

FLORIDA PUBLIC SERVICE COMMISSION

Gerald L. Gunter Building
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

M E M O R A N D U M

November 14, 1996

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (JAEGER) *JA*
DIVISION OF WATER AND WASTEWATER (XANDERS) *X* *EX* *9/14* *JA*

RE: UTILITY: TURKEY CREEK UTILITIES, INC. & FAMILY DINER,
INC. D/B/A TURKEY CREEK UTILITIES
DOCKET NO. 921098-WS
COUNTY: ALACHUA

CASE: APPLICATION FOR CERTIFICATES TO PROVIDE WATER
AND WASTEWATER SERVICE UNDER GRANDFATHER
RIGHTS

AGENDA: NOVEMBER 26, 1996 - REGULAR AGENDA - PROPOSED AGENCY
ACTION - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\921098R2.RCM

CASE BACKGROUND

Family Diner, Inc. and Turkey Creek, Inc. d/b/a Turkey Creek Utilities (Turkey Creek) was a Class C utility in Alachua County which provided water and wastewater service to approximately 270 customers. On October 26, 1992, Turkey Creek filed an application for a grandfather certificate to provide water and wastewater service pursuant to Section 367.171, Florida Statutes. Order No. PSC-93-0229-FOF-WS, issued February 10, 1993, proposed to grant the certificates to Turkey Creek, approve its service territory and reduce its rates to those which were in effect the date the Public Service Commission received jurisdiction of Alachua County, June 30, 1992. The utility protested this proposed agency action (PAA) order and as a result, the certificates were never issued to the utility.

A second PAA order, Order No. PSC-93-0816-FOF-WS, issued July 27, 1993, regarding rates and charges was issued and was also

DOCUMENT NUMBER-DATE

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protested by the utility. Refunds were required in each of these orders because the Commission found that the utility had improperly increased the rates and charges after the Commission assumed jurisdiction over Alachua County on June 30, 1992. Based on the protests to these two orders, the Commission scheduled a formal hearing to be held on November 3, 1993.

However, before this hearing could be held, the utility withdrew the protests. By Order No. PSC-93-1769-FOF-WS, issued December 3, 1993, the two prior orders were made final and effective. Turkey Creek subsequently filed an appeal of Order No. PSC-93-1769-FOF-WS with the First District Court of Appeal on January 6, 1994. On March 27, 1995, the First District Court of Appeal affirmed the decision made by the Commission in this docket. Accordingly, the correct territory was granted to the utility which would allow for the certificates to be issued. However, since the utility had been sold to the City of Alachua on September 23, 1993, no certificates were ever issued to Turkey Creek. The sale to the city and the pending refunds of rates collected by Turkey Creek were considered at the August 15, 1995, Agenda Conference.

Pursuant to the vote of the Commission, an Order Acknowledging Transfer And Initiating Show Cause Proceeding (Order No. PSC-95-1101-FOF-WS) was issued on September 6, 1995. That order required Turkey Creek to show cause in writing within twenty days, why it should not be fined \$5,000 for not complying with Order No. PSC-93-1769-FOF-WS (which order required refunds to be made in accordance with Orders Nos. PSC-93-0229-FOF-WS and PSC-93-0816-FOF-WS).

In response to the Show Cause Order, Turkey Creek, Inc., and Family Diner, Inc., d/b/a Turkey Creek Utilities filed both a Complaint for Declaratory Relief (served on the Commission on September 19, 1995) in the Eighth Judicial Circuit, and, also, what was entitled Respondents' Reply to Show Cause Order (which was received by the Commission on September 28, 1995). In the response, Turkey Creek requested deferral of the show cause proceeding.

After considering this reply at the November 7, 1995 Agenda Conference, the Commission issued Order No. PSC-95-1445-FOF-WS, which denied the request for deferral of show cause proceedings, clarified the initial show cause order, and reinitiated show cause proceedings against Turkey Creek. That Order was issued on November 28, 1995, and again gave Turkey Creek 20 days in which to respond.

