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December 6, 1996

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32301

Re: PSC Docket Nos. 960235-WS and 620283-WS, Application for approval of the transfer of assets and certificates Nos. 404-@ and 341-S from Econ Utilities Corporation to Wedgefield Utilities, Inc. in Orange County, Florida, and Application for e\Extension of Service Territory.

Dear Ms. Bayo:

Enclosed for filing is the original and fifteen (15) copies of the following documents:

Wedgefield Utility's Motion to Dismiss or Strike OPC's Response in Opposition – 13056-96 12/06/96

Wedgefield Utility's Request for Oral Argument. – 13057-96 12/06/96

Thank you for your assistance.

Sincerely yours,

Ben E. Girtman

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for Transfer of Certificate Nos. 404-W and 341-S in Orange County from Econ Utilities Corporation to Wedgefield Utilities, Inc.	DOCKET NO. 960235-WS
In Re: Application for Amendment of Certificate Nos. 404-W and 341-S in Orange County by Wedgefield Utilities, Inc.	DOCKET NO. 960283-WS

Submitted for Filing:
December 6, 1996

WEDGEFIELD UTILITY'S
MOTION TO DISMISS OR STRIKE
OPC'S RESPONSE IN OPPOSITION

COMES NOW, Utilities, Inc. and its wholly owned subsidiary, Wedgefield Utilities, Inc., (hereinafter collectively referred to as "Wedgefield"), pursuant to Rules 25-22.035(3) and 25-22.037(2), Florida Administrative Code (F.A.C.), Rules 1.100(b) and 1.110(b), Florida Rules of Civil Procedure (F.R.C.P.), and such other rules and laws as may be applicable to this matter, and Wedgefield now files its Motion to Dismiss or Strike OPC's Response in Opposition and as grounds therefore states that:

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FPSC-RECORDS/REPORTING

1. OPC's Response in Opposition again fails to allege sufficient grounds to grant a hearing and should be dismissed or stricken. OPC still fails to state whether it seeks to challenge the Commission decision on the basis of "exceptional circumstances" or seeks to change the overall Commission policy on acquisition adjustments on a case-by-case basis contrary to the requirements of the new Administrative Procedure Act, Chapter 120, F.S. Having failed to allege sufficient facts, or that even exceptional circumstances exist, the petition for hearing can only be construed as an attempt to change the existing, well-considered policy of the Commission against acquisition adjustments, which under the applicable law OPC cannot do.

Exceptional Circumstances Must be Alleged

2. The OPC Response (paragraph 2) asserts that "There is simply no rule or other requirement necessitating an allegation of "exceptional circumstances" in order to be entitled to a hearing." Not only is that statement in direct contradiction of the Commission's own orders (see paragraphs 8 - 10 and 14 - 19 below), but also the applicable rules of pleading require that a plain statement of the facts and grounds for a claim be stated in the pleading. In addition to failing to allege that "exceptional circumstances" exist, insufficient grounds exist for a hearing and no such facts have been pled. Therefore, the OPC Response in Opposition should be dismissed or stricken along with the petition for hearing.

3. The Florida Rules of Civil Procedure are made applicable to the instant proceeding by the Commission's own rules in Chapter 25-22, F.A.C.:

> PART V, DECISIONS DETERMINING SUBSTANTIAL INTERESTS
> SUBPART A, GENERAL PROVISIONS
> Rule 25-22.035, F.A.C., Miscellaneous Matters.
>
> > (3) Procedure: Generally, the Florida Rules of Civil Procedure shall govern in proceedings before the Commission under this part, except that the provisions of these rules supersede the Florida Rules of Civil Procedure where conflict arises between the two.

4. Rule 1.110, General Rules of Pleading, of the Florida Rules of Civil Procedure requires that:

> (b) Claims for Relief. A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . . (2) a short and plain statement of the ultimate facts showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which the pleader deems himself or herself entitled. . . . [Emphasis added.]

5. The OPC petition for hearing neither alleges sufficient facts to show that it is entitled to the relief sought, nor does it show why the jurisdiction of the Commission should be invoked in this manner to address the matter of acquisition adjustments. If the Commission policy is to be changed, it must be addressed in a generic proceeding and not on a case-by-case basis.

6. Not only does the OPC pleading not specifically allege that there are "exceptional circumstances" justifying an acquisition adjustment in this case, the assertions now referred to as "facts" in the OPC Response in Opposition are insufficient to

support a claim of "exceptional circumstances". A reading of the plain language of both the OPC Response in Opposition and the Petition for Hearing itself show that they both merely contain a laundry list of so-called "issues" which do nothing more than beg the question of what the Commission's policy should be and are insufficient as allegations to warrant a hearing.

