ORIGINAL

GRAY|ROBINSON
ATTORNEYS AT LAW

SUITE 1400
301 EAST PINE STREET (32801)
P.O. BOX 3068
ORLANDO, FL 32802-3068
TEL 407-843-8880
FAX 407-244-5690
gray-robinson.com

CLERMONT
FORT LAUDERDALE
JACKSONVILLE
KEY WEST
LAKELAND
MELBOURNE
NAPLES
ORLANDO
TALLAHASSEE
TAMPA

W. Christopher Browder

407-244-5648

CBROWDER@GRAY-ROBINSON.COM

February 10, 2006

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VIA FEDERAL EXPRESS
Blanca S. Bayo, Director
Division of Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 050925-EI 0 In Re: Request for Declaratory Statement by Progress Energy Florida, Inc.
Client-Matter No. 40363-2

Dear Ms. Bayo:

Included with this correspondence for filing the in above-referenced Docket No. 050925-EI, are seven (7) copies of the *ex parte* letter sent on behalf of the Town of Belleair to each Commissioner and all interested parties and setting forth the Town's position on the requested declaratory statement.

Sincerely,

W. Christopher Browder

WCB/:ds

Enclosures - as stated above

cc: Mr. Stephen J. Cottrell, Town Manager, Town of Belleair

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GRAY|ROBINSON
ATTORNEYS AT LAW

SUITE 1400
301 EAST PINE STREET (32801)
P.O. BOX 3068
ORLANDO, FL 32802-3068
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FAX 407-244-5690
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FORT LAUDERDALE
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MELBOURNE
NAPLES
ORLANDO
TALLAHASSEE
TAMPA

407-843-8880
TCLOUD@GRAY-ROBINSON.COM

February 10, 2006

Commissioner Lisa Polak Edgar
Commissioner J. Terry Deason
Commissioner Isilio Arriaga
Commissioner Matthew M. Carter II
Commissioner Katrina J. Tew
Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Docket No. 050925-EI - In re: Request for Declaratory Statement by Progress Energy Florida, Inc.
Our Client Matter No.: 40363-2

Dear Commissioners:

In recognition of the exception under §350.042(1), *Florida Statutes*, to the general prohibition against *ex parte* communications to Commissioners of the Florida Public Service Commission, we submit this correspondence on behalf of our client, the Town of Belleair (the "Town"). We are writing in reference to Docket No. 050925-EI (the "Docket") in which Progress Energy Florida ("PEF") has filed its Petition for Declaratory Statement before the Florida Public Service Commission dated December 21, 2005 (the "Petition"). For purposes of convenience, "PEF" when used herein shall refer either to Progress Energy Florida or its predecessor, Florida Power Corporation, whichever shall apply given the applicable facts and time period referenced.

The Florida Public Service Commission (the "Commission") has recognized that *ex parte* communications with a Commissioner in the context of a docket involving a request for declaratory statement is appropriate.[1] This is consistent with the nature of the declaratory statement proceeding as basically an *ex parte* process which does not generally recognize the right of a third party to intervene in the docket for the purpose of controverting the facts represented in the request by the petitioner.[2] It is pursuant to this recognized exception that we

[1] Order No. PSC-98-0449-FOF-EI, 99 Commission 3:389 (1998)(wherein the Commission specifically recognized the *ex parte* exception and made the written third party ex parte correspondence a part of the docket record).

[2] *See* Order No. PSC-95-0894-FOF-WS, 95 Commission 7:256 (1995) at 49, footnote 3 (Dissenting opinion of Commissioner Deeson looks at nature of declaratory statement proceedings).

provide this correspondence and request that it be made a part of the record of the Docket. Copies of materials referenced in this correspondence are attached for your convenience.

The Town, while not waiving any right it may have to seek to intervene in the Docket, has chosen to provide its initial position on the declaration requested by PEF in the Petition by means of this letter. For the reasons which are set out in detail later herein, the Town respectfully submits that the Commission must, as a matter of law and Commission policy, decline to issue the requested declaration. The declaration requested in the Petition if issued by the Commission, would be contrary to Commission precedent and applicable case law. While PEF may have legitimate questions as to certain inconsistencies between Commission Orders 8035 and 8029 and existing case law on the topic of franchise fees, a petition for declaratory statement is not the appropriate forum to answer such questions. Either a general rate case or an evidentiary hearing would be more appropriate and provide a forum for factual issues to be presented by all interested parties.

I. CRITERIA FOR DECLARATORY STATEMENTS

A. Threshold Criteria for Declaratory Statement. A review of Commission dockets involving requests for declaratory statement make it clear that the Commission will only entertain such requests where the following threshold conditions have been met:

1. A substantially affected person seeks a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of an agency, as it applies to the petitioner' particular set of circumstances[3];

2. The petitioner states with particularity the petitioner's set of circumstances and the specific statutory provision, rule or order that the petitioner believes may apply to the set of circumstances[4];

3. The petitioner shows an "actual, present and practical need for the declaration"[5]; and,

4. The petitioner shows that the requested declaration addresses a "present controversy"[6].

Likewise, the Commission has determined that it will not issue a declaratory statement where the declaratory statement requested is inappropriate for (among others) the following reasons:

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3 Order No. PSC-01-1611-FOF-SU, 01 FPSC 8:41(2001).

4 *Id.*

5 Order No. PSC-04-0063-FOF-EU, 04 FPSC 1:162 (2004) at 9 (*citing Sutton v. Department of Environmental Protection*, 654 So.2d 1047, 1048 (Fla. 5th DCA 1995) and *Santa Rosa County, Fla. v. Administrative Commission, Department of Administrative Hearings*, 661 So.2d 1190, 1193 (Fla. 1995)).

6 *Id.*

1. The request for declaratory statement does not allege facts specific enough to warrant the declaration requested[7]; or,

2. The declaration requested would result in a statement of general applicability interpreting law or policy[8]; or,

3. The declaration requested would amount to piecemeal ratemaking which circumvents general rate case proceedings[9]; or,

4. The declaration, if issued, will not resolve all pending issues[10].

B. Applicable Caselaw on Collection of Franchise Payments. In addition to the relevant Commission precedent above, caselaw on the subject of the collection of franchise payments must be considered by the Commission in making its determination as to whether it should issue the declaration requested in the Petition. Florida case law disfavors charging current utility customers retroactively for past charges that were not collected by the utility at the time services were rendered. While PEF cites correct general principles regarding ratemaking, Florida case law provides more detailed analysis of fact-specific situations involving the collection of past-due franchise fees from current customers rather than the actual customers who enjoyed the benefit of electricity during the period of time in dispute. Even more importantly, PEF completely ignores in the Petition why, given the holding in the *Florida Power Corp. v City of Winter Park*, 827 So. 2d 322 (5th DCA 2002) case cited, it failed to collect the franchise fees from customers in the Town during the period between September 24, 2002, and November 11, 2004 (the "Dispute Period"). Given (1) the holding in the *Florida Power Corp.* case and (2) the fact that Fifth District Court in that case certified to the Florida Supreme Court a conflict between that case holding and the Second District Court's holding in *Florida Power Corporation v Town of Belleair*[11], the decision by PEF not to at least seek permission to collect and escrow the franchise fees during the Dispute Period as it did in the *Winter Park* case was imprudent if not grossly negligent. PEF now seeks to have the Commission reward its decision not to collect any fees for use of the Town's rights-of-way during the Dispute Period. This is behavior the Fifth District Court of Appeals has described as putting PEF in the position "... to extort favorable terms..."[12] from the Town during franchise agreement renegotiations. Accordingly, the applicable case law supports a denial of the declaration, or in the alternative, an answer in the negative.

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7 *See* Order No. PSC-98-0074-FOF-EU, 98 FPSC 1:306 (1998).

8 Order No. PSC-98-0078-FOF-EU, 98 FPSC 1:318 (1998) (*citing Regal Kitchens, Inc. v. Florida Dep't of Revenue*, 641 So.2d 158 (1st DCA 1994) and *Mental Health District Bd v Florida Dep't of Health and Rehabilitative Services*, 425 So.2d 160 (1st DCA 1983)).

9 Order No. 11955, 83 FPSC 76 (1983).

10 Order No. 21301, 89-5 FPSC 471 (1989).

11 *Florida Power Corporation v. Town of Belleair,* 830 So. 2d 852 (2d DCA 2002)

12 *Florida Power Corporation v City of Winter Park*, 827 So. 2d 322, 325 (5th DCA 2002).

II. DETAILED DISCUSSION OF CITY'S POSITION

A. **The Requested Declaratory Statement is Inappropriate and Should be Denied.** The Commission should deny PEF's request for declaratory statement in the Petition for the following reasons:

1. The Petition fails to Allege Facts Sufficient to Support the Declaration Requested.

When a request for declaratory statement does not allege facts specific enough to warrant the declaration requested, the request must be denied.[13] PEF has failed to provide enough factual background in the Petition to allow the Commission to issue the declaration requested or to allow the Commission to determine if permitting PEF to require that uncollected franchise fees be paid by current electric customers within the Town is equitable or permissible under Commission rules and applicable case law. For example, no facts are provided regarding how many of the current customers from whom PEF now seek to collect past due franchise fees are the same customers from whom the franchise fees should have been originally collected. Further, PEF fails to provide any data regarding the total amount of such uncollected franchise fees. PEF also fails to provide any information on how exactly the uncollected fee amount will be calculated, what PEF revenues (i.e., the time period) will be used to calculate the franchise fees to be collected and the resulting per customer charge. The Town has a distinct interest in and need to verify the calculation methodology PEF proposes to use in calculating the franchise fees.

The Commission should also have an interest in learning the methodology by which the uncollected franchise fees will be calculated. Since franchise fees are by definition a percentage of revenues collected by PEF from customers within the Town during the relevant time frame, the Town has to assume that the proposed calculation of the franchise fees PEF now seeks to collect would be based on a historical look at revenues during the Dispute Period. On the other hand, PEF may be requesting to calculate the amount in another way. PEF fails to provide any facts regarding its treatment of the calculated franchise fee amount and if it will be assessed retroactively or on a going forward basis. Further, PEF provides no information in the Petition as to whether it proposes to assess the resulting franchise fee amount against only those customers within the Town who were also customers during the Dispute Period, or all current Town customers. This fact would, in the Town's opinion, be a very important consideration by the Commission in its determination as to whether it should issue the declaration requested in the Petition. Without understanding the method proposed, it is difficult to assess the reasonableness of what PEF now requests in the declaratory statement. Without such information the Commission cannot issue what would amount to an unconditional declaration allowing PEF to impose an additional utility charge on the Town's current PEF customers.

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[13] *See* Order No. PSC-98-0074-FOF-EU, 98 FPSC 1:306 (1998) (In which the Commission opted to deny the request for declaratory statement and instead hold a Section 120.57(1) evidentiary hearing where facts alleged in support of the requested declaration were either insufficient or in dispute and therefore did not support the Commission's issuance of the requested declaration).

2. The Declaration Requested Will Result in a Statement of General Applicability Interpreting Law.

Where a request for a declaratory statement will result in a statement of general applicability interpreting law or policy, the request must be denied[14]. The Commission has followed the mandate set out in *Regal Kitchens, Inc. v. Florida Dep't of Revenue*, 641 So.2d 158 (1st DCA 1994) and *Mental Health District Bd v. Florida Dep't of Health and Rehabilitative Services*, 425 So.2d 160 (1st DCA 1983) in refusing to issue declaratory statements which amount to general statements of policy. In *Regal Kitchens*, the First District Court of Appeals rejected portions of a declaratory statement issued by the Florida Department of Revenue where such portions amounted to the ". . . adoption of broad agency policy or rule interpretation that apply to an entire class of Persons." *Regal Kitchens* at 162. Further, that Court went on to say that the rejected portions of the declaratory statement were too broad in that they ". . . sent a message to a broad class of taxpayers..." regarding that agency's position relative to a codified tax exemption. *Id.* Likewise, the Second District Court of Appeals in *Mental Health District Board* rejected a declaratory statement issued by the HRS which in effect amounted to a statement of general applicability which "...is not an appropriate result of a declaratory statement." *Mental Health District Board* at 162.

In keeping with the direction of the courts in the *Regal Kitchens* and *Mental Health District Board* cases, the Commission has declined to issue declaratory statements where the implications of the declaratory statement requested would affect the power industry statewide.[15] In the Petition PEF requests the Commission to issue a declaration, the effect of which would be to condone as a matter of general policy the collection of franchise fees owed by former customers from a different set of current customers rather than from all current utilities customers as part of the rate base. This declaration would most certainly affect every rate payer living within a municipal area served by a franchise paying investor owned utility. The declaration would also affect every franchise paying investor owned utility within the State of Florida that must determine how to account for uncollected franchise fees. Finally, the declaration requested would as a matter of policy predetermine how uncollected franchise fees must be treated in the context of a general rate case and rate base determination.

3. The Declaration Requested Would Amount to Ratemaking Outside of a Rate Case.

When the declaration requested would amount to piece meal ratemaking which circumvents general rate case proceedings, the request must be denied.[16] The Commission has made it clear that it will not use a declaratory statement to pre-determine an issue as to what a

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[14] Order No. PSC-98-0078-FOF-EU (Commission declined to issue declaration where implications of declaration would affect the electric power industry statewide).

[15] *Id.*

[16] Order No. 11955, 83 FPSC 76 (1983); *See also,* Order No. 12649, 83 FPSC 37 (1983).

utility's future rate will include.[17] The Commission addresses broad statements as to how it will generally treat similar situations by the rule making process.[18] If the declaration requested in the Petition is given by the Commission, the Commission will effectively have issued an unqualified policy statement as to the proper accounting treatment of uncollected franchise fees outside of the context of a general rate case proceedings.

Uncollected franchise fees are a proper element to be considered in a general rate case proceeding.[19] If the Commission issues the requested declaration, it will effectively allow PEF to circumvent general rate case proceedings on the issue of uncollected franchise fees. Factors that might be considered in a general rate case proceeding regarding the collection of these uncollected franchise fees by PEF should include: the proper classification of such uncollected franchise fee under standard utility accounting rules[20]; how much (if any) of such charge should be borne by the rate payers generally, by specific rate payers and by the PEF shareholders; the nature of these uncollected fees and reasons now needing to seek to recover them when no current franchise fees are assessed by the Town against PEF; and the decision by PEF not to collect such fees and if such decision was prudent. In a full rate case proceeding, evidence could be presented by all interested parties to address these questions.

These questions must be addressed, if for no other reason than to allow the Commission to determine if the decision by PEF not to collect the franchise fees originally was prudent. The Commission has made it clear that an approved rate of return ". . . cannot, by itself, guarantee financial viability; a regulated utility has the responsibility for making prudent business decisions."[21] Losses associated with imprudent business decisions must be borne by PEF's shareholders.[22] PEF was a party in both *Florida Power Corporation v Town of Belleair*[23] and *Florida Power Corp. v City of Winter Park.*[24] In the *City of Winter Park* case, the Fifth District Court of Appeals ruled against PEF by upholding the lower court's injunction requiring the collection of franchise fees by PEF during the period after the original franchise agreement in that case had expired.[25] At the conclusion of that case, the Fifth District Court of Appeals certified a conflict between that case and the *Town of Belleair* case. In spite of the fact that the Fifth District Court upheld the duty of PEF to collect franchise fees during the period of negotiation after the expiration of the City of Winter Park franchise, in an abundance of caution PEF requested permission to escrow the funds collected rather than pay Winter Park just in case the decision were to be overturned by the Florida Supreme Court.

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17 Order No. 11955.
18 *Id.*
19 *See e.g.*, Order No. PSC-04-0369-AS-EI, 04 FPSC 4:171 (2004) (Order addressing the treatment of uncollected franchise fees as an element of the base rate calculation)]
20 *See e.g.*, Id. at 34 (Commission classification of uncollected franchise fees as operating costs).
21 Order No. PSC-92-0807-FOF-WS, 92 FPSC 8:216 (1992).
22 See Order No. PSC-93-1023-FOF-WS, 93 FPSC 7:319 (1993).
23 *Florida Power Corporation v Town of Belleair* 830 So.2d 852 (2d DCA 2002).
24 *Florida Power Corporation v City of Winter Park,* 827 So. 2d 322 (5th DCA 2002)
25 Id.

Unfortunately, PEF did not use the same abundance of caution during the Dispute Period. PEF failed to request permission from the lower court after the *Town of Belleair* case to collect and escrow the franchise fees in the event the decision were to be overturned by the Florida Supreme Court. PEF states in Paragraph 7 of the Petition "In compliance with the Second District Court of Appeal mandate, PEF stopped collecting the six percent of revenue franchise fee from its customers and , therefore, stopped remitting the franchise fees to the Town." The Mandate from the Second District Court of Appeal, while overturning the trial court's injunction regarding the collection of the 6% flat franchise fee, goes on to state that ". . . Belleair does have the authority to charge a reasonable regulatory fee for the use of the rights of way, and FPC has conceded that it is obligated to pay such fee and stands ready to do so."[26] The Mandate therefore must not be utilized by PEF as justification for failing to collect any and all fees for use of the Town's rights-of-way during the Dispute Period. Further, PEF had the opportunity to request the option of collecting franchise fees since it admits in Paragraph 7 of the Petition that "Because The Town had sought review of the Second District's decision to the Florida Supreme Court, the trial court ruled that the franchise fees collected and paid to the Town between the expiration of the franchise agreement and the Second District's Mandate be placed in escrow pending a ruling by the Florida Supreme Court." Clearly the decision to simply ignore the possibility that franchise fees or other regulatory fees would in fact become payable to the Town was imprudent and if so, the Commission in a rate case would require PEF's shareholders to bear the cost to make up such uncollected fees.[27]

To issue the declaration requested in the Petition without looking at all relevant rate considerations, the Commission would be rewarding behavior condemned by the Fifth District Court of Appeals as "extortion" and would effectively be making a policy statement that uncollected franchise fees owed by former utility customers may, regardless of the reason for the failure to collect such fees, be imposed on new customers rather than absorbed is an imprudent loss by PEF shareholders. Such a declaration would ". . . predetermine an issue as to what a utility's future rates will include to the exclusion of Commissioners who will hearing [sic] the cause at some future time," and the Commission has said it will not do this.[28]

4. A Declaration from the Commission Will not Resolve the Issue.

Where a declaration will not likely resolve all pending issues raised in the petition, the request for declaratory statement must be denied[29]. If the Commission issues the declaration requested in the Petition, either affirmatively or negatively, it will not resolve the apparent conflict between the case law set out later herein and the requirement of general Rule 25-6.100(7), Fla. Admin. Code, Commission Order No. 8035 and Commission Order No. 8029 to collect franchise fees from the citizens within the Town imposing the franchise payment on PEF. Either party could rightfully take further action to seek clarification on the inconsistency between

[26] Mandate from District Court of Appeal of the State of Florida, Second District, September 24, 2002 at 4.
[27] See Order No. PSC-93-1023-FOF-WS.
[28] Order No. 11955 at 3.
[29] Order No. 21301, 89-5 FPSC 471 (1989).

the case law and the general requirements of Commission Order No. 8035 and Commission Order No. 8029.

For any one or all of the reasons set out above, the Commission should decline to issue the declaratory statement requested in the Petition. To issue the requested declaratory statement would, in the Town's opinion, be contrary to Commission precedent and policy.

B. **Even if A Declaratory Statement is Appropriate the Declaration Must Be Answered in the Negative.**

1. The Petition Improperly Relies on a General Rule of Law That is Not Applicable to the Request for a Declaration.

PEF solely relies on Commission Orders 8029 and 8035 and *City of Plant City v. Hawkins*, 375 So. 2d 1072 (Fla. 1979) as the basis for requesting that the Commission issue a declaratory statement authorizing collection of franchise fees from current customers for services rendered to former customers. The issues addressed in the Petition and the issues raised in the cited orders and case law are not determinative on the facts in this docket, and therefore do not support the declaration requested.

The issue in Order 8035 was whether the Commission correctly held franchise fees could be collected by the direct method of rate collection rather than the spread method of rate collection. This opinion held that the Commission can design rates as direct or spread methods so long as there is competent and substantial evidence to support the decision. The issue in Order 8029 was to determine the appropriate method to collect franchise fees, again, whether it is the direct method or the spread method of rate collection. The Commission held the direct method of collecting franchise fees was the fairest and most equitable. *Hawkins* also confronted the same issue, and that court also held the direct method to collect franchise fees was the most equitable in comparison to the spread method.

The continuing theme in PEF's cited authority is that based on a comparison between the spread method and the direct method to collect franchise fees, the latter is more equitable. The Town does not dispute this rule of general application regarding the method of collecting franchise fees generally. The Town, however, does dispute PEF's application of such general principles to the unique circumstances of this case.. The cited orders and case law, while generally calling for collection of franchise fees from the Town's customers, do not condone the collection of franchise fees from current customers which could have been collected from the former customers who actually received the electric service.

2. PEF Cannot Charge Current Customers for Past Services Rendered to Former Customers.

Florida Statute, Section 367.081 mandates that utility rates must be just, reasonable, compensatory, and not unfairly discriminatory. In issuing and approving franchise fees, the Commission must also consider the value and quality of the service received by the customers, and the benefit received by the particular customer.[30] PEF cannot competently or substantially show how these current customers will receive a benefit from the franchise fees PEF seeks to impose. PEF does not specify how the customers will be charged, nor does PEF justify why current customers should be required to pay the fee when they were not PEF customers during the Dispute Period.[31]

PEF, of its own volition, chose not to collect and escrow the six percent franchise fees from Town customers during the Dispute Period. Now, rather than absorb the cost to pay the Town, PEF proposes to charge current customers. To allow PEF to do this would be highly inequitable.[32] According to *Sugarmill*, the utility company sought to impose a surcharge on current customers in order to reimburse former customers who overpaid for services received. The court held "it is . . . inequitable to surcharge customers who had no ability to change consumption or choose to remain a utility customer. We cannot cure one inequity by creating a newer, greater inequity." Consequently, the court denied the request for a surcharge in order to facilitate a refund to customers who overpaid their utility rates.

The current PEF customers also have no ability to change consumption levels to lower their overall payment for the Dispute Period. Theoretically, neither these customers nor the Town on their behalf are entitled to be parties in this Docket and therefore have no way to safeguard their interests.[33] The customers were also never on notice they may be subjected to a retroactive surcharge. Another factor to consider is that if the declaration requested in the Petition is granted, these current customers have no real choice but to pay the franchise fees charged in order to maintain service with PEF.[34] If the declaration were granted, a greater inequity would result. Customers who received the benefit of service during the Dispute Period have already paid fees due and owing to PEF. Those former customers maintain a legitimate and rational expectation that PEF will not in the future, at some unknown date, seek to charge them additional franchise fees. For PEF's Town-customers that did not receive the benefit of services during the Dispute Period, it is inequitable to charge them a franchise fee based on service they never used or received. These current customers also maintain a legitimate and rational

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30 *See Plant City v Mayo*, 377 So. 2d at 966, 974 (Fla. 1976) (holding when competent and substantial evidence indicates the individuals charged a franchise fee receive no benefit, removal of that charge may be appropriate).

31 *GTE Fla. Inc. v. Clark*, 668 So. 2d 971 (Fla. 1996) (holding under the facts of the case the surcharge must be limited to customers who received services during the disputed time period).

32 *See Sugarmill Woods Civic Assoc., Inc. v. Fla. Water Services*, 785 So. 2d 720 (Fla. 1st DCA 2001).

33 *See id*; *See e.g.*, Order No. PSC-04-0369-AS-EI, 04 FPSC 4:171 (2004).

34 *See id.* at 726 (holding the crucial factor in denying the right to surcharge current customers is their lack of notice that they may be charged present-day for past services).

expectation that PEF will not in the future, at some unknown date, charge them franchise fees for a benefit they never received. Based on *Sugarmill*, PEF cannot charge now for its improper collections in the past.

Utility customers are transient in nature.[35] A blanket rate increase on current customers within the Town to recoup money PEF failed to collect is not the appropriate solution to the predicament PEF created. Even if PEF tried to locate former PEF customers living within the Town during the Dispute Period, this process is tedious, overly burdensome, and should not be permitted.[36] Moreover, if the declaration were granted, the Town utility customers would be paying higher rates than other PEF customers even though according to Paragraph 13 of the Petition PEF is not currently required by the Town to pay franchise fees. The Florida Supreme Court has stated that due to the transient nature of a utility's customer base, "Retroactive application of a pass-through fee would unfairly benefit some customers and penalize others."[37] In fact, the customers charged the uncollected franchise fees from the Dispute Period would be subject to duplicative charges because the customers must also pay the Town utility tax imposed due to PEF's failure to collect the franchise fees for the Town. This is not fair or equitable.

In summary, the Commission should decline to issue the declaration requested in the Petition. To do so would be contrary to the Commissioner's own requirements for a declaratory statement. If the Commission does grant PEF's request the declaratory statement, however, equitable treatment of PEF's customers within the Town calls for the Commission to answer in the negative. To do otherwise would condone behavior by PEF that Florida courts have condemned as being in the nature of extortion, reward PEF's imprudent decision not to collect franchise fees, violate rate making principles, and provide the PEF customers within the Town with no degree of stability in what rates they are currently being charged. Current customers cannot be required under equity to be subjected to imprudently incurred charges that should be absorbed by PEF and its shareholders.

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35 *GTE Fla. Inc.* v. *Clark*, 668 So. 2d 971 (Fla. 1996); *see also Dept. of Rev. v. Kuhnlein*, 646 So. 2d 717.
36 *See Sugarmill*, 785 So. 2d at 726 *citing Dept. of Rev. v. Kuhnlein*, 646 So. 2d 717, 726 (Fla. 1994).
37 *Florida Power Corp. v. City of Winter Park*, 887 So. 2d 1237, 1242 (2004).

The Town therefore respectfully requests that the Commission decline to issue the declaration requested in the Petitioner or alternatively, answer the declaration in the negative.

Sincerely,

Thomas A. Cloud, Esquire
Florida Bar No. 293326

W. Christopher Browder, Esquire
Florida Bar No. 883212

Attorneys for the Town of Belleair

TAC:WCB:ds:kds
cc: Harold McLean, Office of Public Counsel, c/o The Florida Legislature
James W. Walls, Carlton Fields Law Firm
Paul Lewis, Jr., Progress Energy Florida, Inc.
Alex Glenn, Progress Energy Service Company, LLC
Lawrence Harris, Office of General Counsel, Public Service Commission
Stephen J. Cottrell, Town Manager, Town of Belleair

INDEX OF CITED MATERIALS

1.	Order No. PSC-98-0449-FOF-EI, 99 Commission 3:389 (1998)
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3.	Order No. PSC-01-1611-FOF-SU, 01 FPSC 8:41(2001)
4.	Order No. PSC-04-0063-FOF-EU, 04 FPSC 1:162 (2004), 1193 (Fla. 1995)
5.	*Sutton v. Department of Environmental Protection*, 654 So.2d 1047
6.	*Santa Rosa County, Fla. v. Administrative Commission, Department of Administrative Hearings*, 661 So.2d 1190
7.	Order No. PSC-98-0074-FOF-EU, 98 FPSC 1:306 (1998)
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9.	*Regal Kitchens, Inc. v. Florida Dep't of Revenue*, 641 So.2d 158 (1st DCA 1994)
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15.	Order No. 12649, 83 FPSC 37 (1983)
16.	Order No. PSC-04-0369-AS-EI, 04 FPSC 4:171 (2004)
17.	Order No. PSC-92-0807-FOF-WS, 92 FPSC 8:216 (1992)
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In re: Petition for Declaratory Statement Regarding Eligibility of Pre-1981 Buildings for Conversion to Master Metering by Florida Power Corporation

DOCKET NO. 971542-EI; ORDER NO. PSC-98-0449-FOF-EI

Florida Public Service Commission

1998 Fla. PUC LEXIS 615

99 FPSC 3:389

March 30, 1998

PANEL: [*1]

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman, J. TERRY DEASON, SUSAN F. CLARK, JOE GARCIA, E. LEON JACOBS, JR.

OPINION: ORDER ON DECLARATORY STATEMENT

BY THE COMMISSION:

Pursuant to *Section 120.565, Florida Statutes*, and Rule *25-22.020, Florida Administrative Code*, Florida Power Corporation (FPC) filed a Petition for Declaratory Statement with the Commission on November 24, 1997. By letter dated January 21, 1998, FPC waived the 90-day statutorily required time to respond to its petition for declaratory statement.

FPC seeks a declaration concerning Rule 25-6.049(5)-(7), Florida Administrative Code, as it applies to its particular circumstances. Paragraph (5)(a) of the rule requires individual electric metering by the utility

> for each separate occupancy unit of new commercial establishments, residential buildings, condominiums, cooperatives, marinas, and trailer, mobile home and recreational vehicle parks for which construction is commenced after January 1, 1981.

Rule *25-6.049(5)(a), Florida Administrative Code* [*2] .

FPC seeks the following declaration:

> [a] building or facility listed in paragraph (5)(a) of the Master Metering Rule that currently has individually metered occupancy units, does not become eligible for conversion to master metering under the Rule by virtue of having been constructed on or before January 1, 1981.

FPC alleges that it has received several requests from condominium associations and shopping malls to convert from individual to master meters for buildings constructed prior to 1981. In particular, FPC has received requests from Redington Towers One Condominium Association, Inc. (Redington Towers One) and Redington Towers Three Condominium Association, Inc. (Redington Towers Three) to convert from individual to master meters. FPC acknowledges that it incorrectly converted to master meters the Redington Towers Two Condominium Association, Inc., a sister condominium association to Redington Towers One and Three.

In support of its requested declaration, FPC argues that "it was not pre-1981 buildings that were intended to be grandfathered by the Master Metering Rule -- it was the non-conforming use to which those buildings were put that the Rule grandfathered." FPC [*3] also argues that paragraph (5)(a) should be read to be consistent with the underlying purpose behind the rule, which is to require individual metering. As stated by FPC, "[t]he concept of grandfathering simply tolerates pre-existing non-conforming uses, it does not condone the creation of new ones."

In addition, FPC argues that the declaration sought by FPC is consistent with In re: Petition to Initiate Changes Relating to Rule *25-6.049, F.A.C.*, Measuring Customer Service, by microMETER Corporation, Order No. PSC-97-0074-FOF-EU, 97 F.P.S.C. 1:450 (1997). In microMETER, we declined to amend Rule 25-6.049 to allow buildings that are currently required to be individually metered to be master metered, and then sub-metered. Among our reasons for declining to amend the rule was the mismatch that would result from residential customers taking service under a commercial rate. Id. at 1:452. We also denied the microMETER petition because it was not clear whether master metered residential condominium units would qualify for residential conservation programs. Id. One of the primary reasons we originally required individual metering [*4] was to advance conservation. In the microMETER order, we affirmed our policy to require condominium units to be individually metered. Id. . at 1:453.

On January 16, 1998, Redington Towers One filed a "Brief for Declaratory Statement." Redington Towers Three filed essentially the same brief on February 19, 1998. FPC has not responded to either filing. *Section 350.042(1), Florida Statutes*, allows a commissioner to hear communications concerning declaratory statements filed under *Section 120.565, Florida Statutes*. Because these condominium associations could have made their comments directly to the members of the Commission, we find it appropriate to include them in the record of this proceeding for our consideration. We have also considered such comments in prior declaratory statement proceedings. In re: Petition of Florida Power and Light Company for a **Declaratory Statement** Regarding **Request** for Wheeling, 89 F.P.S.C. 2:298, 300 (1989).

Concerning the merits of FPC's petition, Redington Towers One and Three argue that FPC's interpretation is arbitrary and discriminatory. In particular, [*5] the Towers One and Three argue that FPC's reference to In re: Request for amendment of Rule *25-6.049, F.A.C.*, Measuring Customer Service, by 38 tenants of record at Dunedin Beach Campground, Order No. 97-1352-FOF-EU, 97 F.P.S.C. 10:634 (1997), on page 4 of its petition is misleading. In addition, the Towers One and Three argue that the microMETER case is not controlling here.

We do not find these arguments to be persuasive. Moreover, the reading of the rule sought by Redington Towers One and Three would result in an interpretation in which they could switch back and forth between individual and master meters simply because they were constructed prior to 1981. This is not what we intended by paragraph (5)(a) of Rule 25-6.049. Instead, what was intended was to allow master metered buildings constructed before 1981 to remain master metered to avoid retroactive application of the rule.

While we agree with the arguments raised by FPC, we believe the declaration requested by FPC is too broad. See *Regal Kitchens, Inc. v. Florida Department of Revenue, 641 So.2d 158, 162 (Fla. 1st DCA 1994); Florida Optometric Association v. Department of Professional Regulation, Board of Opticianry, 567 So.2d 928, 936-937 (Fla. 1st DCA 1990).* [*6] Instead, we declare that the individually metered occupancy units in Redington Towers One and Three are not eligible for conversion to master metering pursuant to Rule 25-6.049 by virtue of having been constructed on or before January 1, 1981.

In addition, we instruct our staff to initiate the rulemaking process to determine whether paragraph (5)(a) of Rule 25-6.049 should be amended.

It is therefore

ORDERED by the Florida Public Service Commission that Florida Power Corporation's petition for declaratory statement is granted as modified above. It is further

ORDERED that the Florida Public Service Commission staff shall initiate the rulemaking process as discussed above. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission, this 30th day of March, 1998.

BLANCA S. BAYO, Director Division of Records and Reporting

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In Re: Investigation into Florida Public Service Commission jurisdiction over SOUTHERN STATES UTILITIES, INC. in Florida

DOCKET NO. 930945-WS; ORDER NO. **PSC-95-0894-FOF-WS**

Florida Public Service Commission

1995 Fla. PUC LEXIS 1022

95 FPSC 7:256

July 21, 1995

[*1]

KENNETH A. HOFFMAN, Esquire, Rutledge, Ecenia, Underwood, Purnell & Hoffman, 215 South Monroe Street, Suite 420, Tallahassee, Florida 32301-1841, and BRIAN ARMSTRONG and MATTHEW J. FEIL, Esquires, Southern States Utilities, Inc., 1000 Color Place, Apopka, Florida 32703, On behalf of Southern States Utilities, Inc.

TIMOTHY F. CAMPBELL, Esquire, Polk County Attorney's Office, P.O. Box 60, Bartow, Florida 33830, On behalf of Polk County.

DONALD R. ODOM, Esquire, Hillsborough County Attorney's Office, P.O. Box 1110, Tampa, Florida 33601, On behalf of Hillsborough County.

KATHLEEN F. SCHNEIDER, Esquire, Sarasota County Attorney's Office, 1549 Ringling Boulevard, Third Floor, Sarasota, Florida 34236, On behalf of Sarasota County.

ALAN C. SUNDBERG and ROBERT PASS, Esquires, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, First Florida Bank Building, P.O. Box 190, Tallahassee, Florida 32302, and BRUCE SNOW, County Attorney, 112 North Orange Avenue, Brooksville, Florida 34601, On behalf of Hernando County.

THOMAS C. PALMER, Esquire, Collier County Attorney's Office, 3301 East Tamiami Trail, Naples, Florida 33962, On behalf of Collier County.

MICHAEL B. TWOMEY, Esquire, Route 28, Box [*2] 1264, Tallahassee, Florida 32310, On behalf of the Spring Hill Civic Association.

ROBERT J. PIERSON, MARGARET E. O'SULLIVAN, and CHARLES J. PELLEGRINI, Esquires, Florida Public Service Commission, 101 E. Gaines Street, Tallahassee, Florida 32399-0863, On behalf of the Commission Staff.

PRENTICE P. PRUITT and DAVID SMITH, Esquires, Florida Public Service Commission, 101 E. Gaines Street, Tallahassee, Florida 32399-0862, Counsel to the Commissioners.

PANEL:

The following Commissioners participated in the disposition of this matter: SUSAN F. CLARK, Chairman, J. TERRY DEASON, JOE GARCIA, JULIA L. JOHNSON, DIANE K. KIESLING

OPINION: FINAL ORDER DETERMINING JURISDICTION OVER EXISTING FACILITIES AND LAND OF SOUTHERN STATES UTILITIES, INC. PURSUANT TO *SECTION 367.171(7), FLORIDA STATUTES*

BY THE COMMISSION:

BACKGROUND

On September 23, 1993, Southern States Utilities, Inc. (SSU) filed a petition for a declaratory statement regarding

this Commission's jurisdiction over SSU in Polk and Hillsborough Counties pursuant to *Section 367.171(7), Florida Statutes*. By Order No. PCS-94-0686-DS-WS, issued June 6, [*3] 1994, we denied SSU's petition; however, we initiated an investigation to consider this Commission's jurisdiction over SSU throughout the state.

On August 26, 1994, Sarasota County petitioned to intervene in this proceeding. Its petition was granted by Order No. PSC-94-1095-PCO-WS, issued September 6, 1994. On September 2, 1994, Hillsborough County petitioned to intervene in this case. Its petition was granted by Order No. PSC-94-1133-PCO-WS, issued September 15, 1994. On September 8, 1994, Polk County petitioned to intervene. Its petition was granted by Order No. PSC-94-1190-PCO-WS, issued September 29, 1994. By Order No. PSC-94-1363-PCO-WS, issued November 9, 1994, as amended by Order No. PSC-94-1363A-PCO-WS, issued November 21, 1994, party status was conferred upon Hernando County. Collier County and the Spring Hill Civic Association (SHCA) filed petitions for intervention prior to the hearing, which were granted at the hearing.

This Commission conducted a hearing on this matter, in Tallahassee, Florida, from January 23 through 26, 1995. On February 21, 1995, the parties submitted their post-hearing filings. In addition, Sarasota, Hillsborough, and Hernando Counties filed requests [*4] for oral argument. SSU filed a response in opposition to that request. The Counties' motion was granted, and on April 7, 1995, the Commission heard oral argument in this matter.

FINDINGS OF FACT, LAW, AND POLICY

After considering the evidence presented at the hearing in this proceeding, the briefs and other post-hearing filings of the parties, the parties' positions at oral argument, and the recommendations of the Staff of this Commission, the following represents our findings of fact, law, and policy.

SSU'S Present Facilities and Land Constitute a System

Under *Section 367.021(11), Florida Statutes*, "'system' means facilities and land used and useful in providing service and, upon a finding by the commission, may include a combination of functionally related facilities and land." However, *Section 367.021(11), Florida Statutes*, does not define "functionally related" or specify the extent to which facilities and land must be functionally related in order to comprise a system. Since the statute is silent, these matters are within the discretion of the Commission.

SSU argued that its facilities and [*5] land throughout the state are functionally related and comprise a single system. The remainder of the parties argued that SSU's facilities and land are not functionally related. SSU and Sarasota County were the only parties which presented evidence on this issue.

Statutory Standard

Sarasota County argued that, in order to support a finding of functional relatedness by the Commission, SSU must demonstrate an administrative and operational interdependence between its separate facilities and land. However, since the standard urged by Sarasota County is stricter than required by *Section 367.021(11), Florida Statutes*, we expressly reject it.

Collier County argued that we must make an independent finding as to each and every plant in each and every county to determine if it is "multi-county jurisdictional." However, its argument is not supported by the statutory language and Collier County did not cite any other authority for it. We, therefore, reject its argument.

Polk County argued that, under In re: Southern States Utilities, Inc.'s Petition for a Declaratory Statement Regarding Commission Jurisdiction Over Its Water Facilities [*6] In St. Johns County (In re: SSU), we must consider the administrative and operational interrelationship of SSU's facilities and land. According to Polk County, "aside from the administrative relationship that the Commission has already declined as a basis for exclusive jurisdiction, SSU has failed to establish the substantial administrative and operational interrelationship necessary to constitute a functionally related system of facilities and land."

Although demonstrating a functional relationship might require a lesser standard of proof than demonstrating an administrative and operational interrelationship, we do not need to address that issue at this time. Based upon the evidence presented in this proceeding, SSU's facilities and land are administratively and operationally interrelated. They are, therefore, functionally related.

Administrative Interrelationship

SSU analogized its administrative operations to a wagonwheel, with its Apopka office the hub through which each of its individual plants is related. According to SSU, without such services as purchasing, planning, engineering, environmental compliance, permitting, human resources, accounting, budgeting, legal, employee [*7] relations, customer relations, billing, information services, financing, tax administration, and all of the other administrative and customer service functions provided out of Apopka, SSU could not operate any of the individual plants.

SSU presented evidence that, with rare exception, it finances it operations on a company-wide basis. SSU also demonstrated that it purchases insurance and materials, supplies, and services on a centralized basis, provides statewide telephone service through a single carrier, maintains a centralized computer center for its plants in the state, and provides transportation services through company-wide purchases of vehicles, corporate transportation policies, and a nationwide refueling program.

Hillsborough County argued that *Section 367.021(11), Florida Statutes*, does not state or imply that the determination of whether facilities and land constitute a system hinges upon administrative activities of a central office. Hernando County argued that SSU's corporate structure, alone, does not make its facilities and land functionally related. It argued that, although corporate structure may result in similarities in [*8] the way facilities are run, it does not make them functionally related. According to Hernando County, this is highlighted by the distinction between "system," which is defined in *Section 367.021(11), Florida Statutes*, and "utility," which is defined in *Section 367.021(12), Florida Statutes*. Sarasota County also argued that the Apopka office does not make SSU functionally related.

Although SSU's corporate and/or organizational structure may not, in and of themselves, make SSU's facilities and land throughout the state functionally related, they certainly go further toward establishing a functional relationship than not. We, therefore, do not find the Counties' arguments persuasive.

Sarasota County also argued that, in this case, all administrative functions are performed either at the individual plant or the Apopka office and that "none of the administrative activities for one system is performed by personnel located at another system in a contiguous county." However, the evidence demonstrates that administrative activities are performed not only at Apopka, but at the regional and area levels [*9] as well. Sarasota County's argument is, therefore, not supported by the record.

Sarasota County further argued that according to Order No. PSC-93-1162-FOF-WU (93 FPSC 8:181, 183-184) issued in In re: SSU, company-wide relationships between facilities in noncontiguous counties are not factors to be considered in determining whether facilities and land are functionally related. However, we did not state that company-wide relationships are not factors. We stated that "company-wide relationships between facilities in noncontiguous counties are not necessary . . . to establish Commission jurisdiction." Id., at 183-184. Sarasota County's argument is, therefore, not compelling.

Based upon the evidence discussed above, we find that SSU's existing facilities and land are administratively interrelated.

Operational Interrelationship

The evidence demonstrates that SSU's operations labor force consists of management personnel and field personnel. Management personnel include SSU's president, four regional managers, thirteen area supervisors and an operations service manager. Regional managers provide administrative and operational support for all facilities in the region and report to Apopka. [*10] Area supervisors are responsible for daily operations and supervising the field personnel. Field personnel include chief operators and operations and maintenance personnel.

SSU claimed that its facilities are operationally interrelated as demonstrated by field activities which cross county boundaries. It presented evidence that one out of every eight hours worked by field personnel involves work across county boundaries. SSU also showed that, in some counties where it has facilities, there are no offices for field personnel; tasks are performed by personnel based in other counties.

SSU presented evidence of two emergency situations, involving its Lehigh facility, in which support was provided from two other SSU plants. It also cited a situation in which a welder, based in Hernando County, was dispatched to perform repairs in Lee County, as well as other examples of cross county labor and the frequencies of cross county

field support.

In addition, SSU proved that employees and equipment are shared on a daily basis without regard to county boundaries or jurisdiction. For instance, employees and equipment from Spring Hill are sent to Polk and Hillsborough Counties on an as-needed [*11] basis. The equipment includes tanker trucks, pumper trucks and other vehicles, tools, welding equipment, testing equipment, composite samplers, backhoes and other construction equipment, pumps, meters, air compressors, generators, and mowing equipment. It also showed that, during emergencies, major pieces of treatment plant, such as ammoniation equipment, are shared.

The record also demonstrates that SSU purchases materials and supplies, such as chemicals, meters, and parts, which are delivered to, stored at, and distributed from designated locations. For example, chemicals for SSU's Hillsborough and Polk County plants are distributed from the Seaboard facility located in Hillsborough County. Similarly, the facilities at Lake Gibson Estates, located in Polk County, serve as the storage facility for equipment, supplies, and forms for the Zephyr Shores (Pasco County) facility.

SSU further presented evidence that employees from the operations services department, environmental compliance and permitting department, and senior operations personnel based in Apopka, provide technical training to field employees. Such training includes training in plant operations, Department [*12] of Environmental Protection and water management district permitting, proper equipment use and maintenance techniques, proper testing procedures, safety, including the proper use, handling and storage of hazardous chemicals, confined space entry, proper cross connection/backflow prevention and other operations procedures. Training is provided predominately in Apopka, but also on site at individual plants or in central locations within each region. The location where the training is provided depends upon the content of the training. SSU conducted approximately 175 training sessions in 1993 and 1994, which were attended by 1,316 employees statewide.

SSU also demonstrated that it was establishing a central laboratory in Volusia County (North Region) to perform tests on certain types of samples taken from all SSU service areas in every region, which is yet another example of SSU's services crossing county boundaries. Approximately ninety percent of the lab analyses would be performed at this lab. SSU expects that the lab will be operational within the next few months.

Finally, SSU showed that meter readings are keyed into a batch file from the meter read sheets or downloaded into its [*13] computer system directly from the electronic devices. Meter readings which are not downloaded directly into the computer are sent to Apopka. All customer bills are mailed to customers from the Apopka office.

Sarasota County argued that any activities which flow across county boundaries are either de minimis, or irrelevant because the counties involved are not contiguous. The evidence, however, demonstrates that substantial activities cross county boundaries. Accordingly, we reject Sarasota County's argument regarding the so-called de minimis nature of the activities.

As for the argument regarding contiguity, Sarasota and the other Counties rely on Board v. Beard for the proposition that, unless all of the counties involved are contiguous, we cannot find a functional relationship. We do not agree.

Although the Board v. Beard Court discussed contiguity, in terms of a hypothetical utility, it did not impose any "contiguity" requirement. In addition, its discussion specifically addressed whether service transversed county boundaries, not whether the facilities and land constitute a system pursuant to *Section 367.021(11), Florida Statutes.* Therefore, [*14] we reject the argument that SSU must meet a "contiguity" requirement in order for us to find that its facilities and land constitute a system.

Moreover, the Court was not clear in Board v. Beard whether the hypothetical utility consisted of isolated facilities separated by hundreds of miles or multiple facilities which span hundreds of miles. In this case, twenty-three of the twenty-six counties are contiguous in one continuous span. Washington, Martin, and St. Lucie County are not part of this span; however, St. Lucie and Martin County are contiguous to each other.

Although the Washington County facilities are geographically isolated from SSU's other facilities, SSU believes that they are also operationally interrelated. Although there is little direct sharing of equipment or personnel with those facilities, they do share in the services provided by the Apopka office. There is evidence that operations are handled the same throughout the west region, in which Washington County is located, and that personnel from other parts of the west region could operate the Washington County facilities if necessary. In addition, all customers, including those in Washington County, [*15] may contact the "1-800" number for customer service.

