ORIGINAL

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

JACK SHREVE
PUBLIC COUNSEL

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July 2, 2001

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 in Opposition to Wedgefield's Motions. 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

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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 July 2, 2001

CITIZENS' RESPONSE IN OPPOSITION TO WEDGEFIELD'S MOTIONS

The Citizens of Florida (Citizens), by and through Jack Shreve, Public Counsel, file this response in opposition to the following motions filed by Wedgefield Utilities, Inc. (Wedgefield) on June 25, 2001: (1) renewal of Wedgefield's motion for summary final judgment, (2) renewal of 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, as amended, and (3) motion to strike portions of prefiled direct testimony of OPC witnesses Larkin and Biddy.

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 assets of Econ Utilities, Inc., to Wedgefield. In doing so, the Commission, by a vote of two to one, declined to recognize the 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 the acquisition adjustment in determining rate base in this case for the purpose of setting rates.

On May 14, 2001, Citizens filed testimony addressing the acquisition adjustment. Hugh Larkin, Jr., C.P.A., urged the Commission to change its non-rule policy on acquisition adjustments by adopting a sharing approach to the acquisition adjustment. He re-submitted the testimony he provided the Commission in its pending rule making proceeding, as well as testimony specific to the circumstances of Wedgefield. Mr. Larkin's testimony shows that absent some action by the Commission to share the acquisition adjustment between Wedgefield and its customers, Wedgefield's rates will produce a return on equity of 69% on the company's actual investment -- a absolutely unreasonable return for a regulated monopoly. He further shows that the Commission's non-rule policy is supposed to provide benefits to customers, but those benefits are not present in this case. Although the customers would be charged higher rates, the company has spent extremely little on the company since its purchase. In fact, rate base has actually declined since the purchase because the amount of investment by the company is less than the amount of depreciation taken by the company. The company has no capital budgeting plans and no formal preventative maintenance plan. Complaints by customers substantially increased under the current ownership of the utility.

Citizens' other witness, Ted Biddy, P.E., raises questions about the existence of assets actually providing service to customers. After comparing required permits on file with the DEP to the company assets shown on the MFRs, Mr. Biddy could find no evidence that certain transmission and distribution

system facilities were actually installed. In addition, he questions whether softener units and high service pumps on the books are actually in existence and providing service. All together, Mr. Biddy's cost study showed gross plant assets of about $1,000,000 less than what appears on the company's MFRs. Mr. Biddy's study buttresses the argument for using the company's actual investment in Wedgefield instead of the book values inherited from the previous owners.

MOTION TO STRIKE

Wedgefield's motion once again attempts to prevent Citizens from presenting evidence to the Commission concerning the acquisition adjustment. As in past cases, Wedgefiled ignores prior Commission practice, as well as case law and statutes, that provide Citizens the opportunity to seek action by the Commission.

It is ironic that Wedgefield cites the 1990 Jasmine Lakes Utility[1] case in its notice of supplemental authority. In a 1990 transfer application decision for Jasmine Lakes Utility , the Commission declined to recognize a negative acquisition adjustment for Jasmine Lakes Utility. Wedgefield, however, overlooks the subsequent rate proceeding for this utility. In a 1993 rate case proceeding, the Commission reversed its transfer case decision regarding an acquisition adjustment and recognized the negative acquisition adjustment for

[1] Commission order number 23728 issued November 11, 1990.

the purpose of setting rates.[2] The following excerpt from the decision sets forth the Commission's rationale:

> Negative Acquisition Adjustment
>
> It is the utility's position that no negative acquisition should be included in rate base. The utility argues that this Commission previously disallowed inclusion of a negative acquisition adjustment for the utility in PAA Order No. 23728, issued November 7, 1990, which became final and effective without protest. The utility further argues that the record in this case is devoid of evidence that extraordinary circumstances existed at the time of transfer.
>
> OPC witness Dismukes testified that a negative acquisition adjustment of $17,753 should be included in rate base. To support this position, OPC cites utility witness Dreher's testimony that the utility was in bad shape prior to purchase, that the utility had not been maintained in seven years, and that the previous owner had neglected the utility for a long time. OPC further argues that recognition of this difference would insulate the ratepayers from failures or negligence by the prior utility management.
>
> We agree with OPC. The facts of this case are such that even though this Commission did not include an acquisition adjustment to rate base in the transfer docket, Docket No. 900291-WS, we find that it is patently unfair and unjust to the customers of this utility, for the investors to receive a return on that portion of the original purchase price that was less than rate base. In reaching this conclusion, we have relied 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 Order No. 23728, this Commission determined that the transfer of the Jasmine Lakes system to the current owner was in the public interest because, "...the utility's water and wastewater systems need improvements and the stockholders have committed to making the improvements necessary to provide the

[2] Commission order no. PSC-93-1675-FOF-WS issued November 18, 1993.