This Challenge to OPC's Response in Opposition is Appropriately Made by Motion

7. Rule 1.100(b), F.R.C.P., requires that:

> (b) Motions. An application to the court for an order shall be by motion which . . . shall state with particularity the grounds therefor, and shall set forth the relief or order sought.

Wedgefield files this motion to dismiss or strike OPC's Response in Opposition on the grounds stated herein. Furthermore, pursuant to the Commission's own Rule 25-22.037(2), F.A.C., "Motions may be filed in opposition to the proceedings, or for other purses during the proceeding." [Emphasis added.] This motion is filed in opposition to the OPC Response in Opposition, on the grounds stated herein, and therefore, the "opposition" to OPC's Response (as authorized by Florida Rules of Civil Procedure and by the Commission's own Rule 25-22.037(2), F.A.C.) is appropriately made by motion.

Commission Order No. PSC-96-1241-FOF-WS

8. The Commission Order in this case clearly states:

> In the absence of extraordinary circumstances, it has been Commission policy that the purchase of a utility at a premium or discount shall not affect the rate base calculation. Considering the likely impact of used and useful adjustment for this utility, the circumstances in this instance do not appear to be extraordinary. Therefore, no acquisition adjustment is included in the rate base calculation. [Emphasis added. Order No. PSC-96-1241-FOF-WS, at page 5.]

9. "In the absence of exceptional circumstances" is the wording of the Commission's Order. To overcome the rulings of the Commission, the Petition for Hearing must allege that exceptional circumstances exist and then allege facts that support such a finding of exceptional circumstances. Otherwise, the Commission is merely being requested to go to the expense and time-consuming difficulty of a lengthy hearing without justification. For what benefit - to anyone?

10. Assuming the utility transfer becomes final, the Commission will retain jurisdiction over this utility, including any future change in rates and charges.

The OCPUD Study

11. OPC's Response in Opposition (to Wedgefield's Motion to Dismiss or Strike OPC's Petition for Hearing) erroneously claims that its protest and petition showed "exceptional circumstances" based upon a study done by the Orange County Public Utilities Division (OCPUD). However, the OCPUD study is not an appropriate

or reliable source for any information relating to the depreciated original cost as considered by this Commission in setting rates for a utility. For example, in determining whether the County should purchase the utility system, the County's study deducted an estimated cost of $11.2 million which the County would incur in running mains for about ten miles to connect the utility to the County's system. Such calculations have nothing to do with determining the original cost of plant in service to be considered by the Commission in setting rates under Section 367.081, F.S., for the utility, particularly as a stand-alone system. Furthermore, when the utility personnel attempted to use the results of the OCPUD study to justify a reduction in the assessed value assigned to its assets by the County property tax appraiser, the County refused and kept the assessed value essentially the same as it had been prior to the OCPUD study.

12. Attached as Exhibit "A" is a copy of the County Commissioner's response to Econ Utility's letter to the Orange County Property Appraiser seeking a reduction in the assessed value of the utility property based upon the OCPUD study.

Upgrades and Capacity Expansions

13. Paragraph 5 of the OPC Response asserts that "The pleading also alleged that Wedgefield planned to spend a substantial amount of money to bring the utility up to standards . . . ." That erroneous assertion apparently was based on a letter dated October 23, 1995 from Utilities Inc. to Econ Utilities. The

letter states in part that ". . . the utility facilities are in need of timely upgrades and capacity expansions requiring immediate capital expenditures in the neighborhood of $900,000." OPC somehow misinterprets that comment. The DEP operating permit issued January 9, 1995, requires expansion of the sewage treatment plant. Additional water storage capacity also is needed. Certain other expenditures are needed to expand effluent disposal capacity into a power line area. Although there are some improvements and upgrades planned if Wedgefield acquires the system, there are no outstanding DEP citations for quality of service. So, the $900,000 is planned to be spent on needed expansion of system capacity and improvement of service. Expansion of portions of a utility system and periodic expenditures for improvement of service are normal and do not in any way make the customers "pay twice", as OPC erroneously claims.

In Previous Dockets, the Commission
Already Has Addressed the Matters Sought to be Raised Herein by OPC

14. In 1989, in Docket No. 891309-WS, OPC sought to open an investigation on acquisition adjustments or to initiate rulemaking related thereto. The Commission denied OPC's petition, but opened its own investigation in that docket. [Order No. 22361, 90 FPSC 1:11].

15. In 1990, the Commission reported the results of its investigation in its Proposed Agency Action (PAA) Order No. 23376 [90 FPSC 8:306]. The Commission first stated its existing policy:

> . . . . Our policy is that, absent extraordinary circumstances, the purchase of a utility system at a premium or discount shall not affect the rate base calculation. . . . This has been our policy since approximately 1983 . . . . [Order No. 23376 at 1, 90 FPSC 8:306 at 306.]