Turkey Creek timely filed its response on December 18, 1995, and, asserting that there were material issues of fact and law in dispute, requested a formal hearing pursuant to Section 120.57(1),

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Florida Statutes. Turkey Creek also reiterated its assertion that the Commission did not have jurisdiction to issue the orders requiring a refund, that the question of jurisdiction was properly asserted through a Declaratory Statement Action in Circuit Court, and that the Commission should refrain from taking any action pending the outcome of Turkey Creek's Declaratory Statement Action in Circuit Court.

Staff submitted its recommendation concerning that response and the appropriate action for the Commission to take to be considered at the February 20, 1996 Agenda Conference. In that recommendation, staff recommended that:

- 1) there was no dispute of material fact; therefore no formal hearing was required on the show cause proceedings;
- 2) there was no reason to defer any show cause proceeding pending the outcome of Turkey Creek's suit in circuit court; and
- 3) a fine in the amount of \$5,000 should be immediately imposed for Turkey Creek's failure to make refunds as required by Order No. PSC-93-1769-FOF-WS.

However, before that recommendation could be considered, Turkey Creek, by letter dated February 19, 1996, made an offer of settlement. In that offer, Turkey Creek stated that, if the Commission would abate the penalty proceedings, it would deposit with an appropriate escrow agent an amount of money which it considered sufficient to cover the refunds, and make the refunds from that escrow account if it was unsuccessful in its circuit court action.

Based on this offer, staff modified its recommendation at the February 20th Agenda Conference, and recommended that the \$5,000 fine be imposed, but that it be suspended if Turkey Creek deposited \$42,000 in an appropriate escrow account within three weeks of the date of the Order. In calculating the \$42,000 figure, staff had only limited data and estimated this amount to be the maximum amount for any refund. The Commission voted to approve staff's recommendation as modified and issued Order No. PSC-96-0350-FOF-WS on March 11, 1996, which imposed a \$5,000 fine, but suspended such fine if the utility deposited \$42,000 in an appropriate escrow account within three weeks of the date of the Order.

Also, on March 5, 1996, the Eighth Judicial Circuit issued its Order dismissing with prejudice Turkey Creek's Declaratory

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Statement action. However, on March 12, 1996, Turkey Creek petitioned for reconsideration of that Order.

With respect to Order No. PSC-96-0350-FOF-WS, Turkey Creek disagreed that the appropriate amount to be deposited in the escrow account was \$42,000, and timely filed its Notice of Administrative Appeal of Order No. PSC-96-0350-FOF-WS on April 10, 1996. However, while this appeal was pending, Turkey Creek, by letter dated June 13, 1996 (Attachment A), offered to make all refunds which it calculated to be due if the Commission would waive interest and any penalty or fine. Turkey Creek presented its calculations of the appropriate refund, and, under separate cover, provided the supporting documentation. Also, Turkey Creek proposed that the Commission agree to a stay of the proceedings in the Circuit Court and District Court of Appeal and agreed that it would make such refunds "very shortly" after it signed off on any settlement agreement.

While staff was reviewing these proposals, the Eighth Judicial Circuit issued, on June 24, 1996, its order denying rehearing and affirming its decision to dismiss with prejudice Turkey Creek's Declaratory Statement action. Turkey Creek did not appeal this Order of the Circuit Court, but the appeal of Order No. PSC-96-0350-FOF-WS in the First District Court of Appeal is still pending.

Upon further discussions with staff, Turkey Creek has clarified (by letters dated September 10 (Attachment B) and October 7, 1996) its proposed settlement offer and, if the Commission will suspend all fines or penalties, now offers:

1. That it will pay the full amount of the refund (\$24,576.46), without interest;
2. That it will make such payment to the City of Alachua (City), which now serves those customers, within 30 days of the date of the order accepting such settlement offer; and
3. That it will withdraw its appeal in the First District Court of Appeal.

The City has agreed (Attachment C) to process the refunds, but with the understanding that it would be allowed to keep all unclaimed refunds. This recommendation addresses the proposed settlement offer and the appropriate amount of the refund.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission accept the proposed settlement offer as set out in Turkey Creek Utilities' letter of June 13, 1996, and as modified by its letters dated September 10, and October 7, 1996?

