisition adjustment?" (See, App. C, Attachment B, ¶ 5) No other "issue" was raised by OPC.

17. On October 3, 2000, Wedgefield filed its Motion to Strike and Dismiss the Office of Public Counsel's Petition Requesting Section 120.57 Hearing and Protest of Proposed Agency Action. (See, App. C) A Staff Recommendation (App. E) was filed on October 26, 2000, to be considered at the November 7, 2000, Commission Agenda Conference. Staff's recommendation was to grant Wedgefield's Motion to Strike and Dismiss on the grounds of administrative finality (App. E, pages 3, 7-8). The only basis relied upon by Staff for not recommending granting the motion on the grounds of *res judicata*, collateral estoppel, or *stare decisis*, was on the grounds that, "within the four corners of its petition", OPC did not mention the prior case (Wedgefield I) in which the negative acquisition issue had already been decided (App. I), and because Wedgefield, in its Motion to Strike and Dismiss, had not requested the Commission to take official notice ("judicial notice") of the prior order. (App. E, pages 6-7) As is the usual practice, the Staff Recommendation had

been drafted with input from the various Staff members working on the case, and upon final review by each Staff member they placed their initials beside their names on the first page of the Recommendation.

18. In case there is any doubt, a Commission Staff Recommendation may properly be included in an appellate record when the Commission Staff attorney cross-examines witnesses at the hearing before a Commission panel. The Commission Staff attorney in this current rate case will be cross-examining witnesses, even if the issue of negative acquisition adjustment is dismissed. Therefore, it is appropriate to include Staff Recommendations in this Petition and in the attached Appendix. See, *Citizens of State of Florida v. Beard*, 613 So.2d 403 (Fla. 1992).

19. Unexpectedly, five days later and without known precedent, the first Staff Recommendation dated October 26, 2000, was withdrawn and a second, new Recommendation dated October 31, 2000, was substituted in its place. (App. F) The only changes were to reverse the "Yes" recommendation to a "No" recommendation re granting Wedgefield's motion to dismiss and strike on the grounds of administrative finality. (See, App. F, page 2) Also, the discussion supporting the "Yes" recommendation had been stricken from the recommendation (App. F, pages 7 - 8). The date for the Commission Agenda Conference had not been changed, and it was still scheduled for November 7, 2000. All Staff members signed off on this second Staff Recommendation reversing the first recommendation.

20. Based on the conflicting, and now fully negative, Staff Recommendation, three days later, on November 3, 2000, Wedgefield filed its Motion for Summary Final Order and its Motion to Amend Wedgefield's Motion to Strike and Dismiss (App. D, pages 4, 7). In that Motion, Wedgefield moved to amend its original Motion to Strike and Dismiss by asking the Commission to take official notice of its Final Order in the first Wedgefield case (App. I) in which the OPC request for a negative acquisition adjustment had been denied. The Motion to Amend (App. D, page 4) addressed the basis for Staff's recommendation to deny Wedgefield's Motion to Strike and Dismiss, that is, there was no reference to the

Wedgefield case in the "four corners" of OPC's Petition and Wedgefield had not requested the Commission to take official notice of the prior, Wedgefield I order. As stated in that Motion to Amend, "[t]he Commissioners and the Staff have repeatedly stated in proceedings before the Commission that it is not necessary for the Commission to take official notice of its own orders. Even in the Wedgefield transfer hearing on March 19, 1998, Wedgefield's undersigned counsel had a difficult time getting the Commissioners to acknowledge the desirability of taking official notice of the approximately 100 prior decisions of the Commission on the subject of acquisition adjustments. Even the OPC attorney argued that it was unnecessary for the Commissioners to take official notice of its own decisions:

> Commissioner, I have no objection to taking official notice, In fact, I have no objection to taking official notice of any orders of the Commission. I do not see the purpose of it. I think it's a - I think that official notice of an order solely replaces having the Clerk of the Commission coming in under oath and testifying that these are, in fact, the orders of the Commission. That's all official notice does. It serves no purpose. It doesn't make them any different than any order of the Commission. I certainly have no objection to taking notice of all theses, these orders. I don't think it serves any purpose. [Transcript of hearing, March 19, 1998, page 11, In re Wedgefield Utilities, Inc., Order No. PSC-98-1092-FOF-WS in Docket No. 960235-WS , quoting the OPC attorney.] (See, App. D, page 8)

