GATLIN, SCHIEFELBEIN & COWDERY, P.A.
Attorneys at Law

The Mahan Station
1709-D Mahan Drive
Tallahassee, Florida 32308

B. KENNETH GATLIN
WAYNE L. SCHIEFELBEIN
KATHRYN G.W. COWDERY

TELEPHONE (904) 877-5609
TELECOPIER (904) 877-9031
E-MAIL bkgatlin@nettally.com

ORIGINAL FILE C

January 30, 1997

HAND DELIVERY

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

RE: Docket No. **970027**
Complaint of The Christian and Missionary Alliance Foundation, Inc., d/b/a Shell Point Village against Florida Cities Water Company regarding service availability charges.

Dear Ms. Bayo:

Enclosed for filing are an original and fifteen copies of the Answer to Complaint of Christian Missionary Alliance Foundation, Inc. d/b/a Shell Point Village on behalf of Florida Cities Water Company, in reference to the above docket.

Please acknowledge receipt of the foregoing by stamping the enclosed extra copy of this letter and returning same to my attention.

Very truly yours,

B. Kenneth Gatlin

B. Kenneth Gatlin

ACK ____
AFA ____
APP ____
CAF 1 BKG/met
CMU ____ Enclosures
CTR ____
EAG ____
LEG 1
LIN 5
OPC ____
RCH ____
SEC 1
WAS ____
OTH ____

DOCUMENT NUMBER-DATE
01159 JAN 30 97
FPSC-RECORDS/REPORTING

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Complaint of The Christian and Missionary Alliance Foundation, Inc., d/b/a Shell Point Village against Florida Cities Water Company regarding service availability charges.	Docket No. 970027-WS Filed: January 30, 1997

FLORIDA CITIES WATER COMPANY'S ANSWER TO COMPLAINT OF CHRISTIAN MISSIONARY ALLIANCE FOUNDATION, INC. d/b/a SHELL POINT VILLAGE

Florida Cities Water Company (FCWC) files this its answer to the complaint of the Christian and Missionary Alliance Foundation, Inc., d/b/a Shell Point Village (Foundation), and states:

1. FCWC admits the allegations contained in paragraphs 1, 2 & 3 of the Complaint.

2. In response to paragraph 4 of the Complaint, FCWC states that while it is not familiar in detail with the layout of Foundation's development, FCWC agrees that the allegations in paragraph 4 contains a description of what FCWC currently understands the layout and operation of Foundation's development.

3. In response to paragraph 5, FCWC says that it currently understands the allegations in paragraph 5 to be a correct description of the Foundation's method of delivering water service to its occupants. However, FCWC denies the last sentence of paragraph 5. The Foundation is not billed for monthly use on a bulk basis as a general service customer. Instead, the Foundation is billed as a multiple-dwelling service (MDS) customer. The MDS rate is the same as for general service (FCWC water tariff sheet

no. 22.0), attached hereto as Appendix "A". That definition of a MDS customer is as follows:

> "Any single structure or group of structures containing more than one dwelling unit whose water service is provided through one meter. This shall include, but not be limited to, high-rise apartment complexes, garden-style apartment complexes, duplexes, triplexes, condominiums, and trailer parks, and other structures with similar service characteristics."

The descriptions of paragraphs 4 and 5 of the Complaint describe a customer that fits the definition of a MDS customer as provided in the FCWC Water Tariff Sheet No. 22.0.

4. In response to paragraphs 6, 7 & 8, FCWC states that the Foundation has not paid capacity charges for 553.6 (692 x 0.8) equivalent residential connections (ERCs). The Foundation has paid fees for 392 ERCs leaving a balance of 161.6 ERCs, which currently exists for which service availability charges have not been paid.

5. In response to paragraphs 6 through 10, FCWC states that the Foundation has not been billed for plant service capacity charges on the basis of gallonage per day, but on the basis of ERCs. FCWC's approved tariff does not provide for average gallonage per day used to calculate the plant capacity charges. The charge is based on ERCs. (Copy of Tariff Sheet No. 36.0, item 3 is attached hereto as Appendix B.)

6. FCWC denies the allegations in paragraph 11, and states

that FCWC is not in violation of the rules or statutes cited, but it is complete compliance with such rules and statutes, and the tariff approved by the Florida Public Service Commission. FCWC further states that the Foundation is not due any refund or credit and, in fact, the Foundation owes additional plant capacity and AFPI charges for 161.6 ERCs for existing facilities plus 77.6 ERCs (97 x 0.8) for new facilities at $855.73 per ERC, resulting in a total of $204,690.62. The AFPI charges are set forth on approved tariff sheet no. 39.0), attached hereto as Appendix "C". The current charge is $230.73 per ERC.