The record also shows that each facility, including the Washington County facility, is connected by several computer links to Apopka. These computer links strengthen the functional relationship between all of SSU's facilities. They allow SSU to track environmental compliance and file reports with regulators. They also permit a centralized analysis of monthly operating report data by Apopka personnel to facilitate prompt identification and analysis of abnormalities in water or wastewater quality and expedite remedial measures.

The computer links also allow SSU to expedite services that are provided to the customers, including turning their water on or off, other service calls, responses to emergencies, customer complaints, and requests for information. In fact, any customer can go to any office in any county, whether contiguous or not, to pay a bill or to have service turned on or off.

Based upon the evidence discussed above, we find that SSU's existing facilities and land are operationally interrelated.

Comparison to Previous Cases

Hillsborough County argued that the facts in this case differ from the facts in In re: Petition [*16] for Declaratory Statement Relating to Jurisdiction of the Florida Public Service Commission over Jacksonville Suburban Utilities Corporation in Duval, Nassau and St. Johns Counties (In re: JSUC). Hillsborough County noted that JSUC's office was centrally located and that the driving time to the remote areas in each of the counties was approximately the same, but that driving times from SSU's Apopka office to the individual sites vary considerably. It also noted that the same manager and maintenance personnel are not responsible for all of SSU's operations, as was the case with JSUC. Although there are differences between SSU's and JSUC's operations, we do not believe that any particular distinguishing characteristic is dispositive.

Hernando County argued that SSU's operations differ in important respects from those of JSUC. For instance, JSUC was managed by one manager, used the same employees in each of the three counties, and was generally run as one operation throughout the three counties. Hernando County argued that, even based solely upon geographical considerations, SSU's operations do not, indeed cannot, share the same degree of operational and administrative integration. [*17] Again, however, we do not believe that any of these differences are necessarily dispositive.

Hernando County also argued that this case is dissimilar from In re: JSUC because SSU has extra levels of management that JSUC did not have. Hernando County acknowledges, however, that this is merely a function of its size. We agree. Moreover, we do not find these extra levels of management to be germane to our determination whether SSU's facilities and land constitute a system.

Sarasota County argued that SSU has not demonstrated the administrative and operational interdependence demonstrated in In re: SSU and In re: JSUC. Sarasota County argued that SSU's and JSUC's facilities in St. Johns County were operationally and administratively dependent upon facilities and personnel outside of St. Johns County. However, since we have not accepted Sarasota County's suggested standard of administrative and operational interdependence, its distinction here is not persuasive.

Miscellaneous Arguments

Hillsborough County also argued that we cannot find that SSU's facilities and land, wherever located, constitute a single system because, "where the legislature includes language ['wherever located'] [*18] in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion and exclusion." The problem with this argument is that "wherever located" does not appear in Chapter 367, Florida Statutes. The language was included in the phrasing of an issue to make it clear that we were considering all of SSU's present operations in the State of Florida.

Hernando County argued that, since *Section 367.021(11), Florida Statutes*, does not define "functionally related," we must apply the plain meaning. According to Hernando County, although not required under Board v. Beard, "the most obvious example of such a relationship would be the physical connection of facilities through pipes or lines."

We agree that we should use the plain meaning of the words at issue. As used in *Section 367.021(11), Florida Statutes*, "functionally" modifies "related" which, in turn, modifies "facilities and land." Thus, by the statute's plain meaning, the facilities and land must be related by or through the functions they perform. [*19] The statute does

not set forth any further restrictions. We also agree with Hernando County that it is clear from Board v. Beard that a physical connection is not required.

Conclusion

Upon consideration of the evidence and the arguments advanced by the parties, we find that SSU's facilities and land are administratively and operationally interrelated. We also find that SSU's present facilities and land are functionally related and, as such, constitute a single system pursuant to *Section 367.021(11), Florida Statutes.*

The Meaning of "Service"

Section 367.171(7), Florida Statutes, provides that "notwithstanding anything in this section to the contrary, the commission shall have exclusive jurisdiction over all utility systems whose service transverses county boundaries, whether the counties involved are jurisdictional or nonjurisdictional . . . ." Chapter 367, Florida Statutes, does not define "service." Hence, the meaning of "service" is crucial to our jurisdictional determination.

Prior to this proceeding, we have only considered the issue of our jurisdiction under *Section 367.171(7), Florida Statutes* [*20] , on three occasions. The first was In re: Petition of General Development Utilities, Inc. for Declaratory Statement Concerning Regulatory Jurisdiction Over its Water and Sewer System in DeSoto, Charlotte, and Sarasota Counties (In re: GDU). By Order No. 22459 (90 FPSC 1:396), we granted GDU's petition for declaratory statement and asserted jurisdiction over GDU's operations in DeSoto, Charlotte, and Sarasota Counties.

On reconsideration, the City of North Port and Charlotte County raised, for the first time, the issue that GDU's wastewater lines did not physically cross county boundaries. By Order No. 22787, (90 FPSC 4: 125), we stated that "we specifically find, as a matter of law, that GDU's service can transverse county boundaries, even if its lines do not physically cross the same boundaries." However, we did not directly address the definition of "service."

In In re: JSUC, by Order No. 24335 (91 FPSC 4:103), we determined that JSUC's facilities in St. Johns and Nassau County were subject to our jurisdiction under *Section 367.171(7), Florida Statutes*, even though there were no physical connections across county boundaries. In so doing, [*21] we accepted JSUC's uncontroverted assertions regarding the administrative and operational interrelationships between its Duval, Nassau, and St. Johns County operations. We did not, however, define "service."

On appeal of Order No. 24335 by St. Johns County, the Court held, in *Board v. Beard, supra at 593,* that:

To determine whether JSUC was a system whose service transversed county boundaries within the meaning of the subsection, the PSC properly focussed upon the statutory definition of 'system' set out in subsection 367.021(11):

'System' means facilities and land used or useful in providing service and, upon a finding by the commission, may include a combination of functionally related facilities and land.

We reject the county's assertion that the functional relationship referred to requires an actual physical connection between JSUC's facilities. If physical connection was required there would be little need for a 'finding by the commission' that the facilities were functionally related. We note that the County does not dispute JSUC's factual account of the functional interrelatedness of its Duval and St. Johns facilities, and the undisputed [*22] evidence establishes that these facilities are interrelated administratively and operationally. Thus, the evidence supports the PSC's finding that JSUC's facilities constitute 'a combination of functionally related facilities and land'; in a word, a 'system.' Because the service provided by this system crosses county boundaries, it is clear that the PSC has exclusive jurisdiction over JSUC pursuant to subsection 367.171(7).

In In re: SSU, by Order No. PSC-93-1162-FOF-WU (93 FPSC 8: 181), we exercised jurisdiction over SSU's operations in St. Johns County pursuant to *Section 367.171(7), Florida Statutes.* In largely adopting SSU's uncontroverted assertions, we stated that:

The administrative and operational interrelationship between the facilities in St. Johns County and Duval County adequately supports a finding by the Commission that they constitute a combination of functionally related facilities — a 'system'. [sic] Because the service provided by the system transverses county boundaries, we declare that the Commission has exclusive jurisdiction over Southern States Utilities, Inc.'s water facilities in St. Johns County

pursuant [*23] to *Section 367.171(7), Florida Statutes.*

We also acknowledged SSU's assertions of a wide range of administrative services which it provided to the St. Johns County facilities from its corporate headquarters in Orange County. We concluded, however, that "these company-wide relationships between facilities in noncontiguous counties are not necessary, however, to establish the Commission's jurisdiction." Again, however, we did not define what is meant by "service."

SSU relies upon our decisions in the above three cases, as well as the holding in Board v. Beard, to argue that "service," as used in *Section 367.171(7), Florida Statutes*, includes everything that is necessary to provide water and wastewater collection and treatment to SSU's customers. SSU argued that "service" cannot be segregated from the "system," which provides the service. According to SSU, if its system transverses county boundaries, its service necessarily transverses county boundaries.

The Counties contended that "service," as used in *Section 367.171(7), Florida Statutes*, can only mean the physical [*24] delivery of water and the collection and treatment of wastewater. They argued that their position is consistent with the word's usage throughout Chapter 367, Florida Statutes, and Chapter 25-30, Florida Administrative Code, as well as with the rules of statutory construction. Sarasota County also argued that, since none of SSU's facilities located in any nonjurisdictional county provides water or wastewater to contiguous counties, *Section 367.171(7), Florida Statutes*, is not applicable to SSU on a statewide basis.

The Counties' argument that service only means the physical delivery of water and the collection and treatment of wastewater leads, inevitably, to the conclusion that there must be a physical connection across county borders. That position has already been explicitly rejected by the Court in Board v. Beard. As for Sarasota County's argument regarding contiguity, as noted above, contiguity is dictated by neither the statutory language nor the holding in Board v. Beard.

Sarasota County urges that the narrow meaning of "service" is consistent with its usage in the Venice Gardens franchise agreement, Sarasota County Ordinance [*25] No. 83-48, as amended, and the Sarasota County Water and Sewer Franchise Utility Rules and Regulations. We do not administer these franchises or ordinances. This argument is, therefore, not persuasive.

In addition, it argued that *Section 367.081(2)(a), Florida Statutes*, distinguishes between "service" and "cost of service." Accordingly, Sarasota County maintained that SSU's centralized activities are elements of the cost of service, but not of "service" itself. However, this distinction can easily be turned around to support SSU's argument: since the "cost" of "service" includes everything necessary to deliver water to and collect and treat wastewater from SSU's customers, "service," as used in *Section 367.081(2)(a), Florida Statutes*, includes SSU's centralized administrative support functions.

The word "service" or "services" is used in forty-four sections and subsections in Chapter 367, Florida Statutes, in the context of water and wastewater. However, that usage is not exclusive; service is also used, with different meanings each time, in three other sections of Chapter 367, Florida Statutes. The [*26] Counties' definition of the word "service" is narrow, inconsistent with well-established Commission practice, and not compelled by statutory construction principles. We, therefore, reject it.

The delivery of water and the collection and treatment of wastewater represent merely a utility's output or production, not the provision of service. Water cannot be provided, nor can wastewater be collected and treated, without a myriad of administrative and operational support functions. SSU carries out these functions primarily from centralized locations.

Polk County contended that, although the administrative and operational support functions may be necessary, it is not necessary that they emanate from a centralized location. It argued that this support could be provided from each county. However, it would be economically illogical and, most likely, imprudent for SSU to operate in the manner suggested by Polk County. It also does not matter that these services could be provided from each county. SSU operates as it does and that is the factual situation before us.

In response to a query, at oral argument, whether service could be delivered across county boundaries without a physical connection, [*27] Hernando County replied that the Board v. Beard Court did not address the meaning of "service." Hernando County contended that, after finding that JSUC's facilities constituted a system, the Court made a "leap" in declaring that the service provided by that system transversed county boundaries. We do not agree. Although

the Court did not specifically address the definition of "service," it held, *id. at 592-593,* that:

To determine whether JSUC was a system whose service transversed county boundaries within the meaning of the subsection, the PSC properly focussed upon the statutory definition of 'system' set out in subsection 367.021(11):

* * *

We reject the county's assertion that the functional relationship referred to requires an actual physical connection between JSUC's facilities.

* * *

Because the service provided by this system crosses county boundaries, it is clear that the PSC has exclusive jurisdiction over JSUC pursuant to subsection 367.171(7).

SSU provided abundant evidence and compelling argument that "service" includes everything necessary to provide water to and collect and treat wastewater from its customers, including [*28] the administrative and operational support originating out of Apopka. It should be noted that one of Hernando County's proposed findings of fact (which we rejected on other grounds) indicates that fully fifty-five percent of SSU's total costs for 1993 and 1994 were incurred at the statewide level. We agree that the physical delivery of water and collection and treatment of wastewater cannot be logically divorced from all the components that go into providing the end product. We, therefore, find that "service" includes everything necessary to provide water to and collect and treat wastewater from SSU's customers, including the administrative and operational support functions originating out of Apopka.

Impact on Customers

SSU and the Counties provided extensive testimony and argument regarding the potential impact of a determination that this Commission has jurisdiction over SSU's operations in non-jurisdictional counties pursuant to *Section 367.171(7), Florida Statutes*, upon SSU's customers and upon the Counties' ability to address "local concerns." However, these potential impacts are not elements to be considered in making a jurisdictional [*29] determination under *Section 367.171(7), Florida Statutes*. Accordingly, although we acknowledge their testimony and arguments, we make no findings and reach no conclusions on this matter.

Conflict With Constitutional or Statutory Provisions

Sarasota County contended that *Section 367.171(7), Florida Statutes*, conflicts with the county option provisions of Sections 367.171(1) and (3), Florida Statutes. Sarasota County argued that, in order to read these three sections in harmony, "application of the former must be restricted to those circumstances where a utility system is providing water and wastewater service to contiguous counties." We do not agree. *Section 367.171(7), Florida Statutes*, states, in pertinent part, that "notwithstanding anything in this section to the contrary, the commission shall have exclusive jurisdiction over all utility systems whose service transverses county boundaries, whether the counties involved are jurisdictional or nonjurisdictional . . . . "(Emphasis added.) That statement makes it clear that *Section 367.171(7), Florida Statutes* [*30] , preempts the other subsections.

The Counties and SSU also provided extensive argument on whether a determination that we have jurisdiction would conflict with any other statutory provisions, or any constitutionally granted charter or home rule powers. Although it does not appear that any conflict would result, we again do not make any specific findings because we do not have any discretion under the statute to consider such matters.

Regulatory Inefficiencies

SSU also presented evidence and argument that regulatory inefficiencies arise out of county-option regulation. The Counties presented their own evidence and argument that such inefficiencies do not exist or will not result if jurisdiction over SSU's operations remains with nonjurisdictional counties. Although we acknowledge their arguments, we do not make any specific findings on these arguments because they are also not an element of our analysis under *Section 367.171(7), Florida Statutes.*

Impairment of Growth Management

Finally, the parties presented abundant evidence and argument regarding whether a determination that this

Commission has jurisdiction, pursuant to *Section 367.171(7), Florida Statutes* [*31] , would impair the Counties' ability to implement growth management policies. Again, although we acknowledge the parties' arguments, we make no finding in this regard because it is not an element of our analysis under the statute.

SSU Provides Service Which Transverses County Boundaries

We have already determined that SSU's facilities and land constitute a system as defined by *Section 367.021(11), Florida Statutes*. We have also found that "service," as used in *Section 367.171(7), Florida Statutes*, includes everything necessary to provide water to and collect and treat wastewater collection from SSU's customers, including administrative and operational support services. The final element of our analysis is whether SSU provides service which transverses county boundaries, pursuant to *Section 367.171(7), Florida Statutes*.

In its brief, Polk County stated that Board v. Beard left the hypothetical question of whether facilities located in noncontiguous counties could still come under the PSC's jurisdiction unanswered. Polk County noted that the decisions in Board v. [*32] Beard and In re: SSU dealt with a relatively small number of facilities located in contiguous counties, and that this docket addresses a considerably larger number in noncontiguous counties.

Hillsborough County argued that service cannot be said to transverse county boundaries because SSU does not satisfy the "contiguity requirement." In support of its argument, Hillsborough County cited Board v. Beard. Hernando and Sarasota County agreed. Hernando County argued that service does not transverse county boundaries because Hernando County is not contiguous to Orange County, in which SSU's corporate headquarters are located. Sarasota County argued that, even if service includes support services from SSU's corporate headquarters in Orange County, the service can only transverse the contiguous county boundaries of Lake, Osceola, Seminole, and Brevard.

SSU argued that *Section 367.171(7), Florida Statutes*, does not require contiguity. SSU contended that if the Legislature intended for a utility with functionally related facilities to be classified as a jurisdictional system, there is no logical reason to distinguish between contiguous and [*33] noncontiguous counties.

We agree with the position advanced by SSU. As noted above, the Board v. Beard Court did not hold that counties must be contiguous in order for this Commission to find that it has jurisdiction under *Section 367.171(7), Florida Statutes*.

Hernando County also contended that, although the statute does not explicitly state it, the service that transverses county boundaries must be substantial. We have already found that SSU is administratively and operationally interrelated. Approximately fifty-five percent of SSU's total costs for 1993 and 1994, are provided out of its corporate headquarters. Although it should not be assumed that any level of service, no matter how minimal, triggers jurisdiction, the record for this case demonstrates that substantial service transverses county boundaries.

Finally, Hillsborough County argued that a determination that we have jurisdiction would be an improper expansion of our jurisdiction. The cases cited by *Hillsborough County, Fraternal Order of Police v. City of Miami, 492 So.2d 1122 (Fla. 3d DCA 1986)*, and *Florida Bridge Co. v. Bevis, 363 So. 2d 799 (Fla. 1978)*, [*34] discuss the principle that an agency may not expand or act outside of its statutorily authorized jurisdiction. As noted in Bevis, any doubt as to a particular power should be resolved against the exercise of that power. However, *Section 367.171(7), Florida Statutes*, states that this Commission shall have jurisdiction over utility systems whose service transverses county boundaries. Our determination of jurisdiction, authorized pursuant to *Section 367.171(7), Florida Statutes*, is not equivalent to an expansion of jurisdiction outside of legislatively-conferred powers. Therefore, we conclude that a determination of SSU's jurisdictional status is specifically within our statutorily authorized powers.

Based upon the evidence and argument, we find that SSU is a single system whose service transverses county boundaries. As such, this Commission has exclusive jurisdiction over SSU's existing facilities and land in the State of Florida pursuant to *Section 367.171(7), Florida Statutes*.

Jurisdictional Status of Future-Acquired SSU Facilities

Since we have determined that [*35] this Commission has exclusive jurisdiction over all existing SSU facilities in the state, we must also address whether our exclusive jurisdiction will apply to any future-acquired SSU facility.

SSU stated in its post-hearing brief that the Commission would have jurisdiction over all SSU facilities acquired in the future.

Polk County stated in its brief that if we find that this Commission has exclusive jurisdiction and that finding is affirmed, facilities acquired in the future would also be jurisdictional. The County stated that this highlights the problem that a utility may circumvent county regulation by creating an administrative structure that provides administrative support which transverses county boundaries.

Sarasota County contended that because SSU-owned facilities throughout the state are not functionally related and do not comprise a single system, newly acquired facilities will be regulated by the regulator designated by the Board of County Commissioners pursuant to Sections 367.171(1) & (3), Florida Statutes.

Hernando County and Hillsborough County argued that the Commission must make an individual factual determination as to whether the new facility meets [*36] the statutory requirements for each new facility acquired in the future.

Our determination that SSU's existing facilities constitute a single system whose service transverses county boundaries is based upon a detailed analysis of the evidence presented in this proceeding and our interpretation of the applicable statutory provisions. It would be impossible to make a prospective determination as to any facilities which SSU may acquire in the future. Such a determination would require the assumption that the facilities are in fact functionally related. There is no evidence in this record as to any future facilities which SSU may acquire. We, therefore, agree with Hernando and Hillsborough County that a separate determination will be required for each future-acquired facility. Accordingly, each time SSU acquires a new facility, it should petition this Commission to determine whether that facility becomes part of the system recognized in this proceeding, as well as any jurisdictional ramifications thereof, along with its application for transfer or amendment.

Rulings on Proposed Findings of Fact

The only parties that filed proposed findings of fact and conclusions of law were Collier, [*37] Hernando, and Sarasota Counties. Under Section 120.59(2), Florida Statutes, we are required to consider and rule upon each proposed finding of fact. However, we are not required to rule upon proposed conclusions of law, and we expressly decline to do so here. Accordingly, the parties' proposed findings of fact are accepted and rejected as follows:

The following proposed findings of fact are accepted:

Sarasota County: 2, 3, 4, 7, 9, 11, 13, 17, 20, 23, 26, 27, 29, 31, 32, 33, 46, 47, 48, 53.

Hernando: 1, 6, 11, 13, 26, 30

Collier: 1, 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 14, 17, 20, 21, 24, 26, 27, 28, 29, 32, 34, 46, 50, 51, 52, 53, 54, 55, 57, 58, 59

The following proposed findings of fact are rejected as not supported by the record:

Sarasota County: 1, 6, 8, 10, 12, 19, 21, 22, 24, 25, 28, 30, 34, 35, 36, 40, 41, 42, 43, 44, 45, 49, 50, 52.

Hernando: 7, 12, 15, 21, 27, 28, 29

Collier: 7, 8, 22, 23, 25, 30, 31, 33, 36, 38, 39, 40, 41, 43, 44, 45, 47, 48, 56

The following proposed findings of fact are rejected as cumulative:

Sarasota County: 37, 38, 39

The following proposed findings of fact are rejected as argumentative and/or conclusory:

Sarasota [*38] County: 5, 14, 15, 16, 22, 30, 40, 43, 51

Hernando: 17, 31, 33

The following proposed findings of fact are rejected as not constituting findings of fact:

Sarasota County: 18

Collier: 49

The following proposed findings of fact are rejected as not complying with the requirements of Rule *25-22.056(2)(b), Florida Administrative Code*:

Hernando: 2, 3, 4, 5, 8, 9, 10, 14, 16, 18, 19, 20, 22, 23, 24, 25, 32

Collier: 15, 16, 18, 19, 35, 37, 42, 60, 61.

CONCLUSIONS OF LAW

1. This Commission has the jurisdiction to consider and determine the jurisdictional matter at issue in this proceeding pursuant to *Sections 367.011* and *367.171(7), Florida Statutes*.

2. SSU's existing facilities and land are functionally related, and thus comprise a system as defined in *Section 367.021(11), Florida Statutes*.

3. Service, as used in *Section 367.171(7), Florida Statutes*, consists of the physical delivery of water and the collection and treatment of wastewater, and all of the administrative [*39] and operational activities necessary to deliver water and collect and treat wastewater.

4. SSU is a single system whose service transverses county boundaries.

5. This Commission has exclusive jurisdiction over SSU's existing facilities and land in the State of Florida.

It is, therefore,

ORDERED by the Florida Public Service Commission that, pursuant to *Section 367.171(7), Florida Statutes*, this Commission has exclusive jurisdiction over all existing facilities and land owned by Southern States Utilities, Inc. throughout the State of Florida. It is further

ORDERED that each of the findings made in the body of this Order is hereby approved in every respect.

By ORDER of the Florida Public Service Commission, this 21st day of July, 1995.

CONCURBY: GARCIA (In Part)

DISSENTBY: GARCIA (In Part)

CONCURRENCE/DISSENTS

Commissioner Garcia concurs with the Commission decision, and dissents in part, as follows:

My concern is for the inevitable precedential effect of our decision in this docket on future cases, stemming from the perception that the standard implied in this order may serve to create a situation in which we as a Commission could never reasonably [*40] decline to extend jurisdiction over parts of a system which are located in "non-jurisdictional" counties once the petitioner utility makes a showing of the functional relation of its land and facilities, wherever located. This Commission has taken great pains to ensure that this decision is the result of the merits of this case only, indeed that even future acquisitions of facilities by SSU will be subject to the same factual determination. In reality, the end result is a diminished level of the discretion which this Commission enjoys and is such an integral part of the discharge of our duties.

Many issues were considered as prelude to our decision today, and certain of these were found irrelevant to our determination. The issue of constitutional conflict with the home rule authority of the counties stands out among these. While I agree with the Commission's assessment that it has the statutory mandate to supersede these counties' home rule powers, it is in the spirit of deference to the wishes of the public as expressed through their duly elected representatives

that I couch my concerns. Perhaps the question more properly lies within the purported legislative intent of *Section 367.171(7), Florida Statutes* [*41] , which does not seem to offer this Commission the level of discretion necessary to address these concerns, but it is this decision which gives that intent a tangible character. It seems questionable that the same legislature which charges this Commission with the duty to determine the public interest would limit, in an appreciable way, the discretion necessary for this Commission to make that very determination.

By its decision today the Commission is foreclosed from concluding as to the possibility that, even despite a utility's showing of a functionally related system, oversight and regulation by a local authority is in the best interests of those affected. We are forced to ignore the possibility that, despite the obvious overall benefits of statewide regulation, ratepayers in a given community may have actually bargained for a level of regulatory inefficiency in exchange for a more responsive and locally sensitive regulatory environment. These are possibilities which should have a place in our deliberations, and there is a question whether these possibilities are properly safeguarded by this decision.

At a time when the frequently incoherent monster that is water policy [*42] development and enforcement at the state level is under attack for its own inefficiencies, we should be cautious to quash any effort at consolidation and efficiency, even if it is not our own.

Commissioner J. Terry Deason dissents from the Commission's decision, as follows:

I dissent from the Commission's decision to the extent that we find that "service", as the term is used in *Section 367.171(7), Florida Statutes*, means anything other than the delivery of water and/or wastewater. Our decision that this term should be expansively defined to mean practically any act that is undertaken by the utility in the process of delivering water and/or wastewater is, in my view, an improper substitution of our judgement for that of the legislature. I am particularly concerned that the direct consequence of our actions has created a serious encroachment on the authority of counties. This is a serious step and one that should not be taken lightly. At a minimum, the asserted ambiguity in the statute should not have been resolved in an expansive way that has resulted in divesting county government of fundamental home rule powers.

In explaining my position, [*43] I feel that it is necessary to review our prior decisions (and resulting court decisions) and to discuss the two most relevant statutes. In my opinion, the prior decisions should serve as no basis for our decision. They are either inapplicable or are based on a faulty procedure that deprives them of any value as a precedent. Furthermore, I believe the purposes of the two statutes have been misunderstood by the Commission and parties in the past and perhaps by the majority here. I believe that there are at least two very separate and distinct purposes behind the statutes. One statute (*Section 367.021(11), Florida Statutes*)operates to limit or define how the Commission can regulate utilities within the jurisdictional counties. The other (*Section 367.171(7), Florida Statutes*) operates to define where the Commission can regulate utilities over which they otherwise would have jurisdiction.

Prior PSC decisions

At the outset, I think it is important to emphasize that our decision in this case represents the first instance where the provisions of *Section 367.171(7), Florida Statutes* [*44] , have been directly interpreted. Additionally, this is the first time that we have afforded the requisite due process required by law. There have been 5 previous occasions where this issue has been addressed in some manner by the Commission or a court. In re: Petition of General Development Utilities, Inc. for Declaratory Statement Concerning Regulatory Jurisdiction Over its Water and Sewer System in DeSoto, Charlotte, and Sarasota Counties, 90 FPSC 1:396, reconsideration denied, 90 FPSC 4:125 (In re: GDU); In re: Petition for Declaratory Statement Relating to Jurisdiction of the Florida Public Service Commission Over Jacksonville Suburban Utilities Corporation in Duval, Nassau and St. Johns Counties, 91 FPSC 4:103 (In re: JSUC); In re: Southern States Utilities, Inc.'s Petition for a Declaratory Statement Regarding Commission Jurisdiction Over Its Water Facilities In St. Johns County, 93 FPSC 8: 181, 182 (In re: SSU); *Board of County Commissioners of St. Johns County v. Beard, 601 So. 2d 590 (Fla. 1st DCA 1992)* (Board or Board v. Beard (Appeal of In re: JSUC); and Citrus County, Florida and Cypress and Oaks Villages Association v. Southern States [*45] Utilities, Inc. and the Florida Public Service Commission, 20 Fla. Law weekly D838a, rehearing denied, 20 Fla. Law Weekly D1518.

However, in each instance, the focus of the case was not on the pivotal provisions of *Section 367.171(7), Florida Statutes*. Rather, the first case (In re: GDU) was focused on the validity of the interlocal agreement, while the last two decisions of this Commission (In re: JSUC and In re: SSU) were focused exclusively on factual allegations directed at showing that facilities and land of the utilities were functionally related for the purpose of showing that one system exists under *Section 367.021(11), Florida Statutes*. Only the first case (In re: GDU) contains any discussion

as to the operation of *Section 367.171(7), Florida Statutes*. As discussed below, that discussion is not helpful in this case. In each of the three prior Commission cases, the purpose of the declaratory statement requests were to extend PSC jurisdiction to facilities located in counties that were not jurisdictional pursuant to *Section 367.171(3), Florida Statutes*. [*46] A close inspection of these cases shows that they do not provide a basis for the Commission's decision here.

It has been suggested in the instant proceeding that In re: GDU represents a PSC precedent bearing upon the meaning of the word "service". I think the facts of that case show otherwise. In the GDU case, which was filed 12 days after the effective date of *367.171(11), Florida Statutes*, the physically interconnected water system did actually transverse the boundaries of DeSoto, Sarasota and Charlotte counties. Because of the asserted existence of the physical interconnection, that case did not involve a question of functional relatedness. Instead, the central question was whether a valid interlocal agreement existed pursuant to *Section 367.171(7), Florida Statutes*. It was pointed out only on reconsideration (Order No. 22787; 90 FPSC 4: 125, 126) that GDU's associated wastewater system did not physically transverse the county lines. In response GDU contended that the water and the wastewater system constituted a single system. In citing the definitional subsections of Section 367.021(10) (defining [*47] service area) n1 and (11), Florida Statutes, the Commission appeared to make a definitive ruling on the meaning of the word "service" in stating on reconsideration that:

These definitions show that it is not necessary that GDU's lines physically cross a county boundary for GDU's service to transverse the same boundary. Therefore, we specifically find, as a matter of law that GDU's service can transverse county boundaries, even if its lines do not physically cross the same boundaries. (Emphasis in the original.)

90 FPSC 4:125, 127.

n1 This provision was not at issue in the instant case presumably because it is inapplicable to situations where the PSC does not already have jurisdiction.

In citing the definition of "service area" (which presumes the prior existence of a certificate and, hence, jurisdiction) in conjunction with the definition of system, the PSC was clearly accepting GDU's contention of water and wastewater comprising a single-system and recognizing that it was not necessary for the wastewater lines to physically cross the county boundary when the service area defined by the physically transversing water lines was located in more than one county. [*48] n2 Furthermore, the order must be read narrowly as addressing the status of the wastewater system only since that was the issue before the Commission on reconsideration. In other words, the Commission did not recede from the position in the initial order that the physical crossing of the water system operated to satisfy the requirements of *Section 367.171(7), Florida Statutes*.

n2 There is a logical basis for assuming the physical interconnectedness of both the water and wastewater system in the sense that the wastewater facilities likely rely on the delivery of water from the water facilities which undeniably crossed the county lines.

Thus, the purported conclusion of law in the GDU order is very narrow in its application and does not remotely apply to the case at hand because of the lack here of a physical transversing of service. It is obvious from a close reading of the GDU case that the Commission has never ruled on the meaning of service as it is at issue in this case. Clearly there has been no expression of the Commission's policy on this point.

Likewise, the Commission's two other orders in this general area provide no guidance [*49] in our decisionmaking. Neither of these cases address the question of service. In addition, to the extent that they purport to make the required findings of the existence of a functionally related unitary system, the orders are likewise of no authoritative value because there was never a finding by the Commission that a single system existed. The declaratory statement process utilized by the Commission did not allow for factfinding to occur or for any party other than the company to controvert the represented facts. n3 We implicitly recognized this problem in the instant case in deciding to hold an investigative proceeding rather than to continue to make decisions by the declaratory statement vehicle. n4 Because of this procedural defect and the failure to segregate the issue of defining the word service, these cases offer no guidance in deciding this case.

n3 The declaratory statement process utilized by the Commission is not a factfinding process. It is ex parte

by nature as evidenced by the exemption from the ex parte prohibitions of Section 350.042(1). Intervention is not normally allowed for the purpose of disputing facts. Rather, intervention has been previously allowed on a limited basis for arguing the applicable law.

[*50]

n4 Order No. PSC-94-0686-DS-WS; 94 FPSC 6:67.

Perhaps more significantly, our decisionmaking process has, I fear, created some confusion at the appellate court level. In Citrus County v. Southern States Utilities, the Court reversed our decision to apply uniform rates to all 127 systems then within the regulatory jurisdiction of the PSC. In so doing, the Court stated:

Here, we find no competent substantial evidence that the facilities and land comprising the 127 SSU systems are functionally related in a way permitting the PSC to require that the customers of all systems pay identical rates. (Emphasis added.)

20 Fla. Law Weekly D838. In referencing the required finding of functional relatedness per sub*section 367.021(11), Florida Statutes*, the Court further stated that:

No such finding was made here and could not properly be made given the apparent absence of evidence that the systems were operationally integrated, or functionally related, in any aspect of utility service delivery other than fiscal management.

Id.

Without a doubt the Citrus County Court found that competent substantial evidence must be taken in meeting the [*51] "finding" requirement of the statute. That same Court appears to be laboring under the misunderstanding that the commission adhered to that very stringent standard in reaching the decision (In re: JSUC) that the Court upheld. When contrasted to the explicit requirement that "competent substantial evidence" be taken, confusion on the Court's part is apparent in the immediately preceding portion of the Citrus County opinion when, in citing Board v. Beard (addressing In re: JSUC), the Court is apparently under the impression that the PSC's process yielded:

undisputed evidence . . . that JSUC's facilities were interrelated not only administratively but also operationally, such that the company should be regulated by the PSC.

Id.

In re: JSUC is cited with approval as if it meets the legal requirement that the Commission's finding be supported by competent substantial evidence. It is less than clear that the Court was fully aware of the nature of the proceeding held before the Commission and the fact that the PSC order relied upon in Board v. Beard mistakenly represents that "the facts in the amended petition are not disputed". This language found its way into both Court [*52] opinions and was apparently relied upon heavily by the Court in its conclusions that were based on the mistaken belief that factfinding occurred before the Commission.

Regardless, it is certainly the height of irony that this proceeding was initiated by the implicit recognition that an investigation docket affording affected parties the opportunity to participate in a *Section 120.57(1), Florida Statutes*, evidentiary hearing was preferable to the non-factfinding process of a declaratory statement proceeding. Order No. PSC-94-0686-DS-WS

11 of 105 DOCUMENTS

In re: Petition for declaratory statement as to whether service availability agreement with United Water Florida Inc. requires prior Commission approval as "special service availability contract" and whether contract is acceptable to Commission, by St. Johns County

DOCKET NO. 010704-SU; ORDER NO. PSC-01-1611-FOF-SU

Florida Public Service Commission

2001 Fla. PUC LEXIS 936

01 FPSC 8:41

August 3, 2001

PANEL: [*1] The following Commissioners participated in the disposition of this matter: E. LEON JACOBS, JR., Chairman, J. TERRY DEASON, LILA A. JABER, BRAULIO L. BAEZ, MICHAEL A. PALECKI

OPINION: ORDER GRANTING MOTION FOR EXPEDITED RULING AND DENYING PETITION FOR DECLARATORY STATEMENT

BY THE COMMISSION:

BACKGROUND

Pursuant to *section 120.565, Florida Statutes*, and Rules 28-101, 28-102, and 28-103, Florida Administrative Code, St. Johns County (County) filed a petition for a **declaratory statement** on May 8, 2001. The County **requests** that we issue a **declaratory statement** as to whether the facts set forth in the County's petition would constitute a special service availability contract between the County and United Water Florida Inc. (UWF or utility) and, if so, whether the contract would be acceptable to the Commission. The County states that the statutes, rules, and orders at issue are: *sections 367.111(1)* and *367.101, Florida Statutes*; Rules *25-30.515(17)*, *25-30.515(18)*, *25-30.525* [*2] , and *25-30.550, Florida Administrative Code*; and In re: Complaint of Naples Orangetree, Ltd. against Orange Tree Utility Company in Collier County for Refusal to Provide Service, (Orange Tree Utility Order), 95 F.P.S.C. 2:342 (1995), all of which govern service availability charges and special service availability contracts. Notice of the petition was published in the Florida Administrative Weekly on May 25, 2001.

On July 10, 2001, UWF filed a response to the County's petition. On July 11, 2001, UWF also filed a Motion for Leave to Intervene in this docket, which was granted by Order No. PSC-01-1531-PCO-SU, issued July 24, 2001.

Along with its petition for declaratory statement, the County also filed a Motion for Expedited Ruling. We have jurisdiction to consider this matter pursuant to *section 120.565, Florida Statutes.*

MOTION FOR EXPEDITED RULING

In support of its motion the County states that the process the County will have to commence in response to the declaratory statement takes significant time. This process includes securing the consent of the County Property Appraiser and County [*3] Tax Collector, executing contracts with the County Property Appraiser and Tax Collector, holding a series of public hearings, preparing a bid package for the design and construction of the wastewater collection facilities, and securing financing. The County further states that all these activities must be completed prior to October 2001, which is the date that ad valorem tax invoices must be in the hands of the residents discussed in the County's petition. Thus, the County requests that we act as quickly as possible on its petition.

Pursuant to *section 120.565(3), Florida Statutes*, we must issue a declaratory statement or deny the petition within 90 days after the filing of the petition. As the County filed its petition for declaratory statement on May 8, 2001, we have until August 6, 2001, to issue a declaratory statement or deny the petition. UWF filed its response to the petition on July 10, 2001. We considered the petition at our next available agenda conference. As stated above, the County re-

quests that we act as quickly as possible on this petition. Thus, we hereby grant the County's Motion for Expedited Ruling, as we acted as quickly [*4] as possible to consider this matter.

PETITION FOR DECLARATORY STATEMENT

In its petition, the County states that the Ponte Vedra Beach Municipal Service District (MSD) was created in 1982 to provide services to the residents of the district independent of, as well as supplemental to, those services provided by the County and in cooperation with the County. According to the County, the MSD is authorized to construct water and wastewater facilities, but funding for such facilities cannot be accomplished by special property assessments. The County, however, does have the authority to levy special property assessments for the construction of such facilities.

The County states that the MSD is located entirely within the certificated service territory of UWF. The County states that UWF provides centralized water service to the MSD, but wastewater service is provided by individual septic tanks. According to the County there are approximately 715 customers, the vast majority of whom are residential, within the MSD. The County states that "failing septic tanks within the MSD have contributed to the pollution and degradation of the Guana River" and that "providing centralized sewer services [*5] to the MSD would significantly reduce the further pollution of this area." (Petition at 3) The County contends that due to the location of the MSD it is not legally possible nor economically practicable for the County or the MSD to provide wastewater service to the MSD customers.

The County asserts that based on UWF's current tariffs, customers in the MSD would have to pay approximately $ 10,000 each for wastewater service because a force main and the associated wastewater facilities would have to be constructed to serve the MSD and the location of the MSD is such that the force main and facilities would not be capable of providing service to other developments. The County also asserts that the customers in the MSD would have to convey the force main and the associated off-site facilities to UWF at the time of connection to the UWF system. The County states that "while UWF does not dispute that the retirement of the septic tanks in the MSD is environmentally beneficial, it takes the position that the cost of extending its sewer system to the MSD must be borne by the MSD property owners or their agents." (Petition at 5)

The County states that based on a survey of the MSD residents, [*6] which showed that a majority of them favored the construction of off-site facilities and the imposition by the County of a property assessment sufficient to fund such, the County passed Resolution No. 2000-07 on January 18, 2000. This resolution instructed the County Administrator to take the steps necessary to levy the special assessments needed to fund the MSD main extensions and off-site facilities. The County states that it intends to incur a long term debt estimated to cover 30 years, secured by annual property assessments over the same financing period, to construct the needed facilities and pay UWF's service availability and connection charges. The County further states that after hearings pursuant to *sections 125.3401* and *125.35, Florida Statutes*, it intends to enter into a lease-purchase agreement with UWF whereby "UWF will lease the wastewater collection facilities to be constructed by the County for the length of the financing term at the end of which UWF would purchase the facilities for a nominal sum." (Petition at 7) The County states that during the finance period, UWF would be responsible, [*7] at its sole expense, for the maintenance and operation of the wastewater collection facilities and that UWF would provide retail wastewater service to the MSD customers at UWF's retail service tariff rates and charges, with the exception that UWF would not impose any service availability charges on the MSD customers.

The County states that it will remit to UWF the current wastewater service availability charges and the currently approved wastewater connection fees for all residential and commercial customers within the MSD prior to the connection for the MSD force main to UWF's system. The County further states that under its special service availability contract with UWF the MSD property owners would not be required to pay any additional wastewater service availability or connection fees at the time of connection nor would they be required to connect within any specified period of time. The County stresses that "the connection fee and wastewater service availability charge would be levied and collected by UWF and paid by the County at the time the force main is connected to UWF's system, not at the time each property owner/resident is connected to UWF's system." (Petition at 8)

[*8] The County states that other fees associated with applying for wastewater service, such as the application fee and deposits, would be paid by the MSD customers at the tariff rates approved and in effect at the time of connection.

The County states that UWF has not agreed to waive the administrative, inspection, or legal fees set forth in its service availability tariff. Nevertheless, the County states that these fees have not been included in the special service availability contract submitted with its petition.

The County cites to *Sutton v. Department of Environmental Protection, 654 So.2d 1047 (Fla. 5th DCA 1995),* which states that declaratory statements, like declaratory judgments, are appropriately issued where: 1) there is an actual, present and practical need for the declaration; and 2) the declaration deals with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts. The County requests that we issue a declaratory statement because it is unclear whether the facts set forth above are significant enough to necessitate the use of a special service availability contract requiring our prior approval, and [*9] if so, whether we would approve such a contract. The County further states that before it commences the long and expensive special assessment process, the County needs to know that we would approve the arrangement outlined above.

UWF'S RESPONSE

In its response to the County's petition, UWF states that it does not object to the general arrangement whereby the County will fund the extension of UWF's wastewater system and the County will lease the extended facilities to UWF for a nominal rental amount. UWF also states that it does not object to a lease which includes a bargain purchase option to be exercised at the conclusion of the term for the County's financing instruments or to UWF maintaining and operating the extended facilities to provide wastewater service to the residents of the MSD at the rate set forth in its tariff.

UWF, however, states that it does not intend to enter into the lease agreement and the special service availability contract as proposed by the County. UWF states that any agreement between the County and UWF will be "basically United Water Florida's standard developer agreement with as few revisions as possible." (Response at 2)

UWF cites to Coalition [*10] for Adequacy and Fairness in *Schcol Funding, Inc. v. Chiles, 680 So.2d 400, 404 (Fla. 1996),* which states that a party seeking declaratory relief under Florida law must show: 1) there is a bona fide, actual, present practical need for the declaration; 2) that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; 3) that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; 4) that there is some person or persons who have or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; 5) that the antagonistic and adverse interests are all before the court by proper process or class representation and that the relief sought is not merely giving of legal advice by the courts or the answer to questions propounded from curiosity. UWF asserts that since UWF does not intend to enter into the agreement as proposed by the County, "there are no 'present, ascertained or ascertainable state of facts or present controversy as to a state of facts' for a [*11] declaratory statement regarding the terms of the agreement." (Response at 4)

UWF further cites to *Santa Rosa County v. Department of Administrative Hearings, 661 So.2d 1190, 1193 (Fla. 1995),* for the proposition that courts should not issue a declaratory judgment when a party merely shows the possibility of legal injury on the basis of a hypothetical set of facts which have not arisen and are only contingent, uncertain, and rest in the future. Thus, UWF states that we "should not answer a hypothetical question regarding the specific terms of agreements which will not occur." (Response at 5)

In addition to the reasons why we cannot issue the declaratory statement, UWF states that we should not approve the terms of the agreement as set forth by the County. UWF states that the cap on the amount of the service availability charges set forth in the County's petition would not comport with *H. Miller & Sons, Inc. v. Hawkins, 373 So.2d 913 (Fla. 1979), Christian and Missionary Alliance Foundation, Inc. v. Florida Cities Water Company, 386 So.2d 543 (Fla. 1980),* and the Orange Tree Order. UWF states

[*12] that these cases stand for the proposition that the amount of service availability charges to be paid is to be determined at the time of connection. UWF states that a cap on the service availability charges should not be approved, regardless of whether the agreement is deemed a special service availability contract.

UWF also states that the proposed lease arrangement will not require our prior approval as a special service availability contract because it does not change UWF's charges for the extension of service. UWF asserts that the County will pay the full charge for the line extension as set forth in UWF's service availability policy.

UWF further states that there are a number of inaccuracies in the County's petition, including the County's contention that UWF is obligated to provide wastewater service upon written application of either the property owners or their duly authorized agents. UWF states that its service availability policy requires that a property owner must first enter into an agreement with UWF and then satisfy the provisions of UWF's service availability policy and the agreement.

UWF also states that the list of costs to be paid by the property owners or their [*13] authorized agents in paragraph 4(f) of the County's petition is incomplete. UWF states that this list should include, among other things, the cost of administrative fees, inspection fees, and legal fees.

The utility states that it has not yet received from the County the final plans for the force main, which would enable UWF to confinn its understanding of the location of the force main, the status of the neighboring property, and the estimated cost of the force main. UWF states, however, that it does agree with the County's statement that the cost of extending the wastewater system to the MSD must be borne by the MSD property owners or their authorized agent.

CONCLUSION

Section 120.565, Florida Statutes, governs the issuance of a declaratory statement by an agency. In pertinent part, it provides:

> (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.
>
> (2) The petition seeking a declaratory statement shall state with particularity the [*14] petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

In addition to the threshold requirements for a declaratory statement set forth in *section 120.565, Florida Statutes*, the Sutton case cited by the County and the Chiles and Santa Rosa cases cited by UWF require that a party petitioning for declaratory relief demonstrate that there is a present, ascertained or ascertainable state of facts or a present controversy as to a state of facts and that the facts set forth in the petition are not merely a hypothetical situation.

In light of UWF's statement that it has not entered into the agreement set forth in the County's petition and that it does not intend to enter into the agreement as proposed by the County in its petition, the circumstances set forth in the County's petition constitute a mere hypothetical situation. As such, this matter is not proper for a declaratory statement. Thus, we hereby deny the County's petition to issue a declaratory statement.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission [*15] that St. Johns County's Motion for Expedited Ruling is hereby granted. It is further

ORDERED that the Petition for Declaratory Statement filed by St. Johns County is hereby denied. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 3rd day of August, 2001.

BLANCA S. BAYO, Director

Division of the Commission Clerk and Administrative Services

In re: **Request** for **declaratory statement** by Tampa Electric Company regarding territorial dispute with City of Bartow in Polk County

DOCKET NO. 031017-EU; ORDER NO. PSC-04-0063-FOF-EU

Florida Public Service Commission

2004 Fla. PUC LEXIS 47

04 FPSC 1:162

January 22, 2004, Issued

PANEL: [*1] Commissioners participated in the disposition of this matter: BRAULIO L. BAEZ, Chairman; J. TERRY DEASON; LILA A. JABER; RUDOLPH "RUDY" BRADLEY; CHARLES M. DAVIDSON

OPINION: I. Procedural Background

The procedural background of this docket is related to that of Docket No. 011333-EU, Petition of City of Bartow, Florida, Regarding a Territorial Dispute with Tampa Electric Company, Polk County, Florida, in which the City of Bartow (Bartow) sought modification of its territorial agreement with the Tampa Electric Company (TECO). Bartow's petition to modify the territorial agreement was motivated by plans for a large, residential development called Old Florida Plantation (OFP), to be located on a tract of undeveloped land. The historic (1985) territorial boundary divided the OFP property between Tampa Electric Company's ("TECO's") and Bartow's service territories. OFP lies entirely within the City's municipal boundaries and the developers wanted Bartow to serve OFP, so Bartow petitioned for a modification to the territorial agreement to include all of the OFP property within its service territory.

