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FLORIDA CITIES WATER COMPANY
RATE APPLICATION FOR RECOVERY OF LEGAL EXPENSES

TESTIMONY OF
GERALD S. ALLEN

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1 FLORIDA CITIES WATER COMPANY
2 RATE APPLICATION FOR RECOVERY OF LEGAL EXPENSES
3 TESTIMONY OF GERALD S. ALLEN

4 Q. Please state your name and business address.

5 A. Gerald S. Allen, 4837 Swift Road, Suite 100,
6 Sarasota, Florida 34231.

7 Q. By whom are you employed and in what capacity?

8 A. I am the President of Florida Cities Water
9 Company(FCWC).

10 Q. Is a summary of your educational and professional
11 background attached at Exhibit ____ (GSA-1).

12 A. Yes.

13 Q. What positions have you held with FCWC and its
14 parent, Avatar Utilities Inc. (AUI).

15 A. I held the position of Vice President, Engineering,
16 Avatar Utilities Inc. (AUI), the parent company of
17 FCWC, from April 1988 until December 1989; Executive
18 Vice President, Engineering, from January 1, 1990
19 until December 29,1991; Executive Vice President and
20 Chief Operating Officer from December 30, 1991 to
21 June 30, 1996. I have been President, FCWC, since
22 July 19, 1995 and President, AUI and its other
23 subsidiaries since July 1, 1996.

24 Q. Please describe the operations of FCWC.

25 A. FCWC owns and operates water and wastewater systems

1 in Golden Gate (Collier County), North and South Ft.
2 Myers (Lee County), Sarasota County, Carrollwood
3 (Hillsborough County) and Barefoot Bay (Brevard
4 County) and serves approximately 33,000 water and
5 25,000 wastewater customers. It has eight (8) water
6 treatment facilities and six (6) wastewater
7 treatment plants. At December 31, 1996, net utility
8 plant property was approximately \$120 million.

9 Q. Have you previously testified before the Commission?

10 A. Yes.

11 Q. What is the purpose of your testimony?

12 A. The purpose of my testimony is to (1) explain the
13 purpose of FCWC's application in this docket, (2)
14 describe the legal action brought against FCWC by
15 the United States causing the legal expenses which
16 FCWC is seeking to recover in this docket, (3)
17 provide an overview of the history of the events and
18 circumstances leading to this litigation, (4)
19 describe efforts made by the FCWC to settle the
20 matter before the litigation started , and (5)
21 discuss the final outcome of the litigation.

22 Q. What did you rely upon for your testimony?

23 A. I relied upon my first-hand knowledge and the
24 business records of FCWC and AUI.

25 Q. Will other witnesses provide testimony in this case?

1 A. Yes. Mr. Michael Acosta, Vice President, Engineering
2 and Operations, FCWC, will provide testimony
3 pertaining to permitting issues and construction of
4 facilities at the Waterway Estates Wastewater
5 Treatment Plant to upgrade it to Advanced Wastewater
6 Treatment (AWT)¹ standards and the relocation of the
7 effluent outfall. Mr. Gary H. Baise, Attorney,
8 Baise and Miller, P.C. will cover the legal issues,
9 legal proceedings, settlement discussions and offers
10 after filing of the complaint by the United States
11 Department of Justice (USDOJ) on behalf of the
12 United States, and the outcome of the litigation.
13 Mr. John D. McClellan, Regulatory Consultant,
14 Deloitte & Touche LLP, will cover the prudence of
15 FCWC's defense against the complaint from a
16 financial perspective and the regulatory principles
17 applicable to FCWC's request for rate relief. Mr.
18 Michael Murphy, Vice President and Chief Financial

¹ As defined in FDEP regulations (403.086), AWT means treatment which will provide a reclaimed water product that:
(1) contains not more than the following concentrations on a permitted annual average basis:
a. Biochemical Oxygen Demand - 5mg/l
b. Suspended Solids - 5mg/l
c. Total Nitrogen, expressed as N - 3mg/l
d. Total Phosphorus, expressed as P - 1mg/l
(2) has received high level disinfection, as defined by FDEP rule.

1 Officer, FCWC, will cover the litigation expenses,
2 the method of recovery proposed by FCWC in this
3 docket and the surcharge which FCWC proposes to
4 collect from customers. Mr. L. Gray Geddie, Jr.,
5 Esq., Ogletree, Deakins, Nash, Smoak & Stewart,
6 P.C., will provide testimony regarding the
7 reasonableness of the conduct of the defense of the
8 complaint by FCWC's attorneys and the fees and
9 charges associated therewith.

10 Q. What is the purpose of FCWC's application in this
11 docket?

12 A. The purpose is to seek approval to recover a portion
13 of FCWC's legal expenses incurred by FCWC in its
14 successful defense of legal action brought by the
15 United States relating to alleged violations of the
16 Clean Water Act (CWA), plus rate case expenses.
17 Recovery is sought through a monthly customer
18 surcharge applicable to FCWC's water and wastewater
19 customers in S. Ft. Myers, N. Ft. Myers and Barefoot
20 Bay. FCWC proposes that it be allowed to collect
21 the surcharge for a period of ten years or until
22 such time as the expenses have been fully recovered,
23 whichever occurs first. FCWC recognizes that the
24 Commission does not have jurisdiction over FCWC's
25 rates in Collier, Hillsborough and Sarasota Counties

1 and upon approval of a surcharge as sought in this
2 proceeding, FCWC will seek approval by Collier,
3 Hillsborough, and Sarasota Counties of a surcharge
4 to be applicable to its customers in those Counties.

5 The Original Complaint

6 Q. Describe the legal action brought by the United
7 States.

8 A. The U.S. Department of Justice (USDOJ), on behalf of
9 the United States, filed a complaint in the Middle
10 District of Florida, Fort Myers Division, on October
11 1, 1993 (case number is 93-281-CIV-FTM-21), alleging
12 that FCWC had violated the CWA at its Waterway
13 Estates Wastewater Treatment Plant (Waterway)
14 (Original Complaint)((Exhibit ____ (GSA-2)). Later,
15 an amended complaint was filed which broadened the
16 scope of allegations pertaining to violations of the
17 CWA to include FCWC's Barefoot Bay (Barefoot) and
18 Carrollwood Wastewater Treatment Plants
19 (Carrollwood).

20 Q. What did the Original Complaint allege?

21 A. The Original Complaint alleged that FCWC (1)
22 discharged pollutants from Waterway into the
23 Caloosahatchee River during the period from October
24 1, 1988 to October 31, 1989 without a National
25 Pollution Discharge Elimination System (NPDES)

1 permit, (2) discharged pollutants into a tributary
2 canal leading to the Caloosahatchee River from on or
3 about November 1, 1989 to July 14, 1991, at an
4 unpermitted location, and (3) during each month
5 during the period on or about July 1991 to March
6 1992, discharged pollutants in excess of the Total
7 Nitrogen limitation in the NPDES permit and on at
8 least three occasions (February 1992, April 1992,
9 and June 1992), discharged effluent in excess of the
10 toxicity limitation in the NPDES permit.