Next, the Commission addressed OPC's proposed amendment. OPC stated that the Commission policy placed the burden on Staff or OPC to justify why rate base should be established at purchase price rather than original cost. The OPC proposed an amendment to shift the burden of proof to the utility, but the proposal was denied by the Commission which stated:

> 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. [Order No. 23376 at 3, 90 FPSC 8:306 at 308.]

16. Therefore, OPC is fully aware that the Commission has an established policy, arrived at after the Commission's own investigation which was fully participated in by OPC, and reinforced by a generic order. That established policy is that, absent exceptional circumstances, the Commission will deny any acquisition adjustment, positive or negative, across the board, not on a case-by-case basis.

17. The only thing that is done on a case-by-case basis is for the utility or an interested party to decide whether to challenge the Commission's order that there are no exceptional circumstances warranting an acquisition adjustment. If a proper

challenge is raised, that party then must bear the burden to convince the Commission that its policy should not apply in that specific case because there are extraordinary circumstances. Thus, valid "exceptional circumstances" and facts to support the assertion must be pled before a request for hearing can even be considered, must less granted. No allegation and no sufficient facts have been pled or shown to exist in the instant case.

18. After Order No. 23376 was issued in 1990, OPC protested the Order, and the matter went to hearings with testimony from all parties. The Commission confirmed its existing policy in Order No. 25729 [92 FPSC 2:409] in which the Commission acknowledged that some utilities are only able to justify the purchase of a troubled utility because or the Commission's existing policy. [Docket No. 891309-WS, Order No. 25729 at 3 and 4, 92 FPSC 2:409 at 411 and 412.]

19. After such an exhaustive examination of the facts, legal arguments and policy considerations, the Commission subsequently decided (in Docket No. 911082-WS) not to proceed further on considering policy changes for acquisition adjustments. [Order Nos. PSC-93-1663-FOF-WS and PSC-93-1704-FOF-WS at 93 FPSC 11:187 and 93 FPSC 11:335, respectively].

20. The policy was in effect and known to the purchaser in the instant case. The purchaser relied on that established Commission policy in justifying its decision to enter into a contract to purchase the utility. Thus, the Commission's ruling in the instant case on both the transfer and the treatment of

acquisition adjustments are tied together, and if the acquisition adjustment is subject to hearing, so is the approval of the transfer and extension of territory, with Wedgefield Utility reserving all its rights, claims and defenses.

21. OPC's vague assertion about alleged prior maintenance practices of the seller is the only basis possibly alleged for challenging the Commission's denial of an acquisition adjustment in this case. However, way back in the 1991 docket, OPC also unsuccessfully tried to make prior maintenance a grounds for denial of acquisition adjustments. The Commission did not accept that argument. There was no basis for such a claim then, and there is none now. [For example, see pages 9 - 10 of the Supplemental Comments for the Florida Waterworks Association, Transcript of proceedings in Docket No. 911082-WS, Volume I, May 24, 1993.]

22. If OPC wishes to raise the same policy issues again, and if the Commission wishes to re-examine those policy matters all over again, the Commission can do so only in a generic proceeding, and cannot change its policy on a single case basis, in the middle of this proceeding. The Administrative Procedure Act, Chapter 120, F.S., does not allow it, nor do several constitutional grounds, including but not limited to prior notice, due process and equal protection. And the prior hearings and findings of the Commission should not be so lightly considered or ignored.

Wedgefield's Reservation of Rights, Claims and Defenses

23. Wedgefield reserves all its rights, claims and defenses in this matter, including but not limited to the right to withdraw its applications in their entirety.

Conclusion

WHEREFORE, the OPC Response in Opposition should be dismissed or stricken. Furthermore, OPC's Motion to Strike Wedgefield's "Contingent Request for Hearing" should be denied and the OPC Petition for Section 120.57(1) Hearing and Protest of Proposed Agency Action should be dismissed or stricken, in which event, the entire Order No. PSC-96-1241-FOF-WS would be final.

RESPECTFULLY SUBMITTED, this 6th day of December 1996.

Ben E. Girtman
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Suite 207
Tallahassee, FL 32301
(904) 656-3232

Attorney for Utilities Inc.
and Wedgefield Utilities, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent to the Charles Beck, Esq., Office of Public Counsel, c/o The Florida Legislature, 111 W. Madison St., Tallahassee, FL 32399-1400; Mr. John Forrer, Econ Utilities, 1714 Hoban Rd. NW Washington, D.C. 20007; and to Rob Vandiver, Esq., General Counsel, and Donna Cyrus-Williams, Esq., Division of Legal Services, Florida Public Service Commission, 2540 Shumard Oak Blvd., Tallahassee, FL 32399-0850, by U.S. Mail (or by hand delivery * or facsimile #) this 6th day of December 1996.