7. This Complaint by the Foundation against FCWC is no different from the Foundation's position in Docket No. 770236-W, resulting in Order No. 8468, attached hereto as Appendix "D". That Order was issued on September 6, 1978. The proceeding in Docket No. 770236-W only involved FCWC and the Foundation. The Foundation raises again the same issues in this instant docket. As a result, the controversy between these two parties has been resolved and the doctrine of res judicata and administrative finality prevents this controversy from being litigated again. In the case of Peoples Gas System, Inc. v. Mason, 187 So.2d 335, 339 (Fla. 1966), the Supreme Court has ruled specifically as follows:

> " . . . [o]rders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to modification. This rule assures that there will be a terminal point in every proceeding at which the parties and the public may rely

> on a decision of such an agency as being final and dispositive of the rights and issues involved therein. This is, of course, the same rule that governs the finality of decisions of courts. It is as essential with respect to orders of administrative bodies as with those of courts.

9. The Foundation by its Complaint in this docket is in effect requesting the Commission to reopen a case that was ruled upon and resolved by the Commission by Order No. 8468, entered on September 6, 1978.

10. The Courts in Florida continue to follow the Peoples Gas System case and reaffirm its holdings. See McCaw Communications of Florida, Inc. v. Clark, 679 So.2d 1177 (Fla. 1996), Florida Power & Light Company v. Beard, 626 So.2d 660 (Fla. 1993), Mann, D.D.S. v. Department of Professional Regulation, Board of Dentistry, 585 So.2d 1059 (Fla. 1st DCA 1991), Austin Tupler Trucking, Inc. v. Hawkins, et al., 377 So.2d 679 (Fla. 1979), and Russell, D.D.S. v. Department of Business and Professional Regulation, 645 So.2d 117 (Fla. 1st DCA 1994).

11. The above cited cases lay down the requirement that there must be a change in circumstances or public interest in order for the PSC to reopen a proceeding. The Foundation has not alleged any new facts or change of circumstances that could be a basis for the Commission reopening this controversy.

WHEREFORE, FCWC requests that:

1) The Commission deny the Foundation's Complaint in this

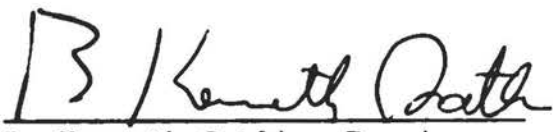
docket, on the basis that FCWC has followed the statutes, rules, and approved tariffs.

2) The Complaint of the Foundation should be dismissed on the basis that this controversy was resolved by the Commission in Order No. 8468, entered September 6, 1978 and no change in circumstances are alleged by the Foundation.

3. The Commission order that the Foundation should pay FCWC a total of additional $204,690.62 which includes 239.2 ERCs for which the Foundation has not paid.

DATED this 30th day of January, 1997.

Respectfully submitted,



B. Kenneth Gatlin, Esquire
Fla. Bar #0027966
Gatlin, Schiefelbein & Cowdery, P.A.
1709-D Mahan Drive
Tallahassee, Florida 32308
(904) 877-5609

Attorneys for
FLORIDA CITIES WATER COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Mr. Marty Friedman, Esquire, Rose, Sundstrom & Bentley, 2548 Blairstone Pines Drive, Tallahassee, Florida 32301, on this 30th day of January, 1997.

B. Kenneth Gatlin

APPENDIX A

FLORIDA CITIES WATER COMPANY
North & South Ft. Myers Div.

Seventh Revised Sheet No. 22.0
Canceling Sixth Revised Sheet No. 22.0

MULTIPLE DWELLING SERVICE

RATE SCHEDULE MDW - WATER SERVICE

Availability - Water service in accordance with this rate schedule is available to all multiple dwelling units throughout the certificated area in Lee County, Florida.

Definition - Any single structure or group of structures containing more than one dwelling unit whose water service is provided through one meter. This shall include, but not be limited to, highrise apartment complexes, garden-style apartment complexes, duplexes, triplexes, condominiums and trailer parks, and other structures with similar service characteristics.

Rate - Same as General Service (GSW).

Terms of Payment - Bills are due and payable when rendered and become delinquent if not paid within twenty (20) days. Service may be discontinued after five (5) working days' written notice is mailed to the customer separate and apart from any other bill.

Additional Clauses - Water and sewer charges are billed concurrently and payment for water service only is not acceptable to the Company without concurrent or simultaneous payment of the sewer charge. Non-receipt of total charges may result in discontinuance of service.

Limitations - Subject to all of the Rules and Regulations of the Company.

Effective Date: "For service rendered on or after August 15, 1996.

Type of Filing: 1996 Rate Reduction.

Gerald S. Allen

President

WP 7/96

FLORIDA CITIES WATER COMPANY
Water - Lee County

First Revised Sheet No. 36.0
Cancelling Original Sheet No. 36.0

3. Plant Capacity Charge:

All new applications for service at a new location shall pay in advance, a plant capacity charge of $625 per residential customer and $500 per multiple family unit. A non-residential customer shall pay $2.08 per gallon, based upon the customer's maximum daily water usage, or some other acceptable standard, but not less than $625. An ERC for this system is defined as 300 GPD.