11 Q. What was the basis for civil penalty requested in
12 the Original Complaint?

13 A. The Original Complaint requested a civil penalty in
14 the amount of \$25,000 per day for each alleged
15 violation of the CWA including \$25,000 per day in
16 each month in which a monthly average was violated.

17 Q. What was the total amount of penalty requested?

18 A. The total civil penalty requested was \$32,375,000
19 broken down by general allegation as follows:

20 (1) discharging without a permit - \$9,900,000,

21 (2) discharging at an unpermitted location -
22 \$15,525,000, and

23 (3) exceeding permit limits for nitrogen and
24 toxicity - \$6,950,000.

25 Q. Did FCWC have the financial resources to pay this

1 penalty?

2 A. No.

3 Q. What was FCWC's response to the Original Complaint?

4 A. FCWC filed an answer to the complaint on November
5 22, 1994 denying the allegations (Exhibit _____ (GSA-
6 3)).

7 Q. What was your role during the period prior to the
8 filing of the Original Complaint?

9 A. Beginning in 1989 when the construction schedules
10 were being revised, I kept up with progress toward
11 upgrading Waterway to meet advanced wastewater
12 treatment (AWT) standards and the construction of a
13 new effluent outfall into the Caloosahatchee River
14 and communicated with FCWC managers regarding same;
15 provided overall engineering oversight with respect
16 to the projects; reviewed and approved the award of
17 contracts associated with these projects;
18 participated to a limited extent in some of the
19 negotiations with the contractor which constructed
20 facilities in connection with the upgrade of
21 Waterway; participated in meetings with the USEPA
22 and USDOJ pertaining to enforcement actions and
23 settlement; was actively engaged in the
24 negotiations with the U.S. Environmental Agency
25 (USEPA) on matters related to enforcement from

1 approximately mid-1991 forward and settlement
2 negotiations with the USEPA and USDOJ prior to the
3 filing of the Original Complaint by the USDOJ.

4 Q. After you became familiar with environmental
5 regulation in Florida, what was your assessment of
6 the relationship between the Florida Department of
7 Environmental Protection (FDEP)² and the USEPA?

8 A. Until May 1995, the FDEP did not have delegated
9 authority to administer the Federal NPDES program,
10 yet it required permits for the construction and
11 operation of wastewater treatment plants as well as
12 for the disposal of final effluent, including
13 surface water discharges covered by the NPDES permit
14 program. This resulted in substantial duplication
15 of the permitting process and of permits which were
16 independent, not coordinated and had differing terms
17 and conditions. Generally, the FDEP requirements
18 were more stringent than those of the USEPA and it
19 was my impression that the FDEP was the lead
20 regulator. So, if the permittee could meet the
21 requirements and standards of the FDEP, it could
22 meet muster with the USEPA. This relationship was
23 easily recognized. The FDEP had a much larger staff

² Formerly known as Florida Department of Environmental
Regulation (FDER).

1 than the USEPA on a per facility basis and was much
2 more intensely engaged in construction, permitting
3 and operational issues, including enforcement.

4 Q. Please provide an overview of the situation which
5 lead to the Original Complaint.

6 A. The NPDES permit which was issued by the USEPA
7 expired in 1986. The USEPA denied renewal of the
8 permit, ordered FCWC to cease discharge or upgrade
9 Waterway to meet AWT standards, and relocate the
10 effluent outfall. Subsequently, the USEPA issued
11 two Administrative Orders which, among other
12 conditions, set forth a schedule for compliance and
13 a new NPDES permit for a discharge directly to the
14 main channel of the Caloosahatchee River rather than
15 the Canal which flows directly into the river. The
16 schedule was amended twice due to circumstances
17 recognized by the USEPA to be beyond the control of
18 FCWC. The final schedule called for the relocation
19 of the outfall by August 1, 1991 and compliance with
20 the water quality standards set forth in the NPDES
21 permit (See Exhibit____(MA-9)) by November 1, 1991.
22 FCWC completed substantial improvements to the
23 wastewater treatment plant, relocated the outfall
24 and complied with all requirements of the amended
25 schedule except with respect to consistently meeting

1 the nitrogen and toxicity limits set forth in the
2 new NPDES permit.

3 Q. Why were the nitrogen and toxicity limits not met?

4 A. These limits were not met because two process units
5 were not complete and in service.

6 Q. What caused the delay in completing these units?

7 A. Principally because the permitting process at the
8 federal, state and local levels required much more
9 time than FCWC anticipated at the time the schedules
10 were developed. The schedules and circumstances
11 pertaining to the permits and the permitting process
12 will be covered in more detail in the prefilled
13 testimony of Witness Acosta.

14 Q. Did the FDEP also require a permit for the operation
15 of Waterway including the discharge to the Canal?

16 A. Yes. The FDEP permit, which had an expiration of
17 August 2, 1988, was in effect when the USEPA denied
18 renewal of the NPDES permit.

19 Q. Did the FDEP later establish a schedule for
20 upgrading Waterway and relocating the effluent
21 outfall out into the river?

22 A. Yes. Although amended as the work progressed, the
23 final schedule set forth in a FDEP Consent Order
24 called for substantial completion of construction
25 (both plant upgrade and new outfall) by September 1,

1 1992 and certification of facilities in compliance
2 by June 1, 1993.

3 Q. Did FCWC fully meet the final schedule?

4 A. Yes.

5 Q. From an overall compliance perspective, did you
6 believe that the FDEP was generally satisfied with
7 FCWC's performance with respect to compliance with
8 the FDEP permits and Consent Orders applicable to
9 Waterway including the construction of facilities
10 required for the plant upgrade and new outfall.

11 A. Yes. This conclusion is corroborated by the
12 deposition and testimony at trial of Dr. Abdul Daqi
13 Ahmadi, Professional Engineer Administrator,
14 Southwest District, FDEP in the Federal Court case.

15 Q. In your opinion, why did the USDOJ bring suit
16 against FCWC in this case?

17 A. Although there was evidence of technical violations
18 of the CWA, failure of the USEPA to pursue
19 settlement administratively similar to Carrollwood
20 and Barefoot through Consent Agreements and Orders
21 Assessing Administrative Penalties (discussed in
22 following sections) was clearly inconsistent.
23 Therefore, I believe the USEPA and USDOJ were
24 substantially influenced by similar litigation
25 brought against the City of Cape Coral on March 15,

1 1991. The City's wastewater treatment plant located
2 a few miles downstream of Waterway also discharged
3 into the Caloosahatchee River. Like Waterway, it
4 was a secondary treatment plant which was being
5 upgraded. I believe the USEPA and USDOJ felt
6 compelled to initiate litigation against FCWC to
7 avoid the potential for having to defend their
8 decision to lodge complaints against the City and
9 under somewhat similar circumstances decline to
10 lodge complaints against FCWC.