On June 23, 2003, we issued an Order on proposed agency action modifying the territorial [*2] agreement slightly, but leaving most of the OFP property in TECO's service territory. Order No. PSC-03-0739-PAA-EU in Docket No. 011333-EU. Bartow protested the Order and filed a Petition for Formal Hearing, which was set for May 19, 2004.

On October 8, 2003, TECO filed a Petition for Declaratory Statement in the same docket, 011333-EU. TECO filed the petition to address an issue that it believed would not be addressed in the hearing on the territorial dispute. The issue was whether Bartow had the right to provide end-use electric service to the non-electric utility facilities it would build in OFP (e.g. firestation, sewer-lift station). According to TECO, Bartow claimed it had the right to serve these facilities under the territorial agreement and TECO claimed it did not.

This docket, No. 031017-EU, was opened to handle the Petition for Declaratory Statement. On October 20, 2003, Bartow filed a Motion to Dismiss or Abate the Petition for Declaratory Statement. On October 29, 2003, TECO filed its Answer to Bartow's Motion to Dismiss.

As mentioned above, the hearing in Docket No. 011333-EU was set for May 19, 2004, but on November 21, 2003, the Southwest Florida Water Management District [*3] (SWFWMD) bought the OFP property. Bartow withdrew its Petition for Formal Hearing on December 2, 2003. On December 18, 2003, Bartow filed an Amended Motion to Dismiss or Abate TECO's Petition for Declaratory Statement, which was amended to account for the sale of OFP. On January 6, 2004, TECO filed its Response to Bartow's Amended Motion to Dismiss or Abate and Memorandum of Law. On January 7, 2004, Bartow filed a Motion to Dismiss and, in the Alternative, Response to TECO's Supplemental Petition for Declaratory Statement.

This Order addresses the Amended Motion to Dismiss or Abate TECO's Petition for Declaratory Statement filed by Bartow on December 18, 2003, and TECO's amended response filed on January 6, 2004.

We have jurisdiction under *Section 366.04(2), Florida Statutes*. Notice of the Petition for Declaratory Statement was published in the Florida Administrative Weekly on October 24, 2003.

II. Motion to Dismiss

In order to understand the Amended Motion to Dismiss and the Response, we must consider the declaratory relief requested by TECO. TECO asks us to declare that:

> 1) the 1985 territorial agreement is valid and binding upon [*4] TECO and Bartow;
> 2) TECO has the exclusive right and obligation under the territorial agreement to provide end-use electric service to fire stations, police stations, sewer lift stations, street lights or other non-electric utility facilities owned and/or operated by Bartow and located within TECO's service territory; and,
> 3) Any attempt by Bartow to self-provide end-use electric service to such facilities in TECO's service territory, without prior Commission approval, would constitute a violation of the territorial agreement and Order No. 15437.

A. Bartow's Amended Motion to Dismiss or Abate

Bartow explains that its initial Motion to Dismiss had to be amended because the OFP property was sold to the SWFWMD, which eliminated the plans for development.

Bartow claims the Petition should be dismissed because there are currently no plans to develop OFP. Accordingly, Bartow explains it has no plans to serve its own non-electric facilities in OFP, because such facilities will not be built now that no development is planned.

Under these circumstances Bartow contends that the relief requested by TECO cannot be granted. First, lack of development moots the need for us to declare that [*5] TECO has the right to "provide end-use electric service to fire stations, police stations, sewer lift stations, street lights or other non-electric utility facilities owned and/or operated by Bartow and located within TECO's service territory." The need for such a declaration no longer exists because Bartow does not plan to build such facilities.

Similarly, there is no need for us to declare that "any attempt by Bartow to self-provide end-use electric service to such facilities in TECO's service territory, without our prior approval, would constitute a violation of the territorial agreement and Order No. 15437" because Bartow has no plans to do so.

Finally, Bartow contends that TECO's request that we find the territorial agreement valid and binding upon Bartow is not proper because under *Section 120.565, Florida Statutes*, declaratory statements accept as valid existing orders, and therefore cannot be used to validate or invalidate an order. *Retail Grocers Association of Florida Self Insurers Fund v. Department of Labor & Employment Security, 474 So.2d 379, 383 (Fla. 1st DCA 1985).*

Bartow also claims that it is [*6] improper to resolve contract disputes through declaratory statements, yet that is exactly what TECO is trying to do. Bartow's position is that contract disputes should be adjudicated.

Bartow explains that two purposes of declaratory statements are to avoid costly litigation by selecting the proper course of action in advance, *Florida Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering v. Investment Corporation of Palm Beach, et al., 747 So.2d 374 (Fla. 1999),* and to provide guidance to others in similar circumstances. Id. at 525; *Chiles v. Department of State, Division of Elections, 711 So.2d 151 (Fla. 1st DCA 1998).* Bartow contends that neither of these purposes is served by TECO's Petition because, if Bartow or TECO ever again seek to have their rights under the territorial agreement adjudicated, it will be in the nature of a contract dispute that may or may not include issues related to Bartow's provision of electric service to city-owned facilities.

B. TECO's Response

TECO explains that Bartow and TECO clearly disagree on the interpretation of the territorial agreement. Bartow [*7] contends it has the right to serve city-owned facilities in TECO's service territory and TECO claims Bartow does not have that right. TECO further contends that this disagreement will lead to uneconomic duplication of electric distribution facilities in TECO's service territory.

TECO makes two arguments in support of its contention on uneconomic duplication. First, based on information filed in Docket No. 011333-EU, TECO claims that Bartow has constructed excess transformer capacity of over 84 MVA in the vicinity of the OFP property. Second, TECO believes that part of the OFP property will be developed, based on a recent article in the Bartow Ledger. TECO explains that in the article, officials of the Southwest Florida Water Management District (SWFWMD) said they intended to sell back 1200 acres to OFP, and that the sale price for the property was based on the value of the anticipated development, not the value of the land. Given these facts and Bar-

tow's belief that it has the right to serve city-owned facilities in TECO's service territory, TECO believes that uneconomic duplication is likely to occur. TECO therefore maintains that the declaratory relief it requested must be granted [*8] in order to avoid uneconomic duplication of facilities.

TECO claims that it is not trying resolve a contract dispute with a declaratory statement. TECO explains the territorial agreement "becomes embodied" in the Order approving it. Order No. 23995 issued in Docket No. 900744-EU on January 3, 1991. The agreement is part of the Order and TECO is asking us to interpret our Order.

TECO claims that its request that the territorial agreement be found valid and binding on TECO and Bartow is legitimate. TECO explains that Florida Power & Light asked for a similar declaration regarding its territorial agreement with the City of Homestead, and over Homestead's objection, we found it appropriate. Order No. 20400 issued in Docket No. 880986-EU, December 2, 1988.

C. Analysis

Section 120.565, Florida Statutes, governs the issuance of a declaratory statement. In pertinent part, it provides:

> (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.
>
> (2) The [*9] petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

When determining the availability of a declaratory statement in administrative proceedings, courts may be guided by the law on declaratory judgments in civil proceedings. *Couch v. State, 377 So.2d 32, 33 (Fla. 1st DCA 1979).* In both administrative and civil proceedings, an entity seeking a declaratory statement must show that there is an "actual, present and practical need for the declaration", and that the declaration addresses a "present controversy." *Sutton v. Department of Environmental Protection, 654 So.2d 1047, 1048 (Fla. 5th DCA 1995);* see also *Santa Rosa County, Fla. V. Administration Commission, Division of Administrative Hearings et al., 661 So.2d 1190 (Fla. 1995);* Couch at 33. Judicial restraint is also a principle that must be considered when deciding whether to issue a declaratory statement. Couch at 33.

Under circumstances very similar [*10] to those in this docket, the Florida Supreme Court ruled that a declaratory statement should not be issued because there was not a present need. Santa Rosa County at 1192-3. In Santa Rosa County the County adopted a comprehensive plan after the Department of Community Affairs (DCA) found it to be out of compliance. The DCA petitioned for an administrative hearing seeking a determination that the plan was out of compliance. The case was settled.

During the pendency of the administrative case the county had filed a complaint for declaratory relief in circuit court pertaining to the constitutionality of the laws governing comprehensive plans. DCA filed a motion to have the complaint denied, claiming the case was moot now that the administrative case had been settled. The County objected, claiming it needed declaratory relief because it anticipated future disputes over complying with the comprehensive planning laws. The circuit court ruled in favor of DCA, the 1st District Court of Appeals reversed, and the Florida Supreme Court reversed the 1st District Court of Appeals. Id.

The Court found that the actual dispute between the parties was resolved by the settlement so declaratory [*11] relief was not available to the County. Id. The Court stated that:

> Florida courts will not render, in the form of a declaratory judgment, what amounts to an advisory opinion at the instance of parties who show merely the possibility of legal injury on the basis of a hypothetical 'state of facts which have not arisen' and are only 'contingent, uncertain, [and] rest in the future.'

Id.(citing *LaBella v. Food Fair, Inc., 406 So.2d 1216, 1217 (Fla. 3d DCA 1981)* quoting *Williams v. Howard, 329 So.2d 277, 283 (Fla. 1976)).*

In this docket, the actual dispute between the parties was resolved when the OFP property was sold and the Petition for Formal Hearing was withdrawn. Although TECO has ongoing concerns about Bartow's interpretation of the territorial agreement, and disagrees with Bartow's interpretation, that disagreement does not create an "actual, present and practical need for the declaration." Sutton at 1048. There is no such need because there are no city-owned facilities for Bartow to serve in TECO's territory and Bartow has no plans to build any. TECO's concern that Bartow will build electric distribution **[*12]** facilities if development does occur in the future may or may not be well grounded, but it is not up to us to decide because TECO's assertion is based on a "state of facts which has not arisen." Santa Rosa County at 1192-3. For this reason the Motion to Dismiss should be granted.

Much of TECO's argument against the Motion to Dismiss is factually based. TECO addresses the likelihood of future development, and Bartow's actions if there is future development. These are questions of fact that cannot be resolved through a declaratory statement. The only types of hearings allowed for declaratory statements are those not involving disputed issues of material fact. Rule *28-105.003, Florida Administrative Code*. Because a declaratory statement proceeding cannot be used to test the veracity of TECO's assertions against Bartow, they are extraneous.

Finally, TECO's petition for a declaratory statement is not legitimized by the more liberal interpretation of Chapter *120.565, Florida Statutes*, resulting from the 1996 amendment to the statute. At that time the term "only" was deleted from Section 120.565(1), **[*13]** as shown below:

[EDITOR'S NOTE: TEXT WITHIN THESE SYMBOLS [O> <O] IS OVERSTRUCK IN THE SOURCE.]

> Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances [O>only<O].

The Florida Supreme Court addressed the effects of this amendment in *Florida Department of Business and Professional Regulation, Division of Pari-mutuel Wagering v. Investment Corporation of Palm Beach, D/B/A Kennel Club and Palm Beach Jai Alai, et al. 747 So.2d 374 (Fla. 1999)*[hereinafter "Investment Corp."]. Prior to this decision petitions for declaratory statements could be dismissed if the issue raised was applicable to more than one person. The view was that rulemaking was the required procedure under such circumstances.

In Investment Corp. the Court modified its position and found that issuance of a declaratory statement can be appropriate and beneficial if it applies to more than one person's particular situation. *Id. at 380-1* (quoting *Chiles v. Department of State, Division of Elections, 711 So.2d 151, 154 (Fla. 1st DCA 1998).* **[*14]** The Court recognized a distinction between a rule and a declaratory statement that would apply to more than one person. In this context the Court stated that the purposes of a declaratory statement were to allow parties to avoid litigation by selecting the proper course of action in advance, and to provide guidance to others who may interact with an agency in the same way. Id. at 381 (quoting Chiles at 154-5). The Court, while allowing a declaratory statement to serve as a policy statement in some respects, did not eliminate the need for a live controversy, nor did it allow a declaratory statement to serve as an adjudication. Thus, reaching the merits of TECO's petition for declaratory statement might avoid litigation, but its petition still does not satisfy a threshold requirement for issuance of a declaratory statement because there is no live controversy. Furthermore, because of the factual assertions TECO makes about any future development and Bartow's actions if it does occur, reaching the merits would bring an adjudicatory element into a proceeding where it has no place.

For the reasons provided above, Bartow's Amended Motion to Dismiss or Abate TECO's Petition for **[*15]** Declaratory Statement is granted.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that The City of Bartow's Motion to Dismiss is granted. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 22nd Day of January, 2004.

*654 So. 2d 1047, *; 1995 Fla. App. LEXIS 5405, **;*
20 Fla. L. Weekly D 1220

HELEN C. SUTTON, Appellant, v. DEPARTMENT OF ENVIRONMENTAL PROTECTION, etc., Appellee.

CASE No. 94-736

COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

654 So. 2d 1047; 1995 Fla. App. LEXIS 5405; 20 Fla. L. Weekly D 1220

May 19, 1995, Filed

SUBSEQUENT HISTORY: [1]**

Released for Publication June 7, 1995.

PRIOR HISTORY: Administrative Appeal from the Department of Environmental Protection.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant challenged a final order from appellee Department of Environmental Protection (Florida), dismissing a petition for declaratory statement as to whether the bottom of a lagoon was sovereign submerged lands of the State of Florida and, if it was, whether it was subject to Fla. Admin. Code Ann. r. 18-21.005 with respect to the construction of docks.

OVERVIEW: An owner of adjacent property to appellant owner of several lots on a lagoon, built a dock on the lagoon. Appellee Department of Environmental Protection (Florida) dismissed appellant's petition for declaratory statement as to whether the bottom of the lagoon was sovereign submerged lands of the State of Florida and, if it was, whether it was subject to Fla. Admin. Code Ann. r. 18-21.005 with respect to the construction of docks. On appeal, the court found that subsequent to dismissing appellant's petition, appellee filed a notice of agency statement that the dock was constructed on sovereign submerged lands of the State of Florida and that the Board of Trustees of the Internal Improvement Trust Fund claimed ownership of the submerged bottoms whereupon the dock was built. Having made that determination, appellee notified the dock owner that she was required to comply with the applicable statutes requiring her to obtain a consent of use from appellee. The court held that because this notice gave appellant the relief she was requesting, her petition was moot and there was no need to issue a declaratory statement.

OUTCOME: The court affirmed the dismissal of appellant's petition for a declaratory statement because appellant's rights, status, and other equitable or legal relations were not in doubt. Before appellee Department of Environmental Protection could issue a permit approving the construction of the dock, the dock owner must apply for a consent of use under the Florida Administrative Code and a hearing must be held.

CORE TERMS: declaratory statement, dock, submerged, lagoon, sovereign, bottom, declaratory, declaration, equitable, notice, built, final order

LexisNexis(R) Headnotes ◆ Hide Headnotes

Civil Procedure > Remedies > Declaratory Relief

HN1 A declaratory statement cannot be issued for general applicability. Petitions for

declaratory statements are similar to petitions for declaratory judgments, and appellate courts are guided by decisions issued under the declaratory judgments statute. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Remedies > Declaratory Relief

HN2 Individuals seeking declaratory relief must show that there is a bona fide, actual, present, and practical need for the declaration and that the declaration deals with a present controversy as to a state of facts. More Like This Headnote

COUNSEL: John H. Rains, III and Joseph N. Tucker of Annis, Mitchell, Cockey, Edwards & Roehn, P.A., Tampa for Appellant.

Brain F. McGrail, Assistant General Counsel and Keith C. Hetrick and Evelyn Golden, Assistant General Counsel, Tallahassee for Appellee.

JUDGES: THOMPSON, J. HARRIS, C.J., and GRIFFIN, J., concur.

OPINIONBY: THOMPSON

OPINION:

[*1048] THOMPSON, J.

Helen C. Sutton timely appeals from a final order entered by the Department of Environmental Protection ("DEP") dismissing a petition for declaratory statement. n1 We affirm.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 This order is appealable under rule 9.030(b)(1)(C) of the Florida Rules of Appellate Procedure, and section 120.68, Florida Statutes (1993).

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Sutton owns a home and several lots on a lagoon of Kings Bay in Citrus County. Kings Bay is part of the Crystal River, and both are designated as Outstanding Florida Waters. See Fla. Admin. Code **[**2]** R. 62-302.700 (formerly Fla. Admin. Code R. 17-302.700). Tana Hubbard, the owner of the adjacent property, has built a dock on the lagoon. Sutton filed a petition for declaratory statement with DEP seeking a determination as to whether the bottom of the lagoon of Kings Bay is sovereign submerged lands of the State of Florida and, if it is, whether it is subject to the requirements of rule 18-21.005 of the Florida Administrative Code with respect to the construction of docks. If the bottom of the lagoon is sovereign submerged lands of the State of Florida, Hubbard would be required to follow the permitting process and obtain a consent of use in order for her dock to be approved by DEP. DEP would then have to hold a hearing to determine whether to issue the consent of use in accordance with section 253.77, Florida Statutes (1993). Sutton, as a riparian owner of adjacent upland property, must receive notice of any hearing on Hubbard's consent of use application. § 253.70, Fla. Stat. (1993).

DEP issued a final order dismissing the petition for declaratory statement without allowing Sutton to be heard. Subsequent to dismissing Sutton's petition, DEP filed a notice of agency statement **[**3]** that the dock was constructed on sovereign submerged lands of the State of Florida and that "the Board of Trustees of the Internal Improvement Trust Fund (Trustees) claims ownership of the submerged bottoms" whereupon the dock was built. Having made that determination, DEP notified Hubbard that she was required to comply with chapter 253

of the Florida Statutes and rule 18-21.005 of the Florida Administrative Code requiring her to obtain a consent of use from DEP. As this notice gave Sutton the relief she was requesting, her petition is moot and there is no need to issue a declaratory statement.

The purpose of a declaratory statement is to:

> set out the agency's opinion as to the applicability of a specified statutory provision or of any rule or order of the agency as it applies to the petitioner in this particular set of circumstances only.

§ 120.565, Fla. Stat. (1993) (emphasis supplied). HN1 A declaratory statement cannot be issued for general applicability. Mental Health Dist. Bd., II-B v. Department of Health & Rehabilitative Servs., 425 So. 2d 160 (Fla. 1st DCA 1983). Petitions for declaratory statements are similar to petitions for declaratory judgments, **[**4]** and appellate courts are guided by decisions issued under the declaratory judgments statute. Couch v. State, 377 So. 2d 32, 33 (Fla. 1st DCA 1979). This court has held that the purpose of a declaratory judgment action

> is to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations. HN2 Individuals seeking declaratory relief must show **[*1049]** that there is a bona fide, actual, present, and practical need for the declaration . . . [and that] the declaration deals with a . . . present controversy as to a state of facts.

State Farm Mut. Auto. Ins. Co. v. Marshall, 618 So. 2d 1377, 1380 (Fla. 5th DCA 1993), disapproved on other grounds, Cunningham v. Standard Guar. Ins. Co., 630 So. 2d 179 (Fla. 1994).

Here, there is no need for DEP to issue a declaratory statement because Sutton's rights, status, and other equitable or legal relations are not in doubt. Before DEP can issue a permit approving the construction of the dock, Hubbard must apply for a consent of use under chapter 18-21 of the Florida Administrative Code and a hearing must be held. In fact, Sutton has conceded in her brief and at oral argument **[**5]** that there is a hearing pending that was initiated pursuant to chapter 18-21 of the Florida Administrative Code and that Sutton is actively participating in the hearing. For these reasons, we affirm the decision of DEP.

HARRIS, C.J., and GRIFFIN, J., concur.

661 So. 2d 1190, *; 1995 Fla. LEXIS 1141, **;
20 Fla. L. Weekly S 333

LEXSEE 661 SO.2D 1190

SANTA ROSA COUNTY, FLORIDA, Petitioner, v. ADMINISTRATION COMMISSION, DIVISION OF ADMINISTRATIVE HEARINGS, et al., Respondents.

No. 84,545

SUPREME COURT OF FLORIDA

661 So. 2d 1190; 1995 Fla. LEXIS 1141; 20 Fla. L. Weekly S 333

July 13, 1995, Decided

SUBSEQUENT HISTORY: [**1] As Revised on Denial of Rehearing October 12, 1995.

PRIOR HISTORY: Application for Review of the Decision of the District Court of Appeal Certified Great Public Importance First District - Case No. 93-659 (Leon County).

COUNSEL: Kenneth G. Oertel and M. Christopher Bryant of Oertel, Hoffman, Fernandez & Cole, P.A., Tallahassee, Florida; and Thomas V. Dannheisser, County Attorney, Santa Rosa County, Milton, Florida, for Petitioner.

David L. Jordan, Deputy General Counsel; Stephanie M. Callahan, Assistant General Counsel and Dan Stengle, General Counsel, Department of Community Affairs, Tallahassee, Florida, for Respondents.

JUDGES: GRIMES, C.J., and OVERTON, SHAW, KOGAN, HARDING, WELLS and ANSTEAD, JJ., concur.

OPINION: [*1191] The Motion for Rehearing filed by Petitioner, having been considered in light of the revised opinion, is hereby denied.

PER CURIAM.

We have for review *Santa Rosa County v. Administration Commission, Division of Administrative Hearings, 642 So. 2d 618 (Fla. 1st DCA 1994),* in which the First District certified the following question:

> DOES A COUNTY HAVE STANDING TO CHALLENGE BY A DECLARATORY [**2] ACTION THE CONSTITUTIONALITY OF A STATUTE OR RULE WHICH INDIRECTLY REQUIRES THE COUNTY TO EXPEND PUBLIC FUNDS IN ORDER TO COMPLY WITH THE MANDATES OF SUCH STATUTE OR RULE, AND FURTHER PROVIDES FOR A POTENTIAL LOSS OF REVENUE TO THE COUNTY IN

THE EVENT OF NONCOMPLIANCE?

Id. at 624. We have jurisdiction pursuant to article V, section 3(b)(4), of the Florida Constitution.

Facts and Proceedings Below

On April 2, 1990, pursuant to *section 163.3161, Florida Statutes* (1989), Santa Rosa County submitted a proposed comprehensive plan to the Department of Community Affairs (DCA) for written comment. The DCA provided the county with its objections, recommendations, and comments regarding the county's comprehensive plan. Subsequently, by ordinance, the county adopted its comprehensive plan. In response, the DCA issued its "Statement of Intent to Find the Comprehensive Plan Not in Compliance" with Florida Administrative Code Rule 9J-5, and chapter 163, Florida Statutes. The DCA then filed a petition with the Division of Administrative Hearings (DOAH) for a determination that the county's comprehensive plan did not comply with chapter 163.

Almost a year later, the county **[**3]** filed a complaint for declaratory and injunctive relief in Santa Rosa County Circuit Court against the DCA, DOAH, and Don W. Davis in his capacity as hearing officer of DOAH. In its complaint, the county sought a declaration as to the constitutionality of the statutes **[*1192]** and rules being applied in the administrative comprehensive plan case. The lawsuit was later moved to the circuit court in Leon County.

In June of 1992, the parties, in the context of the pending DOAH action, signed a stipulated settlement agreement in which the county agreed to adopt a remedial plan in compliance with the provisions of the Growth Management Act. n1 In September of 1992, the DCA filed a motion for summary judgment in the circuit court action. The DCA alleged that the parties had settled the administrative litigation concerning the county's compliance with the comprehensive plan and that the civil suit was thus moot, as Santa Rosa County had no present need for a declaratory judgment. The trial court granted the motion and ordered summary judgment in favor of the DCA.

n1 In pertinent part, the agreement provided:

> 18. Adoption or Approval of Remedial Plan Amendments. Within 60 days after receipt of the Department's objections, recommendations, and comments, the local government shall consider for adoption all remedial plan amendments and amendments to the support document, and deliver the amendments and a transmittal letter to the Department as provided by law. The letter shall describe the remedial action adopted for each part of the plan amended, including references to specific portions and pages.
>
> . . . .
>
> 20. Review of Remedial Amendments and Notice of Intent. Within 45 days after receipt of the adopted remedial plan amendments and support documents, the Department shall issue a notice of intent pursuant to *Section 163.3184, Florida Statutes*, for the adopted amendments in accordance with this agreement.
>
> . . . .
>
> b. Not in Compliance: If the remedial actions are not adopted, or if they do not satisfy this agreement, the Department shall issue a notice of intent to find the plan amendments not in compliance and

> shall forward the notice to DOAH for a hearing as provided in subsection 163.2184(10), the Florida Statutes, and may request that the matter be consolidated with the pending proceeding for a single, final hearing. The parties hereby stipulate to that consolidation and to the setting of a single final hearing if the Department so requests.

[**4]

The county subsequently filed a motion for rehearing which alleged that it still needed a declaration because it would be exposed to future problems in complying with chapter 163 and rule 9J-5. In the order denying the county's motion for rehearing, the trial court explained:

> The Settlement Agreement resolved the dispute between the parties as to the particular facts alleged in the complaint. This court granted Summary Judgment on the grounds that the requested declaration no longer presented an actual controversy as to the state of facts nor was there a bona fide, present need for the declaration for the reason that Santa Rosa County was no longer subject to sanctions.

Santa Rosa County appealed the summary judgment to the First District. In its opinion, the First District agreed with the county that its challenge was not moot; however, the court affirmed the summary judgment based on the county's lack of standing. *Santa Rosa County, 642 So. 2d at 623.*

Analysis

We disagree with the First District's conclusion that declaratory relief was still available after settlement of the parties' dispute. Based on our review of the record and the settlement agreement, [**5] we find that all disputes between the parties were resolved by the stipulated settlement agreement, which was signed by the county and the DCA in June of 1992. Therefore, because there was no pending controversy, the Declaratory Judgment Act was no longer available to Santa Rosa County. n2

n2 See *§ 86.011, Fla. Stat.* (1993).

The purpose of a declaratory judgment is to afford parties relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations. *Martinez v. Scanlan, 582 So. 2d 1167, 1170 (Fla. 1991).* Parties who seek declaratory relief must show that

> there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or [*1193] persons who have, or reasonably [**6] may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interest are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the

> answer to questions propounded from curiosity. These elements are necessary in order to maintain the status of the proceeding as being judicial in nature and therefore within the constitutional powers of the courts.

Id. (alteration in original)(quoting *May v. Holley, 59 So. 2d 636, 639 (Fla. 1952))*. Thus, absent a bona fide need for a declaration based on present, ascertainable facts, the circuit court lacks jurisdiction to render declaratory relief. *Martinez, 582 So. 2d at 1170* (citing *Ervin v. Taylor, 66 So. 2d 816 (Fla. 1953))*.

Additionally, it is well settled that, "Florida courts will not render, in the form of a declaratory judgment, what amounts to an advisory opinion at the instance of parties who show merely the possibility of legal injury on the basis of a hypothetical 'state of facts which have not arisen' and are only 'contingent, uncertain, **[**7]** [and] rest in the future.'" *La Bella v. Food Fair, Inc., 406 So. 2d 1216, 1217 (Fla. 3d DCA 1981)* (quoting *Williams v. Howard, 329 So. 2d 277, 283 (Fla. 1976))*; see also *American Indemnity Co. v. Southern Credit Acceptance, Inc., 147 So. 2d 10, 11 (Fla. 3d DCA 1962)*(holding that, in a declaratory action case, "courts may not be required to answer a hypothetical question or one based upon events which may or may not occur").

In light of these legal principles, we find that in the instant case the stipulated settlement agreement resolved the dispute between Santa Rosa County and the DCA. With the addition of the remedial plan amendments, the county agreed to bring their comprehensive plan into compliance with chapter 163, Florida Statutes, and rule 9J-5, Florida Administrative Code. Consequently, there was no longer a bona fide, actual, or present need for a declaration as to the constitutionality of those statutes or rules being applied to the county. Therefore, the circuit court lacked jurisdiction to grant declaratory and injunctive relief.

Accordingly, because we find that all issues between the parties were rendered moot, we approve the result of the district **[**8]** court's decision but disapprove its opinion to the extent of conflict herewith and express no opinion on the certified question.

It is so ordered.

GRIMES, C.J., and OVERTON, SHAW, KOGAN, HARDING, WELLS and ANSTEAD, JJ., concur.

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In re: Petition of IMC-Agrico Company for a Declaratory Statement Confirming Non-Jurisdictional Nature of Planned Self-Generation

DOCKET NO. 971313-EU; ORDER NO. PSC-98-0074-FOF-EU

Florida Public Service Commission

1998 Fla. PUC LEXIS 85

98 FPSC 1:306

January 13, 1998

PANEL: [*1] The following Commissioners participated in the disposition of this matter: JULIA L. JOHNSON, Chairman, J. TERRY DEASON, SUSAN F. CLARK, DIANE K. KIESLING, JOE GARCIA

OPINION: ORDER GRANTING INTERVENTION AND DENYING MOTIONS TO STRIKE AND MOTIONS TO DISMISS

BY THE COMMISSION:

On October 10, 1997, IMC-Agrico Company (IMCA) filed a petition for declaratory statement (Petition). The Petitioner asks us to issue an order declaring that planned self-generation and transmission facilities will not result in a retail sale, cause IMCA or its lessor to be deemed a public utility, or subject IMCA or its lessor to our regulation. On October 20, 1997, IMCA filed a request to address the Commission at the agenda conference at which the decision on the petition was considered.

On October 30, 1997, Tampa Electric Company (Tampa Electric) filed a Petition for Leave to Intervene and Request for Hearing, Answer and Request for Hearing, and Request for an Opportunity to Address the Commission.

On November 12, 1997, IMCA filed a Response in Opposition to Tampa Electric Company's Petition to Intervene and a Motion to Strike Tampa Electric Company's Answer and Request for Hearing.

On November [*2] 14, 1997, Florida Power Corporation (FPC) filed a Petition for Leave to Intervene.

On November 19, 1997, Florida Power and Light Company (FPL) filed a Petition for Leave to Intervene or Motion to Participate Amicus Curiae in Docket No. 971313-EU, and a Motion to Dismiss IMC-Agrico's Petition for Declaratory Statement. FPL filed its Amicus Curiae Memorandum on November 24, 1997.

On November 19, 1997, Tampa Electric filed a Memorandum in Opposition to IMC-Agrico's Motion to Strike Tampa Electric Company's Answer and Request for Hearing.

On November 21, 1997, Peace River Electric Cooperative, Inc. (PREC) filed a Petition to Intervene and Request for Hearing.

On December 1, 1997, IMCA filed a response in Opposition to FPL's Petition to Intervene and Motion to Dismiss.

The following were filed after December 1, 1997:

FPL's Motion to Address the Commission; IMCA's Response in Oppostion to Peace River Electric Cooperative, Inc.'s Petition to Intervene and Request for Hearing; IMCA's Response to Florida Power and Light Company's "Amicus Curiae Memorandum"; Florida Industrial Cogeneration Association's Petition for Leave to Intervene; Petition of Florida Global Citrus, Ltd. for [*3] Leave to Intervene.

The project at issue is described as a plan to construct and operate a natural gas-fired combined cycle electric generating unit and 69 KV transmission line to provide electric power for IMCA's mining and processing complex in central Florida. Pursuant thereto, IMCA will organize a wholly-owned subsidiary into which assets including land, rights of way and other property to be used in the project will be placed. The IMCA subsidiary and Duke Energy Power Services LLC (DEPS) will organize a partnership (or equivalent entity) as co-general partners to which both will make equity contributions.

The partnership will design and construct both the generating unit and transmission line and lease undivided ownership interests in the project to, respectively, IMCA and an Exempt Wholesale Generator (EWG) that will be an affiliate of DEPS. IMCA and DEPS currently envision that the Power Plant will have a total net generating capacity of approximately 240 MW, but are also considering the possibility of constructing a larger project.

As a result of the two lease arrangements, it is intended that IMCA will provide self-service to the extent of its current expected [*4] requirement of 120 MW and that the EWG will sell the remaining output into the wholesale market. To that end, petitioner lists various parameters expected to govern the IMCA lease when finalized as well as various filings which will be made to secure EWG status for the DEPS subsidiary.

Tampa Electric characterizes the proposed arrangements as a subterfuge retail sale which would create a territorial dispute as to who should service IMCA, a current interruptible service customer of Tampa Electric. Tampa Electric also asserts that more facts than those provided by petitioner are needed for us either to act on the petition or to differentiate the allegedly non-jurisdictional arrangements described therein from a retail sale subject to our jurisdiction. Further, Tampa Electric asserts standing to intervene in that it will, it states, suffer injury that is both sufficient to entitle the Company to a Section 120.57 hearing and of a type which the hearing is designed to protect. [sic; See, n. 1, supra 1]

That injury would assertedly include loss of revenues from sales to IMCA of at least $ 12.3 million in annual retail base revenues and the stranding of investment in transmission [*5] and subtransmission to serve the delivery points of IMCA.

FPC argues, similarly, that insufficient facts are provided in IMCA's Petition for us to decide whether the arrangement proposed is self-generation or a retail sale. Like Tampa Electric, FPC asserts that its substantial interests will be affected because of loss of revenues from sales to IMCA and the uneconomic duplication of FPC's existing generating and transmission facilities. FPC notes that it received revenues from IMCA in the amount of $ 20.8 million for the sale of 522,000,000 KWH of energy for the 12 months ending September 30, 1997.

FPL acknowledges that IMC-Agrico is not a retail customer of FPL, but alleges that immediate adverse impact on FPL's exclusive right to provide retail electric service would result because of the precedent that our issuance of this declaratory statement would establish. FPL alternatively seeks to participate amicus curiae if it is denied intervention. FPL's Motion to Dismiss asserts that the Petition for Declaratory Statement should be dismissed because it seeks a declaratory statement as to parties other than IMC-Agrico and because there are insufficient facts alleged on the basis of [*6] which we can issue a Declaratory Statement.

Tampa Electric's Memorandum in Opposition to IMC-Agrico's Motion to Strike Tampa Electric's Answer and Request for Hearing once again addresses, inter alia, the claimed insufficiency of the facts in the petition as a basis on which we can declare the proposed arrangement to be self-service rather than a prohibited retail sale.

PREC's Petition and Request for Hearing are similar to those of Tampa Electric and FPC.

DISCUSSION

Because there will normally be no person, other than the petitioner, who will be affected, the right of persons affected by agency action to a 120.57 hearing is generally not implicated under Section 120.565 petitions for declaratory statement. *Florida Optometric Association v. Department of Professional Regulation, Board of Opticianry, 567 So.2d 928, 936 (1st DCA 1990).* Nonetheless, that general observation by the Court in Florida Optometric does not absolutely preclude intervention in declaratory statement proceedings. Both the petitioner and those seeking intervention, excepting FPC, cite *Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478 (1st DCA 1981)* [*7] as the proper standard to apply. In Agrico, the Court held that standing to participate in an administrative proceeding as a party whose substantial interests will be affected by proposed agency action requires one to show

1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and
2) that his substantial injury is of a type or nature which the proceeding is designed to protect. n1

406 So.2d at 482.

n1 It is assumed that the Court meant "protect against".

In its Response to both Tampa Electric and FPC's Petition to Intervene, IMC-Agrico argues that neither prong of the Agrico test is met. IMC-Agrico notes that 3-4 years will pass before the plant is built and concludes therefore that the injury is neither immediate nor of the type a declaratory statement proceeding is designed to protect against.

In this case, however, petitioners for intervention allege more than the mere economic losses from lawful self-generation found to be insufficient to create standing in Order 16581, cited by IMC-Agrico. n2 Intervention petitioners allege here that issuance of the declaratory statement [*8] is sought on the basis of insufficient facts necessary for us to know whether the resulting project will be self-generation or prohibited retail sales. Therefore, intervention petitioners assert that if the Declaratory Statement is issued, territorial disputes, stranded investment and unwarranted costs to the companies and their rate payers will result from those unlawful retail sales.

n2 In re: Petition of Monsanto Company for a Declaratory Statement concerning the Lease Financing of a cogeneration Facility, Docket No. 860725-EU. Order 16581, p. 2.

Where our long-standing policy requires public utilities to anticipate territorial disputes and bring them to us for resolution, it would be inconsistent to characterize these allegations as lacking "immediacy". Moreover, where IMC-Agrico seeks a disclaimer of our jurisdiction pursuant to *Section 366.02, Florida Statutes* and a major focus of the regulation of public utilities pursuant to Chapter 366 is the prevention of uneconomic duplication of utility facilities, it would be inconsistent to say that the 120.565 proceeding is not designed to protect against the type of injuries [*9] alleged or that those injuries lie outside the zone of interest of Chapter 366. Accordingly, we find that Tampa Electric, FPC and PREC have standing to participate in these proceedings as parties. FPL, whose more speculative intervention claim is based on concern for the precedent established, will be permitted to participate as amicus curiae, rather than as an intervenor. Order No. 16581, p. 2. Accordingly, IMC-Agrico's Motion to Strike Tampa Electric's Answer and Request for Hearing is denied. FPL's Motion to Dismiss IMC-Agrico's Petition is also denied. We believe that the mere description of an ownership structure and the effect of petitioner's activities on elements of that structure does not make the petition improper for seeking a declaration as to third parties. For example, a **request** for a **declaratory statement** to the effect that no sale to the public takes place does not make members of the public "indispensable parties" or render such a petition defective.

In Tampa Electric Petition to Intervene and Request for Hearing (Tampa Petition), Tampa Electric states that

... IMCA's Petition for Declaratory Statement does not allege facts specific or extensive enough to [*10] warrant a determination that the proposed transactions described in the petition would not constitute the retail sale of electricity within Tampa Electric's retail service territory.

Tampa Electric then continues as follows:

A formal proceeding is necessary to determine, through discovery, the presentation of evidence and cross-examination, the true nature of IMCA's proposal so that a clear determination may be made as to whether the proposed project will be owned and operated in such a way as to effect the retail sale of electricity, contrary to the purpose and intent of *Section 366.04, Florida Statutes.*

Tampa Petition, p. 7-8.

While the first of these two statements is limited to a characterization of the facts presented in IMCA's Petition for Declaratory Statement, the second statement goes beyond those facts. We note that Rule 25-22.022 provides for a hearing pursuant to § 120.57 without specifying whether it should be a § 120.57(1) hearing where the facts are in dispute, or a § 120.57(2) hearing where the facts are not in dispute. We currently have the discretion to conduct a § 120.57(1) hearing, and so decide. [*11] See, e.g., *Sans Souci v. Division of Florida Land Sales, 448 So.2d 1116, 1119-1120 (1st DCA 1989).*

In view of the above, it is

ORDERED by the Florida Public Service Commission that the petitions to intervene of Florida Power Corporation, Tampa Electric Company and Peace River Electric Cooperative are granted. It is further

ORDERED that the petitions of Florida Power and Light Company, Florida Global Citrus, Ltd., and Florida Industrial Cogenerator Association to participate as amicus curiae are granted. It is further

ORDERED that the motions to strike filed by petitioner IMC-Agrico and the Motion to Dismiss filed by Florida Power Corporation are denied. It is further

ORDERED that this matter be set for a 120.57(1) hearing on an expedited basis.

By ORDER of the Florida Public Service Commission this 13th day of January, 1998.

BLANCA S. BAYO, Director

Division of Records and Reporting

Commissioners Kiesling and Garcia dissented.

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In re: Petition for Declaratory Statement by Duke Energy New Smyrna Beach Power Company, L.L.P. Concerning Eligibility to Obtain Determination of Need Pursuant to Section 403.519, F.S., Rules 25-22.080 and .081, F.A.C., and Pertinent Provisions of the Florida Electrical Power Plant Siting Act

DOCKET NO. 971446-EU; ORDER NO. PSC-98-0078-FOF-EU

Florida Public Service Commission

1998 Fla. PUC LEXIS 89

98 FPSC 1:318

January 13, 1998

PANEL: [*1] The following Commissioners participated in the disposition of this matter: JULIA L. JOHNSON, Chairman, J. TERRY DEASON, SUSAN F. CLARK, DIANE K. KIESLING, JOE GARCIA

OPINION: ORDER DENYING PETITION FOR DECLARATORY STATEMENT

BY THE COMMISSION:

BACKGROUND

On November 4, 1997, Duke New Smyrna Beach Power Company, L.L.P. (Duke New Smyrna) filed a petition for declaratory statement. The petition asks us to issue an order stating that Duke New Smyrna is entitled to apply for a determination of need for its proposed power plant pursuant to Sections 403.519 and 403.503(4) and (13) of the Florida Electrical Power Plant Siting Act and Rules 25-22.080-.081, Florida Administrative Code.

On December 2, 1997, Florida Power Corporation (FPC) filed a Motion to Dismiss Proceeding, Answer to Petition for **Declaratory Statement**, and Petition to Intervene and **Request** for Administrative Hearing.

Pleadings filed after December 1, 1997 included the following:

> Florida Power & Light Company's (FPL) Motion for Leave to Participate Amicus Curiae; FPL's Notice of Supplemental Authority; Duke New Smyrna's Motion to Dismiss FPC's Petition to Intervene and to Deny FPC's Request for [*2] Administrative Hearing; Duke New Smyrna's Consolidated Motion to Strike FPC's Answer and FPC's Motion to Dismiss; FPL's Petition for Leave to Intervene; Enron Capital & Trade Resources Corp.'s Motion for Leave to File Amicus Curiae Memorandum of Law and Request to Address the Commission; Duke New Smyrna's Motion to Dismiss FPL's Petition for Leave to Intervene.

The power plant Duke New Smyrna plans to develop is a natural gas fired, combined cycle electrical generating unit near New Smyrna Beach, in Volusia County, Florida. The plant is envisioned, but not definitely configured, at between 240 MW and 500 MW of net generating capacity and planned to come on line as early as the summer of 2000.

Pursuant to a participation agreement being negotiated between Duke New Smyrna and the Utilities Commission of New Smyrna Beach (New Smyrna Commission), the New Smyrna Commission will be entitled to 20 MW to 30 MW of the plant's output. The remainder of the output will be marketed in the open wholesale market. Duke New Smyrna will take all investment, capital, and market risk associated with building and operating the plant.

Duke New Smyrna will be certified as an Exempt Wholesale Generator [*3] (EWG) pursuant to the Public Utility Holding Company Act, *15 U.S.C.S. § 79Z-5a* (1994 & Supp. 1997), and will file a tariff and application materials with

FERC to sell the plant's output at market-based rates. Market-based rates have been approved for other facilities by the FERC, as in Cataula Generating Company, L.P., FERC P 61,261 (1997). Unlike the owner of a QF (Qualifying Facility), Duke New Smyrna could not compel any utility to purchase its power.

DISCUSSION

FPC cites a number of cases holding that, when the result is an agency statement of general applicability interpreting law or policy, declaratory statement proceedings are inappropriate. *Regal Kitchens, Inc., v. Florida Dep't of Revenue, 641 So.2d 158 (1st DCA 1994),* and *Mental Health District Bd v. Florida Dep't of Health and Rehabilitative Services, 425 So.2d 160 (1st DCA 1983).* We agree with FPC that a statement to the effect that Exempt Wholesale Generators are proper applicants under the Siting Act would be a statement of general applicability interpreting law and policy. Such a statement would not **[*4]** merely affect petitioner in petitioner's set of circumstances only, but would carry implications for the electric power industry statewide.

On this basis, we decline to issue the requested **Declaratory Statement,** noting that petitioner can file a **request** for rulemaking. Staff was also directed to discuss with the Chairman appropriate proceedings to review law and policy as to merchant plants being applicants for certificates of need.

In view of the above, it is

ORDERED by the Florida Public Service Commission that the Petition for Declaratory Statement of Duke-New Smyrna Beach Power Company L.L.P. is denied. It is further

ORDERED that this docket be closed.

By Order of the Florida Public Service Commission this 13th day of January, 1998.

BLANCA S. BAYO, Director

Division of Records and Reporting

Commissioner Garcia dissented.

den, J., entered in dissolution proceeding. The District Court of Appeal held that husband was not entitled to receive credit against wife's interest in marital home for one half of all mortgage payments, taxes, insurance premiums relating to home and repairs necessary for sale of home which occurred since date of parties' separation.

Affirmed in part, reversed in part, and remanded.

Divorce ⇐252.5(3)

In divorce proceeding in which marital home, an entireties property, was ordered sold, husband was not entitled to receive credit against wife's interest in home for one half of all mortgage payments, taxes, insurance premiums relating to home and repairs necessary for sale of home which occurred between date of parties' separation and date of final judgment.

William H. Maness, Jacksonville, for appellant.

James G. Roberts, Roberts & Reiter, P.A., Michael J. Korn, Prom, Korn & Zehmer, P.A., Jacksonville, for appellee.

PER CURIAM.

Appellant, the former wife, appeals a final judgment of dissolution of marriage contending the award of rehabilitative alimony and the equitable distribution provisions are erroneous. With the exception of one error which requires reversal, we find no abuse of discretion in the awards made by the trial court.

With regard to the parties' marital home, which was an entireties property, the trial court required that it be sold and the equity split equally between the parties except, however, that upon the sale of the home, the former husband "shall receive a credit against the wife's interest in the home for one-half of all mortgage payments, taxes, insurance premiums related to the home and repairs necessary for the sale of the home which have occurred since the date of the parties' separation in August 1991." We agree with the former wife that the award of credits to the former husband from August 1991 through the date of the final judgment is not supported by law or fact. *Taber v. Taber*, 626 So.2d 1089 (Fla. 1st DCA 1993). While the *Taber* court remanded this issue to the trial court for reconsideration of whether the former husband could prove that some special credit should be given for the payments made during the marriage, we are satisfied that in this instance, there is no basis for granting credits prior to the final judgment.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

SMITH, JOANOS and DAVIS, JJ., concur.

REGAL KITCHENS, INC., Appellant,

v.

FLORIDA DEPARTMENT OF REVENUE, Appellee.

No. 93-994.

District Court of Appeal of Florida, First District.

July 29, 1994.

Corporation filed request for Department of Revenue to issue technical assistance advisement to address applicability of sales tax laws to transaction between corporation and related general partnership involving sale and leaseback of commercial premises. The Department informed corporation that rental income paid to partnership was not exempt. Corporation filed petition for declaratory statement, and Department of Revenue issued declaratory statement taking same position. The District Court of Appeal, Padovano, Phillip J., Associate Judge, held that: (1) Department of Revenue's declarato-

ry statement was impermissibly broad in that it purported to declare a general policy that applied to entire class of taxpayers, but (2) Department's position on merits of case was correct as to specific transaction.

Affirmed in part and reversed in part.

1. **Administrative Law and Procedure** ⇐508

Statute allowing administrative agency to set out its opinion as to applicability of specified provision or rule or order as it applies to petition in his particular set of circumstances, limits use of declaratory statement to expression of agency's position on issue raised by individual petition in particular set of facts. West's F.S.A. § 120.565.

2. **Administrative Law and Procedure** ⇐508

Administrative agency may not use declaratory statement as vehicle for adoption of broad agency policy or to provide statutory or rule interpretations that apply to entire class of persons. West's F.S.A. § 120.565.

3. **Administrative Law and Procedure** ⇐421, 508

Administrative agency cannot effectively repudiate one of its own rules by making contrary expression in declaratory statement.