4. Allowance for Funds Prudently Invested (AFPI) Charge

Until the Company is providing service to 33,867 equivalent residential customers, each application for service at a new location in the Company's system shall pay, in advance, and in addition to the charge in 3 above, an AFPI (excess capacity) charge based upon the number of equivalent residential customers (ERC's) and the appropriate amount as set forth in the table on Sheet No. 39.0.

A.A. Reeves III
Vice President

APPENDIX C

UNITED CITIES WATER COMPANY
S. Ft. Myers Water Systems

Second Revised Sheet No. 39.0
Canceling First Revised Sheet No. 39.0

SCHEDULE OF FEES AND CHARGES (CONTINUED)

Description	Amount	Sheet No.
Allowance for Funds Prudently Invested (AFPI) Charge	See Table Below	36.0

WATER

WITH PREPAYMENT OF SERVICE AVAILABILITY CHARGES

	1985	1986	1987	1988	1989	1990	1991
January	--	10.90	44.65	81.73	122.53	167.51	217.17
February	--	13.62	47.64	85.02	126.15	171.51	221.59
March	--	16.34	50.63	88.30	129.78	175.51	226.01
April	--	19.07	53.62	91.59	133.40	179.50	226.01
May	--	21.79	56.61	94.88	137.02	183.50	226.01
June	--	24.52	59.60	98.17	140.65	187.50	226.01
July	--	27.24	62.59	101.46	144.27	191.50	226.01
August	--	29.96	65.58	104.75	147.89	195.50	226.01
September	--	32.69	68.57	108.04	151.52	199.49	226.01
October	2.72	35.68	71.86	111.66	155.51	203.91	226.01
November	5.45	38.67	75.15	115.28	159.51	208.33	226.01
December	8.17	41.66	78.44	118.91	163.51	212.75	226.01

January 1, 1992 - July 31, 1993 226.01

Thereafter 230.73

NOTE: 1) Amounts indicated above are per ERC.

2) From March 1, 1991 to August 2, 1993 the charge was $226.01 per ERC.

3) On August 3, 1993 and thereafter, the charge will be $230.73 per ERC.

4) Multiple Family Units, as that term is defined in Rate Schedule MDW, shall pay 80% of the above charges.

Effective Date: "For service rendered on or after August 3, 1993.

Type of Filing: 1993 Price Indexing & Pass-Through.

Paul H. Bradtmiller

Executive Vice President

WP 6/93

Florida Public Service Commission

APPROVED

Authority No. WS-93-0100

Docket No. N/A

Order No. N/A

Effective August 3, 1993

Mark H Hill

Director
Division of Water and Sewer

In re: Complaint of FLORIDA CITIES WATER COMPANY against the CHRISTIAN AND MISSIONARY ALLIANCE FOUNDATION, INC. d/b/a SHELL POINT VILLAGE

DOCKET NO. 770236-W (CP)

ORDER NO. 8468

ISSUED: 9-6-78

The following Commissioners participated in the disposition of this matter:

WILLIAM T. MAYO
ROBERT T. MANN

Pursuant to notice, the Florida Public Service Commission, by its duly designated Hearing Examiner, JOHN R. MARKS, III, held a public hearing on the above matter in Fort Myers, Florida, on February 28, 1978.

APPEARANCES: JOHN W. COSTIGAN, Post Office Box 66, Tallahassee, Florida 32302, for the complainant.

HOWARD S. RHOADS, Post Office Box 1480, Fort Myers, Florida 33902, for the defendant.

LEON F. OLMSTEAD, 101 East Gaines Street, Tallahassee, Florida 32304, for the staff of the Florida Public Service Commission and the public generally.

The Examiner's recommendations were served on the parties on June 7, 1978. Exceptions were taken thereto, and Oral Argument was heard on the exceptions on July 10, 1977. Now, having considered all of the evidence, we enter our order.

ORDER

BY THE COMMISSION:

The Examiner's recommendations are as follows:

"By this complaint, Florida Cities Water Company, (the utility or FCWC), alleges that the Christian (sic) Missionary Alliance Foundation, Inc., d/b/a Shell Point Village (defendant or the Foundation) failed to comply with a request for the payment of certain funds as required by the utility's tariff. Specifically, the complainant utility charges that the defendant refused to pay the sum of $52,500 for plant capacity (service availability or connection) charges related to 210 multiple family units located within the Foundation's Shell Point Village Complex.

Examiner's Findings of Fact

Florida Cities Water Company is a public water and sewer utility in Lee County, Florida and its rates and charges are subject to regulation by the Florida Public Service Commission pursuant to Chapter 367, F.S. The Foundation owns Shell Point Village, a retirement community composed of residential buildings, a nursing home, an auditorium, recreation and dining facilities, snack shop, forty room guest house and maintenance buildings all situated on a 75 acre tract. Residents of the village occupy their

units under provisions of a residence agreement and have no proprietary interest in the village itself. About 1967, the defendant contracted with FCWC to provide water service to its contemplated development. By the terms of the agreement, the utility extended a main to the front entrance and provided an 8" meter. The Foundation constructed and maintains the distribution systems inside or on the downside of the meter. They are billed at the meter on a bulk basis as a commercial user.