> customers with quality of service." Order No. 23728 at 4. Further, we note that in 1990, the time of the transfer, the utility was already purchasing 80 percent of its water from Pasco County, yet the utility has earned a return on the water plant components for the past two years. Order No. 23728 at 3. In addition, we find that rate base was adjusted in the transfer docket to, "reflect repairs and improvements that need to be made to the wastewater plant." Id. Based on the foregoing, we find it appropriate to adjust rate base to include a negative acquisition adjustment of $6,495 to water and $11,258 to wastewater. In re Application of Jasmine Lakes Utilities Corporation, 93 F.P.S.C. 11:205, 213-214.

The similarities between *Jasmine Lakes* and this case are striking. Like *Jasmine Lakes*, the Commission declined to recognize an 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 the 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.

In another case, the Commission revisited a positive acquisition adjustment it had previously given the company. The following is an excerpt from a Central Florida Gas Company and Chesapeake Utilities Corporation case:

> In Order No. 18716 (Docket No. 870118-GU) we approved an Acquisition Adjustment in the amount of $200,000 for Central Florida Gas Company. This acquisition adjustment was approved based on

> projected savings due to Central Florida Gas Company's acquisition by Chesapeake Utilities Corporation in 1985. However, we approved the $200,000 acquisition adjustment with the caveat that the projected savings would be analyzed in future rate cases to determine if the projected savings actually occurred or had eroded.
>
> The record in this case reveals that the savings which were predicted to occur as a result of the acquisition have not materialized. To the contrary, the company (Central Florida Gas) has experienced a total increase in its revenue requirements since its acquisition by Chesapeake. In addition, the company has failed to demonstrate that increased expenses related to the acquisition will not continue to occur of that the savings it has projected will ever materialize. Therefore, the acquisition adjustment of $200,000 should be removed from the Company's rate base, and the Company's request for an acquisition adjustment of $509,422 is denied. Also the related Accumulated Depreciation and Amortization Expense should be reduced by $172,592 and $33,960 respectively. *In re: Petition of Central Florida Gas Co. and Plant City Natural Gas*, 90 F.P.S.C. 7:158, 160-161 (1990).

Not only does this case again confirm that the Commission may review its previous decisions regarding acquisition adjustments; in *Central Florida Gas*, the Commission looked at whether envisioned benefits for customers materialized. The evidence presented by Citizens in Wedgefield takes a similar tack by showing that customers have not received the benefits envisioned by the Commission – all while the company seeks an unconscionable return on equity of 69%.

These decisions by the Commission are consistent with the principle that the burden of proof in ratemaking cases rests on the utility. *Florida Public Service Commission vs. Florida Waterworks Association*, 731 So.2d 836 (Fla. 1st DCA 1999); *Florida Power Corporation vs. Cresse*, 413 So.2d 1187 (Fla. 1982). Wedgefield is not relieved of this burden in a rate case proceeding because the Commission determined book value in a transfer proceeding. Wedgefield's notice of supplemental authority cites a string of cases stating that the book value established for transfer cases does not include adjustments for working capital or used and useful – an obvious fact to anyone familiar with rate cases and the establishment of rates. But the cases don't stand for the proposition submitted by Wedgefield – that the Commission is forever bound by the transfer case book value. Wedgefield simply does not and can not answer the fact that what we are asking the Commission to do in this case is no different than what the Commission has done in other cases. In a rate case proceeding, the burden of establishing rate base is always on the utility. The Commission can review previous decisions about acquisition adjustments in a company's rate case, as shown by *Jasmine Lakes Utility* and *Central Florida Gas*.

These decisions are further consistent with Section 350.0611, Florida Statutes, which states that the Office of Public Counsel shall 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). This statute specifically provides the Public Counsel the power to raise such issues again, even if inconsistent with positions previously adopted by the Commission. This further buttresses the Commission's decisions which re-addressed acquisition adjustments in rate case proceedings, notwithstanding earlier decisions regarding acquisition adjustments in certificate transfer proceedings.

