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ORIGINAL
FILED

April 16, 1996

Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Case No. 950387-WS

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket are the original and 15 copies of Citizens' Response to Motion to Strike Testimony of Ted L. Bidy. A diskette in the IBM-compatible WordPerfect 5.1 is also submitted.

Please indicate the time and date of receipt on the enclosed duplicate of this letter and return it to our office.

- ACK _____
- AFA 1 _____
- APP _____
- CAF _____
- CMU _____
- CTR _____
- EAG _____
- LEG L HM:bsr
- LIN 5 Enclosures
- CFO _____
- ROI _____
- SEC 1 _____
- WAS _____

Sincerely,

Harold McLean
Associate Public Counsel

RECEIVED & FILED

ds
FPSC BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

04357 APR 16 96

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL
FILE COPY

In Re: Application of Florida
Cities Water Company, North Ft.
Myers Division, for an increase in
wastewater rates in Lee County,
Florida)
)
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Docket No. 950387-SU

Filed: March 25, 1996

CITIZENS' RESPONSE TO MOTION TO
STRIKE TESTIMONY OF TED L. BIDDY

The Citizens of the State of Florida, by and through JACK SHREVE, Public Counsel (Citizens), respond to the April 9th, 1996 Motion to Strike the Testimony of Ted L. Bidly (motion) and say:

LABEL ON THE TESTIMONY

1. Mr. Bidly's testimony is inadvertently and incorrectly labeled "Direct" when it is in fact rebuttal testimony; it was identified as rebuttal at the April 4th prehearing conference where it was discussed at some length. Its incorrect labeling is neither determinative of its tenor, nor prejudicial to Florida Cities Water Company, the applicant;

THE FILING DATE OF THE TESTIMONY

2. Commission records will show that the testimony bears document No. 04111-96 which indicates that it was filed on April 9, 1996, immediately prior to the instant motion; the "draft" of the testimony furnished to Counsel Schiefelbein was furnished to ensure that FCWC had adequate opportunity to test its import;

THE DUE DATE OF THE TESTIMONY

3. Order PSC-96-0451-SU granted an extension of time through April 9, 1996, for the filing of rebuttal testimony, albeit, ostensibly for the benefit of only FCWC; however, undersigned counsel brought to the attention of the prehearing officer that traditional commission practice would require that where a filing deadline were extended upon motion of one party, the deadline would be similarly extended for all parties; undersigned counsel also noted that the time for reconsideration of the extension had not run, and that were the deadline amendment construed to apply only to the utility, counsel would petition for reconsideration of the motion;

THE COMPROMISE REGARDING THE TESTIMONY

4. The prehearing officer has already entered a ruling which permits the filing of Mr. Bidy's rebuttal testimony. The prehearing officer was faced with several competing positions of the parties, and entered his decision which incorporated a negotiated compromise:
 - a. Ms. Walla claimed that FCWC's interrogatory answers were incomplete and that she wished to file supplemental testimony--the utility believed that its answers were complete, but noted that if Ms. Walla were permitted to file supplemental direct, that FCWC should be permitted not only to file written rebuttal, but should be afforded considerable latitude in presenting

live rebuttal to Ms. Walla's supplemental direct at the hearing.

- b. Undersigned counsel represented that the Citizens intended to file rebuttal testimony to answer the Staff's sponsoring a Department of Environmental Protection witness who offered testimony which contested the Citizens position that FCWC built wastewater treatment capacity in order to treat excess inflow and infiltration. Within the context of the cooperative spirit extant at the prehearing conference among the parties, the Citizens endorsed the notions contained in ¶ b., immediately above, and applied to the prehearing officer to receive the filing of Mr. Bidy's rebuttal testimony, subject to the same provisions respecting the supplemental direct to be offered by Ms. Walla, namely, FCWC's adequate opportunity to provide written rebuttal, thereto, and wide latitude in providing live rebuttal at hearing.
5. Prehearing officer Commissioner Garcia accepted this compromise in his ruling at the prehearing conference.
6. The Citizens relied on the ruling of Commissioner Garcia by immediately providing a draft of Mr. Bidy's testimony to Counsel Schiefelbein, and by making Mr. Bidy available for deposition at FCWC's convenience.¹

¹ Mr. Gatlin, counsel for FCWC, and Mr. Jaegger, counsel for the Staff, deposed Mr. Bidy on April 9, 1996.


THE TENOR OF THE TESTIMONY

7. Staff has undertaken to sponsor a witness in this docket who will say that the utility does not have excessive infiltration². If accepted by the Commission as true, this could lead the Commission to conclude that the gravamen of the Citizens' case, that the utility expanded its plant to accommodate excessive inflow and infiltration, is erroneous. The Citizens are entitled to answer this charge from a putatively neutral staff with evidence that the utility did in fact expand its treatment capacity to accommodate excessive inflow and infiltration.
8. Mr. Biddy's testimony need not be addressed to other testimony in the case in order to rebut; it need only be addressed to the principles of that testimony. In order to have an opinion of whether FCWC may have built capacity to treat excess capacity, Mr. Biddy need not have read or even be aware of FCWC's testimony to the contrary. It is the principle which Mr. Biddy rebuts, not the witness.
9. The Citizens have relied upon what they viewed as a negotiated settlement of this matter: Mr. Biddy was made available for deposition and in fact was deposed by FCWC and by the Staff of the Commission. To strike the rebuttal testimony of Mr. Biddy would be manifestly unfair to the Citizens.

² see prefiled testimony of Andrew Barinbrock, p. 4.

WHEREFORE, the Citizens of the State of Florida urge the prehearing officer to deny the relief sought in the instant motion.

Respectfully submitted,



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Attorney for the Citizens
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**CERTIFICATE OF SERVICE
DOCKET NO. 950387-SU**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail or by *Hand-delivery to the following party representatives on this 16th day of April, 1996:

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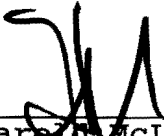
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