11 Q. Was the Cape Coral case settled?

12 A. Yes. The U.S. sought a civil penalty of \$200
13 million from the City of Cape Coral but settled for
14 a penalty of \$750,000.

15 Q. Did FCWC have settlement discussions with the EPA
16 prior to the matter being referred to the USDOJ?

17 A. Yes. FCWC had face-to-face meetings with the USEPA
18 on April 4, 1991; June 19, 1991; and June 9, 1992.
19 In addition to routine monthly Discharge Monitoring
20 Reports and periodic progress reports, FCWC
21 furnished the USEPA a vast amount of information
22 relating to Waterway as a result of these meetings
23 and communications with USEPA officials following
24 the meetings. The USEPA indicated during these
25 discussions that it was limited to settling such

1 cases to a maximum penalty of \$125,000. Clearly
2 these discussions revealed that the USEPA was
3 seeking a settlement in a much greater amount and
4 that the only way this was possible was through
5 referring the matter to the USDOJ.

6 Q. Did FCWC keep the USEPA up to date regarding
7 progress toward upgrading Waterway and relocating
8 the effluent outfall?

9 A. Yes. FCWC took extraordinary steps to keep the USEPA
10 informed. In addition to the monthly submittal of
11 the Discharge Monitoring Reports and frequent
12 conversations with USEPA officials, FCWC rendered
13 written reports on the following dates:

14 April 10, 1988; July 22, 1988; April 24, 1989;
15 July 14, 1989; Feb. 20, 1990; Feb. 23, 1990;
16 April 4, 1990; May 10, 1990; May 17, 1990;
17 Sept. 24, 1990; Oct. 22, 1990; Dec., 11, 1990;
18 Jan. 22, 1991; Feb. 21, 1991; Mar. 1, 1991;
19 Apr. 12, 1991; May 23, 1991; June 24, 1991;
20 July 17, 1991; July 24, 1991; Aug. 22, 1991;
21 Sept. 25, 1991; Oct. 24, 1991; Nov. 5, 1991;
22 Nov. 27, 1991; Dec. 1, 1991; Jan. 13, 1992;
23 Jan. 24, 1992; Feb. 19, 1992; Feb. 20, 1992;
24 Feb. 28, 1992; Mar. 27, 1992; Apr. 21, 1992;
25 Apr. 28, 1992; May 27, 1992; Jun. 25, 1992;

1 and Oct. 12, 1992.

2 Q. Did FCWC have settlement discussions with the USDOJ
3 prior to the filing of the Original Complaint on
4 October 1, 1993?

5 A. Yes.

6 Q. Did FCWC have legal counsel during these
7 discussions?

8 A. Yes.

9 Q. Did the USDOJ present a settlement offer?

10 A. Yes, by letter dated December 9, 1992 to FCWC
11 counsel, Lee A. DeHihns, from Mr. Daniel S. Jacobs,
12 USDOJ Trial Attorney, the USDOJ offered to settle
13 the matter for \$5,000,000 (Exhibit _____ (GSA-4)).

14 Q. Did FCWC think this offer to be fair and equitable?

15 A. No.

16 Q. Why?

17 A. In view of the facts and circumstances surrounding
18 the allegations, the settlement with the City of
19 Cape Coral, and FCWC's belief that it was meeting
20 permit limitations and water quality standards, FCWC
21 did not believe the offer to be fair and equitable.

22 Q. Mr. Jacob's letter makes reference to a meeting
23 scheduled on December 16, 1992 between FCWC and
24 USDOJ and USEPA official as a final opportunity to
25 settle the claims. Was this meeting held?

1 A. Yes.

2 Q. Who attended, what was discussed and what was the
3 final outcome?

4 A. This information is as stated in my memorandum to
5 files dated December 22, 1992 at (Exhibit _____ (GSA-
6 5). Neither Mr. Jacobs nor any of the USEPA
7 officials present exhibited any inclination to
8 settle the matter for anything less than \$5,000,000.

9 Q. Did FCWC counter the USDOJ settlement offer of
10 \$5,000,000?

11 A. Yes, on December 23, 1992, after careful
12 consideration and with advice of legal counsel FCWC,
13 through Mr. DeHihns, offered to settle the matter
14 for \$250,000.

15 Q. What was the basis for this offer?

16 A. The basis for the offer is set forth in Mr. DeHihns
17 letter to Mr. Robert B. Gordon, dated December 18,
18 1992 (Exhibit _____ (GSA-6).

19 Q. Did the USDOJ accept this offer?

20 A. No, the offer was summarily and totally rejected.

21 Q. Did FCWC present another counter offer?

22 A. Yes, in January 1993, FCWC increased its counter
23 offer to \$500,000.

24 Q. Did the USDOJ accept this counter offer?

25 A. No.

1 Q. Do you know why the USDOJ did not accept FCWC's
2 counter offer?

3 A. Not specifically; however, I do know that the USDOJ
4 Trial Attorney in charge of the matter expressed the
5 highest degree of confidence that the USDOJ would
6 prevail on the Court to grant much higher penalties
7 should a settlement not be reached. This Trial
8 Attorney stated in my presence on at least one
9 occasion that, "[T]he government could get at least
10 \$1,000,000 by just showing up in court in this
11 matter." When the Cape Coral settlement was
12 mentioned to Mr. Jacobs, he indicated that the U.S.
13 held private companies, such as FCWC, to a higher
14 standard than that applicable to municipalities.

15 Q. Was settlement discussed after the Original
16 Complaint was filed but before the Court rendered
17 its judgement?

18 A. Yes. Mr. Baise will address such discussions in his
19 testimony.

20 The Amended Complaint

21 Q. When was the Amended Complaint filed?

22 A. March 30, 1995 (Exhibit ____ (GSA-7)).

23 Q. What did the Amended Complaint allege?

24 A With respect to Waterway, the Amended Complaint
25 alleged that in addition to the allegations

1 contained in the Original Complaint, the exceedance
2 of the NPDES permit limits for nitrogen during the
3 period in or about July 1991 to March 1992 was
4 expanded to include allegations of exceedances with
5 respect to both the concentration of nitrogen and
6 loading limitation which effectively doubled the
7 number of days of alleged violations.

8 With respect to Barefoot, the Amended Complaint
9 alleged that (1) during the period on or about April
10 1, 1990 to October 31, 1991, pollutants from
11 Barefoot were discharged into the Sebastian River,
12 without a NPDES permit; (2) from time to time during
13 the period 1990-1993, effluent was discharged which
14 exceeded the maximum limitations of USEPA
15 Administrative Order 90-106 (AO 90-106) or NPDES
16 Permit Number FL0042293 for TSS, Fecal Coliform,
17 Dissolved Oxygen (DO), Biological Oxygen
18 Demand³(BOD), pH and Total Residual Chlorine (TRC);
19 (3); on at least three occasions during the period
20 1992-1994, the effluent failed the test for chronic
21 whole effluent toxicity in NPDES Permit Number
22 FL0042293; (4) during part of the period 1991-1993,

³ Biological Oxygen Demand is not a scientific term;
therefore, it is presumed that the intended term was
Biochemical Oxygen Demand.