21. It seemed unusual that the Commission Staff would reverse itself, change from recommending granting to recommending denying Wedgefield's Motion to Strike and Dismiss, and seemingly ignore all the judicial principles of *res judicata*, collateral estoppel, *stare decisis*, and administrative finality. On November 16, 2000, the Commission Staff issued a third Recommendation (App. G) recommending approval of Wedgefield's Motion for Summary Final Order. (App. G, Issue 1, page 4) In issue 2 (App. G, page 8, without stating the legal reasoning for its recommendation, Staff recommended that if the Commission granted Wedgefield's Motion for Summary Final Order in Issue I,

> . . . then no ruling is necessary on the Motion to amend Wedgefield's Motion to Strike and Dismiss and [on] Wedgefield's Motion to Strike and Dismiss because they are moot. <u>However</u>, if the Commission <u>denies</u> 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 <u>should also be denied</u>. [Emphasis added.]

The third Staff Recommendation cited no authority or precedent for such a "shadow" denial.

22. Wedgefield's Motion for Summary Final Order was based on the authority of the Commission case In re Bonita Country Club Utilities, Inc., Docket No. 990975-WU, Order No. PSC-00-0341-PCO-SU, 00 FPSC 2:353, issued February 18, 2000.

23. Finally, at the Agenda Conference on November 28, 2000, the Commission granted Wedgefield's Motion to Amend its Motion to Strike and Dismiss (App. A., pages 7, 10), and the Commission took official notice of its final order in the prior Wedgefield case (Wedgefield I) in which the issue of negative acquisition adjustment had already been decided. That removed the only ground in the Staff's three Recommendations for denial of the Motion to Strike and Dismiss. The Commission also had voted to deny both of Wedgefield's other motions: Wedgefield's Motion to Strike and Dismiss(App. A, pages 7, 11), and Wedgefield's Motion for Summary Final Order (App. A, pages 6, 10).

24. Go figure.

25. Wedgefield then decided to seek appellate review.

F. Order to show cause pursuant to Fla. R. App. 9.100(h)

26. Pursuant to Fla. R. App. 9.100(h),

> If the petitioner demonstrates a preliminary basis for relief, a departure from the essential requirements of law that will cause material injury for which there is no adequate remedy by appeal, or that review of final administrative action would not provide an adequate remedy, the court may issue an order directing the respondent to show cause, within the time set by the court, why relief should not be granted. . . .

27. Not being able to rely upon the Commission's prior final Order PSC-98-1092-FOF-WS issued August 12, 1998, in regard to this same issue which the Office of Public Counsel seeks to raise in this second case, would establish a precedent which would inject such uncertainty into the administrative process (and into the judicial process if the principal were followed in Circuit Court), that it would prohibit regulated entities and all other litigants from being able to rely upon the final decisions of those courts and tribunals

which are vested with no less than the judicial and quasi-judicial decision-making authority under our system of government.

28. Uncertainty increases risk, even for a regulated utility, and nothing creates more uncertainty that not being able to rely upon prior decisions of the state regulatory commission.

29. Wedgefield and the fourteen (14) other utility subsidiaries of Utilities, Inc. which operate in Florida and are subject to the Florida Commission's jurisdiction, have been involved in cases where dozens of final orders have been rendered by this Commission. In the past, Wedgefield and its affiliated utilities have been able to rely, to a reasonable extent, on the certainty of the law and rules governing utility regulation in Florida and the finality of the Commission's orders. However, Order No. PSC-00-2388-AS-WU substantially impairs that ability to know what the law is and to be able to rely on the finality of the Commission's decisions.

30. The seriousness of the error involved and the potential impact, not only upon the parties to this proceeding, but also on parties in other proceedings and for the judicial system as a whole, is substantial. The order calls into question, and undermines, the finality and reliability of, every other final order of the Commission, whether issued in the past or to be issued in the future.