On August 8, 1973, after proper notice and hearing, the Commission entered Order No. 5822, which, among other things, authorized the utility to collect a plant capacity charge of $250.00 per multiple dwelling unit. Between January, 1975, and January,.1976, the Foundation added three new buildings to its Shell Point Village complex containing a total of 210 multiple family units. When the utility discovered the addition of the units it submitted an invoice to the defendant requesting payment of the monies calculated in accordance with the tariff provisions. The Foundation refused to make payment.

The utility, since 1973, has had a customer increase of 146% and has spent approximately $3.5 million since 1974 increasing its water supplies and expanding its plant and distribution system. FCWC has budgeted $5,000,000 more for future expansion and development. The Foundation concedes that it consumes more water as a result of the construction of the 210 new multiple dwelling units.

In accordance with Chapter 120, F.S., the defendant requests rulings on certain proposed findings of fact. Those rulings are attached as an appendix to this Recommendation.

Examiner's Conclusions of Law

"Vested Rights" Theory

The defendant's initial defense is based on the theory that the Foundation has "vested rights" under its original contract with FCWC in accordance with §367.011(4), F.S. The Supreme Court in Fletcher Properties, Inc. v. Hawkins, Case No. 52,254, opinion dated January 23, 1978, addressed this same issue. In that case Fletcher Properties entered a contract with the utility prior to the date the Public Service Commission obtained jurisdiction over investor-owned utilities in Duval County. The contract included the payment of service availability charges. After jurisdiction over the utility was established in the Commission, Fletcher intervened in the utility's application for plant capacity (service availability or connection) charges, contending that, by reason of its pre-existing contract, it was not subject to pay the new charges. The Commission in Order No. 7902 determined that Fletcher Properties must pay the new connection fee, and by memorandum decision, the Supreme Court affirmed that order. As such, a defense based on the "vested rights" theory is without merit.

Impairment of Contracts

The Foundation also contends that an independent reason for the inapplicability of the tariff is that connection charges under Part IX of the Commission's rules are not applicable to pre-existing contracts. Rule 25-10.120 F.A.C., is cited and it reads as follows:

> 'Policies implemented and contracts entered into prior to the adoption of this part are not subject to this Part IX.'

To attach the meaning as asserted by the defendant would be contrary to prevailing legal principles. Provisions of contracts with public utilities as to rates and charges are presumed to have been made in view of the continuing authority of the legislature under the police power to regulate public utilities in the public interest. Furthermore, there are several cases which adhere to the general principle that contracts of public utilities are made subject to the reserved authority of the state, under its police power, to modify contracts in the interest of the public welfare without unconstitutionally impairing contract rights between private parties. See Midland Realty v. Kansas Power and Light Co., 300 U.S. 109; City of Plantation v. Utility Operating Company, 156 So.2d 842; Miami Bridge Company v. Railroad Commission, 20 So.2d 356; and Fletcher Properties, Inc. v. Hawkins, et al, 355 So.2d 514.

"New Customer"Theory

The Foundation next contends that for purposes of the service availability charge that it is an "Existing location" and not a "new customer" and is therefore excused from payment of the charge. The defendant relies exclusively upon FCWC First Revised Tariff Sheet No. 26.0 as approved by the Commission and promulgated in accordance with Order No. 5822. The relevant portion of the tariff reads as follows:

> 'CONNECTION CHARGE'
>
> All applications for service at a new location shall pay, in advance, a connection charge of: $300.00 per residential customer with 3/4" meters, $350.00 per residential customer with 1" meters, $250.00 per multiple dwelling unit as that term is defined in Rate Schedule MDW, and an amount that is fair and reasonable for commercial customers, but not less than $350.00."

The Foundation's interpretation of the tariff would indicate the master meter location is not a "new location" but an old or existing location. Additionally, the defendant contends that since delivery and service is at the meter the connection or service availability fee does not apply to any new additions

on the downstream or the Foundation's side of the meter. Following this reasoning, the Foundation could construct one or one thousand new units on its enclave and not be subject to the plant capacity fee as long as it is master metered. However, by this reasoning it also follows that if the utility decided to install 210 new meters at the Foundation's entrance to serve the newly constructed units the connection fee would be a legitimate charge. Rather than such extreme interpretations, a rule of reasonableness should prevail. §367.101, F.S., entitled "Charges for Service Availability" provides as follows:

> 'Charges and conditions made by a utility shall be just and reasonable. The Commission shall, upon request or upon its own motion, investigate agreements or proposals for charges and conditions to be made by a utility for service availability. The Commission shall, after notice and hearing, set just and reasonable charges and conditions for service availability.' (Emphasis added)

In Order No. 5822 the Commission made the following comment with regards to the purpose of service availability charges:

> 'The observation that increased costs attributed solely to increased population should not be imposed upon the existing water or sewer system rate payer, is the subject of our continuing efforts, and succinctly expresses our philosophy on the subject. We agree with Witness Nasl that the cost of expanded facilities to serve additional customers should be borne principally by those customers for whom the facilities were expanded.' (Emphasis added)

The Commission then noted at Page 12 of Order No. 5822 that the charges applicable to multiple dwelling units are 'designed to assure that the new customer will bear the expense of expansion of the facilities to provide him service in order that such new customer will not be subsidized by existing customers and still be commensurate with the utility's prudent investment in facilities to provide the service.'