1 BOD was not monitored as required by NPDES Permit
2 Number F10042293⁴; and (5) during part of the period
3 1991-1993, testing for TRC using the method
4 specified in NPDES Permit Number F10042293 was not
5 accomplished.

6 With respect to Carrollwood, the Amended
7 Complaint alleged that (1) during the period in or
8 about August 1990 to June 1991, pollutants were
9 discharged into Sweetwater Creek without a NPDES
10 permit; and (2) from time to time during 1991,
11 pollutants were discharged in excess of the
12 limitations in NPDES Permit Number FL0029319 for
13 TSS, Total Phosphorus, Fecal Coliform, Total
14 Nitrogen, CBOD and TRC.

15 Q. Did FCWC agree with these allegations?

16 A. No. The majority of the allegations with respect to
17 Carrollwood and Barefoot had previously been settled
18 by USEPA Consent Agreements and Orders Assessing
19 Penalties.

20 Q. What was the basis for the civil penalties requested
21 in the Amended Complaint?

22 A. The Amended Complaint requested civil penalties in
23 the amount of \$25,000 per day for each alleged

⁴ Carbonaceous Biochemical Oxygen Demand (CBOD) was actually reported.

1 violation of the CWA including \$25,000 per day in
2 each month in which a monthly average was violated.

3 Q. What was the total amount of the civil penalty
4 requested?

5 A. The total penalty requested was \$104,325,000 broken
6 down between the three wastewater treatment plants
7 as follows:

8 Waterway - \$42,825,000,
9 Barefoot - \$35,400,000, and
10 Carrollwood - \$26,100,000.

11 Q. Did FCWC have the financial resources to pay this
12 penalty?

13 A. No.

14 Carrollwood

15 Q. At what point did you become involved in the
16 enforcement issues pertaining to Carrollwood?

17 A. My involvement begin in 1989 after it became evident
18 that the viability of connecting Carrollwood to the
19 Hillsborough County wastewater system continued to
20 be tenuous and other alternatives should be pursued.

21 Q. What was your involvement thereafter?

22 A. I kept up with progress toward completing studies of
23 the impact of continuing the discharge to Sweetwater
24 Creek, provided general engineering oversight during
25 the design of the new wastewater treatment plant,

1 participated to a limited extent in negotiations in
2 connection with the FDEP and the Hillsborough County
3 Pollution Control Commission pertaining to the new
4 wastewater treatment plant, participated in
5 negotiations with the USEPA pertaining to the final
6 Administrative Order and the Consent Order (both
7 discussed below), reviewed and approved the award of
8 contracts for engineering services and construction,
9 and participated in the early stages of negotiations
10 with Hillsborough County which lead to finally
11 connecting Carrollwood to the County system.

12 Q. Please provide an overview of the situation and
13 circumstances which lead to the allegations of the
14 Amended Complaint with respect to Carrollwood.

15 A. In June 1975, the USEPA issued a NPDES permit,
16 having an expiration date of August 15, 1980,
17 authorizing the discharge of WWTP effluent to
18 Sweetwater Creek and setting water quality limits
19 for the discharge.

20 In September 1977, the Hillsborough County
21 Pollution Control Commission (HCPCC) notified FCWC
22 that Carrollwood was not in compliance with the
23 temporary operating permit (TOP) issued by the FDEP
24 since it had not been upgraded to advanced
25 wastewater treatment (AWT) standards and since the

1 County intended to acquire Carrollwood, it would not
2 be advisable for FCWC to upgrade the WWTP to AWT
3 standards. In June 1978, HCPCC notified FCWC that
4 the TOP would expire on September 1, 1978 and
5 stating that Carrollwood must be acquired by the
6 County, connected to a regional WWTP or otherwise
7 develop alternative means of effluent disposal.
8 Nevertheless, the FDEP issued a new TOP in April
9 1979 authorizing the continued discharge until
10 September 1980. However, in October 1979, the FDEP
11 notified FCWC that the wasteload allocation for
12 Carrollwood called for no discharge to the receiving
13 waters (Sweetwater Creek).

14 In view of the circumstances and directives
15 from the HCPCC and FDEP, FCWC perused connecting to
16 the County's wastewater system. Between June 1979
17 and July 1990, FCWC received six written responses
18 to its requests to connect to the County's system
19 indicating connection dates successively in the
20 future, the earliest being 1983 and the latest being
21 1991, a span of nine years. In March 1988, the
22 County notified FCWC that it anticipated capacity
23 becoming available in early 1990 and the capacity
24 fee applicable to the Carrollwood connection was
25 \$5,538,000 based on then current rates.

1 Furthermore, FCWC requested that the City of Tampa
2 consider allowing Carrollwood to connect to its
3 system but in June 1986, the City declined to offer
4 such service.

5 In April 1980, FCWC applied for renewal of the
6 NPDES permit. The USEPA responded in September 1984
7 by denying renewal of the permit because the FDEP
8 had determined that the wasteload allocation to
9 Sweetwater Creek called for no discharge and
10 indicating that an Administrative Order would be
11 forthcoming. The Order, issued in November 1984
12 directed FCWC to submit a plan for the elimination
13 of the discharge to Sweetwater Creek, cease
14 discharging to the creek by June 1987 and to comply
15 with all of the requirements of the previous NPDES
16 permit. In the meantime, the FDEP continued to
17 authorize the discharge via temporary operating
18 permits.

19 FCWC having found no other alternative and
20 based on the County's representations that capacity
21 would be available, albeit unable to commit to a
22 specific date, entered into a contact with an
23 engineering firm in January 1987 to design the
24 necessary pumping station and forcemain required to
25 transport wastewater to the County's system. The

1 completed plans and specifications for these
2 facilities were submitted to the County in June 1987
3 by FCWC's engineer with a request, on behalf of
4 FCWC, that FCWC be placed on the waiting list for
5 County wastewater treatment capacity.

6 In 1987, a bill known as the Grizzle-Figg Bill
7 was enacted which FCWC believed would, under certain
8 criteria, allow a continued discharge to Sweetwater
9 Creek. The FDEP agreed that such discharge might be
10 permissible and in March 1988 issued a new TOP
11 setting forth such discharge as a possible
12 alternative provided all criteria could be met. In
13 September 1988, FCWC retained a consultant which
14 undertook extensive scientific studies to evaluate
15 the impact of a continued discharge on the creek.
16 The report, which indicated "minimal negative
17 impacts" on Sweetwater Creek assuming that the WWTP
18 was upgraded to meet AWT standards, was transmitted
19 to the FDEP on June 19, 1989 (Exhibit____(GSA-8)).
20 Therefore, in view of the ever decreasing prospect
21 of being able to connect to the County's wastewater
22 system, FCWC undertook the design of a new WWTP
23 meeting AWT standards by awarding a contract to
24 Dyer, Riddle, Mills and Precourt, Inc. on April 11,
25 1989 (Exhibit____(GSA-9)). The construction permit

1 application for the upgraded plant and associated
2 facilities was filed with the FDEP on November 15,
3 1989. The FDEP issued the permit on July 27, 1990.
4 Bids for the construction were received on July 26,
5 1990 but in view of recent heightened prospects of
6 connecting Carrollwood to the County's system, the
7 award of a contract was withheld.