31. If the Commission Order was allowed to stand, what is the purpose of *res judicata*, collateral estoppel, *stare decisis*, and administrative finality?

32. In addition to the current effort by OPC to re-litigate the same issue of negative acquisition adjustment in the Wedgefield II case, it also had raised the issue in the recent Cypress Lakes transfer case whereby that utility was transferred from Cypress Lakes Associates, Ltd. to Cypress Lakes Utilities, Inc., in Polk County. (As indicated above, Cypress Lakes Utilities and Wedgefield Utilities are both owned by Utilities, Inc.)

33. In the Cypress Lakes case, the Commission issued an order approving the transfer, and by PAA order set rate base for purposes of the transfer (Docket No. 971220-WS, Order No. PSC-98-0993-FOF-WS issued July 20, 1998). OPC filed a protest and

petition for hearing on the issue of negative acquisition adjustment, but failed to even allege, much less prove, a single "extraordinary circumstance", which the Commission requires before a negative acquisition adjustment can be considered. (For a discussion of the requirement of showing "extraordinary circumstances", see the discussion above in II. THE FACTS ON WHICH THE PETITIONER RELIES.) The Commission denied several motions filed by Cypress Lakes seeking to have the protest dismissed based on the failure to even allege that any "extraordinary circumstance" existed in the case, a precondition to considering a negative acquisition adjustment. Upon stipulation by the parties, the case was then decided on the pre-filed testimony and exhibits, without a hearing. The Commission entered its final order denying OPC's demand for a negative acquisition adjustment (Docket No. 971220-WS, Order No. PSC-00-0264-FOF-WS issued February 8, 2000), thereby again reaffirming its prior policy on acquisition adjustments, which has been in effect, and has remained unchanged, since at least 1983.

34. With the summary changes of procedure going on at the Commission without rulemaking or other due process guarantees, it is incumbent upon this Court to preserve the finality of decisions of the Florida Public Service Commission.

35. The egregious nature of the Commission's failure to recognize and uphold the precedent of its prior decisions and not require re-litigating the same case over and over again, is reflected in the lack of due process at the Customer Meeting held in this case on May 31, 2000, in Wedgefield's service area. Commissioners have not attended this type of proceedings in the past. In this case, however, they attended, heard unsworn "testimony" (but only from customers), posed questions to customers for them to answer, prohibited Wedgefield's attorney from cross examining those "witnesses", and allowed the Public Counsel to make a speech, in part encouraging the customers to get involved in the rate case on the negative acquisition adjustment issue because it would not be very costly to the ratepayers to do so. Wedgefield's counsel verbally objected to the Staff and to the Commissioners prior to and during that proceeding regarding the new procedure, but to no avail. Later, at a preliminary pre-hearing conference, OPC's attorney requested that

Wedgefield's attorney seek approval from Wedgefield to stipulate to introducing the entire record from Wedgefield I into the Wedgefield record. That certainly would save expenses for OPC, but it shows that Wedgefield II is a mirror of Wedgefield I and the negative acquisition issue should not have to be tried again.

36. Furthermore, at the Agenda Conference on August 1, 2000, at which the interim rates were approved, the comments of one Commissioner seemed to suggest the concept of *res judicata* and the other judicial principles at issue herein would be followed in this case. In regard to Issue 2 on the proper amount of rate base (which a negative acquisition adjustment will reduce), the Commissioner stated:

> . . . And with respect to and with respect to the acquisition adjustment issue, Mr. Girtman I would agree with you that the Commission applied their non-rule standard to the facts of the cases you have cited to. And I am willing to respect all of those decisions because I do understand that the Econ-Wedgefield case was fully litigated. I'm quite aware of that. But, I urge Staff again to bring that rule to us. It has taken far too long. You know, you need to bring it to us. We've got to take a look at whether it's time to have a rule, what our policy is - you do have a new Commission. You do. I'm looking forward to looking at those issues. . . .

On Issue 7 relating to a different issue in the case, the Commissioner stated:

> . . . I think it would be my desire that you all [Commission Staff] get with legal and figure out if we need to do rulemaking on some of these things that we've used over and over again. I think parties are entitled to rely on what the Commission's practice is. And rules are for that. . . .