Thus, the intent and purpose of service availability (connection) charges is to help defray a portion of the cost of extending and expanding plant capacity and facilities so as to serve those persons who are most directly responsible for that increased cost. If it were not for service availability charges, the utility would have to invest the additional money, which investment would be reflected in increased rates to all customers. In effect, the rates of old customers would increase in order to subsidize the expansion needed to serve those units causing the expansion. It should also be noted

1. Footnote omitted.

that Shell Point is not subsidizing old customers through the payment of service availability or connection charges. Connection fees account for or defray only a portion of the total funds needed by the utility for construction expansion. The company invests the remainder, which investment is reflected in increased rates. This insures that existing customers do pay for a portion of the new construction, which of course does improve and upgrade the quality of both the water and the service to old customers.

Limitations on Funds

The Foundation also asserts that the connection charge is invalid since it does not limit the use of funds generated to plant expansion created by new customers. This assertion appears to originate from an observation made by the Florida Supreme Court in the Contractors and Builders Association of Pinellas County v. City of Dunnedin, (sic) 322 So.2d 314 (1976), where the court, in discussing the city ordinance under attack, stated the following:

> 'The same considerations which underlie statutes of frauds require that a revenue producing ordinance explicitly set forth restrictions on revenues it generates, where such restrictions are essential to its validity. As between private parties, a contract 'that is not to be performed within the space of one year', Fla. Stat. Section 725.01 (1973), or which is 'for the sale of goods for the price of $500 or more', Fla. Stat. Section 672.201 (1973), is unenforceable unless reduced in writing, with certain exceptions not pertinent here. Counsel for Respondent has represented that the fees collected under the ordinance exceed $196,000.00. Brief for Respondent at 53. Nothing in the record indicates that capital outlay for expansion will be completed within a year's time.
>
> The failure to include necessary restrictions on the use of the fund is bound to result in confusion, at best. City personnel may come and go before the fund is exhausted, yet there is nothing in writing to guide their use of these moneys (sic), although certain uses, even within the water and sewer systems, would undercut the legal basis for the funds' existence.
>
> There is no justification for such casual handling of public moneys (sic), and we therefore hold that the ordinance is defective for failure to spell out necessary restrictions on the use of fees it authorizes to be collected.' (Emphasis added)

It appears from a careful reading of the entire opinion that the court's reference to the two statutes is nothing more than an analogy to emphasize the need for a guide to city employees in the future as to the use

of the funds in question especially after the present management and employees are gone. Furthermore, monies collected by a municipality for the most part go into a general revenue fund and unless specifically earmarked they could be used for purposes other than water and sewer operations.

Contrary to the allegations of the Foundation, there is an effective restriction on the funds collected by Florida Cities Water Company. The actual use of a certain dollar bill is certainly not regulated; but the accounting for all such funds is strictly regulated by the Commission and is a major consideration in the setting of rates for water service. The collection of these charges have the direct effect of keeping rates to a minimum, and in some instances, can cause rate to go down. No such restriction is placed upon municipal utilities, which may continue to charge the same or even increased monthly rates, not being subject to the regulatory requirements imposed on private utilities. It is upon all of the foregoing factors that a municipally owned and operated utility is required to account for the actual use of the funds collected. The basis for the Supreme Court's determination that the use of the funds be strictly limited is tied directly to the fact that these are public funds.

"Use" Theory

The final defense raised by the defendant states that if the tariff is valid and applicable, the charge of $52,500.00 is not fair and reasonable. It is their contention that the charge is incurred when the customers (sic) plans to make use of the water. In other words, it is the use that allegedly is the justification for imposing the charge. The defendant fails to realize that water is currently being provided to the entire 210 units, all of which are capable of immediately receiving service with no control by the utility. The charge is a 'service availability fee' or a 'connection fee' or a 'plant capacity fee' and not a charge for 'use' of the water. The necessary plant expansion accommodates all 210 units and is not merely available if and when the particular tenant of a multiple dwelling unit actually begins using the water.

From the foregoing, the EXAMINER concludes that the service availability or connection charges presently set forth in Florida Cities Water Company tariffs are applicable to the defendant in the amount of $250.00 per multiple dwelling unit. It is, therefore,

RECOMMENDED that the complaint of Florida Cities Water Company, herein be and the same, is hereby determined to be meritorious and that the defendant, Christian (sic) Missionary Alliance Foundation, Inc., d/b/a Shell Point Village be required to pay the $52,500 plant capacity (connection) charges as required by the Florida Cities Water Company First Revised Tariff Sheet No. 26.0.

Appendix

Rulings on Certain Proposed
Findings of Fact

The defendant requests the hearing officer to make the following findings of fact:

The hearing officer is requested to put an appropriate check mark after each finding - i.e. to either grant the finding or deny it.