4. **Taxation** ⇐1234

Department of Revenue's declaratory statement that real estate sales tax exemption, which applied if consideration paid by one corporation to related corporation for use of property was equal to debt secured by property and if each corporation was equally liable on debt, did not apply in situation in which owner was general partnership and operator was a corporation, was impermissibly broad; statement was not limited to analysis of applicability of exemption under rule, much of discussion was devoted to expression of Department's view that there was no statutory basis for exemption, and although Department disclaimed intent to nullify rule, message sent to broad class of taxpayers was that Department had concluded exemption for related corporations was not valid. West's F.S.A. § 120.565.

5. **Administrative Law and Procedure** ⇐508

Declaratory statement may be affirmed in part to the extent it is proper, if improper parts are severable.

6. **Administrative Law and Procedure** ⇐508

Taxation ⇐1222

Portion of Department of Revenue's declaratory statement containing detailed explanation of Department's position regarding validity of sales tax exemption on sale of property between related corporations was severable from remainder of declaratory statement; reasoning was not necessary to support Department's conclusion that exemption in question did not apply to taxpayer, and thus Department was not required to express opinion on validity of exemption. West's F.S.A. § 120.565.

7. **Administrative Law and Procedure** ⇐701, 796

Declaratory statements are subject to judicial review, but appellate court may reverse declaratory statement only if agency's interpretation of law is clearly erroneous. West's F.S.A. § 120.68.

8. **Taxation** ⇐1234

For purposes of determining whether rental income was taxable, "business," defined in tax statute to be any activity engaged in by any person or cause to be engaged in by him with object of private or public gain, benefit or advantage, was broad enough to encompass many different forms of rental arrangements including sale and leaseback transaction between corporation and related general partnership, and was not limited to those who engaged in regular course of dealing with different clients or customers. West's F.S.A. § 212.02(2).

See publication Words and Phrases for other judicial constructions and definitions.

9. **Taxation** ⇐1234

In determining whether sales tax was due on rental income paid under sale and leaseback arrangement between corporation and related general partnership, existence of landlord/tenant relationship did not turn on

whether rental agreement was reduced to writing. West's F.S.A. § 212.01.

10. Corporations ⇐1.6(11)

Those who seek protection afforded by incorporation must also accept the burdens; individuals may incorporate to shield themselves from personal liability, or for many other reasons, but may not then disavow existence of corporation for purpose of obtaining tax advantage.

11. Taxation ⇐1234

Department of Revenue was entitled to collect state sales tax due for rental income paid by corporation to related partnership for commercial property; it appeared that general partnership was established for sole purpose of taking title to property and leasing it back to corporation, and language of lease indicated that corporation was not merely alter ego of general partnership. West's F.S.A. § 212.01.

12. Taxation ⇐204(2)

Tax exemption must be strictly construed against party claiming exemption.

13. Taxation ⇐1317

Department of Revenue's conclusion that exemption from state sales tax on rental income did not apply to sale and leaseback between corporation and related partnership was not clearly erroneous; Department properly concluded that exemption applicable to "related corporations" transaction could not be applied to "related partnership." West's F.S.A. § 212.031.

14. Taxation ⇐1234

Admitted conflict between Department of Revenue's declaratory statement regarding state sales tax exemption for rental income paid between related corporations and technical assistance advisements previously issued by Department in other cases was not ground for reversal of decision denying claim to exemption for rent paid by corporation to related general partnership. West's F.S.A. § 212.031.

15. Administrative Law and Procedure ⇐502

Taxation ⇐1234

Rule that administrative agency may not reject widespread policy established by usage or stated by it and relied upon by public does not apply to technical assistance advisement by Department of Revenue, which was not an expression of policy. West's F.S.A. § 213.-22(1).

16. Administrative Law and Procedure ⇐508

Taxation ⇐1319

Department of Revenue's stipulation that its declaratory statement was inconsistent with previous technical assistance advisements, without more, was not reason to find it invalid.

J. Riley Davis of Katz, Kutter, Haigler, Alderman, Marks and Bryant, Tallahassee, and Stanton G. Levin, P.A., Coral Gables, for appellant.

Robert A. Butterworth, Atty. Gen., and Jarrell L. Murchison, Asst. Atty. Gen., Tallahassee, for appellee.

Cynthia S. Tunnicliff of Pennington & Haben, Tallahassee, for amicus curiae Florida Auto. Dealers Ass'n.

Harold F.X. Purnell of Rutledge, Ecenia, Underwood & Purnell, P.A., Tallahassee, for amicus curiae Lodge Enterprises, Inc.

Bernard A. Barton, Jr., Douglas A. Wright, and Laurel J. Lenfestey of Holland & Knight, Tampa, for amicus curiae Anchor Glass Container Corp.

PADOVANO, Philip J., Associate Judge.

This is an appeal from a declaratory statement issued by the Department of Revenue. The appellant, Regal Kitchens, Inc., has advanced two arguments for reversal: (1) the declaratory statement is impermissibly broad in that it purports to declare a general policy that applies to an entire class of taxpayers, and (2) the position asserted by the Department on the merits of the case is incorrect. We have concluded that the first argument is meritorious and that portions of the declara-

tory statement must be stricken. However, because we find no error in the Department's position on the merits, those portions of the declaratory statement specifically addressing the transaction in this case are affirmed.

Central to the tax controversy between the immediate parties is a dispute regarding the nature of the legal relationship between a corporation, a general partnership, and four individuals. The corporation, Regal Kitchens, conducts its business operations on improved real property owned by a general partnership known as 8600 Associates. The property consists of a manufacturing plant and offices. Four individuals are the principal owners of both the corporation and the partnership. Each of the principals owns stock in Regal Kitchens, Inc., in the same proportion that he owns his separate partnership interest in 8600 Associates.

The real property was once owned by Regal Kitchens subject to a mortgage in favor of the Banker's Life Company. In 1977, Regal decided to sell the property to 8600 Associates, and to lease it back. After the sale and leaseback, 8600 Associates assumed liability for payment of the note and mortgage to Banker's Life and Regal remained liable on the note. In 1981, Regal Kitchens obtained a loan from the Merchants Bank of Miami and used the equity in the property owned by 8600 Associates as collateral. At that time, 8600 Associates gave the Merchants Bank a second mortgage on the property. The loan agreement with Merchants Bank provides that a default on the first mortgage is a default on the second. Additionally, the four principals in Regal Kitchens and 8600 Associates guaranteed payment to Merchants Bank.

The agreement between Regal Kitchens and 8600 Associates was reduced to writing in the form of a commercial lease. According to the most recent version of the lease, Regal Kitchens pays rent each month and 8600 Associates applies the rental income to its payments on the first and second mortgages on the property and the insurance and taxes. There is no profit to 8600 Associates. The rent payments received from Regal do not exceed the total financial obligation by 8600 Associates for the expenses and the debt service. 8600 Associates is not engaged in any other business. Apparently, the partnership was formed for the sole purpose of taking title to the real property and leasing it back to Regal Kitchens.

Regal Kitchens formally requested that the Department of Revenue issue a technical assistance advisement to address the applicability of the sales tax laws to the transaction between Regal and 8600 Associates. On April 24, 1992, the Department answered by informing Regal Kitchens that the rental income paid to 8600 Associates under the written lease is taxable under chapter 212, Florida Statutes, and that it is not subject to any exemption. Regal then filed the petition for declaratory statement that has become the subject of this appeal. On March 2, 1993, the Department of Revenue issued the Declaratory Statement, once again taking the position that the rent paid by Regal Kitchens to 8600 Associates is subject to sales tax under chapter 212, the Florida Revenue Act.

The Department reasoned that the transaction was taxable under section 212.031, Florida Statutes (1989), and that Regal Kitchens was not entitled to a tax exemption under rule 12A–1.070(19)(c). This exemption applies if the consideration paid by one corporation to a related corporation for the use of property is equal to a debt secured by the property and if each of the corporations is equally liable on the debt. However, the Department concluded that Regal was not equally liable and that the exemption could not be used in a situation such as this, in which the owner is a general partnership and the operator is a corporation. In the process, the Department made a detailed analysis of rule 12A–1.070(19)(c).

[1, 2] The first issue is whether the declaratory statement is impermissibly broad. We conclude that it is. Section 120.565, Florida Statutes (1989), states in part that "[a] declaratory statement shall set out the agency's opinion as to the applicability of a specified statutory provision or of any rule or order of the agency as it applies to the petitioner in his particular set of circumstances only." This statute limits the use of a declaratory statement to an expression of the agency's position on an issue raised by an

individual petitioner in a particular set of facts. As this court observed in *Florida Optometric Association v. Department of Professional Regulation*, 567 So.2d 928, 937 (Fla. 1st DCA 1990), an administrative agency may not use a declaratory statement as a vehicle for the adoption of a broad agency policy or to provide statutory or rule interpretations that apply to an entire class of persons.

[3, 4] The declaratory statement in this case goes well beyond an expression of the Department's position on the issue presented by Regal Kitchens. The Department concluded that Regal Kitchens was not entitled to claim the exemption in rule 12A–1.070(19)(c) for rental payments between related corporations because the exemption must be strictly construed and because it does not apply to a rental payment made by a corporation to a general partnership. However, the declaratory statement was not limited to an analysis of the applicability of exemption under rule 12A–1.070(19)(c). On the contrary, much of the discussion is devoted to an expression of the Department's view that there is no statutory basis for the exemption. The Department disclaimed an intent to nullify the rule 12A–1.070(19)(c) exemption by stating that the rule "was duly promulgated and will be respected until it is repealed." Yet the message sent by the declaratory statement to a broad class of taxpayers was clear: the Department has concluded that the exemption stated in rule 12A–1.070(19)(c) for related corporations is not valid. An administrative agency cannot effectively repudiate one of its own rules by making a contrary expression in a declaratory statement.

[5, 6] Although the declaratory statement contains a detailed explanation of the Department's position regarding the validity of rule 12A–1.070(19)(c), that reasoning is not necessary to support the conclusion. If the exemption does not apply to Regal Kitchens, as the Department maintains, then the Department has no cause to express an opinion on the validity of the exemption. Despite this error, it is possible for the court to separate the part of the declaratory statement that properly addresses the tax consequences of the Regal Kitchens transaction from those parts of the declaratory statement that are improper expressions of general agency policy. A declaratory statement may be affirmed in part to the extent that it is proper, if the improper parts are severable. *Mental Health Dist. Bd. v. Florida Dep't of Health and Rehabilitative Services*, 425 So.2d 160 (Fla. 1st DCA 1983). Applying this principle, the court strikes out only those portions of the declaratory statement that address the validity of the tax exemption afforded by rule 12A–1.070(19)(c).

[7] The next issue is whether the Department was correct on the merits of its determination that the rent paid by Regal Kitchens to 8600 Associates is taxable. Declaratory statements are subject to judicial review under section 120.68 of the Administrative Procedure Act, but an appellate court may reverse a declaratory statement only if the agency's interpretation of the law is clearly erroneous. *Grady v. Department of Professional Regulation*, 402 So.2d 438 (Fla. 3d DCA), *appeal dismissed*, 411 So.2d 382 (Fla. 1981).

Section 212.031, Florida Statutes (1993), provides in part that "every person is exercising a taxable privilege who engages in the business of renting, leasing, letting, or granting a license for the use of any real property." Regal Kitchens maintains that the transaction in this case is not taxable because 8600 Associates is not engaged in the business of leasing property. We disagree. 8600 Associates was established for the sole purpose of taking title to the property and leasing it back to Regal Kitchens. On these facts it appears that 8600 Associates is in the business of leasing property. In fact, that is its only business.

[8] The term "business" is defined in subsection 212.02(2), Florida Statutes (1993), as "any activity engaged in by any person, or caused to be engaged in by him, with the object of private or public gain, benefit, or advantage, either direct or indirect." This definition is broad enough to encompass many different forms of rental arrangements, including the transaction in this case. *See, e.g., Kirk v. Western Contracting Corp.*, 216

So.2d 503 (Fla. 1st DCA), *cert. denied*, 225 So.2d 535 (Fla.1969). The stockholders of Regal Kitchens would not have titled the property in the name of a partnership and leased it back unless there was some benefit inherent in that arrangement. Nothing in subsection 212.02(2) Florida Statutes (1989), suggests that the term "business" is limited to those who engage in regular course of dealing with different clients or customers. A person who rents a single duplex unit is engaged in business as is the owner of an apartment who rents thousands of units.

[9] Regal Kitchens relies on *Lord Chumley's of Stuart, Inc. v. Department of Revenue*, 401 So.2d 817 (Fla. 4th DCA 1981), but that case is distinguishable here. The relationship between the owner of the property and the corporations operating businesses in *Lord Chumley's* was that of trustee and beneficiary. The corporations each paid the mortgage payments, taxes, insurance, and other expenses and no payments were made directly to the owner. The court was justified in its conclusion that there was no sales tax due because there was no rental agreement and no rental income of any kind. In contrast, the relationship between Regal Kitchens and 8600 Associates is that of landlord and tenant. The Department has distinguished *Lord Chumley's* by pointing out that this case involves a written lease agreement. However, the issue should not turn on whether a rental agreement is reduced to writing. A more fundamental distinction is that the sales tax was not due under the facts of *Lord Chumley's* case because there was no rental agreement of any kind. The character of the relationship between the owner of the land and the operator of the business of the land was not that of a landlord and tenant.

Regal Kitchens contends that the payments cannot be regarded as "rent" because 8600 Associates is merely the "alter ego" of Regal Kitchens. Specifically, Regal argues that "[t]he effect of the relationship between the parties and the 'lease arrangement' is that four individuals own and 'lease' the subject real estate to themselves and pay the mortgage indebtedness represented by a first and second mortgage." This argument puts Regal Kitchens in the unusual position of a corporation attempting to pierce its own corporate veil. Having set up a corporation, ostensibly for the purpose of establishing itself as a separate legal entity, Regal now argues that it is actually not distinct from the related partnership, 8600 Associates. Regal's characterization of the transaction is inconsistent with the corporation laws and the terms of the lease itself.

[10, 11] Those who seek the protection afforded by incorporation must also accept the burdens. Individuals may incorporate to shield themselves from personal liability, or for many other reasons, but they may not then disavow the existence of the corporation for the purpose of obtaining a tax advantage. This is not a case in which nominal parties to a business venture are "paying rent to themselves" as Regal argues. On the contrary, this is a case in which a corporation is paying rent to a general partnership.

The argument that Regal Kitchens is merely an "alter ego" of 8600 Associates is also belied by the language of the lease. Paragraph 27 states: "[i]t is expressly understood that the Landlor[d] shall not be construed or held to be a partner or associate of the Tenant in the conduct of its business. The relationship between the parties hereto is and shall remain at all times that of Landlord and Tenant." Having characterized its own relationship strictly as that of a "tenant" of 8600 Associates, Regal Kitchens is not in a position to argue that the Department of Revenue is powerless to collect sales taxes due the State of Florida for the rental income. Nor should the court participate in an effort to recharacterize Regal Kitchen's status as a tenant, for that would only assist the owners in avoiding the consequences of their own decision to incorporate.

[12, 13] The Department correctly determined that Regal Kitchens was not entitled to claim the exemption stated in rule 12A-1.070(19)(c). To establish a valid claim to the exemption, the taxpayer must show that the consideration is paid by one corporation to a related corporation for the use of land, that the consideration is equal to an amount of the debt owed by the related corporation and secured by the property, and that both cor-

porations are equally liable on the debt. The Department concluded that Regal was not "equally liable" on the debt because its position with regard to the second mortgage was merely that of guarantor, and that the exemption could not be applied to a corporation that is related to a partnership. We cannot say that this conclusion is clearly erroneous. A tax exemption must be strictly construed against the party claiming the exemption. *State Department of Revenue v. Anderson*, 403 So.2d 397 (Fla.1981); *State ex rel. Szabo Food Services, Inc. of North Carolina v. Dickinson*, 286 So.2d 529 (Fla.1973); *Green v. Pederson*, 99 So.2d 292 (Fla.1957). If the exemption at issue is strictly construed it must be limited to its terms and applied only to related corporations. The Department has no duty, and arguably no right, to extend the exemption beyond its terms so that it applies to all related party leases.

[14, 15] Finally, the admitted conflict between the declaratory statement and technical assistance advisements previously issued by the Department in other cases is not a ground for reversal. We are mindful of the rule that an administrative agency may not reject a widespread policy established by usage or stated by it and relied upon by the public, *Walker v. State Dep't of Transp.*, 366 So.2d 96 (Fla. 1st DCA 1979); *Outdoor Advertising Art Inc. v. Florida Dep't of Transp.*, 366 So.2d 114 (Fla. 1st DCA 1979); *Price Wise Buying Group v. Nuzum*, 343 So.2d 115 (Fla. 1st DCA 1977), but this rule does not apply here because a technical assistance advisement is not an expression of policy. Subsection 213.22(1), Florida Statutes (1989), states:

> ... Technical assistance advisements shall have no precedential value except to the taxpayer who requests the advisement and then only for the specific transaction addressed in the technical assistance advisement ... A technical assistance advisement is not an order issued pursuant to s. 120.565 or s. 120.59, or a rule or policy of general applicability under s. 120.54.

Regal's claim that the declaratory statement is invalid because it is in conflict with previous technical assistance advisements cannot be sustained in view of the plain wording of this statute. If a technical assistance advisement is not a policy of general applicability, the Department cannot be said to have violated its policy simply by taking a new position in a declaratory statement. If that were the case, the Department could never recover from a mistake or revise an interpretation in a previous technical assistance advisement.

[16] This conclusion does not alter the Department's duty to give equal treatment to similarly situated taxpayers. An aggrieved taxpayer can raise an equal protection claim if the Department is engaging in any form of selective or discriminatory taxation. However, these kinds of claims are not yet ripe for review in this case. A claim of discrimination in taxation could be made only after the tax is enforced, and it could be reviewed only after the agency has an opportunity to address the issue in a hearing in which evidence is presented and a record is made. At present, the only issue for review before this court is the validity of a declaratory statement. The stipulation that the statement is inconsistent with previous technical assistance advisements, without more, is not a reason to find it invalid.

For these reasons we uphold the portions of the declaratory statement that are addressed to the facts of this case and reject the remaining portions on the ground that they are invalid. The declaratory statement is affirmed in part and reversed in part.

SMITH and MINER, JJ., concur.

William Leslie LEE, Appellant,

v.

STATE of Florida, Appellee.

No. 92–3442.

District Court of Appeal of Florida, First District.

Aug. 1, 1994.

Rehearing Denied Sept. 7, 1994.

Defendant was convicted in the Circuit Court, Bay County, N. Russell Bower, J., of

Accordingly, the judgments against appellant are affirmed, but the cause is remanded for correction of two of his sentences. Appellant need not be present for this purpose.

BOARDMAN, A.C.J., and GRIMES and DANAHY, JJ., concur.

MENTAL HEALTH DISTRICT BOARD, II-B, Appellant,

v.

FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES; and Apalachee Community Mental Health Services, Inc., Appellees.

No. AK-336.

District Court of Appeal of Florida, First District.

Jan. 7, 1983.

Appeal was taken from declaratory statement issued by Department of Health and Rehabilitative Services. The District Court of Appeal, Joanos, J., held that: (1) part of statement determining applicability of statute to mental health services provider, assuming provider was in compliance with contracts, rules, and statutes, and was providing appropriate, good quality service, but did not address how this determination was to be made, was within Department's authority, and (2) resolution of question of direct contracting between counties and mental health services providers required statement of general applicability which was not an appropriate result of a declaratory statement, as it did not address the applicability of a statute, rule or order to petitioner in his particular set of circumstances only.

Affirmed in part and reversed in part.

1. Mental Health ⇐20

Part of declaratory statement determining applicability of statute to mental health services provider, assuming provider was in compliance with contract, rules, and statutes, and was providing appropriate, good quality service, but not addressing how this determination was to be made, was within Department of Health and Rehabilitative Services' authority to give its opinion as to applicability of a statutory provision, rule, or order as it applies to petitioner in his particular set of circumstances only. West's F.S.A. § 394.81.

2. Mental Health ⇐20

Resolution of question of direct contracting between counties and mental health services providers required statement of general applicability which was not an appropriate result of a declaratory statement, as it did not address applicability of a statute, rule, or order to petitioner in his particular set of circumstances only. West's F.S.A. § 394.81.

3. Administrative Law and Procedure ⇐390

Declaratory statement proceedings are not appropriate when result is an agency statement of general applicability interpreting law or policy.

Kenneth F. Hoffman of Oertel & Laramore, Tallahassee, for appellant.

Eric J. Haugdahl, Asst. Gen. Counsel, for Dept. of Health and Rehabilitative Services, Tallahassee, appellee.

Ronald W. Brooks of Brooks, Callahan & Phillips, Tallahassee, for Apalachee Community Mental Health Services, Inc., appellee.

JOANOS, Judge.

This is an appeal from a declaratory statement issued pursuant to Section 120.565, Florida Statutes, by the Department of Health and Rehabilitative Services ("HRS").

Apalachee Community Mental Health Services, Inc. ("Apalachee") petitioned HRS for a declaratory statement interpreting Sections 394.457 and 394.71–.81, Florida Statutes. Apalachee alleged it had been providing and continued to provide mental health, alcohol, and Baker Act services, for which it received state financial aid, to a specific area since before 1976 and that there had been no decrease in local funds or local participations in the programs it provided. Further, Apalachee alleged that on September 21, 1981, the Mental Health Board District II–B ("Board") requested proposals from other providers for some of the services which Apalachee had been providing. Apalachee also alleged the Board questioned the authority of counties to enter into contracts to provide services directly with providers such as Apalachee rather than proceeding through the Board. Finally, Apalachee alleged it was in doubt as to how HRS interprets Chapter 394, Florida Statutes, with reference to these matters. The specific questions posed by Apalachee in its petition were whether the Board is authorized to request proposals for alternative programs and providers for services provided by Apalachee since 1976, and whether contracts for services could be made directly between providers and counties, or whether the applicable statutory provisions require such contracts to be made solely through the Board.

The petition for a declaratory statement named both HRS and the Board as respondents and the Board moved to dismiss the petition. The primary ground for dismissal alleged was that Apalachee had not alleged a controversy between itself and HRS, but instead alleged a controversy between itself and the Board, seeking to make HRS an arbiter. The Board asserted that the purpose of declaratory statements is to resolve agency controversies or answer questions or doubts concerning the applicability of any statutory provision or rule as it does or may apply to the petitioner in his particular circumstances, and as petitioner sought a determination of the validity of the actions of a third party, the Board, proceedings for a declaratory statement were not authorized.

HRS denied the Board's motion to dismiss and went on to issue a declaratory statement on the two questions set forth above. In the final declaratory statement, HRS stated that Section 394.81 does not prohibit a mental health board from requesting proposals from alternative programs and providers, however, HRS also noted:

> if an existing service provider is providing quality services based on service priorities in the approved district plan and conforms to existing contracts, rules and statutes, there is no need to request proposals from other providers. In fact, to do so would be disruptive to the continuity of service delivery. However, in the event an existing provider is not in compliance with the contract, rules or statutes and if monitoring and evaluation data indicate poor quality or inappropriate service, it may be desirable for a district mental health board to request proposals to improve the quality of the services.

In answer to the question as to direct contracting between providers and counties, HRS stated:

> The . . . question . . . appears to request an impermissible statement of general applicability. However, a review of the petition indicates that Apalachee provides certain . . . services by contract directly with Franklin and Gadsden counties and not by an award or contract through the Board. With this particular set of circumstances, an HRS response . . . is appropriate.
>
> Sections 394.71–394.81, Florida Statutes (1981), do not prohibit a contract for providing mental health, alcohol or Baker Act services made directly between the provider and a particular county. Further, these sections do not require that such a contract be made solely by and through a district mental health board.

On appeal, the Board argues HRS erred in entering the declaratory statement because the petition and declaratory statement attempt to bind a third party, the Board, which amounts to a deprivation of

due process of law; the declarations in the statement are determinations of statewide applicability, which require rulemaking; disputed, material facts existed requiring a formal, adversary hearing; and the statements are contrary to HRS's own rules and changes in rules can only be made in formal rulemaking proceedings.

In response, Apalachee points out that HRS is the "Mental Health Authority" of Florida and the appropriate body to interpret the statutory provisions involved, and that the HRS district administrator is responsible for reviewing the district plan submitted by the District Mental Health Board, suggesting a hierarchal structure in which the Board is subject to HRS interpretations of the statutory provisions it is responsible to administer. Rule 10E–4.09(2)(a), Fla.Admin.Code, provides that the Board is the direct link between HRS and community services and is responsible to HRS for programs, priorities, and services.

[1] "A declaratory statement shall set out the agency's opinion as to the applicability of a specified statutory provision or of any rule or order of the agency as it applies to the petitioner in his particular set of circumstances only." Section 120.565, Florida Statutes. In its statement as to the solicitation of proposals by the Board, HRS has basically determined the applicability of Section 394.81 to Apalachee[1], assuming Apalachee is in compliance with the contracts, rules, and statutes, and is providing appropriate, good quality service. The order does not address how this determination is to be made, however, presumably until there has been a showing that Apalachee is no longer in compliance with contracts, rules, and statutes, or providing appropriate, good quality care, Apalachee is entitled to continuing financial aid in accordance with Section 394.81. Therefore, this part of the statement is within HRS's authority to give its opinion as to the applicability of a statutory provision, rule, or order "as it applies to the petitioner in his particular set of circumstances only." We recognize that this carries implications for the Board's relationship with Apalachee and to some extent may limit the Board's options. However, the statement is consistent with agency policy of promoting continuity of services, *see* Rule 10E–4.09(2)(b), Fla.Admin. Code, and there is no doubt that HRS is responsible for the administration of Section 394.81, Florida Statutes, *see* Section 394.78(1), Florida Statutes.

[2, 3] Regarding the question of direct contracting between counties and mental health services providers, however, it appears HRS's initial impression was correct, that resolution of the question requires a statement of general applicability which is not an appropriate result of a declaratory statement, as it does not address the applicability of a statute, rule, or order "to the petitioner *in his particular set of circumstances only.*" (e.s.) Even though Apalachee is currently involved in direct contracts with several counties, this is not necessarily a situation peculiar to Apalachee, but instead carries implications for providers and counties statewide. Declaratory statement proceedings are not appropriate when the result is an agency statement of general applicability interpreting law or policy. *See generally Price Wise Buying Group v. Nuzum,* 343 So.2d 115 (Fla. 1st DCA 1977).

The final order is AFFIRMED insofar as it declares the applicability of Section 394.81 to Apalachee, and REVERSED insofar

1. 394.81 Current state financial aid continued. —The department shall continue to provide financial aid to all programs and facilities which are receiving state aid on December 31, 1976, if:

(1) The board district within which the program or facility is located provides the minimum required services, as defined in s. 394.75(3)(a)–(f); or

(2) The district administrator is satisfied that such services will be provided within a reasonable period, or is satisfied that the other provisions of s. 394.76(4)(c), are applicable; and

(3) There is no decrease in local funds and local financial participation in the program.

as it addresses the propriety of direct contracting between providers and counties.

LARRY G. SMITH and SHAW, JJ., concur.

FOOD MACHINERY CORPORATION and National Union Life Insurance, Appellants,

v.

Delmis SHOOK, Appellee.

No. AK-411.

District Court of Appeal of Florida, First District.

Jan. 7, 1983.

Rehearing Denied Feb. 9, 1983.

Appeal was taken from an order of the deputy commissioner awarding permanent partial disability for claimant's noise-produced hearing loss. The District Court of Appeal, Larry G. Smith, J., held that: (1) evidence was sufficient to support award; (2) deputy commissioner did not improperly shift burden of proof resting upon claimant to come forward with noise level tests; and (3) claim for benefits was not untimely.

Affirmed and remanded with instructions.

1. Workers' Compensation ⇐1553

Evidence supported findings that claimant, who worked for 23 years in one-room, 700–foot long machinery-filled manufacturing plant, suffered prolonged exposure to noise, cumulative effect of which was injury or aggravation of preexisting condition and was subjected to hazard greater than that to which general public was exposed, thereby supporting deputy commissioner's award of permanent partial disability for claimant's noise-produced hearing loss.

2. Workers' Compensation ⇐1359

Burden of proof rests upon claimant to come forward with noise level tests, if such evidence is required to prove claim of noise-produced hearing loss.

3. Workers' Compensation ⇐1753

Finding by deputy commissioner that absence of noise level test was not fatal to claim of noise-produced hearing loss did not improperly shift claimant's burden of proof to come forward with noise level tests if such evidence was required to prove claim, because employer/carrier did not provide legal authority to effect that proof of excessive noise levels can be made only by scientific tests, and because employer/carrier presented no evidence to refute claimant's testimony on issue.

4. Workers' Compensation ⇐1279

Where deputy commissioner found that it was June 1, 1979 before claimant reached point where his hearing loss had become disabling and was required to seek medical attention, he properly concluded that June 1, 1979, was date of "accident" so that claim filed on April 22, 1981, was timely. West's F.S.A. § 440.19.

Bernard J. Zimmerman and Michael M. O'Brien of Akerman, Senterfitt & Eidson, Orlando, for appellants.

Richard R. Roach, Jr., of Woods, Murray & Roach, P.A., and Lex Taylor, Lakeland, for appellee.

LARRY G. SMITH, Judge.

The employer/carrier cites several alleged errors in the deputy commissioner's award of permanent partial disability for claimant's noise-produced hearing loss. We affirm.

[1] The evidence was sufficient to meet the three-pronged test of *Festa v. Teleflex,*

95 of 105 DOCUMENTS

In re: Petition for Declaratory Statement by Park Manor Waterworks, Inc.

DOCKET NO. 830046-WS; ORDER NO. 11955

Florida Public Service Commission

1983 Fla. PUC LEXIS 669

83 FPSC 76

May 20, 1983

PANEL: [*1]

The following Commissioners participated in the disposition of this matter: CHAIRMAN GERALD L. GUNTER, COMMISSIONER JOSEPH P. CRESSE, COMMISSIONER JOHN R. MARKS, III, COMMISSIONER SUSAN W. LEISNER

OPINION: BY THE COMMISSION:

Park Manor Waterworks, Inc., (utility) has petitioned this Commission for a declaratory statement pursuant to s. *120.56(5), Fla. Stat.* and Rule 25-22.20, Fla. Admin. Code.

Specifically, the utility seeks a declaratory statement of s. *367.081(2), Fla. Stat.*, our general ratemaking statute for the water & sewer industry, as it relates to the following questions:

1. Under the circumstances herein described, may the Commission lawfully fix petitioner's rates at a level which would require petition's shareholders to subsidize petitioner's revenues in order to avoid a default by petitioner of the terms of a loan obtained by petitioner to make required capital improvements? and,

2. In fixing just, reasonable, compensatory and not unfairly discriminatory rates, pursuant to *Section 367.081(2), Fla. Stat.*, with the Commission allow petitioner to [*2] amortize the prudent expenditure over the same or lesser period that petitioner is able to finance that expenditure, at the most favorable terms reasonably available?

The utility indicates that it has supplied this Commission with all the necessary information to answer these questions by way of its application for an increase in rates in Docket No. 810020-WS.

The declaratory statement provisions of the Florida Administrative Code provide for the resolution of controversy or doubt pertaining to the applicability of a specific statutory provision to the Petitioner's particular set of circumstances. To this end, the declaratory statement is a valuable tool. However, a declaratory statement can not, and is not designed to, circumvent general rate case proceedings.

What the utility seeks in its petition is not a determination that it must abide by some statutory provision. What it does ask is how will this Commission treat these issues in its next rate case. In effect, the utility is asking the Commission to conduct, on a piece meal basis, a rate case proceeding under the guise of a declaratory statement.

The answers to such questions should properly be made in the utility's future [*3] case. This body cannot predetermine an issue as to what a utility's future rates will include to the exclusion of Commissioners who will hearing the cause at some future time. The questions poised by the utility are not questions properly resolved by a declaratory statement from this Commission.

If the utility is asking this Commission to issue a broad statement as to how we will generally treat such situations, a declaratory statement is the improper vehicle to do so. That is the purpose of the rulemaking process.

Based on our review of the circumstances surrounding this **request,** we believe this petition for a **declaratory statement** should be properly denied.

Now, in consideration of the foregoing, it is

ORDERED by the Florida Public Service Commission that the **request** for a **declaratory statement** by Park Manor Waterworks, Inc. be and is hereby denied.

By Order of the Florida Public Service Commission this 20th day of May, 1983.

56 of 105 DOCUMENTS

In re: Petition of Tampa Electric Company for a Declaratory Statement Regarding Proposed Transfer of Service

DOCKET NO. 890415-EI; ORDER NO. 21301

Florida Public Service Commission

1989 Fla. PUC LEXIS 770

89-5 FPSC 471

May 31, 1989

PANEL: [*1]

The following Commissioners participated in the disposition of this matter: MICHAEL McK. WILSON, CHAIRMAN; THOMAS M. BEARD; BETTY EASLEY; GERALD L. GUNTER; JOHN T. HERNDON

OPINION: ORDER DISMISSING PETITION FOR DECLARATORY STATEMENT

BY THE COMMISSION:

On March 20, 1989, Tampa Electric Utility Company (TECO) submitted its Petition for Declaratory Statement regarding the proprietary of the proposed provision of electric service by Florida Power Corporation to Agrico Chemical Company.

On April 4, 1989, Florida Power Corp. (FPC) filed its Petition to Intervene. By petition dated April 7, 1989, Agrico filed its Petition to Intervene and alleged that its substantial interest are subject to determination in TECO's Petition for Declaratory Statement. Agrico also filed its response to the petition and a motion to dismiss. Agrico's response illustrates factual differences between its statements and the allegations in TECO's **request** for **declaratory statement.**

On May 9, 1989, TECO filed a complaint and request for resolution of a territorial dispute. The Division of Records and Reporting docketed this complaint as Docket No. 890646-EI.

After consideration of TECO's **request** for **declaratory [*2] statement** and review of the petitions to intervene by FPC and Agrico, it is apparent that responding to TECO's **request** for **declaratory statement** is not likely to resolve all the pending issues. It appears that there are disputes of material fact and that the substantial interests of the three noted companies are directly involved.

Therefore, TECO's **request** for **declaratory statement** should be dismissed. Resolution of the issues presented will be considered in Docket No. 890646-EI.

It is, therefore,

ORDERED by the Florida Public Service Commission that the Petition for Declaratory Statement be and hereby is dismissed.

ORDERED that this docket is hereby closed.

By ORDER of the Florida Public Service Commission this 31st day of MAY, 1989.

830 So. 2d 852, *; 2002 Fla. App. LEXIS 12549, **;
27 Fla. L. Weekly D 1951

LEXSEE 830 SO. 2D 852

FLORIDA POWER CORPORATION, a Florida corporation, Appellant, v. TOWN OF BELLEAIR, a Florida municipal corporation, Appellee.

Case No. 2D01-5717

COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

830 So. 2d 852; 2002 Fla. App. LEXIS 12549; 27 Fla. L. Weekly D 1951

August 30, 2002, Opinion Filed

SUBSEQUENT HISTORY: [**1] Released for Publication September 24, 2002. Review granted by *Town of Belleair v. Fla. Power Corp., 852 So. 2d 862, 2003 Fla. LEXIS 1530* (Fla., 2003)
Quashed by Town of Belleair v. Fla. Power Corp., 2005 Fla. LEXIS 399 (Fla., Mar. 10, 2005)

PRIOR HISTORY: Appeal from nonfinal order of the Circuit Court for Pinellas County; W. Douglas Baird, Judge.

DISPOSITION: Affirmed in part, reversed in part, and remanded.

COUNSEL: Sylvia H. Walbolt, Robert W. Pass, James Michael Walls, Joseph H. Lang, and Robert E. Biasotti of Carlton Fields, P.A., St. Petersburg, and R. Alexander Glenn, St. Petersburg, for Appellant.

Lee Wm. Atkinson of Tew, Barnes & Atkinson, L.L.P., Clearwater, for Appellee.

JUDGES: WHATLEY and SILBERMAN, JJ., Concur.

OPINIONBY: FULMER

OPINION: [*853] FULMER, Judge. Florida Power Corporation (FPC) challenges the partial summary judgment and temporary injunction entered in favor of the Town of Belleair (Belleair). We affirm the partial summary judgment and reverse the temporary injunction. FPC has been the sole supplier of electric service within the town limits of Belleair since 1971 pursuant to Ordinance 119, which granted FPC a franchise for thirty years. The franchise agreement required FPC to pay a franchise fee equal to 6% of FPC's revenues from the sale of electricity within the town limits. It also provided that upon expiration of the franchise agreement on December 1, 2001, Belleair had the right to purchase the electrical [**2] plant and facilities located within the town, the valuation of which would be fixed by arbitration. Prior to the expiration of the franchise agreement, the parties were unable to negotiate an extension of the agreement, and a dispute arose regarding the parties' rights and

obligations under it. FPC took the position that the buy-out provision of the franchise agreement was no longer enforceable because of changes in state law. FPC also indicated that it was not interested in conveying its facility to any party and that it would continue to serve the town as required by law regardless of the existence of a franchise agreement. However, FPC did not intend to continue paying the 6% franchise fee at the expiration of the existing franchise agreement because recent Florida decisions found that attempts by local governments to unilaterally impose a "franchise fee" constituted illegal taxation.

In September 2000, Belleair filed a two-count complaint seeking, in count one, a declaratory judgment concerning the rights and obligations of Belleair and FPC under the franchise agreement. In count two, Belleair sought a mandatory injunction requiring FPC to continue paying the 6% franchise fee **[**3]** after the expiration of the franchise agreement. Thereafter, Belleair filed a motion for partial summary judgment seeking to enforce the buy-out provision and to compel FPC to arbitrate the value of its facilities. Belleair also filed a motion for temporary injunctive relief seeking a mandatory injunction to force FPC to continue to collect and forward fees, for the use of the rights- of-way, equaling 6% of its revenues in the same manner it did under the franchise agreement. The trial court granted both of Belleair's motions.

FPC raises three issues in this appeal: (1) the trial court erred by issuing the mandatory injunction; (2) the trial court erred by ordering FPC to arbitrate the value of its Belleair facilities instead of deferring to the jurisdiction of the Florida Public Service Commission; and (3) the trial court's arbitration order was unauthorized and violated due process. Issues (2) and (3) have been addressed in *Florida Power Corp. v. Casselberry, 793 So. 2d 1174 (Fla. 5th DCA 2001)*. On these issues, we align ourselves with the Fifth District and affirm without discussion.

The remaining issue concerns a challenge to the mandatory injunction, in which **[**4]** the trial court compelled FPC to continue paying to Belleair an amount equal to the 6% franchise fee as reasonable compensation for FPC's continued use and occupation of Belleair's rights-of-way. A temporary injunction is an extraordinary and drastic remedy and, therefore, should be granted sparingly. *Agency for Health Care Admin. v. Cont'l Car Servs., Inc., 650 So. 2d 173* **[*854]** *(Fla. 2d DCA 1995)*. A party seeking a temporary injunction must prove that: (1) it will suffer irreparable harm unless the status quo is maintained; (2) there is no adequate remedy at law; (3) the party has a clear legal right to the relief granted; and (4) a temporary injunction will serve the public interest. *Liberty Fin. Mortgage Corp. v. Clampitt, 667 So. 2d 880 (Fla. 2d DCA 1996)*. The purpose of a temporary injunction is to maintain the status quo until full relief can be granted following a final hearing. Id.

Here, the trial court determined that Belleair had "a clear legal right to a temporary injunction to maintain the status quo." We disagree. The trial court was without authority to order FPC to continue paying the franchise fee after the franchise agreement expired. **[**5]** The trial court cannot, by injunction, extend the terms of a contract after its expiration. *Sanz v. R.T. Aerospace Corp., 650 So. 2d 1057, 1059 (Fla. 3d DCA 1995)*. Additionally, without the franchise agreement to support the negotiated franchise fee, a 6% flat fee constitutes an illegal tax pursuant to *Alachua County v. State, 737 So. 2d 1065 (Fla. 1999)*, because it bears no relationship to the actual cost of regulation or maintenance of Belleair's rights-of-way. However, as explained in Alachua County, Belleair does have the authority to charge a reasonable regulatory fee for the use of the rights-of-way, and FPC has conceded that it is

obligated to pay such fee and stands ready to do so.

Because we conclude that Belleair failed to demonstrate a clear legal right to continue receiving the 6% fee after the expiration of the franchise, we reverse the trial court's order granting the temporary injunction. Our reversal renders moot FPC's remaining challenges to the issuance of the injunction. Accordingly, we affirm the partial summary judgment, reverse the temporary injunction, and remand for proceedings consistent with this opinion.

WHATLEY and **[**6]** SILBERMAN, JJ., Concur.

4 of 4 DOCUMENTS

FLORIDA POWER CORPORATION, Appellant, v. CITY OF WINTER PARK, FLORIDA, Appellee.

CASE NO. 5D01-2470, 5D02-87

COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

827 So. 2d 322; 2002 Fla. App. LEXIS 13475; 27 Fla. L. Weekly D 2075

September 19, 2002, Opinion Filed

SUBSEQUENT HISTORY: *Approved by Fla. Power Corp. v. City of Winter Park, 2004 Fla. LEXIS 1877* (Fla., Oct. 28, 2004)

PRIOR HISTORY: [**1] Non-Final Appeal from the Circuit Court for Orange County, R. James Stroker, Judge.

DISPOSITION: Affirmed.

COUNSEL: Sylvia H. Walbolt, Robert W. Pass, James Michael Walls, and Joseph H. Lang, Jr., of Carlton fields, P.A., Tallahassee, and R. Alexander Glenn, Associate General Counsel, Progress Energy Service Co., LLC. St. Petersburg, for Appellant.

Gordon H. Harris, Thomas A. Cloud and Tracy A. Marshall, of Gray, Harris & Robinson, P.A., Orlando, for Appellee.

JUDGES: HARRIS, J., SHARP, W., J., concurs. SAWAYA, J., dissents, with opinion.

OPINIONBY: HARRIS

OPINION: [*323]

HARRIS, J.

This case involves an electrical system originally built by the City of Winter Park (appellee herein) and ultimately sold to the predecessor of Florida Power Corporation (appellant herein). That sales agreement and accompanying franchise agreement, as well as all subsequent franchise agreements, contained a "right to buy back" provision and a franchise fee negotiated by the parties, the most recent fee being 6% of gross receipts based on the sale of electricity within the city. When the most recent franchise agreement expired by its terms, [**2] renegotiations reached an impasse. Florida Power remained in possession of the city's rights-of-way and continued to operate as though the franchise agreement was still in existence but refused to pay the previously negotiated fee. The City sued seeking an injunction to require Florida Power to pay the fee as a holdover franchisee during the term of protracted negotiations or (as is now the case) arbitration. The trial judge granted the injunction which in effect continues the status quo of the parties' relationship under the previous franchise agreement during this holdover period. We affirm.

Florida Power gives two reasons for reversal: one, since an action for damages is available an injunction is an improper remedy and two, the supreme court in *Alachua County v. State, 737 So. 2d 1065 (Fla. 1999),* held that the unilateral imposition of a fee (since the franchising agreement has expired) charged to a franchisee for the use of public property which fee is unrelated to the cost of maintaining such public property is an unconstitutional tax. n1

> n1 While some of the statements in *Alachua County* seem appropriate to this case, because of the context in which such statements were made, their relevancy herein is somewhat diminished. In *Alachua County*, the county was attempting to generate new revenues in face of a limitation on its taxing authority and hoped to justify the new assessment as a franchise fee, or as a follow-up position, as rental of its right-of-way. This new "fee" was unilaterally imposed by ordinance. In our case, however, there is no legitimate concern that a new tax is being imposed. The parties negotiated a franchise agreement which gave Florida Power certain rights and imposed on Florida Power an obligation to pay the city a certain sum for exercising these rights. When the franchise agreement expired by its terms, Florida Power elected

to remain in possession and to exercise all of the rights previously conferred by the expired franchise agreement. There is no logical reason to permit Florida Power to continue exercising the rights conferred by the expired franchise agreement during this period of renegotiation and yet relieve it of its accompanying obligations. A continuation of the originally agreed-to fee during this extended period is simply not a new tax.

[**3]

[*324] A reading of *Alachua* convinces us that its result would have been different had the fee charged by the County in fact been based on a previously negotiated fee for the franchise rights agreed to by the parties. In other words, if a franchisee and a governing body agree to a reasonable fee for access to the city's residents and the use of the public property to provide services during the term of the franchise then such fee has not been "unilaterally imposed" and will be enforced during a holdover period in which renegotiation occurs. In this case, Florida Power does not challenge the reasonableness of the franchise fee even during these stalemated negotiations. To interpret *Alachua* as Florida Power suggests would mean that any franchise fee negotiated by the parties which is not directly related to the cost of providing maintenance to the franchise property is invalid and unenforceable.

The supreme court in *City of Pensacola v. Southern Bell Tel. Co., 49 Fla. 161, 37 So. 820, 824 (1905),* held:

Municipalities which have the power and are charged with the duty of regulating the use of their streets may impose a *reasonable* charge in the nature of a [**4] *rental*, for the occupation [of such property]. n2

n2 As stated in the dissent, *Alachua County,* in a footnote, recognized that some courts have suggested that considering a franchise fee as rental is outdated; even so, the *Alachua County* case did not overrule *City of Pensacola.* A franchise fee such as the one involved in this case consists of two components: (a) the right (often exclusive) to provide services to municipal inhabitants for a charge and (b) the right to use public rights of way in order to provide this service. Thus the franchise fee includes a component charge both for permitting the franchisee access to the captive clients and a charge for using the public rights-of-way. In *Alachua County,* the municipality attempted by ordinance to enact a privilege fee based on the gross revenue generated by the sale of electricity within the county. The principal question in *Alachua County* was not whether the charge was a fee or rental; the question was whether the charge was a fee (or rental) or a tax. In holding the charge to be a tax, the trial court noted that the charge was not based on a bargained-for agreement between the utility and the county. A bargained-for rental cannot be imposed unilaterally and an implied rental, if such is appropriate, must be shown to be "reasonable". In our case, the parties negotiated their rights and responsibilities and determined the reasonable amount to be charged. The best determination of what is a reasonable charge is what the parties agree to, based on the benefits accorded Florida Power. It would be highly unusual and unfair to permit Florida Power to stay in possession and receive all the benefits of its now expired agreement and yet be absolved of all responsibility assumed by it as a condition justifying its very occupancy.

[**5]

Thus, the supreme court has analogized the obligations between a franchiser and a franchisee as similar to those in a landlord/tenant relationship. And we believe it immaterial that this dispute arises after the end of the franchise period so long as the franchisee remains in possession of the property with the consent of the franchiser. In a normal landlord/tenant relationship, Florida Power would have become a holdover tenant subject to a claim for double rental. However, as the court stated in *Lincoln Oldsmobile, Inc. v. Branch, 574 So. 2d 1111* [*325] *(Fla. 2d DCA 1990),* "Absent such a demand [a demand for double rental], or other affirmative action on the part of the landlord, the tenant becomes a tenant at sufferance at the original rent." *Id. at 1113.* Why should not Florida Power be treated as a holdover franchisee subject to the previously agreed rental as the trial court held? Instead of bringing an eviction action which is a normal landlord alternative, an alternative not available in this case, the City accepted Florida Power as a tenant at sufferance (until a new franchise agreement could be negotiated or arbitration completed) at the original [**6] "rent."