There is yet further case law and statutory authority permitting the Commission to readdress policies taken in previous cases. This is particularly appropriate here, for the Commission has an open rulemaking proceeding to consider possible changes to its policy on acquisition adjustments. Up to now, the Commission's policy on acquisition adjustments has always been decided on a case by case basis, since the policy has never been incorporated into a rule. We have specifically filed testimony in this case asking the Commission to change its non-rule policy on acquisition adjustments and to adopt a sharing mechanism for acquisition adjustments.

In *Florida Cities Water Company v. Florida Public Service Commission*, 705 So.2d 620 (Fla. 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 (Fla. 1st DCA 1998);

Palm Coast Utility Corporation v. Florida Public Service Commission, 742 So.2d 482, 484-485 (Fla. 1st DCA 1999).

The Commission held such a hearing in the *Florida Cities* case on remand, at which time expert witness and personnel from the Commission and the Florida Department of Environmental Protection testified. The Commission again concluded that it should change its previous practice and use flows determined on an annual basis in both the numerator and denominator of the used and useful calculation. The utility appealed the Commission's decision, and the 1st District Court of Appeal affirmed the Commission. *Florida Cities Water Company vs. Florida Public Service Commission*, No. 1D99-1666 (Fla. 1st DCA October 31, 2000).

Just like the *Florida Cities* case, Citizens here seek an evidentiary hearing to support a change in a Commission policy that will lead to a different rate base amount allowed for assets. In the Florida Cities case, the changed policy was the methodology employed to determine a used and useful amount. In this case, the changed policy concerns treatment of an acquisition adjustment. We are entitled to the opportunity to present evidence that will show the Commission why it should change its policy, just as evidence was allowed -- indeed required -- in the *Florida Cities* case to justify a change in policy there. The *Florida Cities* cases 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. We have presented evidence to the Commission supporting that change.

In the first *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 have provided that evidence in this case and show reasons why the Commission should not follow prior practice in this proceeding.

In addition to all of the foregoing, the Commission may change its previous decision about the acquisition adjustment in this case if it finds a

substantial change of circumstances. Citizens have presented evidence supporting this. The benefits that are supposed to flow from the Commission's non-rule policy are not present in this case. Although the customers would be charged higher rates, the company has spent extremely little on the company since its purchase. Rate base has actually declined since the purchase because the amount of investment by the company is less than the amount of depreciation taken by the company. The company has no capital budgeting plans and no formal preventative maintenance plan. Complaints by customers substantially increased under the current ownership of the utility. None of these facts were available when the Commission made its decision in the transfer application, but they are available now and show that the Commission erred in a decision that would allow this company to earn a return on equity of 69% on its actual investment. In return for a 69% return on equity, the company has treated the utility as a cash cow. Although none of the foregoing cases and statutes require us to show extraordinary circumstances, these facts certainly meet that standard, too.

Motion for Summary Final Order

The company is simply wrong in its claim that there are no disputed issues of fact. Wedgefield has not stipulated to the truth of the facts set forth in the proceeding paragraph, and has in fact filed some rebuttal to the extent it was able. These are disputed facts that relate to the Commission decision on how it

should treat the acquisition adjustment in this case. In addition to those facts, Mr. Biddy has raised questions about the existence of assets claimed in the company's MFRs. The utility isn't stipulating to these facts, either.

In addition to the disputed issues of fact, this case is brimming with disputed issues of policy and law. The Commission typically and routinely allows the parties to present testimony on disputed issues of policy, and even law. Taking such testimony in this case will aid the Commission in its decision. Since there will be a hearing in any event on the used and useful issues raised by the company, the disputed issues of policy can easily be dealt with at the same time. The Citizens further note that the company has submitted testimony on disputed issues of policy related to its used and useful issues, and it expects to be able to present such testimony to the Commission. Citizens should be given the same treatment with respect to the acquisition adjustment issue.

Motion to Strike

Since neither the motion to strike or motion for summary final judgment is meritorious, the motion to strike cannot be granted. The testimony of Citizens' witnesses cited by the company relate to disputed issues of fact, law, and policy concerning the acquisition adjustment.

Conclusion

Wedgefield once again ignores the fact that Commission precedent, case law, and statutes allow the Commission in this rate case to decide whether to recognize the acquisition adjustment for the purpose of setting rates. The Commission may also change its non-rule policy concerning Wedgefield's acquisition adjustment. The Commission didn't previously know that the utility would earn a 69% return on equity on its actual investment and that the utility do little more than treat the utility as a cash cow subsequent to the purchase. The Commission should deny Wedgefield's motions and allow Citizens to present our case at hearing.

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

Attorneys 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 2nd day of July, 2001.

Charles J. Beck

Patricia 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

991437.cos