8 FCWC kept the USEPA advised on its efforts to
9 eliminate the discharge or otherwise develop
10 alternatives satisfactory with the FDEP and the
11 Hillsborough County Environmental Protection
12 Commission (HCEPC). FCWC met with the USEPA on July
13 31, 1990 to report on FCWC's plans and progress, and
14 filed an NPDES permit application for the continued
15 discharge to Sweetwater Creek. Although, the USEPA
16 did not commit to any particular action, the meeting
17 was positive. On September 27, 1990, the USEPA
18 issued Administrative Order 90-100(wKS) (Exhibit ____
19 (GSA-10)) which established water quality standards
20 and required regular progress reports regarding
21 FCWC's construction of the new WWTP meeting AWT
22 standards. On April 19, 1991, FCWC and the USEPA
23 entered into a Consent Agreement and Order Assessing
24 Administrative Penalties, Docket No. CWA-IV 90-542
25 (Exhibit ____ (GSA-11)) assessing a penalty of

1 \$15,000 for FCWC's past violations of the CWA. On
2 May 28, 1991, NPDES Permit No. FL0029319 authorizing
3 the discharge to Sweetwater Creek and setting forth
4 a schedule for completion and placement into
5 operation the WWTP meeting AWT standards. The
6 schedule called for "operational level attainment"
7 by February 1, 1993.

8 In the meantime FCWC continued to pursue
9 connecting to the County's system but prepared plans
10 and obtained permits from the FDEP and HCEPC for the
11 construction of the new WWTP meeting AWT standards.
12 After protracted negotiations, FCWC and Hillsborough
13 County entered into an agreement on June 5, 1991
14 which provided for connecting to the County's system
15 and collection of County connection and treatment
16 fees on a monthly basis (Exhibit ____ (GSA-12)). By
17 letter dated June 24, 1991, the USEPA was notified
18 of this agreement. FCWC completed construction of
19 the pumping station and forcemain required to
20 connect to the County's system on December 13, 1991
21 and the discharge of effluent from Carrollwood to
22 the County's system commenced on January 2, 1992.
23 The USEPA was notified on February 10, 1992 that the
24 Carrollwood WWTP had been inactivated. The USEPA
25 acknowledged receipt of the notice on March 3, 1992

1 and advised FCWC that Administrative Order No. 90-
2 100(wKS) had been complied with and placed in an
3 inactive status. By letter bearing the same date,
4 the USEPA notified FCWC that NPDES Permit No.
5 FL0029319 had been inactivated.

6 Barefoot

7 Q. At what point did you become involved in the
8 enforcement issues pertaining to Barefoot?

9 A. My first involvement to any appreciable degree began
10 in 1989 as the plans were nearing completion and the
11 permit applications were being finalized for an
12 injection well for wastewater disposal.

13 Q. Have you previously testified before the Commission
14 regarding some of the matters which will be covered
15 in this testimony?

16 A. Yes, in the Barefoot Bay Division rate case, Docket
17 No. 951258-WS.

18 Q. Did the Commission consider the requirements of the
19 various environmental regulatory agencies relating
20 to the Barefoot Bay wastewater treatment plant in
21 Docket No. 951258-WS?

22 A. Yes. The Commission gave consideration to FCWC's
23 investment to meet environmental requirements in the
24 Barefoot plant in Docket No. 951258-WS. The
25 Commission's decision in that Docket is reflected in

1 Order Nos. PSC-96-1147-FOF-WS, PSC-97-0223-FOF-WS,
2 and PSC-0516-FOF-WS. These Orders are offered as
3 Composite Exhibit _____ (GSA-13).

4 Q. Please provide an overview of the situation which
5 lead to allegations with respect to Barefoot as set
6 forth in the Amended Complaint.

7 A. Following the commencement of the discharge of
8 treated wastewater effluent to a canal leading to
9 the north prong of the Sebastian River sometime in
10 the mid-1980s, FCWC investigated numerous measures
11 including the upgrading of the WWTP to AWT
12 standards, construction of additional percolation
13 ponds, land application of reclaimed water and the
14 construction of an injection well in an effort to
15 meet the requirements of the various regulatory
16 agencies having jurisdiction including the FDEP, the
17 St. Johns River Water Management District and the
18 USEPA. These efforts initially led to FCWC's
19 purchase of a 40-acre tract for land application for
20 the construction of additional percolation ponds or
21 spray land application. The FDEP and FCWC entered
22 into a Consent Order on October 18, 1988 under which
23 FCWC was ordered, among other things, "[W]ithin one
24 hundred twenty (120) days of the effective date of
25 this Consent Order, Respondent [FCWC] shall submit

1 to the Department an engineering report setting
2 forth a plan for the ultimate elimination of the
3 surface water discharge of effluent from
4 Respondent's facility by the construction of a deep
5 injection well." The Consent Order is attached
6 hereto at Exhibit _____ (GSA-14). However, as
7 explained in my testimony in Docket No. 951258-WS,
8 the injection well option was not deemed viable and
9 irrigation or spray land application was ultimately
10 deemed viable only if FCWC owned the land where the
11 reclaimed water was applied. Ultimately, FCWC
12 upgraded Barefoot to meet AWT standards and
13 purchased an additional 316 acres of land for
14 reclaimed water disposal (irrigation), entered into
15 a contract to provide reclaimed water to the
16 Barefoot Bay Golf Course and obtained permits for
17 same as well as a "wet weather discharge" to the San
18 Sebastian Canal. FCWC filed an application for
19 renewal of the NPDES permit with the USEPA on
20 December 16, 1994. Upon the FDEP's receiving
21 delegated authority to administer the NPDES program
22 on May 1, 1995, the application was forwarded to the
23 FDEP for issuance. On June 6, 1995, the FDEP issued
24 an order granting authority to continue discharging
25 to the canal (Exhibit _____ (GSA-15)) and the final

1 permit for Barefoot (including a wet weather
2 discharge) was issued on September 5, 1997
3 (Exhibit____(GSA-16)).

4 On September 14, 1989, the USEPA observed the
5 discharge from Barefoot into the San Sebastian
6 Canal. On February 28,1990, FCWC filed an
7 application for an NPDES permit and by letter dated
8 March 23, 1990, the USEPA acknowledged receipt of
9 the permit on March 6, 1990 (Exhibit____(GSA-17)).
10 However, the USEPA misplaced the permit application
11 and FCWC refiled same on June 8, 1990
12 (Exhibit____(GSA-18)).