The parties are referred to as Florida Cities and Foundation for brevity.

1. Florida Cities delivers its water at one and only one location, the master meter, at the entrance to Shell Point Village, (granted X ; denied ___).

2. Foundation purchases its water at the meter, (granted X ; denied ___).

3. Florida Cities has been delivering its water to Foundation at the meter since 1968, (granted X ; denied ___).

4. Florida Cities has at all times delivered its water to Foundation at the master meter, an existing location and not a new location, (granted X ; denied ___).

5. Foundation has made no connection (or new connection) to Florida Cities' water system since its original connection in 1968, (granted ___ ; denied X).

6. The addition of internal units by Foundation did not cause water to be delivered to a new location but only caused, at the most, the consumption of additional water at an existing location, (granted ___ ; denied X).

7. A connection charge is only incurred when a customer connects to and makes uses of the water company's facilities, (granted X ; denied ___).

8. Florida Cities revised tariff, sheet 26, imposing connection charges, does not identify the purpose for which the charges are being imposed, (granted ___ ; denied X).

9. Florida Cities revised tariff, sheet 26, does not set forth any restrictions of limitations as to the expenditures that can be made from the charges collected, (granted ___ ; denied X)."

Exceptions

The defendant's exceptions to the Examiner's findings of fact and recommendations are as follows:

1. Denial of defendant's Findings of Fact 5, 6, 8 and 9, is unsupported by evidence in the record.
   A. There was no connection or new connection to Florida Cities' water system since 1968, merely increased consumption by the addition of 210 more units.
   B. Denial of Finding 6, is inconsistent with the granting of Finding 4. Delivery of water to the defendant at the meter is only consistent with an affirmative or grant of Finding 6.
   C. Revised tariff Sheet No. 26 does not set forth the purpose for the tariff, nor does it include restrictions or limitations on expenditures to be made from the charges collected.

2. Rulings on defendant's proposed Findings of fact do not include a "brief statement of the grounds for denying the proposed findings of fact Nos. 5, 6, 8 and 9, as required by Section 120.59, Florida Statutes, (1977). If not in the recommended order, such must be in the final order. Section 120.59, Florida Statutes.

3. Having found that the plaintiff delivers water to the defendant at an existing location, not a new location, there is no basis for imposing liability on the defendant for service at a"new location"as a matter of law.

4. The defendant's position is misunderstood by the Examiner. Foundation's position is that as long as the Florida Cities' tariff only authorizes imposition of connection charges at new locations, the defendant is not responsible for the connection charges for adding the 210 units to an existing location. The complainant's authority for imposition of connection fees does not include requiring the defendant to pay such. Having not obtained or sought the permission, it cannot ask for it under the theory that it is just and reasonable.

5. The Hearing Examiner's view on"impairment of contracts" theory may be correct, but the Commission has the power to adopt a rule that is contrary to prevailing legal principles, as is done in the last sentence of Rule 25-10.120, Florida Administrative Code.

This case is distinguishable from the Fletcher case, because the defendant's rights became vested by payment to the utility of $35,000 for main extension. The utility's plant expansion was required by contract without further consideration. Payment for the line extension was the connection charge since the connection charge is defined as a contribution-in-aid-of-construction in Rule 25-10.121(3)(4), Florida Administrative Code.

6. The Examiner's analysis of the Dunedin case is misplaced, there is nothing to indicate that the holdings therein are limited to public funds. Limiting it to public funds involves the distinction without a difference.

Reply

By its reply, the complainant contended the construction of the 210 new units by the defendant were new connections which placed an additional burden on the utility's plant and facilities.

subsequent to the approval of the connection charge. The overall reason for imposition of increased service availability charges was consistent with the purposes for assessing connection or service availability fees, and additional connections were, in fact, made.

The assertion of inconsistency of Findings 4 and 6 is without merit. The three new buildings added to the burden of the utility plant and therefore required payment of connection fees. The addition of the three new buildings to the system was an additional burden and therefore required payment of service availability charges.

In regard to Proposed Finding 8, company tariff sheets must be read in conjunction with the order of the Commission (Order No. 5822), which clearly states the purpose of the connection charge.

The reasons for denial of Findings of Fact 5, 6, 8 and 9, were clearly set out in the body of the recommended order. If this is not sufficient, the Commission can separately restate those grounds as a part of its final order in this matter.

Paragraph 3 of the exceptions: the existence of the master meter and the question of 210 new units; one does not follow the other. The addition of new units and therefore an additional burden to the system and plant, justify and require payment of service availability charges. The fact that the water delivered to these new units passes through an existing meter is irrelevant.

Paragraph 4 of the exceptions: The tariff sheet implements the statutory authority to provide that the cost of expanded facilities to serve additional customers, should be borne principally by those customers for whom the facilities were expanded. The Examiner's illustration at Page 3 of his recommendation, regarding the hypothetical installation of individual meters is logical, correct and distinctly points out the extreme flaws and fallacies of the defendant's position.

