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

ORIGINAL

March 15, 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' Request for Ruling on First Motion to Compel; Response to Wedgefield's New Objections; Withdrawal of Interrogatories 11-26. 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

Charles J. Beck,
Deputy Public Counsel

APP
CAF
CMP
COM 3
CTR
ECR
LEG 1
OPC
PAI
RGO
SEC 1
SER
OTH

CJB:bsr

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 March 15, 2001

CITIZENS' REQUEST FOR RULING ON FIRST MOTION TO COMPEL; RESPONSE TO WEDGEFIELD'S NEW OBJECTIONS; WITHDRAWAL OF INTERROGATORIES 11-26

The Citizens of Florida (Citizens), by and through Jack Shreve, Public Counsel, file this response to the new objections of Wedgefield Utilities, Inc. (Wedgefield) filed on March 8, 2001; request the Prehearing Officer to rule on Citizens' first motion to compel filed on October 23, 2000; and withdraw our interrogatories 11-26.

1. Commission order no. PSC-00-1528-PAA-WU issued August 23, 2000, proposed to give Wedgefield a 31.97% rate increase. Wedgefield protested that order on September 13, 2000, and Citizens immediately followed Wedgefield's protest with a protest of our own.

2. Citizens filed our first motion to compel on October 23, 2000. The motion to compel relates to our interrogatories and requests for documents served on October 12, 2000. Wedgefiled filed its response and objections on October 20, 2000. In its response Wedgefield objected to every interrogatory and all but two of the requests for documents.

Request for Ruling on Citizens' First Motion to Compel

3. Wedgefield has had its opportunity to object to the discovery, and it did so on October 20, 2000. The order on procedure issued October 16, 2000, requires objections to discovery to be made within 10 days of the discovery request. Wedgefield's October 20, 2000 objections complied with that requirement. However, Wedgefield's new objections filed March 8, 2001, try to raise new objections by claiming that they "reserved" the right to file additional objections.

4. Wedgefield can not "reserve" the right to continue filing new objections to discovery. Their objections must comply with the Commission's order on procedure, and these new objections don't. Citizens request the Prehearing Officer to strike these latest objections that violate the order on procedure and to rule on the Citizen's first motion to compel.

Other responses to Wedgefield's New Objections

5. If the Commission should nevertheless consider Wedgefield's latest round of objections, Citizens provide the following matters for consideration about Wedgefield's claims about the relevancy of the discovery and the Commission's power to address an acquisition adjustment in this proceeding. The Commission's authority to look at an acquisition adjustment is not limited to "changed circumstances," as Wedgefield alleges, and discovery should not be so limited.

6. *First*, Commission precedent supports allowing an issue about Wedgefield's acquisition adjustment in this proceeding. The Commission has changed its decision in other proceeding about allowing acquisition adjustments. In a 1990 transfer application decision, for example, the Commission declined to recognize a negative acquisition adjustment for Jasmine Lakes Utility.[1] In 1993 the Commission reversed that decision in a rate case proceeding by deciding to recognize the negative acquisition adjustment for the purpose of setting rates.[2]

7. The similarities between that case and this case are striking. Like *Jasmine Lakes*, the Commission declined to recognize a negative 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 a negative acquisition adjustment.

8. *Second*, another area where Commission precedent shows that the Commission has the power to change policy on matters affecting rate base concerns margin reserve. Over a period of time the Commission changed the time period it uses to calculate margin reserve. Changed time periods directly affect the amount of used and useful plant found in rate cases, even if there are no changes whatsoever in the physical plant. Changes in the time period used to calculate margin reserve and changes in an acquisition adjustment affect the amount of plant in rate base without any

[1] Commission order number 23728 issued November 11, 1990.
[2] Commission order no. PSC-93-1675-FOF-WS issued November 18, 1993. The Commission's decision is discussed, without naming the utility, at page 5 of attachment B to the staff's October 5, 2000 recommendation in docket 001502-WS.

physical changes in plant. The Commission has the power to make the changes in both cases.

9. *Third*, case law shows that the Commission may recognize a negative acquisition adjustment in this proceeding. The Commission may change its policy affecting items in rate base as long as the Commission bases the change in policy on expert testimony, documentary, opinion, or other evidence appropriate to the nature of the issue involved. In *Florida Cities Water Company v. Florida Public Service Commission*, 705 So.2d 620 (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).

10. 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 (1st DCA 1998); *Palm Coast Utility Corporation v. Florida Public Service Commission*, 742 So.2d 482, 484-485 (1st DCA 1999).

11. 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 First 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).

12. Just like the *Florida Cities* case, Citizens seek an evidentiary hearing to support a change in a Commission policy that will lead to a different rate base amount allowed for an asset. In the Florida Cities case, the changed policy was the methodology used to determine a used and useful amount. In this case, the changed policy will concern recognition of a negative 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.

13. *Fourth*, section 120.68, Florida Statutes, allows the Commission to recognize a negative acquisition adjustment in this proceeding. 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.

14. 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.

15. 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 will provide that record evidence in this case showing the reasons why the Commission should not follow prior practice in this proceeding.

16. *Fifth*, section 350.0611, Florida Statutes, allows the Commission to recognize an acquisition adjustment in this proceeding. Section 350.0611, Florida Statutes created the Office of Public Counsel to 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). Wedgefield may not like addressing the position previously taken by the Commission on its acquisition adjustment, but this statute specifically provides the Public Counsel the power to raise such issues again, even if inconsistent with positions previously adopted by the Commission.

17. Changed circumstances are also a ground for looking at an acquisition adjustment in this proceeding, but as shown by the previous five points, this is not the only ground. The discovery should not be limited only to matters of changed circumstances since the last proceeding.

Withdrawal of Interrogatories 11-26

18. Wedgefiled has made it plainly obvious that it will spare no expense, no matter how excessive or imprudent, in fighting this case. For example, Wedgefield filed an interlocutory appeal to the First District Court of Appeal, even though the appealed

order wasn't eligible for an interlocutory appeal. Another example is Wedgefield's March 8, 2001 pleading at issue here, most of which deals with discovery to which Wedgefield has no right to object again. That did not stop Wedgefield from filing an unprecedented 37 page pleading that even contained a table of contents.

19. Now, Wedgefield states that it will cost at least an additional $20,000 to answer interrogatories 11-26. Pursuant to Fla. R. Civ. P. 1.340(c), Citizens offered to review documents at any location designated by Wedgefield rather than have Wedgefield answer the interrogatories, but we have no doubt that Wedgefield would still make the production prohibitively expensive. Citizens accordingly withdraw interrogatories 11-26.

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

Attorney 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 15th day of March, 2001.

Charles J. Beck

Patricia Cristensen
Jason Fudge
Division of Legal Services
Fla. Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Ben Girtman
1020 E. Lafayette St., #207
Tallahassee, FL 32301-4552