An injunction is a proper remedy under the facts of this case. It is clear that the purpose of the injunction is to maintain the bargained-for relationship which existed during the term of the franchise while the parties attempt to negotiate an extension of that agreement or a buyout of the system.

In *Precision Tune Auto Care, Inc. v. Radcliff, 731 So. 2d 744 (Fla. 4th DCA 1999),* the court recalled that "in *Burger Chef Systems Inc. v. Burger Chef of Florida,*

Inc., 317 So. 2d 795 (Fla. 4th DCA 1975)], we recognized that temporary injunctions can be appropriate in franchise cases in order to preserve the status quo during the ongoing litigation." *731 So. 2d at 746.* In *City of Oviedo v. Alafaya Utilities, Inc., 704 So. 2d 206 (Fla. 5th DCA 1998),* this court upheld an injunction preventing the city from withholding development by its long-time franchisee because the franchisee would not enter into a franchise agreement dictated by the City. We did so over the objections of the City that an injunction was inappropriate because damages were available. We noted that in determining whether damages would be an adequate remedy we should [**7] look at the impact that the challenged action, if not enjoined, would have on others. Furthermore, in *Dotolo v. Schouten, 426 So. 2d 1013 (Fla. 2d DCA 1983),* the court held that "the prevention of continuing wrongs is a well recognized basis for injunctive relief, as is the prevention of a multiplicity of suits." *Id. at 1015* (citing *29 Fla.Jur.2d Injunctions § 15; 22 Fla.Jur.2d Equity §§ 15, 16*).

In this case, by withholding the franchise fee, a fee charged to and collected from its customers, Florida Power is in a position to extort favorable terms from the city. The city's expenses for maintaining its property and regulating the utility continue unabated while the payments of the franchise fee are being withheld. The city must either give in to the demands of Florida Power, impose higher taxes on its citizens, or dip into its reserves to meet costs which should be paid by the users of electricity. As in *City of Oviedo*, we should look at the possible effect on others of the challenged action sought to be enjoined. General taxpayers should not be required to pay obligations more properly owed by users of the system being regulated. If [**8] the franchise fee is subsequently approved and retroactively applied, the user base will almost certainly not be the same because old users will have moved out and new users will have moved in. And all the citizens may suffer if to avoid new taxes or having to dip into reserves the city agrees to a bad deal. In short, an injunction under these circumstances is fair and reasonable (it merely requires Florida Power to pass on to the city the fees collected from the electricity customers) and lawful in that it maintains the status quo during an impasse in negotiations.

We certify conflict with *Florida Power Corp. v. Town of Belleair, 2002 Fla. App. LEXIS 12549, 27 Fla. L. Weekly D 1951* (Fla. 2nd DCA, August 30, 2002).

AFFIRMED.

[*326] **SHARP, W., J., concurs.**

SAWAYA, J., dissents, with opinion.

DISSENTBY: SAWAYA

DISSENT: SAWAYA, J., dissenting.

I respectfully dissent.

The majority analogizes the obligations between a franchiser and franchisee as similar to those in a landlord/tenant relationship and the franchise fee previously agreed to between Florida Power and the City of Winter Park as a rental amount that should be paid by Florida Power as a holdover tenant. In *Alachua County v. State, 737 So. 2d 1065 (Fla. 1999),* [**9] the court held that local governments may collect franchise fees because they derive from and are part of a bargained-for agreement. n1 The court noted that "the concept of [franchise] fees being 'rent,' however, has recently been criticized as an outdated view that arose over a century ago before the development of infrastructures." *Id. at 1068 n.1* (citation omitted). Thus, in my view, I do not think it correct to analogize the expired franchise fee as rent to be paid by Florida Power as a holdover tenant. n2 I think that imposition of the expired franchise fee by the trial court is a tax unconstitutionally imposed on Florida Power. Alachua County.

> n1 In *Florida Power Corp. v. Town of Belleair, 2002 Fla. App. LEXIS 12549, 27* Fla. L. Weekly D1951 (Fla. 2d DCA Aug. 30, 2002), the court held that a franchise fee does not necessarily bear a relationship to the actual cost of regulation and maintenance of the rights-of-way. This is so because when an ordinance is enacted that establishes a franchise fee that has been bargained for by the government and the electric utility, the utility receives rights in exchange for payment of the fee other than the mere use of the government's rights-of-way. For example, the utility receives a long term contract with no guaranteed burdens, additional fees, or challenges to its rights, such as condemning the utility's facilities or taking other actions which would be inconsistent with the utility providing services to the government. Unilateral imposition of the six percent fee on Florida Power after the franchise agreement has expired results in mandatory payment of the fee and deprivation of all of the other bargained-for benefits Florida Power is supposed to receive in exchange for it. On the other hand, the City continues to enjoy all of the benefits of the expired agreement. How can this be fair?

[**10]

n2 The instant case is not a typical land-

> lord/tenant dispute where the rental agreement expires and the tenant refuses to vacate the premises and remains in possession against the wishes of the landlord. Both Florida Power and the City are involved in negotiations for a new franchise agreement, and there is absolutely no evidence in the record that the City has ever demanded that Florida Power not continue to use the City's rights-of-way. The stumbling block in the negotiations is the City's insistence on a buy-back provision as part of the new agreement and Florida Power's refusal to agree to this provision because it is no longer required under Florida law as it was at the time the 1971 agreement was entered into.

Governmental entities are certainly empowered to require payment of a reasonable fee to reimburse them for the costs of regulation. *Alachua County, 737 So. 2d at 1067.* However, such charges must be "'related to the reasonable rental value of the land occupied by electric utilities within the county rights-of-way.'" Id. In other words, there must be a nexus between [**11] the alleged reasonable rental charge and the rental value of the rights-of-way. Id. In the instant case, Florida Power concedes that it must pay a reasonable rental value for use of the City's rights-of-way and stands ready to do so. However, the City failed to introduce any competent evidence to establish the reasonable rental value of the City's rights-of-way and no nexus between the fee and the reasonable value of the land occupied was shown as required by Alachua County. The trial court merely imposed the six percent franchise fee that was bargained for and made a part of the [*327] provisions of the expired 1971 ordinance. I believe this was error.

I am also of the view that the City sought the wrong remedy in the instant case. A temporary injunction may only be entered when the petitioner establishes 1) it has a clear legal right to the relief requested; 2) irreparable harm will otherwise result; and 3) it has no adequate remedy at law. *Wilson v. Sandstrom, 317 So. 2d 732 (Fla. 1975),* cert. denied sub nom. *Alder v. Sandstrom, 423 U.S. 1053, 46 L. Ed. 2d 642, 96 S. Ct. 782 (1976); Hall v. City of Orlando, 555 So. 2d 963 (Fla. 5th DCA 1990).* [**12] Irreparable harm cannot be established where there is an adequate remedy at law, and recovery of money damages is certainly an adequate remedy at law. *Weinstein v. Aisenberg, 758 So. 2d 705* (Fla. 4th DCA), dismissed, *767 So. 2d 453 (Fla. 2000); Barclays Am. Mortgage Corp. v. Holmes, 595 So. 2d 104 (Fla. 5th DCA 1992);* see also 3299 *N. Fed. Hwy, Inc. v. Board of County Comm'rs of Broward County, 646 So. 2d 215 (Fla. 4th DCA 1994).* In the instant case, the City's economic loss can be calculated and compensated by an award of damages. In a case directly on point, the Second District Court held in *Florida Power Corp. v. Town of Belleair, 2002 Fla. App. LEXIS 12549, 27* Fla. L. Weekly D1951 (Fla. 2d DCA Aug. 30, 2002), that an injunction entered on facts very similar to the instant case was error. In reversing the trial court's order granting a temporary injunction in favor of the City of Belleair, the court stated:

> Here, the trial court determined that Belleair had "a clear legal right to a temporary injunction to maintain the status quo." We disagree. The trial court was without authority to order FPC to continue paying the franchise fee after [**13] the franchise agreement expired. The trial court cannot, by injunction, extend the terms of a contract after its expiration. *Sanz v. R.T. Aerospace Corp., 650 So. 2d 1057, 1059 (Fla. 3d DCA 1995).* Additionally, without the franchise agreement to support the negotiated franchise fee, a 6% flat fee constitutes an illegal tax pursuant to *Alachua County v. State, 737 So. 2d 1065 (Fla. 1999),* because it bears no relationship to the actual cost of regulation or maintenance of Belleair's rights-of-way. However, as explained in Alachua County, Belleair does have the authority to charge a reasonable regulatory fee for the use of the rights-of-way, and FPC has conceded that it is obligated to pay such a fee and stands ready to do so.
>
> Id. at D1952.

I agree with the court's rationale in Town of Belleair. The problem in the instant case is not that Florida Power is unwilling to pay the reasonable rental value for the use of the City's rights-of-way; rather, the problem is that the City failed to present competent evidence of what the reasonable rental value is. In my view, the appropriate disposition of the instant case is to reverse the mandatory [**14] injunction and remand to the trial court to determine the appropriate fee based upon evidence of the value of Florida Power's use of the rights-of-way. Lastly, I believe this court should certify conflict with Town of Belleair.

94 of 105 DOCUMENTS

In re: Resolution by Florida Municipalities requesting FPL to pay each municipality interest earnings on franchise fees collected by FPL from customers within the municipality

DOCKET NO. 830351-EU; ORDER NO. 12649

Florida Public Service Commission

1983 Fla. PUC LEXIS 166

83 FPSC 37

November 3, 1983

PANEL: [*1]

The following Commissioners participated in the disposition of this matter: CHAIRMAN GERALD L. GUNTER, COMMISSIONER JOSEPH P. CRESSE, COMMISSIONER KATIE NICHOLS, COMMISSIONER SUSAN W. LEISNER

OPINION: NOTICE OF PROPOSED AGENCY ACTION

ORDER ON MUNICIPAL FRANCHISE FEE RESOLUTIONS

BY THE COMMISSION:

By separate resolutions filed with this Commission, the municipalities of the Town of Lake Park, City of West Plam Beach, Twon of Haverhill, City of Belle Glade, Town of Juno Beach, City of Macclenny and the Town of South Palm Beach requested that we take certain actions with regard to their franchise agreements with Florida Power and Light Company (FPL). Specifically, each of the municipalities has similar franchise agreements or contracts with FPL by which FPL is obliged, among other things, to pay to the municipalities an annual franchise fee equal to 6% of its revenues from the sale of electrical energy to residential and commercial customers within the corporate limits of that municipality, exclusive of other taxes, licenses and impositions paid to the municipality by FPL. The resolutions state that the franchise agreements require the payment of the franchise fee at the [*2] end of each year. By their resolutions the municipalities ask that the Commission require FPL to pay to them any interest earned on the franchise fees collected monthly from FPL's customers until such time as the franchise fees are paid at the end of the year. The municipalities also ask that the Commission make a determination that FPL's customers located within each of the municipal boundaries are penalized as compared to those customers located outside municipal boundaries in that earnings realized by FPL from interest on franchise fees are spread among all of FPL's customers whether they are in a municipality or not.

FPL was requested to treat the resolutions as complaints and file a response. In its Motion to Dismiss Complaints, filed October 7, 1983, FPL states:

1. FPL's sole obligation to pay franchise fees is pursuant to the franchise agreements;

2. The franchise agreements provide for the once a year payment of franchise fees, which FPL is in compliance with;

3. FPL's franchise agreements with the municipalities are expressly exempted from Commission authority by *Sections 366.11* and *366.13, Florida Statutes* [*3] ;

4. The municipalities' request for a "determination" that FPL customers outside municipalities are unfairly benefiting from FPL's franchise fee collections does not constitute either a complaint or a **request** for a **declaratory statement;**

5. Such a "determination" would constitute a reconsideration, in isolation, of one narrow aspect of the ratemaking decision the Commission made in FPL's most recent rate case in Docket No. 820097-EU; and

6. FPL's method of collecting franchise fees is in compliance with Commission Rule *25-6.100, Florida Administrative Code* and Order No. 11277.

We find that the objections made by FPL are well taken. First, Section 366.011(2), Florida Statutes, provides:

(2) Nothing herein shall restrict the police power of municipalities over their streets, highways, and public places or the power to maintain or require the maintenance thereof or the right of a municipality to levy taxes on public services under s. 166.231 or affect the right of any municipality to continue to receive revenue from any public utility s is now provided or as may be hereafter provided in any franchise.

and *Section 366.13, Florida Statutes* **[*4]** , provides:

No provision of this chapter shall in any way affect any municipal tax or franchise tax in any manner whatsoever.

These provisions clearly limit our jurisdiction over franchise agreements. Furthermore, the franchise agreements are contracts entered into between FPL and the various municipalities. By their resolutions, the municipalities appear to acknowledge that FPL is complying with the terms of the franchise agreements, but ask us to modify the contracts, in their favor, in the interest of equity. We have no such authority to modify contracts and must, therefore, decline the municipalities' request that we do so.

The request that we make a "determination" that FPL's municipal customers are treated unfairly serves no purpose here but to buttress the municipalities' claim that they, as the representatives of their citizens, should receive interest payments on the franchise fees. Should the municipalities desire to pursue a determination regarding the allocation of any interest earned on franchise fees, it would be appropriate for them to do so in the context of a rate case. FPL has received test year approval for a new rate case in Docket No. 830465-EI and is expected **[*5]** to file its case in late-1983 or early-1984.

In view of the above, it is

ORDERED by the Florida Public Service Commission that the request that this Commission direct Florida Power and Light Company to pay interest on franchise fees is denied. It is further

ORDERED that the request for a determination that certain Florida Power and Light Company customers are penalized by Florida Power and Light Company's treatment of interest on franchise fees is denied. It is further

ORDERED that the action proposed herein is preliminary in nature and will not become effective or final, except as provided by Florida Administrative Code Rule 25-22.29. It is further

ORDERED that any person adversely affected by the action proposed herein may file a petition for a formal proceeding, as provided by Florida Administrative Code Rule 25-22.29, by November 25, 1983, in the form provided by Florida Administrative Code Rule 25-22.36(7)(a) and (f). It is further

ORDERED that in the absence of such a petition, this order shall become effective as provided by Florida Administrative Code Rule 25-22.29(6).

By ORDER of the Florida Public Service Commission, this 3rd day of NOVEMBER, 1983.

FOCUS - 1 of 1 DOCUMENT

In re: Petition for rate increase by Florida Public Utilities Company

DOCKET NO. 030438-EI; ORDER NO. PSC-04-0369-AS-EI

Florida Public Service Commission

2004 Fla. PUC LEXIS 387

04 FPSC 4:171

April 6, 2004, Issued

PANEL: [*1] BRAULIO L. BAEZ, Chairman; RUDOLPH "RUDY" BRADLEY; CHARLES M. DAVIDSON; BLANCA S. BAYO, Director

OPINIONBY: BAEZ; BRADLEY; DAVIDSON; BAYO

OPINION: ORDER APPROVING SETTLEMENT AND PERMANENT RATE INCREASE

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman

J. TERRY DEASON

RUDOLPH "RUDY" BRADLEY

CHARLES M. DAVIDSON

BY THE COMMISSION:

BACKGROUND

This proceeding was initiated on August 14, 2003, with the filing of a petition for a permanent rate increase by Florida Public Utilities Company (FPUC or the Company). A hearing was scheduled for February 18, 2004. In Order No. PSC-03-1145-PCO-EI, issued on October 13, 2003, the Commission granted the Office of Public Counsel (OPC) intervention in this proceeding.

Through a series of noticed settlement meetings conducted by Commission staff and attended by the parties, a number of preliminarily identified issues were dropped and therefore did not require resolution by this Commission. At the February 18, 2004 hearing, the parties presented a series of stipulations with regard to the remaining outstanding issues for hearing, with the exception of Issues 128 and 137, concerning the appropriate base energy [*2] charges and closing the docket, respectively. We approved the stipulations proposed by FPUC and OPC at the February 18 hearing, and rendered our decision on Issues 128 and 137 at the March 16, 2004, Agenda Conference. Also at the March 16 Agenda Conference, we admitted composite Exhibit 4, consisting of the various proposed stipulations, which had inadvertently not been admitted into the record at the February 18 hearing.

We have jurisdiction over the subject matter pursuant to Section 366.06, Florida Statutes.

APPROVAL OF STIPULATED ISSUES

At the February 18, 2004, hearing, the parties noted that they agreed on the disposition of the outstanding issues in this docket, and that neither FPUC nor OPC intended to waive or abandon any position they had or would have taken and reserved all rights and opportunities to assert such positions in any future proceeding. The parties agreed to the stipulations for the limited purpose of resolving this docket in its entirety. The parties wished to specify that the stipulations did not necessarily reflect positions held by the parties and that they shall not be used as precedent in any forum or proceeding. [*3] However, we note that the stipulations will be used by this Commission for purposes of

evaluating FPUC's future surveillance reports and the interim statute.

We have reviewed the stipulations proposed by the parties, and find that they provide a reasonable resolution of the outstanding issues regarding FPUC's requested rate increase. The stipulations are therefore approved as set forth below. Based upon the approved stipulations, attached hereto are Attachments 1 through 5, which respectively set forth the approved average rate base, capital structure, net operating income, net operating income multipliers, and revenue requirements.

Issue 1: It is appropriate for FPUC to consolidate the rates and charges of its Northeast and Northwest Electric Divisions into a single Electric Division for ratemaking purposes.

Issue 5: The purpose of the test year is to represent the financial operations of a company during the period in which the new rates will be in effect. With the inclusion of appropriate adjustments in this rate proceeding, the historical base year ended December 31, 2002, and the projected test year ending December 31, 2004, are appropriate as they will represent [*4] the period in which rates will be in effect.

Issue 6: The forecasted billing determinants for 2004 contained in MFR Schedules E-18a, E-18b, and E-18c are appropriate adjusted as follows:

(1) For the RS rate class, the appropriate number of bills is 276,846 and the appropriate kwh is 347,114,000. This leads to an increase in test year revenues at present rates of $56,185.

(2) For the GS rate class, the appropriate number of bills is 41,644 and the appropriate kwh is 73,176,000. This leads to an increase of test year revenues at present rates of $127,937.

(3) For the GSLD rate class, the number of bills shall be increased by 12 and the kw shall be increased by 25,468 to reflect the addition of the Family Dollar Distribution Center. This leads to an increase in test year revenues at present rates of $71,940.

Issue 7: The quality of electric service provided by is FPUC adequate.

Issue 8: Non-Utility Accounts Receivable (Accounts 1420.2, 1420.21, and 1420.22) 2002 — $52,203, 2004 — $55,961, shall be removed from working capital.

Issue 9: FPUC's level of Plant in Service for the December 2004 projected test year shall be increased [*5] by $11,248 which is the net effect of: an increase of $728,162 related to the addition of the Family Dollar Store, a reduction of $96,922 for Contributions on revenue producing projects, a reduction of $297,378 cancelled and delayed projects, and a reduction of $250,000 for Contributions in Aid of Construction. This amount includes a $72,614 decrease to common plant in issue 10.

Issue 10: FPUC's requested level of Common Plant Allocated in the amount of $1,721,031 for the December 2004 projected test year shall be reduced by $72,614 for a change in projected additions.

Issue 12: Plant, Accumulated depreciation, and depreciation expense shall be reduced for canceled and delayed projects for the projected test year by $297,378, $16,617, and $11,078, respectively.

Issue 13: It was not appropriate for FPUC to use an average depreciation rate for the combined Marianna and Fernandina Beach for 2003 total plant. The appropriate adjustment shall be to reduce accumulated depreciation in the projected test year in the amount of $22,134.

Issue 14: Accumulated depreciation for Plant in Service for the December 2004 projected test year shall [*6] be decreased by $81,342 which is the net of: an increase of $13,222 for the Family Dollar Store, an increase of $4,675 for the correction of depreciation rates, a reduction of $16,617 for cancelled and delayed projects, a reduction of $22,134 for average depreciation rates, a reduction of $45,483 for depreciation rates effective 1/01/2004, and a

reduction of $3,750 for Contributions in Aid of Construction. Also, this amount includes a reduction of $11,255 for common plant in Issue 15.

Issue 15: The accumulated depreciation for Common Plant Allocated in the amount of $455,192 for the December 2004 projected test year shall be reduced by $11,255 for a change in projected additions.

Issue 16: FPUC's requested level of Customer Advances for Construction in the amount of $621,462 for the December 2004 projected test year is appropriate.

Issue 17: FPUC's level of Construction Work in Progress shall be increased by $88,923 for the December 2004 projected test year.

Issue 20: The correct amount of cash to include in 2004 cash working capital, which includes Accounts 1310, 1340, 1310.4, and 1350, is $135,720. The adjustment is a decrease [*7] of $1,698,681 to 2004 working capital. The cash balance of $135,720 represents a reasonable amount of non-interest bearing cash.

Issue 26: The amount of accounts receivable reflected in the 2004 working capital shall be decreased by $149,764. The accounts receivable shall be projected based on a ratio to revenue rather than customer growth and inflation.

Issue 27: The accumulated provision for uncollectibles shall be reduced by $360. The 2004 working capital shall reflect a balance of $98,605 for this account.

Issue 28: The amount of prepaid insurance shall be based on the allocations used to determine the insurance expense. The correct amount of prepaid insurance to include in working capital for 2004 is $181,270. The adjustment is a decrease of $28,518 to working capital.

Issue 31: Prepaid pensions shall be reduced by $451,268 to reflect a balance of $331,904. The company included a positive amount of pension expense in the income statement. Therefore, the 2004 projected balance of prepaid pensions shall decline.

Issue 32: The 2004 working capital balance for unbilled revenue shall be decreased by $19,326 to reflect a [*8] balance of $493,992. The projection for 2004 unbilled revenue shall be based on kilowatt hour growth rather than customer growth and inflation.

Issue 33: For the purposes of resolving this issue in this docket, the parties have agreed and the Commission has approved that the balance in account 1860 — deferred debits other of $3,376 shall be removed from 2004 working capital.

Issue 34: The deferred debit for the Fernandina Office Addition for $33,554 shall be removed from 2004 working capital. This amount shall be removed because the revised 2004 balance has been projected to be zero.

Issue 36: The correct amount of storm damage reserve to include in working capital for 2004 is $2,216,781. The adjustment is a decrease of $372,585 to working capital.

Issue 37: The projected 2004 working capital shall be increased by $126,621 to reverse the adjustments made by the company to the 2002 working capital amounts. The reversal of these adjustments provides a more reasonable comparison between the 2002 historical balances and projected 2004 balances of these working capital accounts.

Issue 38: The 2004 working capital shall be reduced [*9] by $564,483 for the projected amount of over-recoveries for fuel of $490,094 and for conservation of $74,388.

Issue 40: The 2004 working capital shall be reduced by $434 to remove the non-utility portion included in Account 1430.1 — Accounts Receivable Other.

Issue 41: The 2004 working capital shall be reduced by $8,345 to remove the non-utility portion included in Account 1430.2 — Accounts Receivable Other Miscellaneous.

Issue 42: One-half of the updated rate case expense shall be included in working capital allowance.

Issue 43: Accounts Payable shall be increased by $255,434, $266,162, and $273,922 for the years 2002, 2003, and 2004 respectively, to correct a posting error.

Issue 44: Accounts Payable shall be increased by $13,807, $14,387, and $14,806 for the years 2002, 2003, and 2004 respectively, to correct a posting error.

Issue 45: Taxes Accrued-Gross Receipts Tax shall be reduced by $105,693 for 2004 to remove the portion related to non-electric operations.

Issue 46: Based on the decisions made in other issues, the 2004 projected working capital shall be reduced by $3,643,348 to reflect [*10] a balance of ($ 3,083,353).

Issue 47: Based on the decisions made in other issues, the 2004 projected rate based shall be reduced by $3,461,835 to reflect a balance of $36,379,034.

Issue 48: The appropriate amount of accumulated deferred taxes to include in the capital structure is $5,787,660. This is an increase of $2,454,657 to the 13-month average of $3,333,003. This adjustment consists of the company's true-up of accumulated deferred taxes based on its 2002 tax returns, bonus depreciation for 2003 and 2004, and bonus depreciation on common plant allocated. This adjustment also includes an increase of $105,816 for accumulated deferred taxes resulting from common plant from Issue 56.

Issue 49: The appropriate 13-month average balance for unamortized investment tax credits at zero cost is $2,308, and the appropriate 13-month average balance for unamortized investment tax credits at weighted cost is $207,227.

Issue 51: The appropriate cost rate for short-term debt for the December 2004 projected test year is 3.21%.

Issue 52: The appropriate cost rate for long-term debt is 7.98%.

Issue 56: The accumulated deferred [*11] taxes in FPUC's filing do not include any amount for deferred taxes on common plant allocated to electric operations. The deferred tax balance shall be increased by the amount calculated by multiplying the 13-Mo. Average 2004 Net Plant — Allocated Common, decided upon in Issues 10 and 15, by 8.7852%. This results in an increase to accumulated deferred taxes of $105,816.

Issue 57: All the balances in the capital structure shall be calculated on a 13-month average basis.

Issue 59: The appropriate cost rate for common equity is 11.5% with a range of plus or minus 100 basis points.

Issue 60: The appropriate weighted average cost of capital is 7.86%. This cost of capital is based on a 13 month average capital structure. An amount representing the investment in Flo-Gas Corporation, $2,159,296, has been removed solely from common equity in reconciling rate base and capital structure. To reflect corrections and adjustments in the staff audit report, customer deposits have been adjusted to reflect a balance of $1,817,732 with a cost rate of 6.84%.

Issue 61: Forfeited Discounts (Late Fees) have been understated in calculating the revenue for 2004. [*12] Forfeited Discounts shall be increased by $64,919, from $255,104 to $320,023.

Issue 63: FPUC's projected level of Total Operating Revenue in the amount of $14,491,924 for the December 2004 projected test year shall be increased by $64,919 as stated in Issue 61 and by $220,083 as stated in Issue 123, or by $285,002 in total. It shall also be decreased by $1,354,781 as stated in Issue 66 to remove Franchise Fees and by $1,217,311 as stated in Issue 67 to remove Gross Receipts Tax. Based on the above, the appropriate amount of

Operating Revenues is $12,204,834.

Issue 64: With respect to test year escalation rates, FPUC's payroll factors of 3% for 2003 and 2004 are appropriate. The appropriate customer growth factors are 3.25% for 2003 and 2.44% for 2004. For 2003, the appropriate inflation factor is 2%. FPUC's inflation factor of 1.3% for 2004 is appropriate.

Issue 65: The trend rate factors shall be revised to reflect the stipulated rates for inflation, customer growth and payroll. The appropriate trend rate factors are 1.033 for inflation, 1.0577 for customer growth and 1.061 for payroll. The trend rate factors for inflation only and payroll [*13] only shall be applied to O & M Expenses. This results in a $93,263 reduction to O&M Expenses.

Issue 66: Both operating revenues and taxes other than income taxes shall be reduced by $1,354,781 to remove Franchise Fees from operating revenues and taxes other than income.

Issue 67: Both operating revenues and taxes other than income taxes shall be reduced by $1,217,311 to remove the gross receipts tax, and shall be shown as a separate line item on the bill.

Issue 68: The appropriate amount of O&M Expense for 2004 is $6,913,120 which represents a $771,074 reduction.

Issue 69: FPUC has made the appropriate test year adjustments to remove fuel revenues and fuel expenses recoverable through the Fuel Adjustment Clause. The corresponding balance sheet effect is addressed in Issue 38.

Issue 70: FPUC has made the appropriate test year adjustments to remove conservation revenues and conservation expenses recoverable through the Conservation Cost Recovery Clause. The corresponding balance sheet effect is addressed in Issue 38.

Issue 71: Advertising Expense for year 2002 shall be reduced by $821, as follows: Account 9131, Promotional [*14] Advertising ($ 179), Account 9132, Conservation ($ 240), Account 9136, Other Advertising ($ 213), Account 916, Miscellaneous Sales Expense ($ 189). The Company escalated these amounts by a combined customer growth and inflation factor of 1.072 from year 2002 to the projected 2004 test year. The 2004 amounts total $880 ($ 192, $257, $228, $203).

Issue 74: FPUC's 2004 projections were double counted for costs for retiree medical benefits. Projected 2004 costs included in Account 926.2, Employee Medical Expense, shall be reduced by $20,386.

Issue 75: Account 926.2, Employee Medical Expense, shall be reduced by $122,164, based on a revised estimate resulting from the receipt of the bill for the 2003 medical insurance premium.

Issue 77: The projected test year 2004 pension expense shall be decreased by $10,385.

Issue 78: For the purposes of resolving this issue for this docket, the 2004 storm damage accrual shall be reduced by $103,375 to remove the projected increase in the annual accrual to maintain the annual accrual at its actual historical amount of $121,625. However, if FPUC should experience significant storm-related damage, it [*15] can defer the amount exceeding its reserve balance and petition the Commission for appropriate regulatory treatment.

Issue 81: FPUC has not signed a contract for payroll outsourcing services; therefore, FPUC's 2004 projection for payroll outsourcing costs shall be adjusted, and Account 923.3 shall be reduced by $14,000 for the projected test year 2004.

Issue 83: Account 923.3 shall be reduced by $9,389 for the 2004 projected test year. This amount represents the electric portion of the reduction to tax-related corporate accounting fees.

Issue 86: The Economic Development Costs shall be reduced by $1,132, which limits the amount to 95 percent of the 2004 amount projected by the Company. For any calendar year in which the company spends less than $22,641, then

95% of the difference between the $22,641 and the amount spent shall be credited to the Company's Storm Damage Reserve.

Issue 88: Overhead Cost Allocations shall be decreased by $192,840 for the 2004 projected test year. As taken up in Issue 94, the level of overhead costs allocated to the electric operations shall be decreased by $86,568. As taken up in Issue 98, it shall be increased [*16] by $2,523. As taken up in Issue 99, it shall be decreased by $108,795.

Issue 94: Payroll Expense for discontinued operations for 2004 shall be reduced by a net of $86,568. This amount is comprised of the $109,820 reduction noted in Audit Disclosure No. 10, less $23,724 related to replacement of a Fernandina Beach employee noted in the same Audit Disclosure plus an additional $472 to remove the electric operation payroll charges of an employee of the water utility that was not retained.

Issue 95: Account 903, Customer Records and Collection Expenses, shall be reduced by $39,080 for 2004 to reflect a change in vendor cost for the printing and mailing of company bills.

Issue 96: Account 903, Customer Records and Collection Expenses, shall be reduced by $15,221 for 2004 to remove costs related to propane, merchandising and jobbing, and conservation.

Issue 98: Account 903 shall be increased by $2,523 for payroll related to discontinued operations that was charged to Account 904 in 2004.

Issue 99: Account 920, Administrative and General Salaries, shall be decreased by $108,795 for the 2004 projected test year to correct the allocation [*17] factor. In 2003, actual expense for this account for electric was $832,636. Allowing for an increase of $19,057 for temporary vacant positions in 2003, increases the 2003 amount to $851,693. Using the company-filed payroll factor of 1.03, the reduction to this account for the 2004 projected test year is $108,795 ($ 986,039 — ($ 851,693 x 1.03).

Issue 101: Account 921.5 shall be reduced by $13,880 for 2004 to remove the **uncollected franchise fees.**

Issue 102: Account 921.5 shall be reduced by $1,207 for 2004 to remove non-utility and out-of-period costs.

Issue 105: Bond Issuance Costs are a component of the effective interest cost. Account 923.2 shall be reduced by $561 for 2004.

Issue 107: Account 924, Property Insurance, shall be reduced by $3,726 for 2004 to reflect the current property insurance premium.

Issue 108: Account 925.1 shall be reduced by $78,088 for 2004 to reflect current insurance premiums.

Issue 111: Account 930.2, Miscellaneous General Expense, shall be reduced by $48,657 for 2002 and $52,160 ($ 48,657*1.072) for 2004. These costs were associated with a stock offering that did not materialize.
[*18]
Issue 112: Total Rate Case Expense of $490,862 shall be amortized over five-years, or at $98,172 per year. Rate Case Expense for the 2004 test year shall be reduced by $24,544. One-half of rate case expense, or $245,431, shall be include in Working Capital Allowance, a reduction of $200,999.

Issue 113: The appropriate period for the amortization of rate case expense is five years.

Issue 114: Account 904 shall be increased by $663 for the 2004 projected test year, which is a four-year average of net write-offs to revenues.

Issue 115: The depreciation expense for the projected test year 2004 shall be reduced by $90,966 to reflect the effects of the updated depreciation rates as a result of Docket No. 020853-EI, which was effective January 1, 2004.

Issue 116: 2004 Depreciation Expense shall be reduced by $91,915 in total. This amount includes a $90,966 decrease accounted for in Issue 115. The additional $949 reduction is the net of several adjustments: an increase of $3,119 to correct mathematical errors, an increase of $4,545 related to the Family Dollar Store substation, and an increase of $21,468 related to the Family [*19] Dollar Store assets. Also included are reductions of $105 for common plant, $11,078 related to cancelled and delayed projects, $11,398 for non-utility operations, and $7,500 to reduce depreciation for Contributions in Aid of Construction.

Issue 118: An adjustment shall be made to decrease taxes other than income by $13,794 related to property taxes and increase by $99,411 related to payroll as reflected in Audit Exception 19. Due to adjustments made to payroll expense in Issues 94, 96, 98, and 99, payroll taxes shall be decreased by $17,042. Adjustments made to plant increases Ad Valorem taxes by $2,419. Based on the approved adjustments to revenue, Regulatory Assessment Fees shall be increased by $205. Additionally, based on stipulations for Issues 66 and 67, gross receipts tax and franchise fees shall be reduced by $1,354,781 and $1,217,311, respectively. Therefore, the projected 2004 balance of taxes other than income shall be decreased by $2,500,893 to reflect a balance of $747,160.

Issue 119: Income Taxes Expense shall be increased by $438,258 to $248,020 for the effect of adjustments to NOI, Rate Base and interest synchronization.

Issue [*20] **120:** FPUC's projected Net Operating Income in the amount of $1,088,574 for the December 2004 projected test year shall be increased by $638,534 to $1,727,109.

Issue 121: The appropriate Revenue Expansion Factor is 0.622006 and the appropriate Net Operating Income Multiplier is 1.60770 for the projected 2004 test year. The calculations are based on removal of the Gross Receipts Tax and a change from the Company's Bad Debt Factor of 0.1830 to Commission staff's Bad Debt Factor of 0.1996.

Issue 122: FPUC's requested annual operating revenue increase of $4,117,121 for the December 2004 projected test year shall be decreased by $2,296,748 to $1,820,373.

Issue 123: The revenues from sales of electricity by rate class at present rates for the projected 2004 test year shall be adjusted upward by a total of $220,830, as explained below. With these adjustments, FPUC has correctly calculated revenues from the sales of electricity at present rates for the test year.

1. Revenues for the GS rate class shall be adjusted upward by a total of $133,220 due to the following: an upward adjustment of $127,937 due to changes in the billing determinant forecast, [*21] and an upward adjustment of $5,282 that results when the Non-profit Sports Fields Transitional Rate customers are billed under the correct rate.

2. Revenues for the RS rate class shall be adjusted upward by a total of $56,185 due to changes in the billing determinant forecast.

3. Revenues for the GSD rate class shall be adjusted downward by a total of $5,856 to adjust for the application of Transformer Ownership Discounts to those customers who own their own transformers.

4. Revenues for the GSLD rate class shall be adjusted upward by a total of $37,045 due to the following: an upward adjustment of $71,940 due to changes in the billing determinant forecast attributable to the Family Dollar facility, and a downward adjustment of $34,659 to adjust for the application of Transformer Ownership Discounts to those customers who own their own transformers.

Issue 124: The appropriate methodology cost of service methodology to be used in designing FPUC's rates is the fully allocated embedded cost of service study contained in MFR Schedule E-1, as adjusted for the changes to rate base, revenues, expenses, and return approved by the Commission.

Issue 125: Any [*22] revenue increase granted shall be allocated to the rate classes in a manner that moves the class rate of return indices as close to parity as practicable based on the approved cost allocation methodology, subject to

the following constraints: (1) no class shall receive an increase greater than 1.5 times the system average percentage increase in total, and (2) no class shall receive a decrease.

Issue 126: The appropriate customer charges shall be approved as follows:

Rate Schedule	Customer Charge
Residential Service	$ 10.00
General Service — Non-Demand	$ 14.00
General Service — Demand	$ 44.00
General Service — Large Demand	$ 75.00
General Service — Large Demand-1	$ 600.00

Issue 127: The appropriate demand charges shall be approved as follows:

Rate Schedule	Demand Charge
General Service — Non-Demand	$ 2.48 per kw of billing demand
General Service — Large Demand	$ 2.89 per kw of billing demand

General Service — Large Demand-1

Transmission Demand Charge: The Transmission Demand Charge will be designed to recover, on a per-kilowatt basis, the remaining Commission-approved revenue target for the General Service-Large Demand-1 [*23] rate class after subtracting the revenues attributable to the Commission-approved Customer and Reactive Demand Charges for the class.

Reactive Demand Charge: $.24 per excess kVar

Production Demand Charge: The Production Demand Charge for customers located in the Northwest Florida (Marianna) Division shall be the currently effective tax-adjusted purchased power coincident peak demand charge of the company's wholesale supplier for the former Northwest Florida Division. The Production Demand Charge for customers located in the Northeast Florida (Fernandina Beach) Division shall be the currently effective tax-adjusted purchased power coincident peak demand charge of the company's wholesale supplier for the former Northeast Florida Division.

Issue 129: The appropriate service charges shall be approved as follows:

Type of Charge	Service Charge
Initial Connect	$ 44.00
Reestablish service or change existing acct.	$ 19.00
Temporary Disconnect at customer request	$ 27.00
Reconnect after rule violation (during hours)	$ 37.00
Reconnect after rule violation (after hours)	$ 60.00
Temporary Service	$ 44.00
Collection Charge	$ 11.50

Issue 130: The appropriate [*24] primary voltage transformer ownership discount for the GSD and the GSLD rate classes shall be $0.55 per KW per month.

Issue 131: The Street and Outdoor Lighting energy charges shall be set, to the extent practicable, to recover the total non-fuel energy, demand and customer-related costs allocated to the classes in the Commission-approved cost of service study. The maintenance charges shall be set, to the extent practicable, to recover the total maintenance and associated A&G costs allocated to the classes in the cost of service study. The lighting fixture charges and pole charges shall be set to recover the remaining revenue requirement for the Street and Outdoor Lighting rate classes.

Issue 132: FPUC's Transitional Rate for Non-Profit Sports Fields shall not be eliminated. Elimination of the transitional rate would constitute a burdensome rate increase for sports field customers. Both the customer and non-fuel energy charges for the transitional rate shall be increased by the same percentage revenue increase approved for the GS rate class.

Issue 133: The appropriate standby service rates shall be approved as follows:

The appropriate monthly Local [*25] Facilities Charges are as follows:

$1.89 per KW for customers who have contracted for standby service capacity of less than 500 kW

$0.50 per KW for customers who have contracted for standby service capacity of 500 kW or greater

The Coincident Peak Demand Charge and the Energy Charge for customers located in the former Marianna Division shall be billed at the currently effective purchased power rates of the company's wholesale supplier for the former Marianna Division. The Coincident Peak Demand Charge and the Energy Charge for customers located in the former Fernandina Beach Division shall be billed at the currently effective purchased power rates of the company's wholesale supplier for the former Fernandina Beach Division.

Issue 134: An adjustment by rate class to account for the increase in unbilled revenues due to the Commission-approved revenue increase shall be made by applying the methodology shown in MFR Schedule E-15 to the Commission-approved revenue increase.

Issue 135: The revised rates and charges shall become effective for meter readings on or after 30 days following the date of the Commission vote approving the rates and charges.

[*26] **Issue 136:** FPUC shall be required to file, within 90 days after the date of the final order in this docket, a description of all entries or adjustments to its annual report, rate of return reports, and books and records which will be required as a result of the Commission's findings in this rate case.

APPROVAL OF BASE ENERGY CHARGES

At the February 18, 2004 hearing, all issues for hearing were either noted as having been dropped or approved as a stipulation, with the exception of Issues 128 (appropriate base energy charges) and 137 (closure of the docket). At the March 16, 2004, Agenda Conference, we rendered our decision on Issues 128 and 137. We approved an allocation of the increased revenues by rate class based on the approved cost of service study. The allocation was made in a manner that moves the rate of return of each rate class closer to the system rate of return. No rate class was allocated an increase that exceeded 1.5 times the system average increase, and no rate class was given a rate decrease. This allocation to the rate classes of the approved increase of $1.82 million is shown in Attachment 6, attached hereto and incorporated herein by reference.

In Issue [*27] 128, we also found that the appropriate base energy charges are those shown in Attachment 7, attached hereto and incorporated herein by reference. This attachment includes the approved base energy charges addressed in this Issue, as well as the previously stipulated customer charges (Issue 126), demand charges (Issue 127), and transformer ownership discounts (Issue 130). We calculated the Transmission Demand Charge for the General Service Large Demand-1 rate using the methodology contained in the approved stipulation of Issue 127. The Non-Profit Sports Fields Transitional rate was determined using the methodology described in the approved stipulation of Issue 132. The street and outdoor lighting rates were calculated based on the methodology that was subject of the approved stipulation of Issue 131. The approved rates are designed to recover the revenues allocated to each rate class based on the approved cost of service methodology. We approved the consolidation of the base rates and charges of FPUC's two electric divisions into a single set of rates that will apply to all of FPUC's customers by the stipulation of Issue 1. By Order No. PSC-03-1375-FOF-EG, issued December 4, 2003, [*28] in Docket No. 030002-EI, In Re: Energy Conservation Cost Recovery Clause, we approved a single Conservation Cost Recovery factor that is applicable to all of FPUC's customers, effective January 1, 2004. Customers in the two divisions, however, continue to pay separate Purchased Power Cost Recovery charges. In Docket No. 031135-EI, FPUC filed a petition to implement

consolidated Purchased Power Cost Recovery charges, which we have not yet considered.

The rates approved herein will result in an increase in the total 1,000 kilowatt-hour monthly residential bill for customers located in the Northwest (Marianna) Division of $3.38, to $66.49. Customers in the Northeast (Fernandina Beach) Division will see an increase of $5.40, to $55.33.

Based upon the approved stipulation in Issue 135, the revised rates shall become effective for meter readings on or after 30 days following the date of our vote approving the revised rates. Accordingly, because we approved the new rates at our March 16, 2004, Agenda Conference, the rates shall become effective on April 15, 2004. Pursuant to the requirements of Rule 25-22.0406(8), Florida Administrative Code [*29] , customers shall be notified in their first bill containing the new rates.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the stipulations proposed at the February 18, 2004 hearing are approved as set forth in the body of this Order. It is further

ORDERED that each of the findings made in the body of this Order is hereby approved in every respect. It is further

ORDERED that the Attachments attached hereto are incorporated herein by reference. It is further

ORDERED that all outstanding issues in this docket have been addressed as final agency action. With the issuance of this Order, no further action by this Commission is necessary, and this docket shall therefore be closed.

By ORDER of the Florida Public Service Commission this 6th day of April, 2004.