13 On September 26, 1990, the USEPA issued
14 Administrative Order No. 90-106 which set forth
15 water quality standards for the discharge and among
16 other requirements, required FCWC to file monthly
17 DMRs with the USEPA (Exhibit____GSA-19)). A "show
18 cause" hearing was held by the USEPA in Atlanta on
19 August 14, 1991. A summary of that meeting is at
20 Exhibit____(GSA-20). By letter dated August 23,
21 1991 (Exhibit____GSA-21)), FCWC provided additional
22 information to the USEPA which was requested during
23 the "show cause" hearing. On September 16, 1991, the
24 USEPA issued NPDES Permit No. FL0042293
25 (Exhibit____(GSA-22)) which authorized the Barefoot

1 discharge effective November 1, 1991. The permit
2 provided for ceasing discharge by June 30, 1995.

3 On September 25, 1991, the USEPA issued
4 Administrative Complaint and Consent Agreement and
5 Order Assessing Administrative Penalties, Docket No.
6 CWA-IV 91-538, assessing a penalty in the amount of
7 \$6,000 in settlement of the violations alleged in
8 the Administrative Order No. 90-106 (Exhibit____GSA-
9 23)).

10 FCWC requested that the USEPA accept CBOD in
11 lieu of BOD as the appropriate water quality
12 standard and by letter dated October 28, 1993, the
13 USEPA notified FCWC that it intended to modify the
14 NPDES permit accordingly. The NPDES permit was
15 finally modified to reflect this change on March 24,
16 1994.

17 Q. Until the Amended Complaint was filed, did the USEPA
18 give any indication to FCWC that it was considering
19 the imposition of penalties for previously reporting
20 CBOD rather than BOD or for exceeding any NPDES
21 permit limits?

22 A. No.

23 Q. Did FCWC attempt to settle the litigation with the
24 USDOJ after the Original and Amended Complaints were
25 filed but prior to trial?

1 A. Yes, FCWC made numerous efforts to settle with the
2 USDOJ prior to trial but was unsuccessful. FCWC
3 made an offer of judgement to the USDOJ in the
4 amount of \$500,000 on March 14, 1995 which was
5 summarily rejected. Witness Baise's testimony will
6 cover settlement negotiations in more detail.

7 Q. When did "discovery" commence in the litigation?

8 A. Discovery commenced on March 11, 1994 when the USDOJ
9 filed its first request for the reproduction of
10 documents.

11 Q. Were you deposed by the USDOJ?

12 A. Yes. However, when initially deposed on March 27,
13 1995, on advice of counsel, I declined to answer
14 questions and invoked my right under the Fifth
15 Amendment although I did not believe that I had
16 violated the law in any respect. This advice was
17 prompted by a U.S. Supreme Court decision on January
18 23, 1995 to deny certiorari in the case of
19 Weitzenhoff v. United States, decided by the U.S.
20 Court of Appeals for the Ninth Circuit. I was
21 advised that under Weitzenhoff, anyone who
22 discharges water, no matter how clean, under
23 circumstances where there is a technical violation
24 of a statute, regulation, or permit can be convicted
25 of a felony even if that person had no knowledge

1 whatsoever of any technical violations, or if that
2 person actually believed that he or she was
3 complying with the law in all respects. I was
4 further advised that it does not matter that a
5 person had no idea that his or her conduct might
6 violate the law, and further it does not matter that
7 the discharges are entirely clean and comply in all
8 respects with all federal and state standards.

9 In the fall of 1995, I decided that I would
10 testify and the USDOJ was so notified. My
11 deposition was taken on November 13 and December 15,
12 1995.

13 Q. When was the trial held?

14 A. The trial, lasting eight days, was held during the
15 period March 25-April 5, 1996.

16 Q. What was your involvement at trial?

17 A. I acted as FCWC company representative and
18 testified.

19 Final Outcome of Litigation

20 Q. What was the final outcome of the litigation?

21 A. In its order (Exhibit____(GSA-24)), the Court found
22 that any "potential risk of harm" to the environment
23 had not been quantified. The USDOJ had stipulated
24 in its pre-trial discovery responses and at trial
25 that it had no evidence showing that the violations

1 of the CWA resulted in any environmental harm.

2 With respect to Barefoot, the Court concluded
3 that the TRC violations occurred because FCWC was
4 unaware that the test method approved by the USEPA
5 did not provide precise results and that the levels
6 measured could have been reported as "not
7 detectable," such that FCWC would have been deemed
8 to be in compliance and furthermore, that BOD could
9 have been calculated from CBOD and had this been
10 done, the BOD limits would not have been violated.
11 With respect to toxicity, the Court noted the
12 discrepancy between the plant capabilities and the
13 toxicity requirements of the NPDES permit. In
14 summary, the Court found that the TRC and BOD
15 violations were not serious and that the toxicity
16 test violations were somewhat serious.

17 With respect to Carrollwood, the Court found
18 that none of the violations were serious.

19 With respect to Waterway Estates, the Court
20 found that most of the violations were not serious.
21 Furthermore, the Court found that the discharges to
22 an unpermitted location violations were somewhat
23 mitigated by the fact that the canal was a
24 previously approved discharge location.

1 The Court entered judgement against FCWC civil
2 penalties as follows:

3	Barefoot	\$ 5,610.10
4	Carrollwood	14,675.00
5	Waterway	<u>289,425.00</u>
6	Total	<u>309,710.00</u>

7 Q. Was FCWC satisfied with the outcome of the
8 litigation?

9 A. Yes. I believe the Court's judgement is consistent
10 with FCWC's early assessment of the ultimate outcome
11 and with FCWC's analysis in formulating settlement
12 offers.

13 Q. Did FCWC pay the judgement to the United States?

14 A. Yes.

15 Q. Did the Court find AHI liable in any way for
16 violations of the CWA?

17 A. No.

18 Legal Counsel

19 Q. When did FCWC first retain outside legal counsel in
20 the matters which were the subject of the Original
21 and Amended Complaints?

22 A. FCWC first retained the firm of Parsons and Landers
23 in April 1991 which provided counsel in connection
24 with Waterway, Carrollwood and Barefoot in the early
25 discussions of settlement. Parsons and Landers

1 involvement essentially ceased with respect to
2 Carrollwood and Barefoot when FCWC and the USEPA
3 entered into the Consent Agreements and Orders
4 Assessing Administrative Penalties which FCWC
5 believed resolved these matters. With respect to
6 Waterway, Parsons and Landers remained the principal
7 legal counsel until Altson and Bird was retained but
8 thereafter had a very limited role.