RECOMMENDATION: The Commission should accept the offer of settlement whereby Turkey Creek Utilities agrees that, if the Commission suspends all fines or penalties, then it will withdraw its appeal of Order No. PSC-96-0350-FOF-WS and pay the full amount of the calculated refund (\$24,576.46), without interest, to the City of Alachua within 30 days of the Commission's order accepting such settlement offer. If Turkey Creek Utilities protests this proposed agency action or fails to make such payment to the City of Alachua within the 30 days, then the provisions of Orders Nos. PSC-93-1769-FOF-WS (requiring refunds with interest) and PSC-96-0350-FOF-WS (imposing \$5,000 fine) should be immediately reinstated.

STAFF ANALYSIS: As stated in the Case Background, the Commission, by Order No. PSC-96-0350-FOF-WS, issued on March 11, 1996, imposed a fine of \$5,000 on Turkey Creek for its failure to make refunds as required by Order No. PSC-93-1769-FOF-WS. Order No. PSC-93-1769-FOF-WS required Turkey Creek to refund the excess rates and charges as follows:

1. Monthly service rates from June 30, 1992, through the date of the sale to the City of Alachua (September 23, 1993);
2. Accrued interest on customer deposits from June 30, 1992, through the date each customer's deposit was returned;
3. Public fire protection charge to the Turkey Creek Master Owners Association (TCMOA) - all of 1992 and 1993, if any;
4. Miscellaneous service charges - July 6, 1993, through the date of the sale to the City of Alachua; and
5. Late payment charges - July 6, 1993, through the date of the sale to the City of Alachua.

Although Order No. PSC-93-1769-FOF-WS was appealed, that Order was affirmed by the First District Court of Appeal on March 27, 1995. Further, the Declaratory Statement Action challenging the jurisdiction of the Commission in ordering a refund, and filed in

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the Eighth Judicial Circuit in September of 1995, was dismissed with prejudice with a final order being issued on June 24, 1996. Turkey Creek has appealed Order No. PSC-96-0350-FOF-WS (order assessing the \$5,000 fine). This appeal is still pending.

Now, Turkey Creek, by letter dated June 13, 1996 (and subsequent clarifying letters), has proposed a settlement offer whereby it will pay the refund without interest within 30 days, if the Commission will approve the settlement offer and suspend the \$5,000 fine. Staff has calculated that through June 13, 1996, the interest that Turkey Creek would have had to pay would be about \$3,993.23. In Issue 2, staff has verified that the refund, without interest, is \$24,576.46.

As the Commission can see from the Case Background, what began as an application for a grandfather certificate has turned out to be a protracted struggle through the courts. Turkey Creek has argued that since all utility assets were sold and turned over to the City of Alachua on September 23, 1993, that the final order requiring refunds issued on December 3, 1993, was either improper or that the Commission was without jurisdiction to enter such an order.

Considering the history of the case, staff believes that a rejection of this settlement offer will lead to an equally arduous journey through the courts in any attempt to collect the full amount of the refund (to include the interest), plus the \$5,000 fine. Further, while many orders have been issued, there has never been a hearing where evidence has been presented as to the total amount of refund due. Therefore, although Turkey Creek has agreed to refund the amount of \$24,576.46 for purposes of settlement, it could still, in a subsequent proceeding to verify the amount of refund due, dispute the total amount of refund due. Any subsequent proceedings, whether by the Commission or the customers, could cost far in excess of the amount of any interest.

Staff also notes that this case was first filed about four years ago, and that Turkey Creek has not operated as a utility in over three years. Considering the length of this case and Turkey Creek's obvious reluctance to pay the refund, staff believes that it is in the best interests of the customers for the Commission to accept this settlement offer and close this case upon Turkey Creek complying with the terms of its settlement offer. Through acceptance of this settlement offer, the city manager of Alachua advises us that the customers, without any further effort or expense, should receive their refunds within 30 days of the date Turkey Creek turns over the funds to the City. However, acceptance of this settlement offer would require the Commission to delete the

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requirement for interest set out in Order No. PSC-93-1769-FOF-WS, and to suspend the fine imposed in Order No. PSC-96-0350-FOF-WS.

Staff has been in contact with a customer representative of the homeowner's association who has been keeping the customers informed of the progress of this case, and he states that he is not opposed to the Commission accepting this offer. However, he has not polled the members and cannot say how many of the customers are in agreement. Also, staff has contacted the City of Alachua, and the city manager and the city attorney have agreed that the City will make the refunds based on the data supplied by Turkey Creek.