BLANCA S. BAYO, Director

Division of the Commission Clerk and Administrative Services

ATTACHMENT I

JURISDICTIONAL

COMPARATIVE AVERAGE RATE BASES

FLORIDA PUBLIC UTILITIES COMPANY

DOCKET NO. 030438-EI

PROJECTED TEST YEAR ENDING DECEMBER 31, 2004

ISSUE NO.		JURIS. PER BOOKS	COMPANY ADJS.
	PLANT IN SERVICE	65,722,932	
C	Common Plant Allocated		1,721,031
C	Acquisition Adjustment		3,691
C	Non-regulated Propane Operation		(35,088)
9	Plant — Family Dollar		
9	Contributions in Aid of Construction (CIAC)		
9	Contributions on Revenue Producing Projects		
10	Common Plant — Revised Additions		
12	Canceled & Delayed Projects		
	Total Plant in Service	65,722,932	1,689,634
	ACCUMULATED DEPRECIATION AND AMORTIZATION	(27,889,659)	
C	Common Plant Allocated		(455,102)
C	Acqusition Adjustment		(3,691)
18	Customer Advances for Construction		(621,462)
C	Non-regulated Propane Operation		17,543

ISSUE NO.		JURIS. PER BOOKS	COMPANY ADJS.
9	CIAC Amortization		
12	Canceled & Delayed Projects		
13	Disallow Use of Average Rates		
14	Family Dollar		
14	Correction of Depreciation Rates		
15	Common Plant — Revised Additions		
115	Docket No. 020853 El Updated Rates		
	Total Accumulated Operation & Amount.	(27,689,659)	(1,062,802)
	NET PLANT IN SERVICE	38,033,273	525,832
	CONSTRUCTION WORK IN PROGRESS	621,692	
C	Non-regulated Propane Operation		(923)
17	CWIP		
	Total Construction Work in Progress	621,092	(923)
	PLANT HELD FOR FUTURE USE	0	0
	NET UTILITY PLANT	38,654,965	625,909
	WORKING CAPITAL	559,985	
8	Non-Utility Accounts Receivable Reduction		
20	Cash Accounts		
26	Accounts Receivable Reduction		
27	Unocllectible Accounts Reduction		
28	Prepaid Insurance Reduction		
31	Prepaid Pensions		
32	Unbilled Revenues Reduction		
33	Deferred Debit (Accl. 186.0) Reduction		
34	Femannina Beach Office Addition		
36	Storm Damage Reserve increase		
37	Reverse 2002 Adjustments		
38	Over/Under Recoveries		
40	Other Accounts Receivable (AE#5)		
41	Other Accounts Receivable (AE#6)		
42	Unamortized Rate Case Expense		
43	Accounts Payable Increase		
44	Accounts Payable Water Div. Elimination		
45	Non-utility Gross Receipts Tax Payable		
	Total Working Capital	559,995	0
	TOTAL RATE BASE	39,214,060	625,909

[*30]

ISSUE NO.		ADJUSTED COMPANY
	PLANT IN SERVICE	
C	Common Plant Allocated	
C	Acquisition Adjustment	
C	Non-regulated Propane Operation	
9	Plant — Family Dollar	

ISSUE NO.		ADJUSTED COMPANY
9	Contributions in Aid of Construction (CIAC)	
9	Contributions on Revenue Producing Projects	
10	Common Plant — Revised Additions	
12	Canceled & Delayed Projects	
	Total Plant in Service	67,412,566
	ACCUMULATED DEPRECIATION AND AMORTIZATION	
C	Common Plant Allocated	
C	Acqusition Adjustment	
18	Customer Advances for Construction	
C	Non-regulated Propane Operation	
9	CIAC Amortization	
12	Canceled & Delayed Projects	
13	Disallow Use of Average Rates	
14	Family Dollar	
14	Correction of Depreciation Rates	
15	Common Plant — Revised Additions	
115	Docket No. 020853 El Updated Rates	
	Total Accumulated Operation & Amount.	(28,752,461)
	NET PLANT IN SERVICE	38,660,105
	CONSTRUCTION WORK IN PROGRESS	
C	Non-regulated Propane Operation	
17	CWIP	
	Total Construction Work in Progress	520,769
	PLANT HELD FOR FUTURE USE	0
	NET UTILITY PLANT	39,280,874
	WORKING CAPITAL	
8	Non-Utility Accounts Receivable Reduction	
20	Cash Accounts	
26	Accounts Receivable Reduction	
27	Unocllectible Accounts Reduction	
28	Prepaid Insurance Reduction	
31	Prepaid Pensions	
32	Unbilled Revenues Reduction	
33	Deferred Debit (Accl. 186.0) Reduction	
34	Fernannina Beach Office Addition	
36	Storm Damage Reserve increase	
37	Reverse 2002 Adjustments	
38	Over/Under Recoveries	
40	Other Accounts Receivable (AE#5)	
41	Other Accounts Receivable (AE#6)	
42	Unamortized Rate Case Expense	
43	Accounts Payable Increase	
44	Accounts Payable Water Div. Elimination	
45	Non-utility Gross Receipts Tax Payable	
	Total Working Capital	559,995

ISSUE NO.		ADJUSTED COMPANY
	TOTAL RATE BASE	39,840,259

[*31]

ISSUE NO.	COMMISSION VOTE	ADJS.	ADJUSTED
	PLANT IN SERVICE		
C	Common Plant Allocated		
C	Acquisition Adjustment		
C	Non-regulated Propane Operation		
9	Plant — Family Dollar	728,162	
9	Contributions in Aid of Construction (CIAC)	(250,000)	
9	Contributions on Revenue Producing Projects	(96,922)	
10	Common Plant — Revised Additions	(72,614)	
12	Canceled & Delayed Projects	(297,378)	
	Total Plant in Service	11,248	87,423,814
	ACCUMULATED DEPRECIATION AND AMORTIZATION		
C	Common Plant Allocated		
C	Acqusition Adjustment		
18	Customer Advances for Construction		
C	Non-regulated Propane Operation		
9	CIAC Amortization	3,750	
12	Canceled & Delayed Projects	16,617	
13	Disallow Use of Average Rates	22,134	
14	Family Dollar	(13,222)	
14	Correction of Depreciation Rates	(4,675)	
15	Common Plant — Revised Additions	11,255	
115	Docket No. 020853 El Updated Rates	45,483	
	Total Accumulated Operation & Amount.	81,342	(26,671,129)
	NET PLANT IN SERVICE	92,590	38,752,895
	CONSTRUCTION WORK IN PROGRESS		
C	Non-regulated Propane Operation		
17	CWIP	98,923	
	Total Construction Work in Progress	88,923	709,692
	PLANT HELD FOR FUTURE USE	0	0
	NET UTILITY PLANT	181,513	39,462,387
	WORKING CAPITAL		
8	Non-Utility Accounts Receivable Reduction	(55,961)	
20	Cash Accounts	(1,698,681)	
26	Accounts Receivable Reduction	(149,764)	
27	Unocllectible Accounts Reduction	380	
28	Prepaid Insurance Reduction	(28,618)	
31	Prepaid Pensions	(451,268)	

ISSUE NO.	COMMISSION VOTE	ADJS.	ADJUSTED
32	Unbilled Revenues Reduction	(19,325)	
33	Deferred Debit (Accl. 186.0) Reduction	(3,376)	
34	Fernannina Beach Office Addition	(33,554)	
36	Storm Damage Reserve increase	(372,585)	
37	Reverse 2002 Adjustments	126,621	
38	Over/Under Recoveries	(564,483)	
40	Other Accounts Receivable (AE#5)	(434)	
41	Other Accounts Receivable (AE#6)	(8,345)	
42	Unamortized Rate Case Expense	(200,999)	
43	Accounts Payable Increase	(273,922)	
44	Accounts Payable Water Div. Elimination	(14,806)	
45	Non-utility Gross Receipts Tax Payable	05,693	
	Total Working Capital	(3,643,348)	(3,083,353)
	TOTAL RATE BASE	(3,461,835)	36,379,034

[*32]

ATTACHMENT 2

JURISDICTIONAL

COMPARATIVE CAPITAL STRUCTURES

FLORIDA PUBLIC UTILITIES COMPANY

DOCKET NO. 030438-El

PROJECTED TEST YEAR ENDING DECEMBER 31, 2004

FLORIDA PUBLIC UTILITIES COMPANY — YEAR END

	Amount	Ratio	Cost Rate	Weighted Cost Rate
Long-Term Debt	16,520,339	41.47%	7.87%	3.26%
Short-Term Debt	0	0.00%	0.00%	0.00%
Preferred Stock	197,900	0.50%	4.75%	0.02%
Common Equity	18,157,729	45.58%	12.00%	5.47%
Customer Deposits	1,330,347	3.34%	6.00%	0.20%
Deferred Taxes	3,452,146	8.66%	0.00%	0.00%
Investment Cr. — Wl. Cost	162,409	0.46%	10.00%	0.05%
Total	39,840,870	100.00%		9.00%

COMMISSION VOTE

AVERAGE CAPITAL STRUCTURE:

	Amount	Adjustments Specific	Adjustments Pro Rata	Adjusted Total
Long-Term Debt	16,520,339	(426,820)	(1,739,824)	14,353,895
Short-Term Debt	0	725,666	(78,873)	650,793
Preferred Stock	197,900	(5,720)	(20,774)	171,406

	Amount	Adjustments Specific	Pro Rata	Adjusted Total
Common Equity	18,157,720	(3,147,151)	(1,622,564)	13,388,014
Customer Deposits	1,330,347	487,385	0	1,817,732
Deferred Taxes	3,452,146	2,337,822	0	5,789,968
Investment Cr. — Wl. Cost	182,409	24,618	0	207,227
Total	39,840,870	0	(3,461,835)	36,379,035

[*33]

	Ratio	Cost Rate	Weighted Cost Rate
Long-Term Debt	39.46%	7.98%	3.15%
Short-Term Debt	1.79%	3.21%	0.06%
Preferred Stock	0.47%	4.75%	0.02%
Common Equity	30.80%	11.50%	4.23%
Customer Deposits	5.00%	6.84%	0.34%
Deferred Taxes	15.92%	0.00%	0.00%
Investment Cr.— Wl. Cost	0.57%	9.50%	0.05%
Total	100.00%		7.85%

Investment Credit Weighted Cost:

	Amount	Ratio	Cost Rate	Wtd. Cost
Long-Term Debt	14,353,595	50.25%	7.98%	4.01%
Short-Term Debt	650,793	2.28%	3.21%	0.07%
Preferred Stock	171,406	0.60%	4.75%	0.03%
Common Equity	13,388,014	46.87%	11.50%	5.39%
Total	23,564,108	100.00%		9.50%

Interest Synchronization:

	Adjustments	Cost Rate	Effect on Interest Exp.	Tax Rate
Long Term Debt	(2,166,444)	7.98%	(172,882)	37.630%
Short Term Debt	850,793	3.21%	20,890	37.630
Customer Deposits	487,385	6.84%	33,337	37.630%
Investment Cr. — Wl. Cost	24,818	9.50%	2,358	37.630%
Total	(1,003,448)		(116,297)	

	Effect on Income Taxes
Long Term Debt	65,056
Short Term Debt	(7,861)
Customer Deposits	(12,545)
Investment Cr.— Wl. Cost	(887)
Total	43,782

Change in [*34] **Cost Rates:**

Long Term Debt	18,520,339	0.11%	$ 18,172	37.630%	(6,838)
Short Term Debt	0	3.21%	0	37.630%	0

Customer Deposits	1,330,347	0.84%	11,175	37.630%	(4,205)
Investment Cr. — Wl. Cost	182,409	-0.50%	(909)	37.630%	342
Total	16,520,339		18,172		(10,701)
Total Interest Synchronization					33,061

ATTACHMENT 3

JURISDICTIONAL

COMPARATIVE NET OPERATING INCOME

FLORIDA PUBLIC UTILITIES COMPANY

DOCKET NO. 030438-EI

PROJECTED TEST YEAR ENDING DECEMBER 31, 2004

ISSUE NO.		JURIS. PER BOOKS
	OPERATING REVENUES	41,827,588
C	Remove Fuel Revenues	
C	Remove ECCR Revenues	
C	Add Fuel Clause Gross Receipts Tax	
61	Forfeited Discounts (Late Fees)	
60	Remove Franchise Fees	
67	Remove Gross Receipts Tax	
123	Sales Revenues Adjustment	
	Total Operating Revenues	41,827,588
	OPERATING EXPENSES:	
	OPERATION & MAINTENANCE EXPENSE	35,000,000
C	Remove Fuel Expenses	
C	Remove ECCR Expenses	
65	Trend Rate Factors	
71	Advertising Expenses (913)	
74	Retiree Medical Benefits (926.2)	
75	Medical Insurance Premium (926.2)	
77	Pension Expenses (926.1)	
78	Storm Damage Actual (924)	
81	Payroll Outsourcing Services (923.3)	
83	Tax-related Corporate Accounting Fees (923.3)	
86	Economic Development Cost	
94	Payroll Expense — Discontinued Operations	
95	Billing Vendor Costs (903)	
96	Merchandising (903)	
98	Payroll — Discontinued Operations (903)	
99	Administrative & General Salaries (920)	
101	Misc. Office Exp. — **Uncollected Franchise Fees** (921.5)	
102	Misc. Office Exp. — Non-utility & Out-of-Period (921.5)	
105	Bond Issuance Costs (923.2)	
107	Property Issuance Premium (924)	
108	Injuries & Damages — Insurance Premium (925.1)	
111	Stock Offering Costs	

ISSUE NO.		JURIS. PER BOOKS
114	Bad Debt Expense (904)	
	Total Operating & Maintenance Expense	35,000,000
	DEPRECIATION & AMORTIZATION EXP.	2,708,403
9	CIAC Amortization	
12	Canceled & Delayed Projects	
115	Docket No. 020853-El Updated Rates	
116	Correction of Mathematical Errors	
116	Family Dollar Store Substation	
116	Family Dollar Store	
116	Common Plant	
116	Non-utility Operations	
	Total Operation & Amortization Expense	2,708,403

[*35]

ISSUE NO.		COMPANY ADJS.
	OPERATING REVENUES	
C	Remove Fuel Revenues	(27,112,504)
C	Remove ECCR Revenues	(466,940)
C	Add Fuel Clause Gross Receipts Tax	243,780
61	Forfeited Discounts (Late Fees)	
60	Remove Franchise Fees	
67	Remove Gross Receipts Tax	
123	Sales Revenues Adjustment	
	Total Operating Revenues	(27,335,664)
	OPERATING EXPENSES:	
	OPERATION & MAINTENANCE EXPENSE	
C	Remove Fuel Expenses	(26,852,624)
C	Remove ECCR Expenses	(463,182)
65	Trend Rate Factors	
71	Advertising Expenses (913)	
74	Retiree Medical Benefits (926.2)	
75	Medical Insurance Premium (926.2)	
77	Pension Expenses (926.1)	
78	Storm Damage Actual (924)	
81	Payroll Outsourcing Services (923.3)	
83	Tax-related Corporate Accounting Fees (923.3)	
86	Economic Development Cost	
94	Payroll Expense — Discontinued Operations	
95	Billing Vendor Costs (903)	
96	Merchandising (903)	
98	Payroll — Discontinued Operations (903)	
99	Administrative & General Salaries (920)	
101	Misc. Office Exp. — **Uncollected Franchise Fees** (921.5)	
102	Misc. Office Exp. — Non-utility & Out-of-Period (921.5)	
105	Bond Issuance Costs (923.2)	
107	Property Issuance Premium (924)	
108	Injuries & Damages — Insurance Premium (925.1)	
111	Stock Offering Costs	

ISSUE NO.		COMPANY ADJS.
114	Bad Debt Expense (904)	
	Total Operating & Maintenance Expense	(27,315,805)
	DEPRECIATION & AMORTIZATION EXP.	
9	CIAC Amortization	
12	Canceled & Delayed Projects	
115	Docket No. 020853-EI Updated Rates	
116	Correction of Mathematical Errors	
116	Family Dollar Store Substation	
116	Family Dollar Store	
116	Common Plant	
116	Non-utility Operations	
	Total Operation & Amortization Expense	0

[*36]

ISSUE NO.		ADJUSTED COMPANY
	OPERATING REVENUES	
C	Remove Fuel Revenues	
C	Remove ECCR Revenues	
C	Add Fuel Clause Gross Receipts Tax	
61	Forfeited Discounts (Late Fees)	
60	Remove Franchise Fees	
67	Remove Gross Receipts Tax	
123	Sales Revenues Adjustment	
	Total Operating Revenues	14,491,924
	OPERATING EXPENSES:	
	OPERATION & MAINTENANCE EXPENSE	
C	Remove Fuel Expenses	
C	Remove ECCR Expenses	
65	Trend Rate Factors	
71	Advertising Expenses (913)	
74	Retiree Medical Benefits (926.2)	
75	Medical Insurance Premium (926.2)	
77	Pension Expenses (926.1)	
78	Storm Damage Actual (924)	
81	Payroll Outsourcing Services (923.3)	
83	Tax-related Corporate Accounting Fees (923.3)	
86	Economic Development Cost	
94	Payroll Expense — Discontinued Operations	
95	Billing Vendor Costs (903)	
96	Merchandising (903)	
98	Payroll — Discontinued Operations (903)	
99	Administrative & General Salaries (920)	
101	Misc. Office Exp. — **Uncollected Franchise Fees** (921.5)	
102	Misc. Office Exp. — Non-utility & Out-of-Period (921.5)	
105	Bond Issuance Costs (923.2)	
107	Property Issuance Premium (924)	
108	Injuries & Damages — Insurance Premium (925.1)	
111	Stock Offering Costs	

ISSUE NO.		ADJUSTED COMPANY
114	Bed Debt Expense (904)	
	Total Operating & Maintenance Expense	7,684,194
	DEPRECIATION & AMORTIZATION EXP.	
9	CIAC Amortization	
12	Canceled & Delayed Projects	
115	Docket No. 020853-El Updated Rates	
116	Correction of Mathematical Errors	
116	Family Dollar Store Substation	
116	Family Dollar Store	
116	Common Plant	
116	Non-utility Operations	
	Total Operation & Amortization Expense	2,708,403

[*37]

ISSUE NO.		COMMISSION VOTE ADJS.	ADJUSTED
	OPERATING REVENUES		
C	Remove Fuel Revenues		
C	Remove ECCR Revenues		
C	Add Fuel Clause Gross Receipts Tax		
61	Forfeited Discounts (Late Fees)	64,919	
60	Remove Franchise Fees	(1,354,781)	
67	Remove Gross Receipts Tax	(1,217,311)	
123	Sales Revenues Adjustment	220,033	
	Total Operating Revenues	(2,287,090)	12,204,834
	OPERATING EXPENSES:		
	OPERATION & MAINTENANCE EXPENSE		
C	Remove Fuel Expenses		
C	Remove ECCR Expenses		
65	Trend Rate Factors	(93,283)	
71	Advertising Expenses (913)	(880)	
74	Retiree Medical Benefits (926.2)	(20,380)	
75	Medical Insurance Premium (926.2)	(122,164)	
77	Pension Expenses (926.1)	(10,385)	
78	Storm Damage Actual (924)	(103,375)	
81	Payroll Outsourcing Services (923.3)	(14,000)	
83	Tax-related Corporate Accounting Fees (923.3)	(9,389)	
86	Economic Development Cost	(1,132)	
94	Payroll Expense — Discontinued Operations	(86,566)	
95	Billing Vendor Costs (903)	(39,080)	
96	Merchandising (903)	(15,221)	
98	Payroll — Discontinued Operations (903)	2,523	
99	Administrative & General Salaries (920)	(108,795)	
101	Misc. Office Exp. — Uncollected Franchise Fees(921.5)	(13,880)	
102	Misc. Office Exp. — Non-utility & Out-of-Period (921.5)	(1,207)	
105	Bond Issuance Costs (923.2)	(561)	

ISSUE NO.		COMMISSION VOTE ADJS.	ADJUSTED
107	Property Issuance Premium (924)	(3,725)	
108	Injuries & Damages – Insurance Premium (925.1)	(78,088)	
111	Stock Offering Costs	(52,160)	
114	Bed Debt Expense (904)	663	
	Total Operating & Maintenance Expense	(771,074)	6,913,120
	DEPRECIATION & AMORTIZATION EXP.		
9	CIAC Amortization	(7,500)	
12	Canceled & Delayed Projects	(11,078)	
115	Docket No. 020853-El Updated Rates	(90,986)	
116	Correction of Mathematical Errors	3,119	
116	Family Dollar Store Substation	4,545	
116	Family Dollar Store	21,468	
116	Common Plant	(105)	
116	Non-utility Operations	(11,398)	
	Total Operation & Amortization Expense	(91,915)	2,616,468

[*38]

JURISDICTIONAL

COMPARATIVE NET OPERATING INCOME

FLORIDA PUBLIC UTILITIES COMPANY

DOCKET NO. 030438-El

PROJECTED TEST YEAR ENDING DECEMBER 31, 2004

ISSUE NO.		JURIS. PER BOOKS	COMPANY ADJS.
	TAXES OTHER THAN INCOME	3,267,910	
C	Remove Fuel Clause Revenue Taxes		(259,880)
C	Remove ECCR Revenue Taxes		(3,758)
C	Add Fuel & ECCR Clause Gross Receipts Tax		243,790
66	Remove Franchise Fees		
67	Remove Gross Receipts Tax		
118	RAF Effect of Revenue Adjustments		
118	Property Taxes (AE#19)		
118	Payroll Taxes (AE#19)		
118	Staff Payroll Adjustment		
118	Staff Plant Adjustment		
	Total Taxes Other Than Income	3,267,910	(19,858)
	CURRENT/DEFERRED INCOME TAXES	(190,238)	
119	Effect of NOI Adjustments		
119	Interest Synchronization		
	Total Current/Deferred Income Taxes	(190,238)	0
	INVESTMENT TAX CREDIT	(47,062)	
	Total Investment Tax Credit	(47,062)	0
	(GAIN)/LOSS ON SALE OF PROPERTY	0	

ISSUE NO.		JURIS. PER BOOKS	COMPANY ADJS.
	Total (Gain)/Loss on Sale of Property	0	0
	TOTAL OPERATING EXPENSES	40,739,013	(27,335,564)
120	NET OPERATING INCOME	1,088,575	0

ISSUE NO.		ADJUSTED COMPANY
	TAXES OTHER THAN INCOME	
C	Remove Fuel Clause Revenue Taxes	
C	Remove ECCR Revenue Taxes	
C	Add Fuel & ECCR Clause Gross Receipts Tax	
66	Remove Franchise Fees	
67	Remove Gross Receipts Tax	
118	RAF Effect of Revenue Adjustments	
118	Property Taxes (AE#19)	
118	Payroll Taxes (AE#19)	
118	Staff Payroll Adjustment	
118	Staff Plant Adjustment	
	Total Taxes Other Than Income	3,248,052
	CURRENT/DEFERRED INCOME TAXES	
119	Effect of NOI Adjustments	
119	Interest Synchronization	
	Total Current/Deferred Income Taxes	(150,238)
	INVESTMENT TAX CREDIT	
	Total Investment Tax Credit	(47,062)
	(GAIN)/LOSS ON SALE OF PROPERTY	
	Total (Gain)/Loss on Sale of Property	0
	TOTAL OPERATING EXPENSES	13,403,349
120	NET OPERATING INCOME	1,088,575

[*39]

ISSUE NO.		COMMISSION VOTE ADJS.	ADJUSTED
	TAXES OTHER THAN INCOME		
C	Remove Fuel Clause Revenue Taxes		
C	Remove ECCR Revenue Taxes		
C	Add Fuel & ECCR Clause Gross Receipts Tax		
66	Remove Franchise Fees	(1,354,781)	
67	Remove Gross Receipts Tax	(1,217,311)	
118	RAF Effect of Revenue Adjustments	205	
118	Property Taxes (AE#19)	(13,794)	

ISSUE NO.		COMMISSION VOTE ADJS.	ADJUSTED
118	Payroll Taxes (AE#19)	99,411	
118	Staff Payroll Adjustment	(17,042)	
118	Staff Plant Adjustment	2,419	
	Total Taxes Other Than Income	(2,500,893)	747,159
	CURRENT/DEFERRED INCOME TAXES		
119	Effect of NOI Adjustments	405,197	
119	Interest Synchronization	33,081	
	Total Current/Deferred Income Taxes	438,258	248,020
	INVESTMENT TAX CREDIT		
	Total Investment Tax Credit	0	(47,062)
	(GAIN)/LOSS ON SALE OF PROPERTY		
	Total (Gain)/Loss on Sale of Property	0	0
	TOTAL OPERATING EXPENSES	(2,925,624)	10,477,725
120	NET OPERATING INCOME	638,534	1,727,109

ATTACHMENT 4

COMPARATIVE NET OPERATING INCOME MULTIPLIERS

FLORIDA PUBLIC UTILITIES COMPANY

DOCKET NO. 030438-EI

PROJECTED TEST YEAR ENDING DECEMBER 31, 2004

	Company As Filed	COMMISSION VOTE
Revenue Requirement	100.0000%	100.0000%
Gross Receipts Tax	-2.5000%	0.0000%
Regulatory Assessment Fee	-0.0720%	-0.0720%
Bad Debt Rate	-0.1830%	-0.1996%
Net Before Income Taxes	97.2450%	99.7284%
Income Taxes @ 37.63%	-36.5933%	-37.5278%
Revenue Expansion Factor	00.6517%	62.2006%
Net Operating Income Multiplier	1,64875	1,60770

[*40]

ATTACHMENT 5

COMPARATIVE REVENUE REQUIREMENTS

FLORIDA PUBLIC UTILITIES COMPANY

DOCKET NO. 030438-EI

PROJECTED TEST YEAR ENDING DECEMBER 31, 2004

	Company As Filed	COMMISSION VOTE
Jurisdictional Adjusted Rate Base	$ 39,840,870	$ 36,379,034
Required Rate of Return	9.00%	7.86%
Required Net Operating Income	$ 3,585,678	$ 2,859,392
Achieved Net Operating Income	(1,088,574)	(1,727,108)
Net Operating Income Deficiency/(Excess)	$ 2,497,104	$ 1,132,283
Net Operating Income Multiplier	1,64876	1,60770
Operating Revenue Increase/(Decrease)	$ 4,117,121	$ 1,820,373

[ILLEGIBLE SLIP OP. PAGES 192, 193, 194, 195]

100765

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10 of 28 DOCUMENTS

In re: Application for approval of rate increase in Lee County by TAMIAMI VILLAGE UTILITY, INC.

DOCKET NO. 910560-WS; ORDER NO. PSC-92-0807-FOF-WS

Florida Public Service Commission

1992 Fla. PUC LEXIS 1266

92 FPSC 8:216

August 11, 1992

[*1]

ROBERT S. MEDVECKY, Esquire, Suite 230, 1500 Collier Blvd., Fort Myers, FL 33907, On behalf of Tamiami Village Utility, Inc.

MATTHEW J. FEIL, Esquire, Florida Public Service Commission, 101 East Gaines Street, Tallahassee, Florida 32399-0863, On behalf of the Staff of the Commission

WILLIAM WYROUGH, Esquire, Florida Public Service Commission, 101 East Gaines Street, Tallahassee, Florida 32399-0861, Counsel to the Commissioners

PANEL:

The following Commissioners participated in the disposition of this matter: THOMAS M. BEARD, Chairman; SUSAN F. CLARK

OPINION: FINAL ORDER ESTABLISHING INCREASED RATES FOR WATER AND WASTEWATER SERVICE

BY THE COMMISSION:

CASE BACKGROUND

Tamiami Village Utility, Inc., (TVU) is a Class C utility providing water and wastewater service to 717 residential customers in Lee County, Florida. On November 6, 1991, TVU filed a request for increased water and wastewater rates. Since we found deficiencies in its filing, TVU was required to revise the information filed. On December 3, 1991, TVU filed revised information which satisfied the minimum filing requirements (MFRs) set forth in our rules. Accordingly, the official date of filing for this proceeding is December [*2] 3, 1991. The approved test year for calculating rates is the twelve months ended July 31, 1991.

TVU's MFRs show test year revenues of $ 114,049 for the water system and $ 95,660 for the wastewater system, with net income of ($ 70,565) for the water system and ($ 65,340) for the wastewater system. TVU requests final rates designed to generate $ 204,045 in annual water system revenues, an increase of $ 89,996 (79.91%), and $ 210,491 in annual wastewater system revenues, an increase of $ 114,831 (120.04%).

By Order No. 25669, issued on February 3, 1992, we suspended TVU's proposed rates and granted it an interim wastewater rate increase, subject to refund. We rejected TVU's request for interim water rates.

Pursuant to TVU's request, an administrative hearing in this matter was held in Ft. Myers, Florida, on April 29, 1992.

FINDINGS OF FACT, LAW, AND POLICY

Having considered the evidence presented, the brief of the utility, and the recommendation of our staff, we hereby enter our findings of fact, law, and policy.

STIPULATIONS

Prior to the hearing, the utility and the staff of this Commission proposed to stipulate the following: (1) TVU's facilities should be considered **[*3]** 100% used and useful without regard to a margin reserve; (2) Water accumulated amortization should be reduced by $ 2,144, and wastewater accumulated amortization should be reduced by $ 4,404; (3) Accumulated deferred income taxes should have a zero cost rate; (4) Insurance expense should be allocated based on the plant ratios of 25.71% for water and 74.29% for wastewater.

Upon consideration, we believe that these proposed stipulations are reasonable, and we hereby accept them.

QUALITY OF SERVICE

TVU is only responsible for maintaining a water distribution system since it purchases water from Lee County. Although none of the fifteen customers who testified at the hearing complained about water pressure or quality, four complained about the disruption of water service resulting from water main repairs or breaks.

Five customers testified opposing the magnitude of the requested increase; three customers supported the proposed increase. Several customers testified about not being able to turn off the water at the meter, and one customer testified about his dismay at the methods TVU uses to repair the water mains.

Staff witness Robert Crouch testified that service disruptions, **[*4]** which appeared to be the main service concern of the customers, should be alleviated once the utility installs shut-off valves, as it has proposed to do.

Staff witness James Grob, a compliance officer from the Florida Department of Environmental Regulation (DER), testified that TVU's wastewater treatment plant and collection system are adequately sized to serve the present customers, but the plant's effluent disposal capacity is not adequate. In April and June of 1991, Mr. Grob stated, effluent from one of TVU's percolation ponds was discharged into an adjacent stormwater drainage ditch. The DER district office then filed a case report with the DER Office of General Counsel where further disposition is pending. Mr. Grob also testified that DER's major concern about the wastewater system is the percolation pond capacity.

Utility witness Thomas testified that the discharge referred to was caused by an extraordinary amount of rainfall and did no damage to any person or property. Mr. Thomas testified that infiltration into the collection system is causing the percolation ponds to overflow during periods of heavy rain and that TVU has tried to reduce the infiltration by making **[*5]** repairs on the collection system in the recreational vehicle (RV) park, one of its customers.

Mr. Grob testified that TVU's treatment plant is properly staffed and maintained and that the effluent meets all permitted limits for effluent quality. He also stated that the pump and lift stations meet DER requirements for location, reliability and safety.

Based on the testimony in the record, we believe the quality of the water and wastewater service provided by TVU is satisfactory.

RATE BASE

Our calculation of the appropriate rate bases are depicted on Schedule No. 1-A for the water system and on Schedule No. 1-B for the wastewater system. Our adjustments are itemized on Schedule No. 1-C. Those adjustments which are self-explanatory or which are essentially mechanical in nature are reflected on those schedules without further discussion in the body of this Order. The major adjustments are discussed below.

Pro Forma Costs to Complete Office

In its MFRs, TVU includes a $ 17,412 pro forma adjustment to rate base, allocated evenly between water and wastewater, to recover the costs of computer equipment, furniture, and fixtures to complete a its office. The utility contends **[*6]** that these costs are reasonable and necessary.

Exhibit No. 10, the staff audit report sponsored by staff witness Welch, states under audit disclosure No. 2 that the utility could not get an occupancy certificate for the office and that the utility did not include any rent expenses in the test year. There is no indication in the record that the utility will incur costs beyond what it requested in its MFRs in order to complete building and to furnish its office.

In consideration of the evidence on the record, we believe that the utility's pro forma allowance for office completion costs is reasonable.

Pro Forma Costs for Shut-off Valves

In its MFRs, TVU included a $ 26,310 pro forma adjustment to rate base for the cost of installing shut-off valves in the water distribution system.

In support of its requested adjustment, TVU provided a bid from Bowler Plumbing, Exhibit No. 8, to support the cost for installing the shut-off valves. Utility witness Thomas testified that TVU would not enter into a contract to install the shut-off valves until after TVU is able to pay.

Staff witness Crouch testified that the proposed shut-off valves would enable the utility to isolate sections [*7] of the water distribution system which need repair so that TVU can make repairs without having to turn off the water for the whole service area. Mr. Crouch testified that the shut-off valves are a prudent expenditure, but TVU should provide some assurance to the Commission that the valves will be installed.

In consideration of the evidence on the record, we think that the shut-off valves will be a prudent expenditure and will improve the utility's quality of service. However, since TVU did not provide a contract for installing the valves, we hereby order TVU to install the valves within eight months of the date of this Order. TVU shall notify the Commission in writing upon completing installation of the valves.

Land

In its MFRs, TVU requests that the amount of land in rate base be increased by $ 75,060 to a total of $ 90,060. Utility witness Thomas testified that he believed that the land value in the MFRs is correctly stated; however, if land value meant market or economic value, he continued, the County taxing authority assessed the land at a value of $ 110,000, and Mr. Thomas believed the land's actual market value was even higher. In its brief, the utility argues **[*8]** that land should be included in rate base at its value at the time TVU first dedicated the land to public use. This value was determined by the Commission at the time of transfer to TVU, and the assessments by the County taxing authority support that figure.

TVU purchased the water and wastewater systems from Tamiami Utility Company (TUC), and the Commission approved the transfer of the systems by Orders Nos. 21421 and 21421-A, issued June 20, 1989 and August 9, 1989. The utility admits in Exhibit No. 5 that it purchased the utility from TUC pursuant to contracts and other documents contained in Exhibit No. 6. According to the documents in Exhibit No. 6, TVU paid $ 15,000 for the land and $ 260,000 for the utility systems. Further, utility witness Ustica admitted that the $ 15,000 original value of the land is what appears on TVU's books.

Section 367.081(2)(a), Florida Statutes, states that, in setting rates, the Commission must consider a fair rate of return on the utility's investment in property used and useful. It is axiomatic that the term "invest-

ment" means the original cost of property, as opposed to its "value." We find that **[*9]** the utility has offered no credible justification for its disparate rate base treatment for land. In addition, the utility concedes that the original cost of the land was $ 15,000.

In consideration of the evidence on the record, we believe that only the utility's $ 15,000 investment in land should be included in rate base. Therefore, we have reduced the utility's requested rate base by $ 75,060.

Test Year CIAC Amortization Rates

Exhibit No. 10, the staff audit report, states under audit disclosure No. 6 that the utility calculated amortization of contributions-in-aid-of-construction (CIAC) erroneously. According to this disclosure, the utility computed annual depreciation expense by applying guideline depreciation rates to year-end plant balances. When plant additions or adjustments were made each year, the composite depreciation rate for plant would also change. In amortizing CIAC, the disclosure explains, the utility used the amortization rates from Orders Nos. 21421 and 21421-A: 4.10% for water system CIAC and 3.51% for wastewater system CIAC. Therefore, the CIAC amortization rates the utility used remained constant, whereas the composite depreciation rate for plant **[*10]** changed each year. This, the disclosure states, is not appropriate, and the composite amortization rates for CIAC should have been changed annually based on depreciation expense. The principle advocated by the disclosure is that CIAC amortization is supposed to be synchronized with plant depreciation.

Notably, utility witness Ustica agreed that Rule *25-30.140(8)(a), Florida Administrative Code*, requires that if a utility does not keep CIAC records by specific accounts, then a composite amortization rate should be used for the entire depreciable plant. It is evident from the MFRs that TVU does not keep CIAC records by specific accounts.

Therefore, in order to correct the utility's error in calculating the annual CIAC amortization rate, we find that accumulated amortization of CIAC must be decreased by $ 1,150 for the water system and increased by $ 1,581 for the wastewater system. We also find that the appropriate test year amortization rates for CIAC are 3.34% for the water system and 4% for the wastewater system and that test year amortization of CIAC must be decreased by $ 795 for the water system and increased by $ 1,054 for the **[*11]** wastewater system.

Working Capital

The utility used the formula approach, or one-eighth of operation and maintenance expenses (1/8th of O&M), to calculate working capital. TVU's use of the formula approach is consistent with what is required by the MFRs form, Form PSC/WAS 17, which is incorporated into Rule *25-30.437, Florida Administrative Code*. There was no evidence presented disputing the use of the formula method.

In consideration of the above, we have calculated working capital using the formula method. In a later section of this Order, we find that the proper amounts for test year operating and maintenance expense are $ 132,589 for the water system and $ 95,904 for the wastewater system. Therefore, we have included one-eighth of those amounts, $ 16,574 and $ 11,988, in the systems' respective rate bases for working capital. Our working capital allowance is $ 4,717 less for the water system and $ 3,968 less for the wastewater system than what the utility requested in its MFRs.

Test Year Rate Base

In consideration of the above adjustments, we find that test year rate base is $ 108,485 for the water system and $ 256,243 **[*12]** for the wastewater system.

COST OF CAPITAL

Our calculation of the appropriate cost of capital, as adjusted, is depicted on Schedule No. 2-A, and our adjustments are itemized on Schedule No. 2-B. Those adjustments which are self-explanatory or which are essentially mechanical in nature are reflected on those schedules without further discussion in the body of this Order. The major adjustments are discussed below.

Capital Structure

As of July 31, 1990, TVU's investor-supplied capital consisted of $ 92,930 (29.2%) common equity and $ 225,000 (70.8%) notes payable. According to utility witness Thomas, on or before July 31, 1991, TVU converted the entire issue of 10% notes payable due November 30, 1991, to common equity. Mr. Thomas explained that TVU believed it would be unable to pay the notes upon maturity because of TVU's poor financial condition and, therefore, TVU gave its note holders the option of rolling the notes over, converting the notes into equity, or being paid off. Mr. Thomas admitted, however, that TVU hoped the noteholders would convert the notes into equity shares, and, in fact, that is what the majority of the note holders did. As a result of this capital **[*13]** conversion, TVU's investor-supplied capital on July 31, 1991, consisted of $ 292,500 (effectively 100%) common equity.

In its MFRs, TVU calculated its cost of capital using a year-end capital structure rather than using a beginning-and-end-of-year average as it did for calculating rate base. TVU argues that its rates should be set using this 100% equity capital structure because it is the utility's actual capital structure, reflecting a material change, and the utility cannot change its capital structure or raise new capital.

We reject the capital structure which the utility used in calculating its cost of capital. In principle, we agree that the capital structure used for calculating a utility's rates should be that which will reflect the cost of capital the utility will experience during the period the rates are in effect. However, we add the proviso that the capital structure employed must be reasonable and prudent for an entity providing regulated utility service. TVU's assertion that its capital structure is what it is and therefore TVU should be entitled to a rate of return based on that capital structure ignores any evaluation of the prudence of the capital structure. **[*14]**

We find that both Mr. Ustica and Mr. Thomas were not persuasive witnesses regarding capital structure issues. For instance, Mr. Ustica, a certified public accountant, conceded he was unaware of any regulated utilities with a 100% equity capital structure, yet was evasive to the suggestion that equity capital generally bears a higher risk than debt capital. Mr. Thomas advocated that the utility be allowed a higher rate of return if the Commission made any reductions to rate base or expenses -- an unsound ratemaking concept not worthy of critical analysis here.

Mr. Thomas admitted that he has no experience in determining what would be an appropriate capital structure for a water and wastewater utility and that he did not prepare any comparative analysis of debt and equity ratios relative to the respective cost rates in determining TVU's requested rate of return. Further, as stated above, Mr. Thomas admitted that it was TVU's preference that the noteholders convert their debt to equity. In consideration of the foregoing, it appears clear to us that TVU never even considered the reasonableness of the capital structure that might result from its offering to convert debt to equity **[*15]** prior to the end of the test year. In addition, the decision which apparently compelled TVU's equity conversion in the first place -- the decision to forego obtaining any rate relief and operate at a loss for over two years rather than file for a staff-assisted rate case -- lends critical factual support to our opinion that TVU should not be allowed to recover from its ratepayers costs associated with a capital structure that resulted from imprudence.

In summary, we conclude that TVU has not provided adequate support for its proposed capital structure. We find that TVU's July 31, 1991, year-end capital structure is not reasonable for a regulated water and wastewater utility. An unreasonable and imprudent change to the form of a utility's capitalization is not justification for the use of a year-end capital structure, even if the change is known.

We have therefore adjusted TVU's capital structure to reflect a beginning-and-end-of-year average, which is consistent with the method used to calculate rate base. In addition to that adjustment, we have adjusted the capital structure to recognize $ 40,000 of 8% notes payable the utility issued to certain shareholders and to recognize **[*16]** $ 13,117 of 6% notes payable it issued to employees. Although these notes payable were issued outside the test year, the utility's use of this form of financing is a known change and should be recognized. We believe that a beginning-and-end-of-year average capital structure, recognizing

the subsequent issuance of notes payable, is reasonable for an entity providing regulated utility service. Cost rates for the various components of the capital structure are discussed below.

Equity

As set forth above, we have rejected the utility's proposed capital structure. Further, as a result of the adjustments described above, we calculate that the ratio of equity to total capital for TVU's capital structure is 58.1%. As was the case with its proposed capital structure, TVU failed to provide any credible evidence to support the return on equity it requested in its MFRs.

Utility witness Ustica testified that he relied on information he received from our staff, specifically a return on equity taken from the leverage graph formula established pursuant to *Section 367.081(4)(f), Florida Statutes*, in order to prepare the cost of capital schedule. **[*17]** On cross examination, however, Mr. Ustica admitted that he did not verify the correctness of the return on equity he was given over the telephone against the formula stated in our Order. The return on equity used in the MFRs is 13.11%. According to the leverage graph in Order No. 24246, issued March 18, 1991, which we took official notice of at the hearing, a return on equity of 13.11% is appropriate for utilities with an equity ratio of 40% or less, whereas a return on equity of 11.22% is appropriate for utilities with a 100% equity ratio.

This error notwithstanding, we cannot help but question Mr. Ustica's credibility when, despite having used the Commission's leverage graph formula to calculate the utility's requested return on equity, he testified that he did not believe that the leverage formula could provide a reasonable rate of return for TVU.

In consideration of the above, we find that the utility failed to present sufficient proof that it is entitled to its requested rate of return on equity. However, we think that the utility should be entitled to receive some rate of return on equity investment.

Section 367.081(4)(f), Florida Statutes **[*18]** , gives this Commission the authority to establish a leverage formula from which to calculate a reasonable range of returns on common equity for water and wastewater utilities. According to Section 367.081(4)(f), a utility, in lieu of presenting evidence on its rate of return on common equity, may move the Commission to adopt the range of rates determined by the Commission's leverage formula. In this case, the utility has rejected the use of the leverage formula, but it failed to present any credible evidence to support the rate of return included in its filing. In the absence of credible evidence to support a more appropriate return on equity, we think it appropriate to use the leverage formula to determine a reasonable return on equity for TVU.

Therefore, using the leverage formula approved in Order No. 24246, we find that, with the 58.1% equity ratio approved above, TVU's approved rate of return on equity is 12.13%. In addition, for ratemaking purposes we hereby establish a range of reasonableness of plus or minus 100 basis points within which TVU may earn.

Accumulated Deferred Income Taxes

In its MFRs, the utility calculated its cost of capital using a year-end capital **[*19]** structure, rather than a beginning-and-end-of-year average. The year-end balance for accumulated deferred income taxes in the utility's capital structure was $ 1,226.

As set forth above, we reject the utility's use of a year-end capital structure. Accordingly, the proper amount of accumulated deferred taxes in the capital structure is a beginning-and-end-of-year average, $ 935. As set forth in the "Stipulations" section above, the cost rate for accumulated deferred taxes should be zero, rather than the 20.72% shown in the MFRs.

Overall Cost of Capital

TVU argues it is entitled to a rate of return which fits its own unique and peculiar circumstances and which is sufficient for it to establish credit and to attract capital.

We agree that one of the objectives of setting a rate of return is to maintain a utility's financial viability. However, a Commission-approved rate of return cannot, by itself, guarantee financial viability; a regulated utility has the responsibility for making prudent business decisions. In this case, TVU decided to operate at a loss for over two years before seeking rate relief. As a result, TVU comes to us now in an extremely weak financial condition. **[*20]** Even utility witness Ustica admitted that as a certified public accountant he would have to disclaim an audit opinion on TVU because of its going-concern status. Needless to say, we have reservations as to whether granting TVU a rate increase will instantly reverse more than two years of financial deterioration.

As set forth above, we have found that TVU failed to present adequate evidence in support of its capital structure and cost of capital. Nonetheless, we have balanced TVU's interests with the interests of the ratepayers by establishing a cost of capital which will allow TVU the opportunity to restore its financial viability while, at the same time, not force the ratepayers to pay for TVU's failings.

We adjusted the capital components in TVU's MFRs as specified above. Further, we made a pro rata adjustment over all sources of capital to reconcile the capital structure with our approved rate base. We then applied the cost rates discussed above to the adjusted components in the capital structure and determined a weighted average cost of capital. As shown on the attached schedules, the cost rate used for customer deposits is 8.00%, the cost rate for deferred taxes is zero, **[*21]** the cost rate for notes payable (long-term debt) is 9.52%, which is a weighted average for all notes payable, and the cost rate for equity is 12.13%. Therefore, TVU's overall cost of capital is 10.96%.

NET OPERATING INCOME

Our calculation of net operating income is depicted on Schedule No. 3-A for the water system and on Schedule No. 3-B for the wastewater system. Our adjustments are itemized on Schedule No. 3-C. Those adjustments which are self-explanatory or which are essentially mechanical in nature are reflected on those schedules without further discussion in the body of this Order. The major adjustments are discussed below.

OPERATION AND MAINTENANCE EXPENSE (O & M)

Pro Forma Expense for Sludge Hauling

In its MFRs, TVU included an $ 11,438 pro forma adjustment in order to recover the cost of sludge disposal required by Lee County Ordinances 89-20 and 90-32. These ordinances, which we took official notice of, require that Lee County wastewater utilities send their sludge to a county-approved landfill. Utility witness Thomas testified that Lee County is not currently enforcing the ordinances and he does not know when the County will begin doing so.

Considering **[*22]** the uncertainty over when TVU will have to incur the requested sludge hauling expense, we do not think it appropriate at this time to allow TVU to recover the expense through rates. However, we would encourage TVU to seek recovery of this expense through a limited proceeding once enforcement of the subject ordinances is more certain.

Excessive Infiltration -- Chemicals and Purchased Power

Staff witness Crouch explained that infiltration refers to the leakage of groundwater or rainwater into a wastewater collection system through the pipes, while inflow refers to rainwater leakage into manholes. All collection systems, he stated, experience a certain level of infiltration, since most of the wastewater lines are below the groundwater level.

However, Mr. Crouch opined that the level of infiltration entering TVU's wastewater collection system is excessive. He calculated TVU's infiltration by comparing the flows recorded at the wastewater treatment plant's flow meter with the expected wastewater generated by the customers. To calculate expected wastewater flows, Mr. Crouch assumed that 80% of the water used by residential customers, 96% of the water used by commercial customers, **[*23]** and none of the water used for irrigation would be returned to the wastewa-

ter collection system. For the test year, the wastewater plant treated 39,027,000 gallons of wastewater; the expected flows from customers, however, was 21,469,280 gallons of wastewater. This means that approximately 17,557,720 gallons of wastewater treated during the test year was infiltration and or inflow. Mr. Crouch thought that a reasonable infiltration allowance would be 500 gpd/inch diameter/mile of pipe. He then calculated that a reasonable amount of infiltration for TVU would be 9,171,178 gallons. He therefore considered 8,386,542 gallons (21.5%) gallons to be excessive infiltration.

Mr. Crouch testified that the customers should only be responsible for paying the costs of treating a reasonable amount of infiltration. Accordingly, he recommended that we disallow expenses for electricity and chlorine for treating the excessive infiltration in proportion to the 21.5% figure.

In its brief, TVU argues that a specific expense should not be disallowed unless it can be shown that the expense was imprudent, unreasonable, or excessive. TVU believes that an adjustment to power and chemical expenses is **[*24]** inappropriate since it did nothing to cause the infiltration and an adjustment will render it unable to pay for all of the electricity and chemicals it needs.

We conclude that even if TVU did nothing to cause the infiltration problem, the ratepayers should not be required to pay the extra costs for the treatment of excessive infiltration. Therefore, we have reduced test year chemical expense by $ 307 (21.5% of $ 1,430) and test year power expense by $ 2,721 (21.5% of $ 12,658) because of excessive infiltration.

Purchased Water Costs

In its MFRs, the utility requests $ 116,612 in purchased water costs. This amount includes $ 75,753 in test year expenses and a $ 40,859 pro forma adjustment. Utility witness Thomas testified that the Lee County utility rate department had recommended rates on a four-year plan, but that the Lee County Commission had not approved the increased water rates for 1992-1993, as of the date of the hearing in this matter. When the County Commission approves the bill, the rates will be charged retroactively from October first, Mr. Thomas stated. Mr. Thomas also stated that he hoped that the County would approve the increase before August so that the **[*25]** utility would have the rate increase included in this rate case.

In its brief, TVU points out that its request for approval of a projected test year was denied. TVU maintains that its biggest reason for requesting approval of a projected test year was the impending, known increase in purchased water prices. It argues that the new Lee County rates will be in effect before TVU's new water rates will become effective.

We are aware that TVU's water rates from the County are scheduled to be increased close in time to when final rates in this case will become effective. However, we hesitate to allow an increase to any expense which is subject to change. Even if the utility's projected test year was approved, our thinking on the subject would be the same. With the availability of the pass-through rate increase procedures under *Section 367.081(4)(b), Florida Statutes*, TVU can adjust its rates 45 days after it has notified the Commission that its purchased water costs have changed. The paperwork required is minimal, and in accordance with Rule *25-30.020, Florida Administrative Code*, no filing fee is **[*26]** required.

To calculate the appropriate amount of purchased water cost, however, we think it appropriate to take into account the 1991-1992 Lee County rate, which is currently in effect, taken from Exhibit No. 3. To calculate the adjustment required, we used test year gallons sold from MFRs Schedule No. F-1, the billing analysis which detailed the amount of gallons billed for irrigation meters, and the descriptions of the meters from which Lee County bills TVU as shown in Late-filed Exhibit No. 9. Calculating the service charge by meter type and adding to that the gallonage charge, we computed an annualized purchased water expense of $ 87,351. This amount is $ 11,598 higher than the test year expense, but $ 29,261 less than what TVU requested.