The assertion that the $35,000 paid estops the payment of the additional fee is without merit. Considered in connection with the testimony of Shell Point's own engineering witness and the plain language of the agreement, makes it clear there is nothing in the 1968 contract which addresses the payment of plant capacity charges, which were approved in 1973. The $35,000 was to cover the cost of extending the main to the defendant and nothing more. The tariff distinguishes between connection charges and main extension charges. The contract is not relevant to this dispute.

The Hearing Examiner is on firm legal ground in finding that the Commission rules cannot and do not override prevailing legal principles. The interpretation of the Examiner on the Dunedin case is correct.

Finally, the utility objected to the introduction of an affidavit as to the present population of Shell Point; however, Order No. 7902 may be introduced into the record, although the Commission may take judicial notice of it. (Order No. 7902 was considered by the Supreme Court of the State of Florida, in the case of Fletcher Properties, Inc. v. Paula F. Hawkins, et al, 355 So.2d 514 (1978), and sustained by memorandum decision.

Discussion

The defendant's exceptions are disposed of as follows: (Numbering corresponds to that of the exceptions).

1.A. The defendant's position relative to the "new connection" must be rejected. The addition of the 210 units downstream from the meter was certainly to the complainant's water system.

B. The use of a meter installed at a designated point is to measure water sold and to mark the area of responsibility for the respective entities (utility and Foundation) for maintenance of the distribution system. The entirety of the defendant's tract is within the complainant's certificated service area and all water used therein passes through the complainant's lines.

C. The matter of restrictions on the use of funds is adequately and properly resolved by the Examiner in his discussion under "Limitation on Funds".

2. The defendant complains no "brief statement of the grounds" for denying proposed Findings 5, 6, 8 and 9 was provided. The referenced statutory provision, Section 120.59, F.S., is as follows:

> (2) Findings of Fact, if set forth in a manner which is no more than mere tracking of the statutory language, shall be accompanied by a concise and explicit statement of the underlying facts of record which support the findings. If, in accordance with agency rules, a party submitted proposed findings of fact or filed any written application or other request in connection with the proceedings, the order shall include a ruling upon each proposed finding and a brief statement of the grounds for denying the application or request." (Emphasis added)

It must be noted that the "Appendix" is the defendant's "proposed findings of fact". The defendant requested the Examiner to rule "granted" or "denied" as to nine statements of fact. It did not "propose" that Findings 5, 6, 8 and 9 should be "granted". As such, the so called "proposed findings of fact were not "denied", within the purview of the above cited provision of Section 120.59, Florida Statutes, as to require a "brief statement of the grounds for denying the application or request". No request was made, therefore, none was denied.

In any event, the Examiner discussed the subject of Findings 5 and 6 in detail under the "New Customer Theory" portion of his report and discussed Findings 8 and 9 in detail under the "Limitations on Funds" portion of his report.

3. This exception has been adequately covered in the previous discussion to demonstrate the fallacy of the defendant's contention relative to the "new location". Suffice to say, the three new buildings are new locations receiving service from the complainant's water system and therefore are liable for payment of the plant capacity charges.

4. The position of the defendant is inconsistent with the expressed purpose of Order No. 5288, which approved the complain-

ant's tariff provision in question; namely, that the "cost of expanded facilities to serve additional customers should be borne principally by those customers for whom the facilities were expanded". The Examiner's hypothetical analogy to installation of 210 (or one) new meters to serve the 210 new units, demonstrates the fallacy of the defendant's interpretation of the tariff which is, to say the least, strained and disregards the practical realities of the situation. As noted, the utility has invested and is investing several million dollars to expand its facilities. Had this expansion not been undertaken by the utility, the complainant could not have added the three new buildings. (See Order Nos. 6067 and 6209, Docket No. 74176-W.) Thus, the three new buildings are new customers and should provide a part of the plant capacity required to serve them (Order No. 5288). This comes within the purview of Rule 25-10.125, Florida Administrative Code, which provides:

> "Excess Capacity. In the event that the utility decides to install facilities for its future benefit which are larger than normally required in the requested extension, appropriate adjustment shall be made based on the relative costs with the costs attributable to excess capacity covered by utility investment or refundable advance agreement."

5. The Examiner's discussion under the "impairment of contracts" section of his report correctly analyzes this agreement. The Fletcher case is squarely "on all fours" with the factual situation herein; a pre-existing contract for main extension, which was completely executed; establishment of plant capacity charges at a later date to which the contract did not speak; subsequent additional facilities (demand) added by the customer; and master metered service at the boundary of the customer's premises.

The defendant fails to recognize that plant capacity and main extension charges are both contributions-in-aid-of-construction. Connection (plant capacity) charges are defined by Rule 25-10.121(3), Florida Administrative Code, and are limited to "production, storage and treatment plant", whereas main extension charges are defined in Rule 25-10.121(16), Florida Administrative Code, and are limited to water distribution lines.

6. The Examiner's analysis of the Dunedin case is correct.

7. Subsequent to the hearing, the defendant submitted, by affidavit, purported proof of the present population of Shell Point and moved its inclusion in the record. The complainant objected. The Examiner did not rule on the defendant's motion.