However, a few minutes later, the unanimous vote by all 3 Commissioners on the panel was to deny Wedgefield's Motion to Dismiss and Strike, thus ignoring *res judicata* and the other judicial principles of certainty and finality.

37. The Court should issue a writ of certiorari to review the non-final order because to not do so now would either render moot, or would severely diminish the viability of, the judicial doctrines of *res judicata*, collateral estoppel, *stare decisis*, and administrative finality. The issue of negative acquisition adjustment has already been decided by the Commission for this utility, in a previous case, in which a final Commission order was issued in Wedgefield's favor. It is important to remember the Office of Public Counsel, a party to

both proceedings and upon whose insistence the issue was raised in the both cases, did not seek reconsideration by the Commission of the order in the first case, nor did it seek appellate review of that final order.

38. A review of cases on certiorari shows that the facts in each case are unique, and each case must be judged individually. The Petitioner has not been able to find a case exactly on point. Several cases deal with questions of *res judicata*, collateral estoppel, *stare decisis*, and administrative finality. However, no case has been found which is based on the same facts of this case, or which poses the same, unique problems which are caused by the rendering of this Commission Order.

39. For review, some important facts that are unique about this case are that the issue of negative acquisition adjustment for this utility was fully litigated with notice and a hearing, and a final order was entered by the Commission denying OPC's request for a negative acquisition adjustment. The Office of Public Counsel did not seek appellate review, or even reconsideration, of that final order in 1998. These facts particularly distinguish this case from others. This is not a case like *Ford Motor Co. v. Nelson*, 355 So.2d 158 (Fla. 4th DCA 1978) cited *supra,* in which an automobile manufacturer faced a theoretical, perhaps, and "maybe" possibility of having to litigate the issue of negligence below, maybe appeal the final order (if Ford lost at trial), perhaps deciding to appeal again, and, if Ford won on appeal, having to try the case again. That is an entirely different situation than Wedgefield Utilities, Inc.

40. If the Commission's Order is allowed to stand, to ensure that due process and equal protection standards are met, the Commission would have to review, in a current and timely manner, every one of the now (at least) 103 other cases in which an acquisition adjustment was considered. Exactly 100 of those cases were decided by the Commission prior to Wedgefield I.

41. In addition to the reasons set forth above showing compliance with the requirements of Fla. R. App. 9.100(h), the following additional comments are made in relation to each of the requirements of that rule.

42. The failure of the Commission to honor the judicial principles of *res judicata*, collateral estoppel, *stare decisis*, and administrative finality alone shows that the Order departs from the essential requirements or law and is sufficient to warrant issuance of the order to show cause and, ultimately, the writ of certiorari.

43. If the writ of certiorari were to be denied, if the second hearing proceed to a second final order, and if that second final order were adverse to Wedgefield and were appealed, the subject of the appeal would be not be *res judicata*, collateral estoppel, *stare decisis*, and administrative. That would be like closing the barn door after the horse has already left. Those matters would be moot, because the second case had already been decided.

44. It is not just the injury to Wedgefield Utilities that is at issue here, and it goes is far beyond any question of time, expense, or inconvenience. What is at stake is the viability and credibility of every final order ever issued by an administrative agency. Is there now to be a statute of limitations substituted for finality upon the issuance of a final order? If so, what will that statue of limitations be, and how and when would it be established? Or would there be no statute of limitations at all, an every final order ever issued would be subject to trial or hearing again?

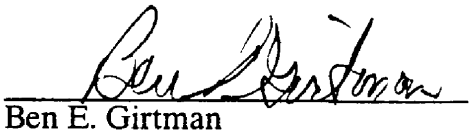
45. The material injury applies not just to Wedgefield. It applies to ever other utility regulated by the Florida Public Service Commission; it applies to every other party in any administrative proceeding and to every non-party who ever finds itself in need of relying on a final order of an administrative agency.

46. What remedy would be available on appeal? What post-hearing remedy would repair the damage of this aberration in, and to, the judicial process?