Non-rate Case Legal Fees

TVU's MFRs show that it spent $ 1,837 in test year non-rate case legal expenses for the water system. In addition, TVU requests a pro forma adjustment of $ 3,163 for water system non-rate case legal expenses, for a total of $ 5,000. Utility witness Thomas testified that TVU requested the pro forma adjustment to recover annually recurring legal expenses. Mr. Thomas also stated that TVU booked $ 3,031 for non-rate **[*27]** case test year legal fees for the wastewater system.

The staff audit report, Exhibit No. 10, addresses legal expenses in two areas, audit exception no. 1 and audit disclosure no. 4. Audit exception no. 1 states that TVU overstated water system legal expense by $ 256 because it recorded 100% of a $ 512 invoice to the water system and 50% to the wastewater system when it should have allocated the amount evenly. Audit disclosure no. 4 points out that the utility recorded a $ 1,562 invoice for legal fees related to TVU's dissolution as a non-profit entity. The disclosure suggests that this expense is non-recurring and that legal expenses for both systems should be reduced by $ 781.

Utility witness Ustica stated that he agreed with audit exception no. 1 and admitted that the expenses discussed in audit disclosure no. 4 were non-recurring. He continued, however, that he was extremely reluctant to agree to anything which would reduce the utility's recovery of expenses, as the utility would continue to have to spend money for legal fees.

Upon review of the record, we believe that the utility will have recurring legal fees. For instance, Mr. Thomas testified on redirect that the **[*28]** utility had been served a summons the day before the hearing. He further testified that DER had proposed to institute legal proceedings against the utility, as Mr. Grob had alluded to. In both cases, he said, the utility would have to hire legal counsel to defend its rights.

We believe that a total allowance of $ 5,000 is reasonable for a utility of this size to recover on-going legal expenses. We have allocated this amount evenly between the water and wastewater systems to recognize that TVU, not any one system, will be incurring the expense. Accordingly, we have reduced test year legal expenses by $ 2,500 for the water system and by $ 832 for the wastewater system.

Rate Case Expense

In its MFRs, the utility included an estimate of $ 88,080 for rate case costs. At the hearing, utility witness Thomas sponsored Exhibit No. 1, which showed the utility's revised estimate for rate case expense, $ 85,640, with supporting documentation attached. We have reviewed the amounts and supporting documentation and present our findings as follows.

Options for Filing Rate Relief

Under Chapter 367, Florida Statutes, a utility has several options for pursuing rate relief: it can **[*29]** file MFRs and request to go directly to hearing, it can file MFRs and request proposed agency action (PAA), or, if it qualifies, it can file an application for a staff-assisted rate case (SARC). We do not think that the presence or nature of these statutory options gives a utility license to choose carelessly. The choice of one method over another, in our view, should not escape a prudence evaluation, since to hold otherwise would allow a utility to recover rate case expense incurred because of misinformation or misrepresentation.

In this case, even though TVU qualified for a SARC, it chose to file MFRs and go directly to hearing. We are concerned with the prudence of this decision. Utility witness Thomas testified that even though TVU needed rate relief for over two years, TVU thought that applying for a SARC was such a poor option that TVU decided to wait until it could afford a general rate increase. When asked to elaborate on why TVU thought SARCs a detrimental option, Mr. Thomas focused on the case of 3-S Disposal. When asked whether he knew of the circumstances surrounding 3-S's SARC and subsequent bankruptcy, Mr. Thomas answered only that 3-S went bankrupt and he thought **[*30]** it had a "lot to do with DER."

We presume that Mr. Thomas and TVU were unaware that 3-S had stipulated to rates lower than what this Commission had approved in a PAA Order and also agreed to not file for rate relief for two years. See

Order No. 23131, issued June 28, 1990, which we took official notice of. Thus, it would appear as though TVU did not have adequate information to make an informed decision.

Further, counsel for the utility gave us the impression that he was not consulted when the utility made its decision on how to go about obtaining rate relief. Specifically, he stated on the record, "My own view is had they asked me, I would have recommended that they not go for the staff-assisted rate case." Yet, Late-filed Exhibit No. 9, entitled Tamiami Village Utility's Board of Director's Minutes from March 1, 1991, reveals that the utility's counsel met with the board of directors and spoke very strongly against SARCs. Were his advice well-founded, perhaps we would not suggest second-guessing the utility's choice. However, according to Late-filed Exhibit No. 9, counsel told the utility's board that if it filed for a SARC, "[it] can't go again for 2 more years," and that **[*31]** "the PSC is going to lean in favor of the consumer." Such representations, no doubt, influenced the utility's board in making the choice it did.

In consideration of this evidence and the record as a whole, we find that the prudence of the board's decision is questionable at best.

Accounting

Exhibit No. 1 shows that $ 20,250 in accounting fees have been incurred as of the date of the hearing and that $ 3,000 in fees are estimated to be incurred to complete the case. The original estimate in the MFRs for accounting fees was $ 25,000. The accountant's billing rate was $ 100 per hour, and, based on our experience, the time the accountant spent preparing the rate case application, answering interrogatories, and dealing with the Commission audit staff appears reasonable. The 30 hours estimated to complete the case likewise appears reasonable.

Therefore, we shall allow the utility to recover in rate case expense the $ 23,250 requested in Exhibit No. 1.

Wages

The utility has requested recovery of officers' wages and board of directors' fees as part of rate case expense. The total requested in Exhibit No. 1, $ 8,721, is comprised of $ 5,571 in wages for the officers and **[*32]** of $ 3,150 in fees for the board of directors. Exhibit No. 1 reveals that these wages and fees are for overtime work in excess of normal utility business. Further, when the test year request and rate case expense amounts for wages and fees are combined the total does not appear unreasonable. We have, therefore, made no adjustments to these expenses.

Miscellaneous Expenses

In Exhibit No. 1, the utility requests recovery of $ 3,850 for supplies, travel expenses, phone, and postage and $ 1,800 for bookkeeping expenses associated with preparing the MFRs. We have reviewed the invoices submitted for these charges and find them to be reasonable.

Attorney's Fees

TVU agreed to pay its attorney a flat fee of $ 48,000, exclusive of costs, to be paid in $ 1,000 monthly installments over the course of four years. Utility witness Thomas indicated that this arrangement was the best way for the utility to get local, experienced legal help to file for a rate case. Mr. Thomas testified that he did not know the number of hours counsel spent working on the rate case because counsel did not provide the utility with statements detailing the work performed. Apparently, providing such **[*33]** statements was not a contemplated part of the arrangement. In their meetings, Mr. Thomas explained, counsel described the work he had done and how much time it took.

As indicated above, the record contains no explicit information on the amount of time counsel worked on the case or what he did during that time. Although we have no objection to flat fee arrangements per se, we

cannot accept an expense blindly and allow TVU's customers to pay an amount which we cannot verify was spent wisely.

Since the utility failed to file supporting documentation to justify its requested legal rate case expense, we find that the record fails to support the legal rate case expense requested. The burden to prove entitlement to an expense is on the utility, and with respect to legal rate case expense, TVU failed to meet that burden. From the filings and from counsel's presence, we know that counsel performed some work on behalf of the utility. The record reveals that the prehearing conference was less than a half-hour, very few motions were filed, discovery was not extensive, only one day was taken for depositions, the hearing took only one day, and counsel's brief was terse. These factors support **[*34]** our conclusion that this proceeding did not require extensive work on the part of TVU's counsel. Therefore, based on our past experience in determining reasonable legal rate case expense and our evaluation of the record as a whole, we find that a reasonable allowance for legal rate case fees in this case is $ 12,000.

Furthermore, we find that the amount of the flat fee agreed to here, $ 48,000, was not reasonable given the representation provided. Counsel's written work was replete with errors, grammatical and legal. The arguments made in the utility's testimony, motions, and brief were inferior. For example, counsel filed prepared testimony of Mr. Thomas who invoked the business judgment rule; but at the hearing, Mr. Thomas admitted he did not understand the business judgment rule. Furthermore, the business judgment rule undoubtedly has no applicability in the context of this case. We note that the utility's brief did not follow the format of the Prehearing Order as required by Rule *25-22.056(3), Florida Administrative Code*, and that the utility did not file a post-hearing statement of issues and positions as required by Rule *25-22.056(3)(a), Florida Administrative Code* **[*35]** , to avoid waiver of issues and positions. The absence of the latter document was aggravated by the utility's failure to summarize its positions in its brief, thereby making it impossible to determine if the utility's position had changed on any given issue.

In conclusion, we believe that the requested legal expense is not supported by the record. However, we think that an allowance of $ 12,000 is reasonable for legal rate case expense.

Conclusion

In consideration of the above, we shall allow TVU to recover $ 49,640 in rate case expense.

In addition, the utility shall submit a detailed statement of the actual rate case expense it incurred within 60 days after the final order is issued, or if applicable, within sixty days after the issuance of an order entered in response to a motion for reconsideration of such final order. The information should be submitted in the form prescribed for Schedule B-10 of the MFRs.

Acquisition and Conversion Costs

In the MFRs, the utility requests an amortization expense of $ 1,369 for its water and wastewater systems. Utility witness Ustica testified that the expense amortized was $ 13,690 spent to acquire the utility systems and to **[*36]** convert TVU from a non-profit to a for-profit corporation. He stated that he amortized the expense over five years, to be consistent with amortization for tax purposes, and allocated the amortized amounts evenly between the water and wastewater systems.

When asked whether TVU's changing from a non-profit to a for-profit entity directly benefitted the shareholders, Mr. Ustica replied that the utility thought it had to convert to a for-profit organization for legal reasons. When asked if the conversion to a for-profit corporation would likely cost the customers more in the long run, Mr. Ustica stated it was possible; but he was evasive when questioned whether the conversion would benefit the customers. He stated that he believed every legitimate business expense of the utility is properly recovered from the ratepayers.

It appears that the premise for TVU's seeking recovery of the amortized acquisition and conversion costs is Mr. Ustica's statement that every legitimate business expense should be recovered from the ratepayers. We

disagree with this premise. Although an expense may be legitimate, the expense may provide no benefit to the ratepayers and should, therefore, not be [*37] borne by them. For instance, the ratepayers should not be forced to pay for expenses associated with utility assets not used for the provision of utility services.

We believe that the costs of acquiring the systems and the costs to convert TVU's corporate status should be borne by the stockholders, not the ratepayers. The evidence in the record supports the conclusion that these costs benefit the shareholders, but the record is silent as to any benefit these costs have to the ratepayers. In all likelihood, the organization structure change would only serve to increase the costs to the ratepayers.

In consideration of the foregoing, we have reduced water and wastewater systems' expenses by $ 1,369 each to remove amortized acquisition and conversion expenses, as such expenses are not appropriate for recovery above-the-line.

Expenses for Reimbursed Line Breaks

In its MFRs, the utility included $ 1,168 in expenses for line repairs that were reimbursed by outside parties. Audit exception no. 4 states that cash receipts were posted in the utility's general ledger for reimbursed expenses for line breaks. These amounts were not included as a reduction to expenses in the MFRs. The [*38] utility did not present any evidence to contradict what was found in the audit exception.

In consideration of the above, we have reduced water operation and maintenance expenses by $ 1,168.

Expenses for Line Repair Beyond Point of Delivery

The system drawings provided by TVU as part of the MFRs indicate that there is 4,580 feet of 6 inch vitrified clay pipe of collection lines in place within the boundaries of TVU's RV park customer. The RV park receives water service through a 3" master meter. During the test year, TVU spent $ 11,640 on repairs to lines in the RV park. Utility witness Thomas testified that these repairs were necessary because Rvs backed over and damaged the sewer laterals, causing infiltration.

We believe that some confusion exists as to whom should be responsible for maintaining the lines in the RV park. The utility requested that it be allowed to recover expenses for repairs in the RV park, yet utility witness Thomas testified that he believed the utility should be responsible for the lines from the meter out and the customer should be responsible for the lines from the meter in.

In addition, the contract for purchase of the utility assets, which is contained [*39] in Exhibit No. 6, supports Mr. Thomas's statement. TVU purchased the utility assets from TUC pursuant to contracts originally entered into between TUC and Southern States Utilities, Inc. TVU took the place of Southern States under the contract. Section 16 (d) of the contract for purchase of the utility assets states, "Southern States agrees that users of the services provided by it shall be liable to maintain only those portions of the water and sewer systems on the users side of meters."

Rules 25-30.225(5), (6), and (7), and Rules *25-30.230* and *25-30.231, Florida Administrative Code*, specify that a utility has the obligation to provide water and wastewater service up to the customer's point of delivery. In consideration of the evidence on the record and the direction of the above-referenced rules, we believe that the point of delivery to the RV park is the meter for water service and the property line for wastewater service. The fundamental question here is, "Who is the customer?" Clearly, the customer is the RV park, not the individual renters of spaces in the RV park.

Although we are [*40] not vested with jurisdiction to determine legal ownership of the lines in the RV park, we do have the obligation and authority to determine which costs are appropriate for ratemaking purposes. If it is resolved elsewhere that the utility has legal title to the lines in the RV park, we think that the RV park's obligation to maintain the lines should remain; in which case the RV park should either maintain the lines itself or pay the utility a charge for the costs of maintaining the lines.

Our decision regarding the point of delivery is a critical and necessary predicate to evaluating the utility's requested repairs expense. We believe that it is not appropriate for TVU to recover from the general body of ratepayers operation and maintenance costs related to lines beyond the point of delivery for the RV park, TVU's sole bulk customer.

Staff witness Crouch testified that if the RV park is responsible for these lines, then it would be fair to require the park owner to pay for their maintenance. Mr. Crouch also indicated that the general body of ratepayers should not carry the responsibility for paying costs attributable to another customer.

In consideration of the above, we shall **[*41]** disallow the $ 11,640 which the utility spent repairing lines in the RV park.

INCOME TAX EXPENSE

The appropriate allowance for income tax expense is a mathematical calculation based on the resolution of other issues in this case. In consideration of the adjusted capital structure, revenues, and expenses we calculate that the appropriate amount of test year income tax expense is $ 1,838 for the water system and $ 4,341 for the wastewater system.

TEST YEAR OPERATING INCOME

We calculated test year operating income, before increased revenues, to be ($ 22,463) for the water system and ($ 16,209) for the wastewater system.

PROJECTED EXPENSES

TVU raised as an issue whether it should be allowed to recover "all known and predictable increases in expenses" even though the approved test year was historical, rather than projected, as the utility had requested. TVU argues that it should recover expenses such as legislated increases in rates for purchased water in this case, rather than being required to seek recovery in a separate pass-through proceeding. TVU believes that a historical test year, adjusted for pro forma items, is not adequate to set rates for the future. **[*42]** Only a projected test year, TVU claims, can be used to properly establish rates for a future period.

Again, we disagree with the utility in principle. A correctly adjusted historical test year can be just as accurate, if not more, than a projected test year. We point out that in this case, we have accounted for all known changes which will affect TVU for the period rates will be in effect. As evidenced by the lack of customer growth since TVU purchased the system, a projected test year is not needed to reflect any major changes due to growth.

In addition, Rule *25-30.437(3), Florida Administrative Code*, states that if a utility files MFRs for a projected test year, separate sets of MFR schedules are required for the base year, the projected year, as well as any intermediate period. This filing requirement would significantly increase the cost of preparing a rate case, and we think that such added expense should be avoided when appropriate.

As indicated in our discussions above, our approval of a projected test year does not relieve the utility of the burden to show the certainty of changes to its operations and the reasonableness and **[*43]** prudence of expenditures required to meet those changes. Contrary to the assertions of the utility in its brief and elsewhere, it is the utility's burden to affirmatively prove that it has acted prudently; it is not the Commission's burden to prove the converse.

In conclusion, we have accounted for all known expenses, and no additional adjustments are necessary.

REVENUE REQUIREMENT

In its MFRs, TVU requests final rates designed to generate $ 204,045 in annual water system revenues, an increase of $ 89,996 (78.91%), and $ 210,491 in annual wastewater system revenues, an increase of $ 114,831 (120.04%). Based on the adjustments discussed above, we find that the appropriate annual revenue requirements for this utility are $ 158,829 for the water system and $ 153,394 for the wastewater system.

These revenue requirements represent annual increases in revenue of $ 44,780 (39.26%) for the water system and $ 57,734 (60.35%) for the wastewater system.

Rate Case Expense Apportionment

Although raised as an issue prior to hearing, the question of whether Section 367.0815, Florida Statutes, should be applied to this case has been rendered moot by that section's repeal, effective **[*44]** April 9, 1992, by Chapter 92-181, Laws of Florida.

RATES AND CHARGES

Monthly Service Rates

We have calculated new rates designed to allow the utility to achieve the revenue requirement approved herein. We find that these new rates are fair, just, and reasonable, and are not unduly discriminatory. The utility's existing rates, any approved interim rates, the utility's requested final rates, and the rates which we hereby approve are set forth on Schedule No. 4-A for water and Schedule No. 4-B for wastewater.

The new rates were designed using the base facility charge (BFC) rate structure. The BFC rate structure allows the utility to more accurately track its costs and allows the customers to have some control over their bills. Each customer pays for his or her pro rata share of the fixed costs necessary to provide utility service through the base facility charge and pays for his or her usage through the gallonage charge. Under the new rates, there is a single base facility charge for all residential customers, regardless of meter size, and a base facility charge based on meter size for general service customers.

The new rates were calculated using the billing information **[*45]** contained in Exhibit No. 14, the utility's billing analysis. The differential in the gallonage charge for residential and general service wastewater customers recognizes that a portion of the residential customers' water usage will be used for irrigation or other outdoor purposes and not returned to the wastewater system. As stated in the following sections of this Order, we have maintained the 6,000 gallon cap on residential wastewater service and have not set a separate rate for the utility's RV park customer.

The rates which we have approved shall be effective for meter readings taken on or after thirty (30) days from the stamped approval date on the revised tariff sheets. The utility shall submit revised tariff sheets reflecting the approved rates along with a proposed customer notice listing the new rates and explaining the reasons therefor. The revised tariff sheets will be approved upon our staff's verification that the tariff sheets are consistent with our decision herein and that the proposed customer notice is adequate.

Four Year Statutory Rate Reduction

Section 367.0816, Florida Statutes, states,

The amount of rate case **[*46]** expense determined by the commission . . . to be recovered through . . . rate[s] shall be apportioned for recovery over a period of 4 years. At the conclusion of the recovery period, the rate[s] . . . shall be reduced immediately by the amount of rate case expense previously included in rates.

The question of a four-year rate reduction was not raised as an issue for hearing; regardless, we find little room for debate in the Legislature's mandate. Accordingly, we have amortized the amount of allowed rate case expense over four years and then adjusted the altered revenue requirement for RAFs. By our calculations, at the end of the four-year recovery period, the utility's water and wastewater rates should be reduced to reflect a $ 6,484 reduction in each system's revenues. The rate reductions at the end of this period are shown on Schedule No. 5-A for water and Schedule No. 5-B for wastewater, which are attached hereto.

The utility shall file revised tariff sheets no later than one month prior to the actual date of the required rate reduction. The utility shall also file a proposed customer notice setting forth the lower rates and the reason for the reduction. If the utility **[*47]** files this reduction in conjunction with a price index or a pass-through rate adjustment, separate data shall be filed for each rate change.

Rate Design

The utility advocates that its fixed costs be recovered in a base rate and its variable costs be recovered through a gallonage charge. Utility witness Willet stated that TVU is currently recovering only a portion of its fixed costs through the gallonage charge. As a result, TVU has been unable to recover fixed expenses during periods when seasonal customers, of which there are a good number, are away.

The utility's concern over properly recovering its fixed costs appears valid. Upon comparing the utility's expenses with its approved charges, we note a disparity between monthly revenues and monthly expenses. For example, TVU must pay its fixed costs, and, in addition, as shown in Exhibit No. 3, the utility pays Lee County a base facility charge of $ 2.91 and a service charge of $ 1.65 for each mobile home on TVU's system. However, TVU's current rate allows it to collect from its residential customers a base facility charge of $ 2.57, a difference of $ 1.99 over what the County charges TVU per customer. Thus, although the **[*48]** utility may be able to recover costs over a 12-month period, it will experience cash flow problems during months when seasonal customers are away.

Despite this, however, when asked to explain the actual allocation of costs between the base facility charge and the gallonage charge, utility witness Ustica stated that "there was no proper mathematical calculation of the rate."

In absence of the utility's providing supporting documentation showing separation of the cost between the base facility charge and the gallonage charge, we have allocated fixed costs (those associated with the ability to provide service) to the base facility charge and variable costs (those associated with the actual delivery of water to the customer) to the gallonage based on standard Commission practice.

Wastewater Gallon Cap

The utility currently has a 6,000 gallons billing cap on residential wastewater service. The utility has requested to remove the cap. Utility witness Thomas testified that the cap should be removed, as it was put into effect years ago and does not reflect the current cost of operating a wastewater plant. However, upon cross examination, he apparently changed his position by stating **[*49]** that if the utility's rates are increased he would not be concerned about the cap.

The utility's billing analysis, Exhibit No. 14, reveals that approximately 92% of the utility's residential customers purchase 6,000 gallons of water or less. Of the remaining 8%, a number of the water bills are for consumption above 30,000 gallons per month, with some monthly bills as high as 43,000 gallons. Since the residential customers of this utility reside in mobile homes, we think it likely that high residential water consumption is the result of irrigation and other non-domestic uses, which is not collected for treatment by the wastewater system. This non-domestic use is recognized by the billing cap on residential wastewater treatment.

In this instance, we think that a cap of 6,000 gallons is appropriate. If the cap was set below 6,000 gallons, cost recovery would have to be reallocated, and residential customers who used less than 6,000 gallons per month would be forced to pay a higher gallonage rate. Likewise, if the cap were above 6,000 gallons, costs would have to reallocated, and residential customers who used more than 6,000 gallons per month would be forced to pay for wastewater **[*50]** service they did not receive.

Therefore, we reject TVU's request to remove the 6,000 gallons wastewater billing cap on the residential service. We find that a 6,000 gallon cap for this utility is appropriate, as it takes into consideration residential water usage above what is collected by the wastewater system. The cap has the benefit of lowering the residential customers maximum bill. A cap on general service customer bills, however, is not appropriate since most of the water used by these customers is collected and treated by the wastewater system.

Special Rate for RV Park customer

In its MFRs and testimony, TVU requests that it be allowed to establish a special rate for an RV park customer. The information the utility presented, however, is conflicting. The rate schedules filed as part of the MFRs indicate that a special rate for the RV Park is "To Be Determined Later." But the revenue schedules in the MFRs include rates and revenues for the RV Park that are based on the general service rate for the RV Park's meter size, not on a special rate.

In addition, utility witnesses Thomas and Willet contradicted each other. Mr. Thomas stated that the RV Park would not be **[*51]** paying its fair share under the utility's proposed rate structure. Ms. Willet testified that a proper rate structure would permit the utility to recover all of its fixed expenses from base rate charges and its variable costs from gallonage charges, without making exception for the RV park.

Mr. Thomas suggested that the utility could charge a higher rate for the RV Park based on the number of sites served. However, he soon after admitted that the utility had not submitted a firm proposal containing cost allocations and revenue projections for a special rate for the RV Park.

Without any supporting cost documentation, we have no way of knowing whether a special rate for the RV park is warranted. The utility argues that the RV Park is not paying its fair share, but has failed to submit any evidence supporting that claim. Therefore, we shall not venture to make the utility's case for it and risk setting a rate that might result in the RV Park's subsidizing other customers' service.

We note that under our approved general service rates, the RV park will generate $ 12,285 in water and wastewater revenues, or 3.9% of the $ 312,223 total revenue requirements; whereas under the utility's **[*52]** proposed general service rate, the RV park would generate $ 13,471 in water and wastewater revenues, or 3.2% of the requested $ 414,536 revenue requirements.

Fire Protection Charge

TVU provides fire protection service through hydrants in its service area. Utility witness Thomas stated that he thought a charge of $ 100 per incident was reasonable to defray expenses associated with providing water used for fire protection.

Although the total cost of water for fire protection may vary per incident, metering such service is not practical. Therefore, we think that a flat per incident charge is appropriate. We find that the $ 100 amount agreed to by the utility is reasonable and hereby approve same.

The utility should file a revised tariff sheet reflecting the approved fire protection charge. The approved charge will be effective for service rendered on or after the stamped approval date on the revised tariff sheet. The tariff sheet will be approved upon staff's verification that the tariffs are consistent with the Commission's decision and the proposed customer notice, discussed earlier, is adequate.

Miscellaneous Service Charges

In its MFRs, TVU requests approval **[*53]** for revised miscellaneous service charges, asserting that its present miscellaneous service charges are arbitrary allowances and are not compensatory. TVU's currently authorized charges are consistent with what we have approved for other water and wastewater utilities in the past. The requested charges include a proposed $ 14 charge for initial connections during normal hours and after normal hours, a $ 7.50 charge for violation reconnections during regular business hours, and a $ 12.50 charge for violation reconnections after normal business hours. Schedule E-3 also indicates that the utility no longer desires to collect charges for premises visits or normal reconnections.

In addition, TVU's current tariff authorizes the utility to collect a single miscellaneous service charge where both water and wastewater services are provided, unless multiple actions beyond the utility's control are required. Utility witness Willett testified that the utility seeks authorization to charge separate miscellaneous service charges even if a customer receives both water and wastewater service because of the cost of maintaining separate records for each service.

The utility witnesses contradicted [*54] each other and contradicted what was in the MFRs regarding miscellaneous service charges. For example, Mr. Thomas testified that a $ 10 charge for a premises visit is not close to being cost-related. Ms. Willett indicated that the utility requested an increase in the premises visit charge from $ 10 to $ 15. However, the proposed miscellaneous service charges in the MFRs do not include any proposed charges for this service. Also, Ms. Willett testified that the utility did not propose a change in the charges for violation reconnections, yet the MFRs indicate a requested change from $ 15 to a charge of $ 7.50 for each service regardless of whether multiple action is required.

More importantly, however, the utility failed to produce evidence on the record showing a cost breakdown and justification for any of its requested miscellaneous service charges. Utility witness Willett provided a brief explanation of the type of work involved in, for instance, a violation reconnect; however, an explanation is not a surrogate for cost data. In consideration of the evidence on the record, we reject the utility's requested miscellaneous service charges as unsupported.

We note that it was [*55] fairly apparent that the utility is unfamiliar with its currently-approved charges and what charge should be collected under what circumstances. For example, Ms. Willett stated that she was not aware that the utility should charge for a normal reconnection, not for a premises visit, when the utility disconnects service at a customer's request. If properly implemented, the utility's present miscellaneous service charges should allow the utility to recover its costs for performing miscellaneous services. Perhaps if the charges had been properly implemented, the utility's concerns would have been resolved without the need for revision. Nonetheless, the utility is free to file for approval of revised miscellaneous charges at any time if it believes it is not recovering its costs. Such a filing must, however, be accompanied by supporting cost justification.

EXCESS INTERIM REVENUES

By Order No. 25669, issued on February 3, 1992, we authorized, subject to refund, an interim increase of $ 49,074, or 51.30%, in wastewater system rates and denied TVU's request for an interim increase in water rates. The interim increase was secured by a corporate undertaking.

Since the revenue [*56] increase approved herein is greater than that approved for interim purposes, a refund of interim rates is unnecessary. Therefore, the utility is hereby released of its obligations under the corporate undertaking.

REFUND OF UNAUTHORIZED SERVICE AVAILABILITY CHARGES

On Schedule A-11, page 16 of the MFRs, TVU indicates that it has collected $ 800 in CIAC between July 31, 1989, and September 31, 1991. On a separate schedule, Schedule E-4, the utility indicates that it has no approved charges for service availability, including meter installation charges.

Utility witness Thomas stated that TVU collected the $ 800 total by charging $ 50 for meter installations. When asked to show where the utility obtained approval to collect the subject charges, Mr. Thomas stated his belief that TVU's miscellaneous service charge tariff, Exhibit No. 7, authorized a charge for initial connections, but he could not say where a specific dollar amount was authorized.

The description of an initial connection charge in the utility's tariff is not an authorization to charge for meter installation. The utility presented no evidence that it was authorized to charge for meter installations or any other [*57] type of service availability charges. Therefore, we hereby require TVU to refund with interest the $ 800 in unauthorized CIAC it collected in violation of Sections 367.081(1), .091(2), and .091(3), Florida Statutes. The refunds shall be made in accordance with Rule *25-30.360, Florida Administrative Code*. The refunds shall be made to the current property owners of record as of the date of the Commission vote and should be made with interest based on the thirty (30) day commercial paper rate for high grade, unsecured notes sold through dealers by major corporations as regularly published in the Wall Street Journal. Interest shall begin accruing upon Commission approval of this recommendation. The refund shall be made within ninety (90) days of the date of this Order.

DEFICIENCIES IN THE MFRS

The record reflects that TVU's November 6, 1991, filing was rejected because it did not meet the minimum filing requirements of Rule *25-30.443, Florida Administrative Code.* TVU refiled on December 3, 1991, and its MFRs were accepted. TVU argues in its brief that a deficiency in the MFRs must be **[*58]** material and relate directly to the inability of the Commission staff to perform its function. The deficiencies in its original filing, TVU argues, were minor and did not justify delaying the establishment of an official date of filing.

We found the following deficiencies in the utility's original filing: (1) The filing fee was insufficient, (2) The MFRs' pages were not consecutively numbered, (3) Each section of the MFRs was not indexed and tabbed, (4) No system maps, unit prices for chemicals, DER inspection reports, list of field employees, and list of vehicles were provided, and (5) An explanation was needed for how the adjustment for contractual services for water and wastewater related to the contractual services shown on Schedules B-4 and B-5.

We are unaware of any provision in Chapter 367, our rules, or prior decisions which supports TVU's "materiality test." The only criteria for setting the official date of filing is whether or not all filing requirements are met. See Rule *25-30.025, Florida Administrative Code.* Rule *25-30.443, Florida Administrative Code*, establishes the filing **[*59]** requirements, and TVU failed to provide all of the information required by the rule. TVU does not deny this.

Further, we reject the utility's assertion that the deficiencies found in its filing were not material. If we believed that certain information was not needed in order to begin processing the case, we would not have promulgated a rule requiring that the information be filed as part of the MFRs.

In consideration of the above, we find that there was no error in establishing the official date of filing as December 3, 1991.

CONCLUSIONS OF LAW

1. This Commission has jurisdiction to establish TVU's rates and charges pursuant to *Section 367.081, Florida Statutes.*

2. As the applicant in this case, TVU has the burden of proof that its proposed rates and charges are justified.

3. The rates approved herein are just, fair, reasonable, compensatory, not unfairly discriminatory, and set in accordance with the requirements of *Section 367.081, Florida Statutes*, and other governing law.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the application of Tamiami **[*60]** Village Utility, Inc., for an increase in its water and wastewater rates in Lee County is approved as set forth in the body of this Order. It is further

ORDERED that each of the findings made in the body of this Order are by reference incorporated herein. It is further

ORDERED that all that is contained in the schedules attached hereto are by reference incorporated herein. It is further

ORDERED that Tamiami Village Utility, Inc., is authorized to charge the new rates and charges as set forth in the body of this Order. It is further

ORDERED that the rates approved herein shall be effective for meter readings taken on or after thirty (30) days after the stamped approval date on the revised tariff pages. It is further

ORDERED that the fire protection service charge approved herein shall be effective for service rendered after the stamped approval date on the revised tariff pages. It is further

ORDERED that prior to its implementation of the rates and charges approved herein, Tamiami Village Utility, Inc., shall submit and have approved a proposed notice to its customers showing the increased rates and charges and explaining the reasons therefor. The notice will be approved **[*61]** upon Staff's verification that it is consistent with our decision herein. It is further

ORDERED that prior to its implementation of the rates and charges approved herein, Tamiami Village Utility, Inc., shall submit and have approved revised tariff pages. The revised tariff pages will be approved upon Staff's verification that the pages are consistent with our decision herein. It is further

ORDERED that Tamiami Vilage Utility, Inc., shall install the shut-off valves described in the body of this Order within eight months of the date of this Order and shall notify the Commission in writing upon completion. It is further

ORDERED that Tamiami Village Utility, Inc., shall, as set forth in the body of this Order, refund with interest the unauthorized service availability charges it collected. It is further

ORDERED that the corporate undertaking provided by Tamiami Village Utility, Inc., as security for interim rates is hereby released. It is further

ORDERED that Tamiami Village Utility, Inc., shall submit, within sixty (60) days of the date of this Order, an itemized report of the actual rate case expense incurred as set forth in the body of this Order. It is further

ORDERED **[*62]** that the docket may be closed upon our staff's verification that the utility has completed the required refunds and upon the utility's filing and staff's approval of revised tariff sheets.

By ORDER of the Florida Public Service Commission this 11th day of August, 1992.

TAMIAMI VILLAGE UTILITY, INC.

SCHEDULE OF WATER RATE BASE

TEST YEAR ENDED JULY 31, 1991

SCHEDULE NO. 1-A

COMPONENT	TEST YEAR PER UTILITY	UTILITY ADJUSTMENTS	ADJUSTED TEST YEAR PER UTILITY	COMMISSION ADJUSTMENTS	COMMISSION ADJUSTED TEST YEAR
1 UTILITY PLANT IN SERVICE	$ 202,516	$ 34,836	$ 237,352	$ 0	$ 237,352
2 LAND	0	0	0	0	0
3 NON-USED & USEFUL COMPONENT	0	0	0	0	0
4 ACCUM-ULATED DEPRECIATION	(86,420)	(1,074)	(87,494)	0	(87,494)
5 CIAC	(104,563)	0	(104,563)	(800)	(105,363)
6 AMORTIZA-TION OF CIAC	50,738	0	50,738	(3,322)	47,417
7 WORKING CAPITAL ALLOWANCE	13,017	8,274	21,291	(4,717)	16,574
RATE BASE	$ 75,288	$ 42,036	$ 117,324	$ (8,839)	$ 108,485

TAMIAMI VILLAGE UTILITY, INC.

SCHEDULE OF WASTEWATER RATE BASE

TEST YEAR ENDED JULY 31, 1991

SCHEDULE NO. 1-B **[*63]**

COMPONENT	TEST YEAR PER UTILITY	UTILITY ADJUSTMENTS	ADJUSTED TEST YEAR PER UTILITY	COMMISSION ADJUSTMENTS	COMMISSION ADJUSTED TEST YEAR
1 UTILITY PLANT IN SERVICE	$ 562,851	$ 8,706	$ 571,557	$ 0	$ 571,557
2 LAND	15,000	75,060	90,060	(75,060)	15,000
3 NON-USED & USEFUL COMPONENT	0	0	0	0	0
4 ACCUM-ULATED DEPRECIATION	(213,833)	(421)	(214,254)	0	(214,254)
5 CIAC	(250,907)	0	(250,907)	0	(250,907)
6 AMORTIZA-TION OF CIAC	125,681	0	125,681	(2,823)	122,859
7 WORKING CAPITAL ALLOWANCE	9,724	6,232	15,956	(3,968)	11,988
RATE BASE	$ 248,516	$ 89,577	$ 338,093	$ (81,851)	$ 256,243

TAMIAMI VILLAGE UTILITY, INC.

ADJUSTMENTS TO RATE BASE

TEST YEAR ENDED JULY 31, 1991

SCHEDULE NO. 1-C

EXPLANATION	WATER	WASTEWATER
(1) LAND		
To remove the adjustment to the cost in land.	$ 0	($ 75,060)
(2) CIAC		
To adjust for unauthorized collection of CIAC.	($ 800)	$ 0
(3) AMORTIZATION OF CIAC		
a) To adjust to an average balance.	($ 2,144)	($ 4,404)
b) To adjust for yearly amortization rates.	(1,159)	1,581
c) To remove the amortization of unauthorized collections of CIAC.	(19)	0
Total	(3,322)	(2,823)
(4) WORKING CAPITAL ALLOWANCE		
To reflect the allowance for working capital using the formula method.	($ 4,717)	($ 3,968)

[*64]

TAMIAMI VILLAGE UTILITY, INC.

CAPITAL STRUCTURE

TEST YEAR ENDED JULY 31, 1991

SCHEDULE NO. 2-A

DESCRIPTION	ADJUSTED TEST YEAR PER UTILITY	WEIGHT	COST	UTILITY WEIGHTED COST
1 LONG TERM DEBT	$ 0	0.00%	0.00%	0.00%
2 SHORT TERM DEBT	0	0.00%	0.00%	0.00%
3 CUSTOMER DEPOSITS	4,963	1.66%	8.00%	0.13%
4 PREFERRED STOCK	0	0.00%	0.00%	0.00%
5 COMMON EQUITY	292,500	97.93%	13.11%	12.84%
6 INVESTMENT TAX CREDITS	0	0.00%	0.00%	0.00%
7 DEFERRED TAXES	1,226	0.41%	20.72%	0.09%
8 TOTAL CAPITAL	$ 298,689	100.00%		13.06%

DESCRIPTION	COMMISSION RECONC. ADJ. TO UTILITY EXHIBIT	BALANCE PER COMMISSION	WEIGHT	COST
1 LONG TERM DEBT	$ 139,059	$ 139,059	41.14%	9.52%
2 SHORT TERM DEBT	0	0	0.00%	0.00%
3 CUSTOMER DEPOSITS	317	5,280	1.56%	8.00%
4 PREFERRED STOCK	0	0	0.00%	0.00%
5 COMMON EQUITY	(99,785)	192,715	57.02%	12.13%
6 INVESTMENT TAX CREDITS	0	0	0.00%	0.00%
7 DEFERRED TAXES	(291)	935	0.28%	0.00%
8 TOTAL CAPITAL	$ 66,039	$ 337,989	100.00%	

DESCRIPTION	WEIGHTED COST PER COMMISSION
1 LONG TERM DEBT	3.92%
2 SHORT TERM DEBT	0.00%
3 CUSTOMER DEPOSITS	0.12%
4 PREFERRED STOCK	0.00%
5 COMMON EQUITY	6.92%
6 INVESTMENT TAX CREDITS	0.00%
7 DEFERRED TAXES	0.00%
8 TOTAL CAPITAL	10.96%

[*65]

RANGE OF REASONABLENESS	LOW	HIGH
RETURN ON EQUITY	11.13%	13.13%
OVERALL RATE OF RETURN	10.39%	11.53%

TAMIAMI VILLAGE UTILITY

ADJUSTMENTS TO CAPITAL STRUCTURE

TEST YEAR ENDED JULY 31, 1991

SCHEDULE NO. 2-B

DESCRIPTION	SPECIFIC ADJUSTMENT (EXPLAIN)-A	SPECIFIC ADJUSTMENT (EXPLAIN)-B	PRO RATA RECONCILE	NET ADJUSTMENT
1 LONG TERM DEBT	$ 112,500	$ 26,559	$ 11,001	$ 150,060
2 SHORT TERM DEBT	0	0	0	0
3 CUSTOMER DEPOSITS	317	0	418	735
4 PREFERRED STOCK	0	0	0	0

DESCRIPTION	SPECIFIC ADJUSTMENT (EXPLAIN)-A	SPECIFIC ADJUSTMENT (EXPLAIN)-B	PRO RATA RECONCILE	NET ADJUSTMENT
5 COMMON EQUITY	(99,785)	0	15,246	(84,539)
6 INVESTMENT TAX CREDITS	0	0	0	0
7 DEFERRED INCOME TAXES	(291)	0	74	(217)
8 TOTAL CAPITAL	$ 12,741	$ 26,559	$ 26,739	$ 66,039

A -- To reflect an average capital structure.

B -- To adjust for increased notes payable not reflected in the MFR's.

TAMIAMI VILLAGE UTILITY, INC.

STATEMENT OF WATER OPERATIONS

TEST YEAR ENDED JULY 31, 1991

SCHEDULE NO. 3-A

DESCRIPTION	TEST YEAR PER UTILITY	UTILITY ADJUSTMENTS	UTILITY ADJUSTED TEST YEAR
1 OPERATING REVENUES	$ 121,802	$ 82,243	$ 204,045
OPERATING EXPENSES			
2 OPERATION AND MAINTENANCE	$ 104,135	$ 66,188	$ 170,323
3 DEPRECIATION	2,360	1,074	3,434
4 AMORTIZATION	1,369	0	1,369
5 TAXES OTHER THAN INCOME	5,840	4,465	10,305
6 INCOME TAXES	1,476	1,757	3,233
7 TOTAL OPERATING EXPENSES	$ 115,180	$ 73,484	$ 188,664
8 OPERATING INCOME	$ 6,622	$ 8,759	$ 15,381
9 RATE BASE	$ 75,288		$ 117,324
11 RATE OF RETURN	8.80%		13.11%

[*66]

DESCRIPTION	COMMISSION ADJUSTMENTS	COMMISSION ADJUSTED TEST YEAR	REVENUE INCREASE
1 OPERATING REVENUES	$ (89,996)	$ 114,049	$ 44,780
OPERATING EXPENSES			39.26%
2 OPERATION AND MAINTENANCE	$ (37,734)	$ 132,589	$
3 DEPRECIATION	810	4,244	
4 AMORTIZATION	(1,369)	0	
5 TAXES OTHER THAN INCOME	(4,050)	6,255	2,015
6 INCOME TAXES	(9,809)	(6,576)	8,414
7 TOTAL OPERATING EXPENSES	$ (52,152)	$ 136,512	$ 10,429
8 OPERATING INCOME	$ (37,844)	$ (22,463)	$ 34,351
9 RATE BASE		$ 108,485	
11 RATE OF RETURN		-20.71%	

DESCRIPTION	REVENUE REQUIREMENT
1 OPERATING REVENUES	$ 158,829
OPERATING EXPENSES	
2 OPERATION AND MAINTENANCE	$ 132,589
3 DEPRECIATION	4,244
4 AMORTIZATION	0
5 TAXES OTHER THAN INCOME	8,270

DESCRIPTION	REVENUE REQUIREMENT
6 INCOME TAXES	1,838
7 TOTAL OPERATING EXPENSES	$ 146,941
8 OPERATING INCOME	$ 11,888
9 RATE BASE	$ 108,485
11 RATE OF RETURN	10.96%

TAMIAMI VILLAGE UTILITY, INC.

STATEMENT OF WASTEWATER OPERATION

TEST YEAR ENDED JULY 31, 1991

SCHEDULE NO. 3-B

DESCRIPTION	TEST YEAR PER UTILITY	UTILITY ADJUSTMENTS	UTILITY ADJUSTED TEST YEAR
1 OPERATING REVENUES	$ 94,528	$ 115,963	$ 210,491
OPERATING EXPENSES			
2 OPERATION AND MAINTENANCE	$ 77,792	$ 49,855	$ 127,647
3 DEPRECIATION	13,167	421	13,588
4 AMORTIZATION	1,369	0	1,369
5 TAXES OTHER THAN INCOME	8,451	6,654	15,105
6 INCOME TAXES	(1,148)	9,606	8,458
7 TOTAL OPERATING EXPENSES	$ 99,631	$ 66,536	$ 166,167
8 OPERATING INCOME	$ (5,103)	$ 49,427	$ 44,324
9 RATE BASE	$ 248,516		$ 338,093
RATE OF RETURN	-2.05%		13.11%

[*67]

DESCRIPTION	COMMISSION ADJUSTMENTS	COMMISSION ADJUSTED TEST YEAR	REVENUE INCREASE
1 OPERATING REVENUES	$ (114,831)	$ 95,660	$ 57,734
OPERATING EXPENSES			60.35%
2 OPERATION AND MAINTENANCE	$ (31,743)	$ 95,904	$
3 DEPRECIATION	(1,054)	12,534	
4 AMORTIZATION	(1,369)	0	
5 TAXES OTHER THAN INCOME	(5,167)	9,938	2,598
6 INCOME TAXES	(14,965)	(6,507)	10,848
7 TOTAL OPERATING EXPENSES	$ (54,298)	$ 111,869	$ 13,446
8 OPERATING INCOME	$ (60,533)	$ (16,209)	$ 44,288
9 RATE BASE		$ 256,243	
RATE OF RETURN		-6.33%	

DESCRIPTION	REVENUE REQUIREMENT
1 OPERATING REVENUES	$ 153,394
OPERATING EXPENSES	
2 OPERATION AND MAINTENANCE	$ 95,904
3 DEPRECIATION	12,534
4 AMORTIZATION	0
5 TAXES OTHER THAN INCOME	12,536
6 INCOME TAXES	4,341
7 TOTAL OPERATING EXPENSES	$ 125,315
8 OPERATING INCOME	$ 28,079

DESCRIPTION	REVENUE REQUIREMENT
9 RATE BASE	$ 256,243
RATE OF RETURN	10.96%

TAMIAMI VILLAGE UTILITY, INC.