Although the Order requiring the refunds with interest (Order No. PSC-93-1769-FOF-WS) was affirmed by the First District Court of Appeal on March 27, 1995, staff believes that the Commission still has the power to accept this comprehensive settlement offer. Even under administrative finality, the courts have recognized that the Commission may, in some circumstances, modify its orders where it finds that such modification is in the public interest. Staff believes that acceptance of the settlement offer is in the public interest because it would alleviate the need for any further hearings on the amount of the refund, any further appeals, and the need for any collection efforts. Also, the city manager of Alachua states that any refund should be completed within 30 days.

Therefore, staff recommends that the Commission accept the offer of settlement whereby Turkey Creek Utilities agrees that, if the Commission suspends all fines or penalties, then it will withdraw its appeal of Order No. PSC-96-0350-FOF-WS and pay the full amount of the calculated refund (\$24,576.46), without interest, within 30 days of the Commission's order accepting such settlement offer. If Turkey Creek Utilities protests this proposed agency action or fails to make such payment to the City of Alachua within the 30 days, then the provisions of Orders Nos. PSC-93-1769-FOF-WS (requiring refunds with interest) and PSC-96-0350-FOF-WS (imposing \$5,000 fine) should be immediately reinstated.

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ISSUE 2: What is the appropriate refund amount?

RECOMMENDATION: The appropriate refund is \$24,576.46. The refund associated with the accrued interest on customer deposits, miscellaneous service charges and late payment charge should be paid only to those customers who paid these charges. In accordance with the settlement offer, Turkey Creek should pay this amount to the City of Alachua within thirty days of the Commission's order. Turkey Creek should also be required to provide the City of Alachua with the billing records associated with the refund upon payment of the refund. Once Turkey Creek has paid the City and provided the City its billing records, Turkey Creek should be required to inform the Commission within fifteen days. In the event these refunds are unclaimed, all unclaimed amounts should be retained by the City of Alachua. (XANDERS)

STAFF ANALYSIS: The refund comprises the difference in monthly water and wastewater service rates, accrued interest on customer deposits, miscellaneous service charges and late payment charges. All refunds cover the period June 30, 1992, through September 23, 1993, the date of the sale to the City of Alachua. Attachment D contains the components of the refund as well as the calculations of the refund.

The refund for the monthly service rates was calculated using the difference between the rates approved by the Commission and the unauthorized rates charged by Turkey Creek. As support for the refund, Turkey Creek provided the spreadsheets that calculated the bills under the PSC approved rates and the bills under the unauthorized rates. Using these spreadsheets, staff has verified that the proposed refund is correct. As shown on Attachment D, the refund for the unauthorized rates is \$4,939.79 for water and \$18,321.93 for wastewater. This results in a grand total of \$23,261.72.

The refund for the interest on customer deposits applies to those customers whose deposit was refunded by Turkey Creek while Turkey Creek was regulated by the PSC. When the deposit was refunded, the interest associated with the deposit was not refunded. Therefore, the utility was required to refund the interest associated with the deposit. Turkey Creek has agreed to refund interest in the amount of \$205.74, which is the interest as of February 8, 1996. We believe that this is a reasonable amount.

The difference in the Commission approved late fee and the unauthorized late fee is \$17. The late fee is applicable to nine customers for a three-month period. Therefore, the appropriate refund is \$459.00

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The refund for Miscellaneous Service Charges is \$25.00. This is the difference between the Commission approved Miscellaneous Service Charge (\$15) and the unauthorized Miscellaneous Service Charge (\$40). According to the figures provided, this charge applies to 26 customers. Therefore, the appropriate amount is \$650.

With regard to the refund steps, Turkey Creek has proposed that the City make the refunds and keep any of the unclaimed amounts. Staff has discussed this proposal with the City of Alachua and both the city attorney and the city manager have agreed to this proposal. As discussed in Issue 1 and shown in Attachment C, the city has agreed to make the refunds based upon the records of Turkey Creek. Therefore, we believe that Turkey Creek should be required to provide the City with all billing records associated with the refund when Turkey Creek delivers the refund to the City. As discussed in the settlement offer, this should be accomplished within thirty days. Once the refund is complete, Turkey Creek should be required to file a report within fifteen days with the Commission indicating that it has paid the City and provided the City its billing records.