Ben E. Girtman

Orange County

Board of County Commissioners
201 South Rosalind Avenue
Reply To: Post Office Box 1393
Orlando, Florida 32802-1393
Telephone (407) 836-7350

May 5, 1995

MAY 10 1995

Gerald F. Blake, President
Magna Properties, Inc.
664 South Military Trail
Deerfield Beach, FL 33442

Dear Mr. Blake:

I have read your letter of April 27, 1995 to Richard Crotty, Orange County Property Appraiser, in reference to the assessed value of Econ Utilities. In that letter you have made an assumption that the county's study of the possible purchase of Econ Utilities is a basis for a re-evaluation of the assessed value. I find that assumption unfounded.

Our Public Utilities Department evaluates possible acquisitions using different rationale than the private sector and for-profit companies. This is categorized as an enterprise fund. We are not in the business of making a profit but providing the best possible service at the lowest possible cost.

Alan Ispass is the Director of Orange County Public Utilities and his charge was to respond to a request by the homeowners of Wedgefield to look at the possibility of purchasing Econ Utilities. The homeowners believe they would get better service at a lower cost from the county rather than a for-profit utility. While that may have some merit, our staff feels that this purchase would be too costly for the county. They feel that these costs would have to be subsidized by other county rate payers and Mr. Ispass and his staff have made the decision that those costs are excessive for us to consider such a purchase at this time.

I feel that by using a staff report that addresses Orange County concerns to benefit your company in having its taxes lowered is inappropriate and ill-founded.

Sincerely,

Bill Donegan
Commissioner, District 5

BD/jm

C: Alan Ispass
Richard Crotty

"A"

ISSUE 6: Should Wedgefield Utilities, Inc. charge the customers in the additional territory the rates and charges approved by the Commission for Econ Utilities Corporation?

RECOMMENDATION: Yes. Wedgefield Utilities, Inc. should charge the customers in the additional territory the rates and charges in Econ Utilities Corporation's tariff. (WALKER)

STAFF ANALYSIS: Econ's presently approved rates and charges were effective January 13, 1995, pursuant to administrative order WS-94-0261. Staff has recommended in Issue 4 that Wedgefield charge Econ's existing rate and charges for the present service area. Staff also recommends that Wedgefield should be authorized to charge Econ's existing rates for customers in the additional territory.

ISSUE 7: Should the Commission order Econ Utilities Corporation to show cause, in writing within twenty days, why it should not be fined for violation of Chapter 367.045, Florida Statutes?

RECOMMENDATION: No, show cause proceedings should not be initiated. (CROSBY)

STAFF ANALYSIS: As stated in the case background, Econ is in apparent violation of Section 367.045, Florida Statutes, which states, in part, that "[a] utility may not delete or extend its service outside the area described in its certificate of authorization until it has obtained an amended certificate of authorization from the commission" Econ has been providing water and wastewater service to a shopping center and the Bancroft Boulevard area for approximately 15 years without approval of the Commission. Such action is "willful" in the sense intended by Section 367.161, Florida Statutes. Section 367.161, Florida Statutes, authorizes the Commission to assess a penalty of not more than $5,000 for each offense, if a utility is found to have knowingly refused to comply with, or to have willfully violated any provision of Chapter 367, Florida Statutes. In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, titled In Re: Investigation Into The Proper Application of Rule 25-14.003, F.A.C., Relating To Tax Savings Refund For 1988 and 1989 For GTE Florida, Inc., the Commission, having found that the company had not intended to violate the rule, nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "[i]n our view, 'willful' implies an intent to do an act, and this is distinct from an intent to violate a statute or rule." Id. at 6.

Econ's failure to obtain Commission approval prior to extending its service area appears to be due to an oversight. When the utility was first certificated, the description of the service area submitted with its application and approved by this Commission inadvertently omitted an area within which lines had been installed and service provided for some time. Staff notes that revenues from the area in question have been included in two subsequent rate cases. The area includes a shopping center and a strip of lots on the west side of Bancroft Boulevard. The omission was discovered during negotiations for the sale of the utility to Wedgefield.

Although Econ failed to obtain prior approval to serve the shopping center and the area along Bancroft Boulevard, staff does not believe that the violation of Section 367.045, Florida Statutes, rises in these circumstances to the level of warranting initiation of show cause proceedings. The utility filed an

application for an amendment of its service area immediately upon discovering the omission. Therefore, staff recommends that the Commission not order Econ to show cause for failing to obtain Commission approval prior to serving the area in question.