Section 120.57(1)(b)(4), Florida Statutes, (1977), requires that all parties shall have an opportunity to conduct cross-examination and submit rebuttal evidence. The post-hearing motion effectively denies these rights to the complainant and its objection must be sustained. Further, there is nothing that makes the population of the defendant's enclave relevant to the question herein concerned.

8. Order No. 7900 is officially recognized as the subject of Fletcher v. Hawkins, 355 So.2d 514 (1978).

The cases cited by the defendant in its brief, Kinyman Water Co. v. United States, 253 F.2d 588 (1958); Lewiston-Meadsville

Water Company v. Public Service Commission, 169 A. 406 (Da. 1933), are clearly distinguishable from the case sub judice. In these cited cases there was no added burden on the utility, whereas, here the addition of the 210 units was to the utility's water system and created a substantially increased burden thereon.

The defendant asserts in its brief that, even if it must pay the charges, it is only liable for a portion thereof represented by the portion of the 210 units that are occupied. This has been before this Commission in Docket No. 74738-WS. We concluded therein that the administrative burden on the utility which the defendant's position would impose would be unreasonable. It would also shift some of the developer's risk to the utility, which we will not allow. For these reasons, the defendant's contention must be rejected.

On the basis of all of the evidence before us, we must conclude and find that the Examiner's Findings of Fact are based on competent substantial evidence and the recommendations are consistent therewith. It is, therefore,

ORDERED by the Florida Public Service Commission that, in the complaint of Florida Cities Water Company against Christian and Missionary Alliance Foundation, Inc. d/b/a Shell Point Village, pursuant to law and the utility's tariff, the defendant is required to pay the sum of $52,500 in plant capacity (connection) charges, as required by the utility's tariff, First Revised Sheet No. 26.0. It is further

ORDERED that the exceptions by the defendant be and the same are hereby rejected. The Examiner's findings and recommendations are approved.

By Order of Chairman PAULA F. HAWKINS, Commissioner WILLIAM T. MAYO, and Commissioner ROBERT T. MANN, as and constituting the Florida Public Service Commission, this 6th day of September, 1978.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of SELLING, INC., for declaratory statement.

DOCKET NO. 770482-WS

(MC)

ORDER NO. 8469
ISSUED: 9-6-78

The following Commissioners participated in the disposition of this matter:

WILLIAM T. MAYO
ROBERT T. MANN

ORDER DISMISSING PETITION

BY THE COMMISSION:

On June 20, 1977, Selling, Inc., filed a Petition for Declaratory Statement concerning the jurisdictional status of Spanish Trails Village, a condominium. Since that time the water and sewer facilities which are at Spanish Trails Village have been foreclosed and subsequently sold to a third purchaser. The third purchaser has filed a new Declaration of Condominium. The Declaration of Condominium is the primary instrument upon which this Commission must rely to determine the jurisdictional status of a condominium-related water and sewer system. The Declaration of Condominium set forth in the

petition is now obsolete which, of course, renders our consideration of it moot.

The Legal and Engineering Departments of this Commission are proceeding informally to determine the jurisdictional status of the water and sewer system of Spanish Trails Village, as it is controlled under the new Declaration of Condominium, and will advise accordingly.

Since no purpose would be served by a further consideration of the Petition for a Declaratory Statement filed by Selling, Inc., and since we have correspondence from the new owners of Spanish Trails Village, stating that there is no objection to the dismissal of this action, we find that this petition should be dismissed.

It is, therefore,

ORDERED by the Florida Public Service Commission that the Petition of Selling, Inc., for Declaratory Statement is hereby dismissed without prejudice and this docket be closed.

By Order of Chairman PAULA F. HAWKINS, Commissioner WILLIAM T. MAYO, and Commissioner ROBERT T. MANN, as and constituting the Florida Public Service Commission, this 6th day of September, 1978.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for transfer of Water Certificate No. 114-W from Charlie Squibb d/b/a IMPERIAL MOBILE TERRACE to Lawrence J. Benson d/b/a IMPERIAL MOBILE TERRACE.	DOCKET NO. 770507-W (TC) ORDER NO. 8470 ISSUED: 9-6-78

The following Commissioners participated in the disposition of this matter:

WILLIAM T. MAYO
ROBERT T. MANN

Pursuant to notice, the Florida Public Service Commission, by its duly designated Hearing Examiner, P. MICHAEL RUFF, held a public hearing on the above matter in Tavares, Florida, on March 27, 1978.

APPEARANCES: LAWRENCE J. BENSON, 63 Clayton Street, Tavares, Florida 32778, testified on behalf of the utility.

HAROLD A. McLEAN, 101 East Gaines Street, Tallahassee, Florida 32304, for the staff of the Florida Public Service Commission and the public generally.

The Examiner's recommendations were served on June 21, 1978. The time for filing exceptions has expired, no exceptions have been filed. Having considered the evidence in the record, we now enter our Order.