9 Q. Why was Parsons and Landers selected for these
10 services?

11 A. Jay Landers, the lead attorney with the Parsons and
12 Landers firm was formerly the Secretary of the FDEP
13 had substantial knowledge of USEPA Region IV through
14 this experience and legal expertise with regard to
15 the permitting process and enforcement.

16 Q. Why did FCWC select Alston & Bird?

17 A. Lee A. DeHihns, the Alston & Bird attorney who
18 provided counsel, was the former USEPA Region IV
19 General Counsel and Acting Region Administrator.
20 Through this experience he had attained expertise in
21 the legal and administrative aspects of the CWA.
22 Furthermore, he was acquainted with most of key
23 administrative and legal staff members at USEPA
24 Region IV.

25 Q. Describe the services Mr. DeHihns provided?

1 A. Mr. DeHihns provided advise and counsel to FCWC on
2 the legal implications of the allegations leading to
3 the Original Complaint, represented FCWC at meetings
4 between FCWC and the USEPA Region IV officials
5 during the period of settlement discussions, and
6 acted as an advisor to Jenner & Block and FCWC's
7 General Counsel during the period beginning after
8 Jenner & Block was retained in June 1993 until the
9 Original Complaint was filed and limited counsel
10 from time to time after it was filed.

11 Q. What other attorneys eventually become involved?

12 A. In May 1993 when it became evident that the prospect
13 of a settlement was not good, FCWC and its General
14 Counsel consulted with Weil, Gotshal & Manges, the
15 Avatar Holding Inc. Corporate Counsel and other law
16 firms. Weil, Gotshal & Manges had provided legal
17 services to Avatar Utilities Inc. subsidiaries from
18 time to time on matter related to environmental law.
19 However, FCWC's General Counsel concluded that
20 attorneys having extensive expertise in CWA law
21 could better serve FCWC inasmuch as the statutory
22 penalties were enormous and consequently the future
23 of FCWC was at stake. This lead to the selection of
24 Mr. Gary H. Baise with the firm of Jenner & Block.
25 Mr. Baise was selected because his area of expertise

1 and specialization in the law dealt with the issues
2 involved in the FCWC case; he was recommended to the
3 FCWC General Counsel by a number of attorneys in the
4 this field of law; the firm's ability to provide
5 legal backup, paralegal assistance, etc.; and the
6 prestige of Jenner & Block.

7 Later, local counsel in Ft. Myers was retained
8 to assist in the filing of documents with the Court
9 in Ft. Myers and proceedings preliminary to trial.
10 The firm of Henderson, Franklin, Starnes & Holt,
11 P.A. was selected after consideration of a total of
12 three firms because of recommendations of local
13 attorneys, their familiarity with the local Federal
14 District Court and its rules, their size and ability
15 to provide backup, and their nearness to the Court
16 and ability to file documents on short notice. Mr.
17 John A. Noland was the principal attorney in this
18 case.

19 Mr. Richard J. Leon with the firm of Baker and
20 Hostetler was retained in early 1995 to assist with
21 settlement negotiations with the USDOJ. Mr. Leon, a
22 former USDOJ official, had extraordinary experience
23 in negotiating with the USDOJ.

24 Q. Did Mr. Baise leave Jenner & Block after he was
25 retained?

1 A. Yes, Mr. Baise left the firm at the end of 1994 and
2 joined the firm of Gabeler, Baise & Miller. This
3 firm later changed to Baise & Miller.

4 Q. Who were Mr. Baise's co-counsel who provided legal
5 services in connection with the case?

6 A. Co-counsel included Don G. Scroggin, Alexander M.
7 Bullock and Lance W. High.

8 Q. Who represented Avatar Holdings Inc.?

9 A. Avatar Holdings Inc. was represented by Weil,
10 Gotshal & Manges LLP. The lead attorney was David
11 B. Hird.

12 Legal Expenses

13 Q. What was the total legal expenses associated with
14 FCWC defense which forms the basis for the recovery
15 sought in this rate proceeding?

16 A. The total outside expenses which forms the basis for
17 recovery is \$3,826,210. See Exhibit____(MM-2).

18 Q. Were any of these expenses associated with AHI's
19 defense?

20 A. No.

21 Q. Please provide a breakdown of these expenses by
22 category.

23 A. The breakdown is as follows:

24	Attorney Fees & Expenses	\$ 3,634,470
25	Expert Witness Fees & Expense	190,314

1 Fact Witness Fees & Expenses 1,426

2 Total \$ 3,826,210

3 Q. Does this total include any amounts for FCWC
4 personnel, travel, document production or copying,
5 or incidentals?

6 A. No.

7 Q. Did FCWC sustain any expenses in these categories?

8 A. Yes, but FCWC is not attempting to recover such
9 expenses in this proceeding.

10 Q. Can these expenses be separated as to the Barefoot
11 Bay, Carrollwood and Waterway systems?

12 A. No. From the early stages of discovery following
13 the filing of the Original Complaint, the scope
14 changed dramatically and until the Amended Complaint
15 was filed in March 1995, included, for purposes of
16 discovery, all FCWC facilities. Therefore, it was
17 not until over two years after the Original
18 Complaint was filed that the scope of much of the
19 legal work narrowed to the extent that only
20 Waterway, Carrollwood and Barefoot were involved.
21 The discovery, pretrial motions, briefs and other
22 proceedings were so intermingled that an attempt to
23 account for legal expenses on a specific plant or
24 system basis was not possible.

25 Q. Did FCWC take measures to control legal expenses?

1 A. Yes. FCWC took several measures to control legal
2 expenses including the following:

3 (1) The FCWC General Counsel renegotiated attorney
4 billing rates with Mr. Baise when he left the firm
5 of Jenner and Block in December 1994. The rates for
6 Mr. Baise and Mr. Scroggin were reduced from \$275
7 and \$225 per hour respectively, to \$200 for each.
8 These billing rates were well below the typical
9 rates in the Washington D.C. area for attorneys
10 having special expertise in CWA litigation.

11 (2) The FCWC General Counsel monitored legal
12 expenses carefully and consulted with Mr. Baise
13 frequently regarding legal expense budgets. All
14 invoices for legal services were first carefully
15 reviewed by FCWC General Counsel and transmitted to
16 FCWC for review prior to payment.

17 (3) Discovery entailed the furnishing of over one
18 million pages of documents and millions of bytes of
19 data on computer storage media. It was decided
20 fairly early in the discovery process to limit the
21 review of documents by FCWC's counsel for
22 confidential and privileged documents. To have
23 followed typical procedures and had counsel to
24 review each document for confidential and privileged
25 content, redact the confidential and privileged

1 portions and defend the discovery motions which
2 would have likely resulted would have resulted in
3 substantially higher legal fees. The USDOJ was
4 essentially given access to FCWC files at ten
5 locations, selected the documents desired and FCWC
6 copied same and submitted to the USDOJ through its
7 legal counsel.

8 (4) Every effort was made to schedule depositions so
9 that attorney time was minimized.