V. CONCLUSION

As stated in the foregoing Nature of Relief Sought, the Petitioner, Wedgefield Utilities, Inc., requests that this Court issue an order to show cause to the Respondent Florida Public Service Commission, and to the Intervenor/Respondent Office of Public Counsel, and ultimately issue its writ of certiorari to the Commission requiring that the Commission grant Wedgefield's Motion to Strike and Dismiss and to grant Wedgefield's Motion for Summary Final Order dismissing the issue of negative acquisition adjustment from this proceeding. If the Commission wants to change its policy on acquisition adjustments it must do so by rulemaking, and then only prospectively.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Certiorari and the accompanying Appendix have been furnished to the following by U.S. mail (or by hand delivery*) this 12th day of January, 2001.

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APPENDIX

INDEX

This Appendix contains conformed copies of documents from the current case (Wedgefield II). It also contains documents from the prior case in which the issue was first decided. The final order entered in 1998 in Wedgefield I was not appealed by the Office of Public Counsel. Those two Orders from Wedgefield I decided the issue of negative acquisition adjustment and formed the basis for the dispute in the recent Order which is now under review by certiorari. The Appendix also contains two orders from the generic Commission proceedings concluded in 1992, which affirmed the Commission's prior existing policy on acquisition adjustments, which OPC seeks to change in the current case.

I. From the current case (Wedgefield II): Docket No. 991437-WU, Application for increase in water rates in Orange County by Wedgefield Utilities, Inc.:

Orders:

A. **Order Denying Motion** for Summary Final Order Without Prejudice, Granting Motion to Amend, Denying Motion to Strike and Dismiss, and Accepting Wedgefield's Settlement Offer, Order No. PSC-00-2388-AS-WU issued on December 13, 2000

B. **Order Granting Motion to Abate and Stay** Proceedings, Order No. PSC-00-2365-PCO-WU issued on December 8, 2000

Motions:

C. Wedgefield Utilities, Inc.'s **Motion to Strike and Dismiss** the Office of Public Counsel's Petition Requesting § 120.57 Hearing and Protest of Proposed Agency Action, filed on October 3, 2000
(See Wedgefield's **Brief and other post-hearing documents** in Wedgefield I.)

D. Wedgefield Utilities Inc.'s **Motion for Summary Final Order and Motion to Amend Wedgefield's Motion to Strike and Dismiss** the Office of Public Counsel's Petition Requesting § 120.57 Hearing and Protest of Proposed Agency Action, filed on November 3, 2000

Conflicting Staff Recommendations on Wedgefield's motions in the current case:

E. **Staff Memorandum dated** October 26, 2000, for the November 7, 2000 agenda conference [**Grant** motion]

F. **Staff Memorandum** dated October 31, 2000, for the November 7, 2000 agenda conference [**Deny** motion}

G. **Staff Memorandum** dated November 16, 2000, for the November 20, 2000 Agenda. [**Grant** motion]
(The agenda conference was actually held on November 28, not November 20. Page 2, et seq., have the date October 31, 2000 at the top of the page.)

II. From the prior case (Wedgefield I): Docket No. 960235-WS, Application for transfer of Certificates Nos. 404-W and 341-S in Orange County from Econ Utilities Corporation to Wedgefield Utilities, Inc.:

H. **Order Approving Transfer** and Granting Amendment of Certificates to Include Additional Territory and Notice of Proposed Agency Action Order Establishing Rate Base for Purposes of the Transfer, Order No. PSC-96-1241-FOF-WS issued on October 7, 1996

I. **Final Order Establishing Rate Base** for Purposes of the Transfer, Declining to Include a Negative Acquisition Adjustment in the Calculation of Rate Base and Closing Docket, Order No. PSC-98-1092-FOF-WS issued on August 12, 1998

III. Orders from the generic proceedings in 1989 - 1992: Docket No. 891309-WS, In re: Investigation of Acquisition Adjustment Policy:

J. **Order Disapproving Proposed Amendment to Acquisition Adjustment Policy**, Order No. 23376 issued on August 21, 1990

K. **Order Concluding Investigation and Confirming Acquisition Adjustment Policy**, Order No. 25729 issued on February 17, 1992