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ISSUE 3: Should the docket be closed?

RECOMMENDATION: Upon expiration of the protest period, if a timely protest is not received from a substantially affected person, and upon verification that Turkey Creek has paid the City and given the City the billing records, the docket should be closed administratively. (XANDERS)

STAFF ANALYSIS: In Issue 2, staff has recommended that Turkey Creek be required to pay the City within thirty days and the Turkey Creek be required to provide the City with all billing records associated with the refund. Upon expiration of the protest period, if a timely protest is not received from a substantially affected person, and upon verification that Turkey Creek has paid the City and given the City the billing records, the docket should be closed administratively.

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MICHAEL W. JONES, P. A.

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GAINESVILLE, FLORIDA 32607

MICHAEL W. JONES
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June 13, 1996

Ralph R. Jaeger, Esquire
c/o Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

**RE: Turkey Creek, Inc., etc. v. Florida Public Service
Commission**

Dear Mr. Jaeger:

My clients have reviewed your last presentation and made their own calculations, which I present to you herein, by referring to your paragraph numbers set forth in your, "Summary of Turkey Creek Refunds Due, Including Interest."

Paragraph One and Two: Our staff inserted the PSC mandated rates into the billing program and ran a total; this figure was subtracted from the actual billed total for a refund amount. The correct amount is around \$23,000, and it will be borne out in the supporting documents Mr. Hope is sending you under separate cover.

Paragraph Three: Without admitting either liability or the accuracy of this number, we are prepared to pay \$205.74.

Paragraph Four: The only money ever paid to my clients by TCMOA for fire protection preceded the turnover date and thus is beyond the PSC's jurisdiction.

Paragraph Five: The arithmetic here seems wrong. At \$17 per charge for 30 units, the total would be only \$510. Anyway, the 30 unit assumption is wrong, as the late-pay rate was only about three (3%) percent, or 9 units. The adjusted amount should be (\$17 x 9 units x 3 months) \$459.

Paragraph Six: Using the \$25 refund rate for the three month period is okay, but the number of new accounts to which it applies needs to be adjusted downward to 26, which is the actual number from our records. The correct amount here is (\$25 per unit x 26 units) \$ 650.

Refund Protocol: Mr. Hope has contacted the City of Alachua about handling the mechanics of the refund process. One proposal is that

the City make the refunds and keep, for its trouble, any of the unclaimed money. Please let us know the P.S.C.'s position.

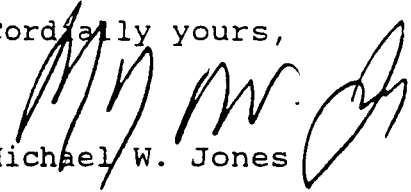
Interest Rate: In consideration of the above, the PSC will waive any claim of interest, penalty or fine in this regard.

Stay: We have a hearing pending in the circuit court, and some approaching briefing deadlines in the First District. I propose we stay each court proceeding until we finalize the settlement, to save time and money for all concerned.

Timing: We are prepared to meet the above obligations very shortly after we sign off on a settlement agreement, to finally close out this dispute.

Please let me hear from you as soon as possible. Thank you.

Cordially yours,



Michael W. Jones

MWJ/gss

cc: Mr. Norwood W. Hope

MICHAEL W. JONES, P. A.

MICHAEL W. JONES, P. A.

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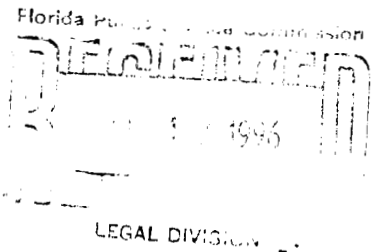
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10
September 6, 1996

SENT VIA FACSIMILE NO.: (904) 413-6250

Ralph R. Jaeger, Esquire
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850



**RE: Turkey Creek, Inc. and Family Diner, Inc.
vs. Florida Public Service Commission**

Dear Mr. Jaeger:

Mr. Norwood W. Hope has authorized me to confirm that we will settle our dispute with the Florida Public Service Commission in accordance with our letter of June 13, 1996, a copy of which is attached for your convenience. Mr. Hope's calculations are attached hereto for your benefit. With respect to timing, we will pay the agreed amount to the City of Alachua within thirty (30) days of the issuance of the Commission order accepting the settlement offer. Upon acceptance of our offer, we will dismiss the appeal.