10 Q. Of the total amount of \$3,826,210, how much is FCWC
11 seeking to recover through rates?

12 A. FCWC is seeking to recover from all customers,
13 without regard to rate making jurisdiction,
14 \$3,589,368 plus rate case expenses. See
15 Exhibit____(MM-3) and Exhibit____(MM-4).

16 Q. What is the basis for this amount?

17 A. The most rational basis for determining the amount
18 that FCWC is justified in recovering is to compare
19 the offer of settlement presented by the USDOJ prior
20 to the filing of the Original Complaint with the
21 final judgement rendered by the Court. The offer
22 presented by the USDOJ by letter dated December 12,
23 1992 provided for FCWC's payment of a penalty in the
24 amount of \$5,000,000 (Exhibit ____ (GSA-4) whereas
25 the final judgement was \$309,700 or 6.19 percent of

1 the offer. Therefore, FCWC would forego recovery of
2 6.19 percent (\$236,842) of its legal expenses
3 associated with its defense but is justified in
4 recovering the remainder or 93.81 percent of the
5 total. Therefore, when combined with the penalty,
6 FCWC will forgo the recovery of \$547,562. This
7 compares closely with the \$500,000 settlement offer
8 presented to the USDOJ before the litigation was
9 initiated and before FCWC had sustain any
10 appreciable legal expenses.

11 Q. Of the total amount FCWC is seeking to recover, how
12 much is it seeking to recover from its customers in
13 Lee County and Barefoot Bay?

14 A. FCWC is seeking to recover \$2,265,833 plus rate case
15 expenses from these customers (See Exhibit____(MM-
16 4)).

17 Q. Did FCWC act responsibly and make reasonable efforts
18 to comply with regulatory requirements with respect
19 to Waterway, Carrollwood and Barefoot?

20 A. Yes. First, environmental regulatory compliance has
21 been and remains a top priority FCWC goal. From
22 both a view of the facts at the time decisions were
23 made by FCWC and a view in hindsight, it is my
24 opinion that FCWC acted reasonably and in good faith
25 in dealing with environmental regulatory compliance

1 matters with respect to Waterway, Carrollwood and
2 Barefoot. FCWC faced almost insurmountable
3 challenges requiring extraordinary measures in
4 meeting the directives of the FDEP and USEPA as well
5 as the other regulatory agencies having any
6 jurisdiction. Throughout the entire course of
7 meeting these mandates, FCWC was under constant
8 pressure to achieve results faster. In the case of
9 Carrollwood and Barefoot Bay, FCWC pursued
10 alternative courses simultaneously in an effort to
11 expedite meeting the mandates of the FDEP and USEPA.
12 In the case of Waterway, FCWC thoroughly
13 investigated all potential alternatives and pursued
14 upgrading the WWTP and relocation of the outfall
15 expeditiously after it was deemed to be the only
16 reasonable alternative. However, it faced obstacles
17 which it could not have reasonably foreseen which
18 caused delays. In addition to meet the mandates of
19 the FDEP and the USEPA, FCWC had to satisfy numerous
20 other regulatory agencies, some of which had
21 requirements and goals which conflicted with those
22 of the FDEP and USEPA. From the perspective of
23 overall outcomes, I believe the FDEP was satisfied
24 with FCWC's performance as is implicit in the
25 deposition and testimony at trial of current and

1 former FDEP officials. Furthermore, as evidenced by
2 its actions with respect to the imposition of modest
3 penalties in the case of Carrollwood and Barefoot
4 long before the USDOJ filed the Original Complaint
5 as discussed in the preceding testimony, I believe
6 the USEPA was satisfied with the outcomes at these
7 facilities.

8 Second, FCWC always considers customer rate
9 impacts in making decisions on matters which effect
10 rates and certainly did so in considering
11 alternatives for meeting the mandates of the FDEP
12 and USEPA in the case of Waterway, Carrollwood and
13 Barefoot Bay. It must be recognized that
14 environmental regulatory agencies focus on achieving
15 goals aimed at compliance in the most expeditious
16 manner and generally give little consideration to
17 the cost and resulting impacts on customer rates.
18 In fact, my experience in dealing with environmental
19 regulators clearly reveal that generally they have
20 little knowledge of rate making. This required that
21 FCWC balance the desires of the FDEP and USEPA to
22 expedite action with customer rate impacts of the
23 action. In dealing with the regulatory compliance
24 matters in the case of Waterway, Carrollwood and
25 Barefoot Bay, FCWC was the only advocate for its

1 customers with respect to rate impacts. Had FCWC not
2 acted responsibly in this regard, customer rates
3 would have undoubtedly been higher.

4 Q. Why do you think recovery of these expenses through
5 customer rates is justified?

6 A. FCWC should be allowed to recover through rates
7 reasonable and prudently incurred expenses in
8 connection with fulfilling its obligations
9 pertaining to the provision of service to its
10 customers. This encompasses expenses of all kinds,
11 including legal expenses. It is clearly prudent
12 that FCWC, like any other business enterprise, avail
13 itself of legal services. To act otherwise would
14 not be in the best interest of its customers. Such
15 expenses are not unlike any other expense incurred
16 in the course of fulfilling its obligations with
17 respect to the provision of service to its
18 customers.

19 In the past, FCWC has been presented with
20 numerous settlement demands by claimants, including
21 regulatory agencies. It has consistently acted in a
22 reasonable manner with advice of legal counsel and
23 in most instances reached settlement with claimants.
24 However, there have been other instances where
25 claimants acted in an unreasonable manner and

1 settlement could not be reached and litigation
2 resulted. The legal expenses associated with
3 settling such claims or if settlement is not
4 reached, litigating claims settlement, has
5 historically been deemed prudently incurred expenses
6 and recovered through rates. The circumstances and
7 actions taken by FCWC in dealing with the USDOJ
8 claim do not differ in any material sense from
9 historical cases and the expenses incurred should be
10 recovered through rates. In this case, after careful
11 consideration with the advise of competent legal
12 counsel, FCWC concluded that the settlement demand
13 which the USEPA presented to FCWC prior to the
14 filing of the Original Complaint was clearly
15 unreasonable. This conclusion was borne out by the
16 judgement rendered by the Court. The settlement
17 demand of \$5,000,000 presented by the USDOJ prior to
18 filing the Original Complaint was sixteen times the
19 \$309,710 judgement rendered by the Court.
20 Alternatively expressed, the judgement was six
21 percent of the settlement demand. If only Waterway,
22 which was the only facility alleged to be in
23 violation of the CWA in the Original Complaint, is
24 considered, the judgement of \$289,425 is \$210,575 or
25 42 percent less than FCWC's counteroffer of \$500,000

1 rendered in January 1993 prior to filing of the
2 Original Complaint and \$190,290 or 38 percent less
3 than the total penalties imposed by the Court's
4 final judgement for all violations at Waterway,
5 Carrollwood and Barefoot.

6 Q. Does this conclude your testimony?

7 A. Yes.