Please advise.

Cordially yours,

Michael W. Jones/lab
Michael W. Jones

MWJ:lab

Enclosure

cc: Mr. Norwood W. Hope

City Of Alachua



ALACHUA COUNTY, FLORIDA

P.O. BOX 9
ALACHUA, FLORIDA 32615-0009
904/462-1231
FAX 904/462-1985

DEPARTMENT City Manager

November 8, 1996

Public Service Commission
Capital Circle Office Center
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Attention: Mr. Ralph Jaeger ✓
Mr. Edie Xanders

Re: PSC Ordered Refunds of Turkey Creek Utilities

Dear Commissioners:

This letter will confirm that the City of Alachua has agreed to be the disbursing agent for the above-mentioned refunds to the former customers of Turkey Creek Utilities. Upon the receipt of the sum of \$24,576.46, the City will make the refunds based upon the records of Turkey Creek Utilities. It is our understanding that the utility will pay this sum to the City within 30 days after the appropriate dismissal of all claims by the PSC. Upon receipt of the moneys, the City will immediately begin making refunds and anticipate it being accomplished within 30 days. The City of Alachua is willing to do this with the provision that it may keep any unclaimed refunds as a fee for being the refunding agent.

Sincerely yours,

Charles M. Morris
City Manager

CMM/cw

JIMMY SWICK, II
Mayor

PATRICK MURPHY
Atty. Mayor

C.H. HATHCOCK, SR.
Commissioner

JAMES A. LEWIS
Commissioner

GERALD BRIDGEMAN
Commissioner

CHARLES M. MORRIS
City Manager

NEIL A. MALPHURS
City Attorney

Turkey Creek Refund

Rates

	Water			Wastewater		
	Original Billings	Billing @ PSC rates	Difference	Original Billings	Billing @ PSC rates	Difference
September	\$3,910.89	\$3,721.65	\$189.24	\$7,970.08	\$7,585.82	\$384.26
October	4140.88	3938.74	202.14	8,333.28	7,931.32	401.96
November	3956.32	3593.19	363.13	9,032.06	7,521.47	1510.59
December	4033.51	3663.03	370.48	9,176.78	7,641.86	1534.92
January	4325.60	3924.55	401.05	9,746.25	8,114.50	1631.75
February	3960.60	3598.18	362.42	9,141.40	7,612.30	1529.10
March	4017.63	3649.40	368.23	9,356.49	7,855.93	1500.56
April	4103.69	3726.21	377.48	9,288.81	7,734.72	1554.09
May	5529.88	5003.43	526.45	10,151.95	8,451.65	1700.30
June	5267.48	4769.43	498.05	10,010.78	8,334.61	1676.17
July	4178.05	3794.30	383.75	9,359.23	7,793.76	1565.47
August	5079.87	4602.35	477.52	10,059.32	8,375.09	1684.23
September	4533.98	4114.13	419.85	9,850.77	8,202.24	1648.53
Total	<u>\$57,038.38</u>	<u>\$52,098.59</u>	<u>\$4,939.79</u>	<u>\$121,477.20</u>	<u>\$103,155.27</u>	<u>\$18,321.93</u>

Grand Total -Water and Wastewater Rates	\$23,261.72
Interest on Customer Deposit	\$205.74
Late Fee	\$459.00
Miscellaneous Service Charges	\$650.00
Total Refund	<u>\$24,576.46</u>
Approximate refund per customer (assumes 270 customers)	\$91.02

Accrued Interest (As of 6/13/96)

Late Fee	\$68.97
MSC	\$99.64
Deposit *	\$28.48
Water	\$807.42
WWater	\$2,988.72
Total **	<u>\$3,993.23</u>

*This amount represents the amount calculated by staff as of June 13, 1996 and the amount agreed to by Turkey Creek as of February, 1996.

**This amount represents the total interest that would not be paid by the utility pursuant to Turkey Creek's offer.