ADJUSTMENTS TO OPERATING STATEMENTS

TEST YEAR ENDED JULY 31, 1991

SCHEDULE NO. 3-C

EXPLANATION	WATER	WASTEWATER
(1) OPERATING REVENUES		
To remove the utility's test year revenue request.	(89,996)	(114,831)
(2) OPERATION AND MAINTENANCE		
a) To reduce unapproved purchased water costs.	(29,261)	0
b) To remove nonrecurring expenses for the repair of lines in the RV park.	0	(11,640)
c) To remove double counted test year legal expenses.	(256)	0
d) To remove non-recurring test year legal expenses.	(781)	(781)
e) To reallocate test year legal fees equally between water and wastewater.	(1,463)	(51)
d) To reflect a reasonable level of legal rate case expense.	(4,805)	(4,805)
e) To reduce power costs due to excess inflitration.	0	(2,721)
f) To reduce chemical expense for excess inflitration.	0	(307)
g) To remove sludge removal expense because of uninforced Lee County Ordinance.	0	(11,438)
h) To remove reimbursement of repaired line breaks.	(1,168)	0
Total	(37,734)	(31,743)
(3) DEPRECIATION		
a) To adjust for unauthorized collection of CIAC.	15	0
b) To reflect corrected amortization rate of CIAC.	795	(1,054)
Total	810	(1,054)
(4) AMORTIZATION		
To adjust for disallowance of organization expenses.	(1,369)	(1,369)
(5) TAXES OTHER THAN INCOME		
To remove RAFs on the requested revenue increase.	(4,050)	(5,167)
(6) OPERATING REVENUES		
To reflect the revenue requirement.	44,780	57,734
(7) TAXES OTHER THAN INCOME		
To reflect RAFs on the revenue increase.	2,015	2,598
(8) PROVISION FOR INCOME TAXES		
To reflect income taxes on the revenue requirement.	8,414	10,848

[*68]

SCHEDULE NO. 4-A

WATER
Monthly Rates

Residential	Current	Utility Requested Interim and Final
Base Facility Charge:		
Meter Size:		
All meter sizes	$ 2.57	$ 15.00
Gallonage Charge per 1,000 G.	$ 3.90	$ 2.36
General Service		
Base Facility Charge:		
Meter Size:		
5/8"X3/4"	$ 2.57	$ 15.00
1"	$ 6.42	$ 37.50
1-1/2"	$ 12.85	$ 75.00
2"	$ 20.55	$ 120.00
3"	$ 41.12	$ 240.00
4"	$ 64.25	$ 375.00
Gallonage Charge per 1,000 G.	$ 3.75	$ 2.36

WATER
Monthly Rates

Residential	Commission Approved Interim	Commission Approved Final
Base Facility Charge:		
Meter Size:	No interim	
All meter sizes	increase approved	$ 8.97
Gallonage Charge per 1,000 G.	No interim increase approved	$ 2.76
General Service		
Base Facility Charge:		
Meter Size:		
5/8"X3/4"	No	$ 8.97
1"	interim	$ 22.44
1-1/2"	increase	$ 44.87
2"	approved	$ 71.80
3"		$ 157.06
4"		$ 224.37
Gallonage Charge per 1,000 G.	No interim increase approved	$ 2.76

SCHEDULE NO. 4-B

WASTEWATER
Monthly Rates

Residential	Current	Utility Requested Interim and Final
Base Facility Charge:		
Meter Size:		
All meter sizes	$ 6.15	$ 18.63
Gallonage Charge per 1,000 G. (Maximum 6,000 G.)	$ 1.52	$ 1.52
General Service		

WASTEWATER
Monthly Rates

Residential	Current	Utility Requested Interim and Final
Base Facility Charge:		
Meter Size:		
5/8"X3/4"	$ 6.15	$ 18.63
1"	$ 15.37	$ 46.58
1-1/2"	$ 30.73	$ 93.15
2"	$ 49.17	$ 149.04
3"	$ 98.34	$ 298.08
4"	$ 153.67	$ 465.75
Gallonage Charge per 1,000 G.	$ 1.83	$ 1.83

[*69]

Residential	Commission Approved Interim	Commission Approved Final
Base Facility Charge:		
Meter Size:		
All meter sizes	$ 9.33	$ 12.17
Gallonage Charge per 1,000 G. (Maximum 6,000 G.)	$ 2.31	$ 1.60
General Service		
Base Facility Charge:		
Meter Size:		
5/8"X3/4"	$ 9.33	$ 12.17
1"	$ 23.67	$ 30.42
1-1/2"	$ 46.62	$ 60.83
2"	$ 74.44	$ 97.33
3"	$ 149.18	$ 212.91
4"	$ 232.66	$ 304.16
Gallonage Charge per 1,000 G.	$ 2.78	$ 1.92

SCHEDULE 5-A

WATER
Monthly Rates

Residential	Current	Utility Requested Interim and Final
Base Facility Charge:		
Meter Size:		
All meter sizes	$ 2.57	$ 15.00
Gallonage Charge per 1,000 G. (Maximum 6,000 G.)	$ 3.90	$ 2.36
General Service		
Base Facility Charge:		
Meter Size:		
5/8"X3/4"	$ 2.57	$ 15.00
1"	$ 6.42	$ 37.50
1-1/2"	$ 12.85	$ 75.00
2"	$ 20.55	$ 120.00
3"	$ 41.12	$ 240.00
4"	$ 64.25	$ 375.00
Gallonage Charge per 1,000 G.	$ 3.75	$ 2.36

WATER
Monthly Rates

Residential	Commission Approved Interim	Commission Approved Final
Base Facility Charge:		
Meter Size:	No interim	
All meter sizes	increase approved	$ 8.97
Gallonage Charge per 1,000 G.	No interim	$ 2.76
(Maximum 6,000 G.)	increase approved	
General Service		
Base Facility Charge:		
Meter Size:		
5/8"X3/4"	No	$ 8.97
1"	interim	$ 22.44
1-1/2"	increase	$ 44.87
2"	approved	$ 71.80
3"		$ 157.06
4"		$ 224.37
Gallonage Charge per 1,000 G.	No interim increase approved	$ 2.76

[*70]

SCHEDULE NO. 5-B

WASTEWATER
Monthly Rates

Residential	Current	Utility Requested Interim and Final
Base Facility Charge:		
Meter Size:		
All meter sizes	$ 6.15	$ 18.63
Gallonage Charge per 1,000 G.	$ 1.52	$ 1.52
(Maximum 6,000 G.)		
General Service		
Base Facility Charge:		
Meter Size:		
5/8"X3/4"	$ 6.15	$ 18.63
1"	$ 15.37	$ 46.58
1-1/2"	$ 30.73	$ 93.15
2"	$ 49.17	$ 149.04
3"	$ 98.34	$ 298.08
4"	$ 153.67	$ 465.75
Gallonage Charge per 1,000 G.	$ 1.83	$ 1.83

Residential	Commission Approved Interim	Commission Approved Final
Base Facility Charge:		
Meter Size:		
All meter sizes	$ 9.33	$ 12.17
Gallonage Charge per 1,000 G.	$ 2.31	$ 1.60
(Maximum 6,000 G.)		
General Service		

Residential	Commission Approved Interim	Commission Approved Final
Base Facility Charge:		
Meter Size:		
5/8"X3/4"	$ 9.33	$ 12.17
1"	$ 23.67	$ 30.42
1-1/2"	$ 46.62	$ 60.83
2"	$ 74.44	$ 97.33
3"	$ 149.18	$ 212.91
4"	$ 232.66	$ 304.16
Gallonage Charge per 1,000 G.	$ 2.78	$ 1.92

6 of 6 DOCUMENTS

In Re: Application for a rate increase in Lee County by Lehigh Utilities, Inc.

DOCKET NO. 911188-WS; ORDER NO. PSC-93-1023-FOF-WS

Florida Public Service Commission

1993 Fla. PUC LEXIS 865

93 FPSC 7:319

July 12, 1993

PANEL: [*1]

The following Commissioners participated in the disposition of this matter: J. TERRY DEASON, Chairman; SUSAN F. CLARK; THOMAS M. BEARD

OPINION: ORDER ON RECONSIDERATION

BY THE COMMISSION:

BACKGROUND

Lehigh Utilities, Inc. (Lehigh or utility) is a class A water and wastewater utility providing service to approximately 10,000 customers in Lehigh Acres, Lee County, Florida. By Order No. PSC-93-0301-FOF-WS, issued on February 25, 1993, this Commission authorized an increase in the utility's rates and charges. On March 11, 1993, the Office of Public Counsel (OPC) timely filed a Petition for Reconsideration of Order No. PSC-93-0301-FOF-WS. On March 12, 1993, Lehigh timely filed a Motion for Reconsideration of Order No. PSC-93-0301-FOF-WS and a Request for Oral Argument. On March 22, 1993, Lehigh filed a Response to Public Counsel's Petition for Reconsideration.

ORAL ARGUMENT

The utility argues that oral argument should be granted because it would facilitate the Commission's understanding of the evidence and precedents and their relationship to the issues raised on reconsideration. We find that the pleadings filed on reconsideration have presented every possible argument [*2] and that oral argument is not necessary to further explicate the utility's view. Therefore, Lehigh's request for oral argument is denied.

NEGATIVE ACQUISITION ADJUSTMENT

In its petition for reconsideration of Order No. PSC-93-0301-FOF-WS, OPC states that a negative acquisition adjustment of $3,600,000 should have been made to the utility's rate base as a result of the purchase of the system by transfer of stock to Seminole Utility Company, a wholly-owned subsidiary of Southern States Utilities, Inc. (SSU). OPC also stated in its petition that evidence was provided at the hearing on this issue, but that the Commission did not address or consider the evidence in its Order. Therefore, OPC argued, the Commission erred in its decision.

In its response, the utility alleged that OPC's petition did not meet the standard required for the reconsideration of final orders and that OPC made arguments in its petition which were not previously raised and should therefore be deemed as having been waived. The utility further responded that the Commission determined that the acquisition adjustment was not appropriate in this instance, and held accordingly; thus, the Commission [*3] did not overlook or fail to consider the issue of the negative acquisition adjustment in this case. In making the argument that an acquisition adjustment was not warranted at the time of transfer, the utility relied on Order No. 25391, issued November 25, 1991, in which the Commission stated that the transfer of stock did not change the utility's rate base. Lehigh also relied on Order No. 25729, issued February 17, 1992, the Acquisition Adjustment Policy docket, in support of this position. Lehigh further stated that it is not aware of any Commission precedent which applied an acquisition adjustment to the rate base of a utility which was purchased through a stock transfer. In addition, the utility asserted that the assets of a selling utility would be irrelevant in a stock transfer, and therefore, would not be appropriately made subject to any

acquisition adjustment.

The utility correctly cited *Diamond Cab Company of Miami v. King, 146 So. 2d 889 (Fla. 1962),* as the standard for determining when reconsideration is appropriate. In Diamond Cab, the Court held that the purpose of a petition for reconsideration is to bring to the agency's attention [*4] a point which it . . . "overlooked or failed to consider when it rendered its order in the first instance." In addition, Lehigh correctly cited the Court's decision in *Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315, 317,* (Fla. 1974), wherein the Court held that a petition for reconsideration "should be based upon specific factual matters set forth in the record and susceptible to review."

We find that our decision on the acquisition adjustment issue was based on the evidence in the record that the purchase of Lehigh was by a transfer of stock which had no affect on the value of the utility's rate base. We also find that OPC failed to identify in its petition any error in fact or law or any point that the Commission overlooked or failed to consider. Therefore, OPC's Petition for Reconsideration on this issue is denied.

GAIN ON SALE

United Florida Utilities Corporation (UFU) sold substantially all of the assets of its St. Augustine Shores water and wastewater utility division to St. Johns County in 1991. The net after-tax gain associated with this sale was $4.2 million. In Order No. PSC-93-0301-FOF-WS, we determined that [*5] a portion of the net after-tax gain was not to be allocated to the Lehigh ratepayers for the following reasons: the ratepayers did not acquire a proprietary interest in the utility property being used for utility service; the shareholders bear the risk of loss on their investments and not the ratepayers; and finally, Lehigh's ratepayers did not contribute to the utility's recovery of its investment in St. Augustine Shores.

In its petition, OPC disagreed with our finding that ratepayers do not acquire a proprietary interest in utility property that is being used for utility service. However, OPC then stated that in seeking reconsideration it is not relying upon any claim of proprietary interest.

In support of its petition, OPC argued that our decision in Lehigh was inconsistent with our decision in Order No. PSC-93-0295-FOF-WS, issued February 24, 1993, a final rate case order for Mad Hatter Utilities, Inc., as well as our decisions in the telecommunications industry when utility plant is retired due to technological obsolescence. In addition, OPC argued that in Order No. 11307, issued November 10, 1982, the Commission cited its earlier Gulf and FP&L cases, Dockets Nos. 810136-EU [*6] and 810002-EU, respectively, as authority for the recognition of gains or losses on utility assets above the line. It is OPC's position that the Commission routinely requires customers to answer for risks associated with utility assets and that it is unfair for the Commission to rely on the customers' lack of a proprietary interest to deprive them of the benefits of a gain.

Lehigh responded that OPC had not identified a mistake of fact or law that was the basis for the Commission's decision. Furthermore, Lehigh stated that OPC acknowledged in its motion for reconsideration it is not relying upon any claim of proprietary interest in the St. Augustine Shores facilities. Lehigh also argued that OPC raised arguments previously addressed in OPC's testimony and the parties' posthearing briefs.

Lehigh stated in its response that OPC was attempting to raise a new theory in support of its previously rejected argument. As to OPC's reference to the Mad Hatter case, Lehigh responded that, in the Mad Hatter case, the Commission found that the utility was entitled to recover a loss arising out of the abandonment of two wastewater treatment plants where the record demonstrated that [*7] the utility's decision to abandon the plants and interconnect with Pasco County was reasonable and prudent. Lehigh also pointed out the distinction that St. Augustine Shores was a condemnation of property and Mad Hatter was a loss on abandonment of property. In addition, Lehigh argued that one could only presume that if the loss was determined to be imprudent, the loss would have been borne by the shareholders. Consequently, Lehigh argued, OPC's generic position that the customers normally bear the loss of abandoned property ignores the factual basis for the Mad Hatter decision.

The utility also points out other distinguishing facts in the Lehigh case: the St. Augustine Shores condemnation resulted in both the sale of the assets and the sale of the customer base; the sale of St. Augustine Shores was concluded before the transfer of Lehigh to Southern States; the entire utility system was regulated by St. Johns County and not the Florida Public Service Commission; and Lehigh ratepayers provided no contribution to or recovery of the investment.

We agree that the Mad Hatter case involved different facts and circumstances distinguishing it from the Lehigh case. One of the most [*8] important distinguishing facts is that St. Augustine Shores condemnation resulted in both

the sale of the assets and the customer base; whereas, in Mad Hatter, the ratepayers who were served by the abandoned plants were the same ratepayers being served by the interconnection with Pasco County. Therefore, because we find that the facts of the Mad Hatter case can be distinguished from the facts in this case, we find no reason to reconsider our decision on the gain on St. Augustine Shores.

We also agree with the utility's argument that the Mad Hatter case was based on evidence that reflected the utility's actions were prudent. That finding was critical to the Commission's determination that the loss should be borne by the ratepayers. In the alternative, had the Commission found the utility's decision to be imprudent, the shareholders would have borne the loss. Consequently, we find OPC's argument that the Commission routinely allows the recovery of losses on utility plant to be in error.

Based on the foregoing, we find that OPC's Petition for Reconsideration of this issue does not present any arguments regarding the sale of utility assets that were not previously considered [*9] by the Commission. Therefore, OPC's Petition for Reconsideration of this issue is denied.

INCOME TAX EXPENSE

In its Motion for Reconsideration, Lehigh argued that the negative income tax expense was incorrectly calculated in Order No. PSC-93-0301-FOF-WS. Lehigh raised several points on reconsideration of the income tax calculation: 1) there was no record support for the negative income tax expense calculation; 2) the calculation was inconsistent with previous Commission decisions; 3) Commission staff bears the burden of proving that tax loss carry-forwards exist because staff raised the tax issues; 4) the Order violates the prohibition against retroactive ratemaking; 5) Lehigh was denied due process by not being on notice of the imposition of a negative income tax expense and by not being allowed to supplement the record with its tax sharing agreement with its parent. Most of the utility's argument for reconsideration is based on the mistaken perception that we calculated income tax expense using historic test year data. Only projected test year data was used in our determination of the appropriate amount of income tax expense.

Record Support

Lehigh argued in its [*10] petition that there was no record support for the negative income tax expense calculation. We disagree. At the beginning of these proceedings, all parties agreed that the income tax expense amount was to be a mathematical calculation based on other adjustments made by the Commission to Lehigh's filing. We find that it is mathematically possible for a negative income tax expense to be the result of those adjustments. Our Order takes the tax effect of each adjustment made to either revenues or expenses as reflected in the column headed Utility Adjusted Test Year, makes adjustments for changes to rate base and capital structure, corrects the parent debt adjustment to exclude the state income tax rate, and reconciles it to the rate base and capital structure as determined in the Order. Use of some of the investment tax credit carry-forwards is recognized by incorporating them in the capital structure while not reducing the tax expense.

In the utility's application, a total income tax expense from jurisdictional wastewater operations of negative $227,966 was projected. This was a larger negative total income tax expense than the projected negative $224,293 total income [*11] tax expense per books for the same period. In the application, the amount of state income tax expense was decreased by the net operating loss (NOL). Further record evidence of NOLs during the projected test year is found in witness Gangnon's testimony on cross-examination.

We find Lehigh's argument regarding the absence of a negative tax expense in, or net operating loss carry-forwards from, the historic test year unpersuasive because our calculation was based on a projected test year calculation, not on the historic test year. Our Order does not address NOLs or NOL carry-forwards from the historic test year.

We agree with the utility's argument that there is testimony indicating that with rate relief there would be no NOLs in the projected test year. However, that testimony clarified whether Lehigh could use investment tax credit carry-forwards. Our calculation of income tax expense, attached hereto as Schedule No. 2, shows that the size of the original negative total tax expense and the relative size of the rate increase would determine whether or not there actually would be a positive tax expense after the rate increase.

Based on the foregoing, we find that the utility [*12] has failed to show any mistake in fact, law or policy, nor has it shown any point which this Commission overlooked or failed to consider on this issue.

Previous Commission Decisions

In its motion, Lehigh argued that the calculation of income tax expense should be based on the prospective cost of service, not on NOLs, and that to do otherwise would be inconsistent with previous Commission decisions. Lehigh cited three decisions of this Commission as support for its position: Order No. 20017, issued September 16, 1988, St. Augustine Shores Utilities; Order No. 24928, issued August 19, 1991, Magnolia Manor Water Works; and Order No. 25139, issued September 30, 1991, Homosassa Utilities, Inc. Each of these orders addresses net operating loss carry-forwards on either a consolidated or stand alone basis. However, we find that these cases are not applicable to this proceeding since the calculation in Order No. PSC-93-0301-FOF-WS was based entirely on the projected test year of Lehigh and did not consider net operating loss carry-forwards on either a consolidated or stand alone basis.

Burden of Proof

In its motion, Lehigh also argued that Commission staff bears [*13] the burden of proving that tax loss carry-forwards exist because staff raised the tax issues. We find that the utility at all times bears the burden of proof in a rate proceeding. See *South Florida Natural Gas v. Public Service Commission, 534 So.2d 695 (Fla. 1988)*. Also, we find that proof of tax loss carry-forwards for the historic test year was not necessary in order to calculate the income tax expense because our calculation was based on projected test year data, not on historic test year data.

Retroactive Ratemaking

The utility further argues that Order No. PSC-93-0301-FOF-WS violates the prohibition against retroactive ratemaking because it reduces the annual revenue requirements to recognize tax benefits arising out of past losses. Again, this argument arises out of the utility's misunderstanding of how the income tax expense was calculated. Therefore, we deny reconsideration on this point.

Due Process

Lehigh argued that this Commission has denied the utility due process by not putting the utility on notice of the imposition of a negative income tax expense and by not permitting the utility to supplement the record with its tax [*14] sharing agreement with its parent. As discussed in an earlier portion of this Order, prior to hearing, the parties to this proceeding agreed that the determination of the appropriate amount of the tax expense was a mathematical calculation or a "fall-out number" resulting from the tax effect of various adjustments made to the utility's revenues, expenses, rate base and capital structure. Therefore, we find that the utility was on notice that the amount of income tax expense would be the number, positive or negative, resulting from our adjustments made based on record evidence. In addition, we find that even if it were permissible to rely on the Tax Sharing Agreement between Minnesota Power and Light and Lehigh, it would add no information to the record to change our tax calculation.

Based on the foregoing, we find that the utility has failed to show any mistake in fact, law or policy, nor has it shown any point which this Commission overlooked or failed to consider. Therefore, the utility's Motion for Reconsideration regarding income taxes is denied.

COMMISSION'S ADJUSTMENT TO INCOME TAX EXPENSE

In our review of the tax calculation in response to the utility's [*15] motion, we found that interest had been double counted. Therefore, we have reconsidered the income tax expense calculation on our own motion and find it appropriate to decrease income tax expense by $5,730 for water and to increase it by $122,979 for wastewater. Our revised calculation of income tax expense is shown on Schedule 2, attached hereto.

OPEBS

In its Motion for Reconsideration, the utility argues that the Commission erred in adjusting the utility's costs related to the Financial Accounting Standards Board pronouncement 106 (FAS 106) to reflect costs associated with an "Other Post-retirement Employee Benefits" (OPEB) plan referred to as Proposed Plan 2. Each of the several points raised by the utility is discussed separately below.

First, the utility argued that the Commission did not vote on this issue at the January 19, 1993, Agenda Conference, and therefore, the scope of review should not be limited by the rules for reconsideration. Our review of the Commission vote sheet from the January 19th Agenda Conference indicates that the Commissioners voted on this issue and all other issues of the Lehigh recommendation. The vote sheet is dispositive of our decision. [*16] Therefore, we find that no mistake of fact, law or policy has been shown on this point.

The second issue raised by Lehigh is that the Order mischaracterized witness Gangnon's testimony as contradictory with regard to the OPEB plan. We find that the record supports a finding that witness Gangnon's testimony was contradictory where he stated that SSU was considering several plans in its actuarial study as a way to reduce OPEB costs, while also stating that "there are no present plans to reduce either the kinds or level of post-retirement benefits now or in the future." Therefore, we find no mistake in our conclusion that the testimony was contradictory.

The third point of Lehigh's motion is a request by the utility that the Commission take official recognition of the rebuttal testimony of Bert T. Phillips and the rebuttal testimony and exhibits of Peter J. Neuwirth, which are part of the record in another SSU rate case for the Marco Island system, Docket No. 920655-WS. As grounds for this request, the utility relies on the Commission's decision in Order No. 20489, issued December 21, 1988 (Docket No. 871394-TP - Review of the Requirements Appropriate for Alternative [*17] Operator Services and Public Telephones).

Our review of Order No. 20489 shows that we have taken official recognition of a federal court decision entered into after the final hearing in the docket but prior to the Commission's final decision. Lehigh requests we take official recognition after the Commission's final decision. Further review of Order No. 20489 shows that the Commission denied, as untimely, General Telephone Co. of Florida's (GTE's) motion for official recognition of an order where the motion for official recognition was filed on the day of the Special Agenda Conference. Lehigh also cited *Sections 90.202(6)* and 120.61, Florida Statutes, as authority for its request to supplement the record. These statutory provisions allow sworn testimony from the record of one case to be entered into the record of another case; however, none of them provides for supplementing the record post-hearing or after entry of a final order. We find that the record is adequate to dispose of the utility's motion for reconsideration on this issue. Therefore, we find that the utility's request to supplement the record with the testimony [*18] and exhibits of witnesses Neuwirth and Phillips is both untimely and unnecessary for the disposition of Lehigh's Motion for Reconsideration.

The fourth issue raised by Lehigh is that it was a mistake of fact to conclude that Lehigh has not yet adopted an OPEB plan. Lehigh misapprehends the Commission's conclusion that a plan will not be adopted until sometime in 1993. The basis for our adjustment allowing recovery of OPEB expenses related to Proposed Plan 2 is that, as an accounting standard, FAS 106 would not be adopted by Lehigh until 1993. Witness Gangnon stated that SSU adopted a formal OPEB plan on January 1, 1991. We find that the FAS 106 expense adjustment is a pro forma adjustment, since the test year ends on September 30, 1992, and SSU will adopt FAS 106 accounting in 1993.

Lehigh has correctly identified one factual error in Order No. PSC-93-0301-FOF-WS regarding witness Gangnon's testimony on this issue. In the last paragraph on page 26 of the Order we incorrectly attributed to Mr. Gangnon testimony to the effect that a plan will not be adopted until sometime in 1993. This is incorrect because witness Gangnon did testify that Lehigh adopted a formal OPEB [*19] plan on January 1, 1991. This phrase did not appear in the Staff Recommendation on which the Commission voted, nor did this information form the basis approving Proposed Plan 2. Our decision was based on the evidence in the record that demonstrated that Lehigh was considering various alternative plans that might reduce its OPEB expenses, as well as other evidence in the record. Therefore, although we misstated a fact, we did not rely on that fact in reaching our decision. Therefore, reconsideration of the Commission's decision with regard to this issue is denied.

The fifth issue raised by Lehigh as basis for reconsideration of the FAS 106 cost adjustments is the reference in Order No. PSC-93-0301-FOF-WS to witness Gangnon's lack of knowledge concerning the OPEB plan. Lehigh's argument in this regard makes a factual issue out of the Commission's discretion to give evidence whatever weight that it deserves. In this case, Mr. Gangnon's testimony was not given the weight the utility desired. This is not a mistake in fact, law or policy. Therefore, reconsideration on this point is denied.

The utility also sought reconsideration on the basis that there is no competent substantial [*20] evidence to support the conclusion that there is a trend to reduce FAS 106 costs. The issue of the competency of the evidence is not an appropriate basis for reconsideration. The utility has shown no mistake of fact, law or policy nor has it shown that the Commission overlooked or failed to consider any point.

Lehigh's final argument on OPEBs was that use of FAS 106 requires reliance on the utility's substantive plan over any other plan. In support of this argument the utility relies on Orders Nos. PSC-92-0708-FOF-TL, issued July 24, 1992, and PSC-92-1197-FOF-EI, issued October 22, 1992, regarding the United Telephone Company of Florida and the Florida Power Corporation rate cases, respectively. When we approved FAS 106 for ratemaking purposes in these Orders, we also made adjustments to the utility's requested FAS 106 costs. (See Orders Nos. PSC-92-0708-FOF-

TL, p. 36, and PSC-92-1197-FOF-EI, p. 11) We find our substituting Proposed Plan 2 for SSU's current OPEB plan to be an appropriate regulatory adjustment based on our findings that SSU may reduce its OPEB costs in the future and the weaknesses and inconsistencies in SSU's case. Although the utility had failed [*21] to demonstrate that its plan was prudent, we appropriately determined that a plan would be offered. Therefore, we chose the lower cost plan. Further, we find that, for regulatory purposes, the Commission is not bound by the utility's substantive plan.

In conclusion, we find that the utility has failed to show any mistake of law, fact or policy on the issue of OPEBs.

REVENUE REQUIREMENT

Based on our changes in the income tax expense, discussed in an earlier portion of this Order, the revenue requirement approved in Order No. PSC-93-0301-FOF-WS has been revised. We find the appropriate revenue requirement for water to be $1,858,685 which represents a $6,000 or .32 percent decrease. For wastewater, we find the appropriate revenue requirement to be $2,151,746, which represents an increase of $128,774 or 6.37 percent. Our calculation of the appropriate revenue requirement is shown on Schedules Nos. 1-A and 1-B for water and wastewater, respectively. Our adjustments to the operating statements are shown on Schedule No. 1-C.

RATES

Based on the foregoing changes in the revenue requirement, we have adjusted the rates as shown below:

Rate Schedule Water [*22] Monthly

Residential and General Service

	Commission Approved Final Rates Order No. PSC-93-0301-FOF-WS	Commission Approved Rates on Reconsideration
Meter Size		
5/8" X 3/4"	$ 8.89	$ 8.87
3/4"	13.34	13.31
1"	22.23	22.18
1-1/2"	44.45	44.35
2"	71.12	70.96
3"	142.24	141.92
4"	222.25	221.75
6"	444.50	443.50
8"	711.20	709.60
10"	1,022.35	1,020.05
Gallonage Charge (per 1,000 gallons)	2.37	$ 2.36

Rate Schedule Wastewater Monthly Residential

	Commission Approved Final Rates Order No. PSC-93-0301-FOF-WS	Commission Approved Rates on Reconsideration
Meter Size	Rates	Rates
All Sizes	$ 14.65	$ 15.28
Gal. Charge (per 1,000 gals.) (6 MG Cap)	$ 3.48	$ 3.82 (1) (Max. 6 MG)

Rate Schedule Wastewater Monthly General Service

	Commission Approved Final Rates Order No. PSC-93-0301-FOF-WS	Commission Approved Rates on Reconsideration
Meter Size		
5/8" X 3/4"	$ 14.65	$ 15.28
3/4"	21.98	22.92
1"	36.63	38.20
1-1/2"	73.25	76.40
2"	117.20	122.24
3"	234.40	244.48
4"	366.25	382.00
6"	732.50	764.00
8"	1,172.00	1,222.40
10"	1,684.75	1,757.20
Gallonage Charge (per 1,000 gallons) (No Max)	$ 4.18	$ 4.58

[*23]

REMARKS: (1) Rate after adjustment was made for effluent pumped to the golf course at the rate of $.1065 cents per 1,000 gallons.

APPORTIONMENT OF RATE CASE EXPENSE

Section 367.0816, Florida Statutes, requires that rate case expense be apportioned for recovery over a period of four years. The statute further requires that the rates of the utility be reduced immediately by the amount of rate case expense previously included in the rates.

At the end of four years, the water rates should be reduced by $39,259 and the wastewater rates should be reduced by $29,616 as shown in Schedules Nos. 3-A and 3-B for water and wastewater, respectively. The revenue reductions reflect the annual rate case expense amounts amortized plus the gross-up for regulatory assessment fees.

The utility shall file tariffs no later than one month prior to the actual date of the required rate reduction. The utility also shall file a proposed "customer letter" setting forth the lower rates and the reason for the reduction. If the utility files this reduction in conjunction with price index or pass-through rate adjustments, separate data shall be filed [*24] for the price index and/or pass-through increase or decrease and the reduction in the rates due to the amortized rate case expense.

This docket may be closed upon the utility's filing and staff's approval of tariff sheets consistent with our decision herein, as well as the utility's meeting any outstanding requirements of Order No. PSC-93-0301-FOF-WS.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that the Petition for Reconsideration of Order No. PSC-93-0301-FOF-WS filed by the Office of Public Counsel is hereby denied. It is further

ORDERED that the Motion for Reconsideration of Order No. PSC-93-0301-FOF-WS and Request for Oral Argument filed by Lehigh Utilities, Inc. is hereby denied to the extent set forth in the body of this Order. It is further

ORDERED that on our own motion, income tax expense is adjusted to the extent set forth in the body of this Order. It is further

ORDERED that each of the findings made in the body of this Order are by reference incorporated herein. It is

further

ORDERED that all that is contained in the schedules attached hereto are by reference incorporated herein. It is further

ORDERED [*25] that this docket may be closed upon the utility's filing and staff's approval of tariff sheets consistent with our decision herein, as well as the utility's meeting any outstanding requirements of Order No. PSC-93-0301-FOF-WS.

By ORDER of the Florida Public Service Commission this 12th day of July, 1993.

NOTE: On the issue of OPEBs, there was a split vote by the panel; the Chairman cast the deciding vote after reviewing the record.

LEHIGH UTILITIES, INC.

STATEMENT OF WATER OPERATIONS

TEST YEAR ENDED SEPTEMBER 30, 1992

SCHEDULE NO. 1-A

DOCKET NO. 911188-WS

	DESCRIPTION	TEST YEAR PER UTILITY	UTILITY ADJUSTMENTS	UTILITY ADJUSTED TEST YEAR	COMMISSION ADJUSTMENTS
1	OPERATING REVENUES	$ 1,621,243	$ 430,552	$ 2,051,795	$ (430,552)
	OPERATING EXPENSES				
2	OPERATION AND MAINTENANCE	$ 946,416	$ 99,578	$ 1,045,994	$ (40,703)
3	DEPRECIATION	198,246	15,042	213,268	(18,791)
4	AMORTIZATION	0	0	0	0
5	TAXES OTHER THAN INCOME	228,164	7,113	235,277	(19,375)
6	INCOME TAXES	3,873	115,553	119,226	(133,030)
7	TOTAL OPERATING EXPENSES	$ 1,376,499	$ 237,266	$ 1,613,785	$ (211,899)
8	OPERATING INCOME	$ 244,744	$ 193,266	$ 438,010	$ (218,653)
9	RATE BASE	$ 4,353,973		$ 4,353,973	
10	RATE OF RETURN	5.62%		10.06%	

[*26]

	DESCRIPTION	COMMISSION ADJUSTED TEST YEAR	REVENUE INCREASE	REVENUE REQUIREMENT
1	OPERATING REVENUES	$ 1,621,243	$ 237,442	$ 1,858,685
	OPERATING EXPENSES		14.65%	

	DESCRIPTION	COMMISSION ADJUSTED TEST YEAR	REVENUE INCREASE	REVENUE REQUIREMENT
2	OPERATION AND MAINTENANCE	$ 1,005,291	$ 0	$ 1,005,291
3	DEPRECIATION	194,497	0	194,497
4	AMORTIZATION	0	0	0
5	TAXES OTHER THAN INCOME	215,902	10,685	226,587
6	INCOME TAXES	(13,804)	99,697	85,893
7	TOTAL OPERATING EXPENSES	$ 1,401,886	$ 110,382	$ 1,512,268
8	OPERATING INCOME	$ 219,357	$ 127,060	$ 346,417
9	RATE BASE	$ 3,575,308		$ 3,575,306
10	RATE OF RETURN	6.14%		9.69%

LEHIGH UTILITIES, INC.

STATEMENT OF WASTEWATER OPERATIONS

TEST YEAR ENDED SEPTEMBER 30, 1992

SCHEDULE NO. 1-B

DOCKET NO. 911188-WS

	DESCRIPTION	TEST YEAR PER UTILITY	UTILITY ADJUSTMENTS	UTILITY ADJUSTED TEST YEAR	COMMISSION ADJUSTMENTS
1	OPERATING REVENUES	$ 1,205,576	$ 1,215,082	$ 2,420,658	$ (1,215,082)
	OPERATING EXPENSES				
2	OPERATION AND MAINTENANCE	$ 842,574	$ 77,504	$ 920,078	$ (38,895)
3	DEPRECIATION	355,628	3,730	359,358	(10,916)
4	AMORTIZATION	0	0	0	0
5	TAXES OTHER THAN INCOME	258,475	42,823	301,298	(54,679)
6	INCOME TAXES	(227,966)	407,677	179,711	(421,389)
7	TOTAL OPERATING	$ 1,228,711	$ 531,734	$ 1,760,445	$ (525,678)

	DESCRIPTION EXPENSES	TEST YEAR PER UTILITY	UTILITY ADJUSTMENTS	UTILITY ADJUSTED TEST YEAR	COMMISSION ADJUSTMENTS
8	OPERATING INCOME	$ (23,135)	$ 683,348	$ 660,213	$ (689,204)
9	RATE BASE	$ 6,562,749		$ 6,562,749	
10	RATE OF RETURN	-0.35%		10.06%	

[*27]

	DESCRIPTION	COMMISSION ADJUSTED TEST YEAR	REVENUE INCREASE	REVENUE REQUIREMENT
1	OPERATING REVENUES OPERATING EXPENSES	$ 1,205,576	$ 946,170 78.48%	$ 2,151,746
2	OPERATION AND MAINTENANCE	$ 881,183	$ 0	$ 881,183
3	DEPRECIATION	348,442	0	348,442
4	AMORTIZATION	0	0	0
5	TAXES OTHER THAN	246,619	42,578	289,197
6	INCOME TAXES	(241,678)	298,353	56,675
7	TOTAL OPERATING EXPENSES	$ 1,234,567	$ 340,930	$ 1,575,497
8	OPERATING INCOME	$ (28,991)	$ 605,240	$ 576,249
9	RATE BASE	$ 5,947,368		$ 5,947,368
10	RATE OF RETURN	-0.49%		9.69%

LEHIGH UTILITIES, INC.

ADJUSTMENTS TO OPERATING STATEMENTS

TEST YEAR ENDED SEPTEMBER 30, 1992

SCHEDULE NO. 1-C

DOCKET NO. 911188-WS

	EXPLANATION	WATER	WASTEWATER
(1)	OPERATING REVENUES		
A.	Reverse revenue increase utility contends is needed to achieve its revenue	($ 430,552)	($ 1,215,082)

	EXPLANATION	WATER	WASTEWATER
A.	To reflect income taxes on the revenue requirement.	$ 99,697	$ 298,353

[*28]

PETITION FOR INCREASED WATER AND WASTEWATER RATES IN LEE COUNTY BY LEHIGH UTILITIES, INC.

Calculation of Income Taxes- Water

(1,823)	State taxable income (MFR Sch. C-2, Page 1 of 2)
(99,578)	O&M increase (MFR Sch. B-1, Page 1 of 1)
(15,042)	Net depreciation increase (MFR Sch. B-1, Page 1 of 1)
(7,113)	Taxes other than income increase (MFR Sch. B-1, Page 1 of 1)
430,552	Revenue increase (MFR Sch. 1-2, Page 1 of 1)
306,996	Sub-total
(430,552)	Revenue decrease (PSC-93-0301-FOF-WS, Sch. 3-A)
40,703	O&M decrease (PSC-93-0301-FOF-WS, Sch. 3-A)
18,791	Net depreciation decrease (PSC-93-0301-FOF-WS, Sch. 3-A)
19,375	Taxes other than income decrease (PSC-93-0301-FOF-WS, Sch 3-A)
(44,687)	Sub-total
27,153	Interest reconciliation ((4.96% * 10916722)-(4.93% * 9517043)) * (3575306/9517043) (MFR Sch. D-1, page 1 of 2 & PSC-93-0301-FOF-WS, Sch. 3-A)
(17,534)	Sub-total
127,060	NOI deficiency (PSC-93-0301-FOF-WS, Sch. 3-A)
109,526	Sub-total
105,483	Taxes on ROE
215,009	Taxable income after revenue increase
0.3763	Tax rate
80,908	Tax expense before parent debt adjustment and deferred taxes
(14,054)	Parent debt adjustment
19,039	Deferred income taxes (MFR Sch. C-1, Page 1 of 2)
85,893	Tax expense

Calculation of Income Taxes - Wastewater

(612,840)	State taxable income (MFR Sch. C-2, Page 1 of 2)
(77,504)	O&M increase (MFR Sch. B-2, Page 1 of 1)
(3,730)	Net depreciation increase (MFR Sch. B-2, Page 1 of 1)
(42,823)	Taxes other than income increase (MFR Sch. B-2, Page 1 of 1)
1,215,082	Revenue increase (MFR Sch. B-2, Page 1 of 1)
478,185	Sub-total
(1,215,082)	Revenue decrease (PSC-93-0301-FOF-WS, Sch. 3-B)
38,895	O&M decrease (PSC-93-0301-FOF-WS, Sch. 3-B)
10,916	Net depreciation decrease (PSC-93-0301-FOF-WS, Sch. 3-B)
54,679	Taxes other than income decrease (PSC-93-0301-FOF-WS,

		EXPLANATION	WATER	WASTEWATER
		requirement.		
(2)		OPERATION AND MAINTENANCE EXPENSES		
	A.	To record cash discounts above the line.	($ 360)	($ 360)
	B.	To adjust to index of 3.63%.	(2,268)	(1,722)
	C.	To remove test year DER fines.	0	(7,500)
	D.	To remove undocumented expenses.	(2,000)	(700)
	E.	To reflect adjustments to FASB 106 expense.	(41,474)	(32,450)
	F.	To remove gas promotional expenses.	(365)	(285)
	G.	To remove nonrecurring costs associated with mergers.	(605)	(474)
	H.	To remove charitable contributions.	(103)	(78)
	I.	To remove non-recurring professional study expenses.	(1,020)	(1,020)
	J.	To remove chamber of commerce dues & expenses.	(140)	(140)
	K.	To remove relocation expenses.	(1,681)	(1,316)
	L.	To adjust rate case expense.	9,313	7,150
		Total	($ 40,703)	($ 38,895)
(3)		DEPRECIATION EXPENSE		
	A.	To remove depreciation expense on non-used & useful plant.	($ 22,184)	($ 18,152)
	B.	To amortize CIAC on margin reserve.	3,393	7,236
		Total	($ 18,791)	($ 10,916)
(4)		TAXES OTHER THAN INCOME		
	A.	To remove RAFs on the requested revenue increase.	($ 19,375)	($ 54,679)
(5)		PROVISION FOR INCOME TAXES		
	A.	To reflect income taxes on the revenue requirement.	($ 133,030)	($ 421,389)
(6)		OPERATING REVENUES		
	A.	Additional revenues to achieve revenue requirement.	$ 237,442	$ 946,170
(7)		TAXES OTHER THAN INCOME		
	A.	To reflect RAFs on the revenue increase.	$ 10,685	$ 42,578
(8)		PROVISION FOR INCOME TAXES		

	Sch. 3-B)
(632,407)	Sub-total
45,169	Interest reconciliation ((4.96% * 10916722)-(4.93% * 8517043)) * (5947368/9517043) (MFR Sch. D-1, page 1 of 2 & PSC-93-0301-FOF-WS, Sch. 3-B)
(587,238)	Sub-total
605,240	NOI deficiency (PSC-93-0301-FOF-WS, Sch. 3-B)
18,002	Sub-total
175,466	Taxes on ROE
193,468	Taxable income after revenue increase
0.3763	Tax rate
72,802	Tax expense before parent debt adjustment and deferred taxes
(18,752)	Parent debt adjustment
2,625	Deferred income taxes
56,675	Tax expense

[*29]

Schedule 3-A

Rate Schedule

Water

Schedule of Commission Approved Rates and Rate Decrease in Four Years

Monthly Rates

Residential and General Service

	Commission Approved Rates	Rate Decrease
Base Facility Charge:		
Meter Size:		
5/8" X 3/4"	$ 8.87	$ 0.19
3/4"	13.31	0.28
1"	22.18	0.47
1-1/2"	44.35	0.94
2"	70.96	1.50
3"	141.92	3.01
4"	221.75	4.70
6"	443.50	9.40
8"	709.60	15.04
10"	1,020.05	21.61
Gallonage Charge (per 1,000 gallons)	$ 2.36	$ 0.05

Rate Schedule

Wastewater

Schedule of Commission Approved Rates and Rate Decrease in Four Years

In re: Petition of Tampa Electric Company for a Declaratory Statement Regarding Proposed Transfer of Service

DOCKET NO. 890415-EI; ORDER NO. 21301

Florida Public Service Commission

1989 Fla. PUC LEXIS 770

89-5 FPSC 471

May 31, 1989

PANEL: [*1]

The following Commissioners participated in the disposition of this matter: MICHAEL McK. WILSON, CHAIRMAN; THOMAS M. BEARD; BETTY EASLEY; GERALD L. GUNTER; JOHN T. HERNDON

OPINION: ORDER DISMISSING PETITION FOR DECLARATORY STATEMENT

BY THE COMMISSION:

On March 20, 1989, Tampa Electric Utility Company (TECO) submitted its Petition for Declaratory Statement regarding the proprietary of the proposed provision of electric service by Florida Power Corporation to Agrico Chemical Company.

On April 4, 1989, Florida Power Corp. (FPC) filed its Petition to Intervene. By petition dated April 7, 1989, Agrico filed its Petition to Intervene and alleged that its substantial interest are subject to determination in TECO's Petition for Declaratory Statement. Agrico also filed its response to the petition and a motion to dismiss. Agrico's response illustrates factual differences between its statements and the allegations in TECO's **request** for **declaratory statement.**

On May 9, 1989, TECO filed a complaint and request for resolution of a territorial dispute. The Division of Records and Reporting docketed this complaint as Docket No. 890646-EI.

After consideration of TECO's **request** for **declaratory [*2] statement** and review of the petitions to intervene by FPC and Agrico, it is apparent that responding to TECO's **request** for **declaratory statement** is not likely to resolve all the pending issues. It appears that there are disputes of material fact and that the substantial interests of the three noted companies are directly involved.

Therefore, TECO's **request** for **declaratory statement** should be dismissed. Resolution of the issues presented will be considered in Docket No. 890646-EI.

It is, therefore,

ORDERED by the Florida Public Service Commission that the Petition for Declaratory Statement be and hereby is dismissed.

ORDERED that this docket is hereby closed.

By ORDER of the Florida Public Service Commission this 31st day of MAY, 1989.

LEXSEE 337 SO. 2D 966,AT 973

PLANT CITY et al., Petitioners, v. William T. MAYO et al., Respondents

Nos. 47713, 47727, 47728, 48475, 48489

Supreme Court of Florida

337 So. 2d 966; 1976 Fla. LEXIS 4506

September 23, 1976

COUNSEL: [**1]

Paul S. Buchman, Plant City, for City of Plant City.

Lawrence Braisted, Braisted & Hill, Winter Haven, for City of Winter Haven.

Henry E. Williams, Jr., City Atty., William T. Keen, Matias Blanco, Jr., Jack W. Crooks and Stann W. Givens, Asst. City Attys., for City of Tampa.

John S. Lloyd, City Atty. and Mikele S. Carter, Asst. City Atty., Miami, for City of Miami, and John C. Chew, Frank B. Gummey, III, and Gregory J. McDole.

J. Kermit Coble, Coble, McKinnon, Reynolds & Rothert, Daytona Beach, for City of Daytona Beach.

William L. Weeks, Prentice P. Pruitt and Donald R. Alexander, Tallahassee, for Respondents.

Woodie A. Liles, Public Counsel, C. Earl Henderson, Associate Public Counsel, and Donald W. Weidner, Deputy Public Counsel, Tallahassee, for the Citizens of the State of Florida.

D. Fred McMullen, Lee L. Willis and James D. Beasley, Ausley, McMullen, McGehee, Carothers & Proctor, Tallahassee, for Tampa Elec. Co.

Ralph A. Marsicano, Tampa, and Burton M. Michaels, Tallahassee, for Florida League of Cities, Inc.

Carl R. Linn, St. Petersburg, for City of St. Petersburg.

George H. Salley, Salley, Barns & Pajon, Miami, for Maule Industries, Inc.

John S. Lloyd, [**2] City Atty., and Mikele S. Carter, Asst. City Atty., Miami, for City of Miami, Amicus Curiae.

JUDGES:

England, Justice. Roberts, Acting C.J., and Adkins, Boyd and Sundberg, JJ., concur.

OPINIONBY:

ENGLAND

OPINION:

[*968] By petitions for writ of certiorari to the Public Service Commission we are asked to review a decision of the Commission that municipal franchise fees paid by electric utility companies in Florida should no longer be considered as a general operating expense payable by all of the utilities' customers, but rather should be separately billed by the utility to the customers of the municipalities which impose the fees.

Procedural Background

In 1974 Tampa Electric Company petitioned the Commission to increase its electric rates throughout its system. By direction of the Commission, customers and the general public were notified of the proposed rate increases in newspapers of general circulation and by inserts placed in each billing sent by Tampa Electric to its customers. None of these notices referred specifically to the treatment of franchise fees in the company's rate structure, or in any manner suggested that a new treatment for these fees would be considered. [**3]

During hearings on the proposed rate increase, the Commission's staff questioned two of Tampa Electric's officers concerning the nature of franchise fees. Evidence adduced through these witnesses showed that eleven municipalities served by Tampa Electric had negotiated franchise agreements at various dates in the past under which the company was granted permission to use municipal rights-of-way in return for a "fee" of 6% of the gross receipts obtained by the company from within municipal boundaries. Testimony was also developed to the effect that each municipality allows the franchise fees paid by Tampa Electric to be credited against property and other taxes owed by the utility to the city. None of the eleven franchise agreements were introduced into evidence during the proceeding, and no other ev-

idence on the subject of franchise fees was developed during the proceeding.

The Commission approved a rate increase for Tampa Electric on May 21, 1975 in its Order No. 6681. Among several other matters set out in the order, the Commission abolished the traditional method of treating municipal franchise fees as a general operating expense for purposes of computing Tampa Electric's [**4] new rate charges. Instead, the Commission ordered Tampa Electric to bill customers within each city a 6% surcharge as a separate item on each bill. The effect of this directive was to place the financial burden for these franchise fees directly on the residents of the municipalities which imposed the fees, rather than spreading that cost among all customers of the utility system.

After Commission Order No. 6681 became final, the cities of Plant City, Winter Haven and Tampa filed petitions with this Court requesting that we review the franchise fee portion of the order. None of the three had been parties to the rate proceeding before the Commission, and Plant City and Winter Haven had been denied permission to intercede on the basis of late-filed requests for reconsideration. The three petitions were consolidated here, and we granted Tampa Electric and Public Counsel for the State of Florida permission to intervene. We also granted the cities of Miami and St. Petersburg, and the Florida League of Cities, Inc., permission to file briefs as a friend of the Court.

Following the entry of its order No. 6681, and as a direct consequence of reconsideration requests filed by cities [**5] which had not participated in the Tampa Electric rate proceeding, the Commission instituted a separate proceeding to determine whether it had the legal authority to require utility companies to charge franchise fees solely to customers within city limits as had been done in Order No. 6681 (and in three other orders approving rate increases for other investor-owned utility companies in the state). In that proceeding the Commission heard oral argument and considered briefs filed by interested parties (not including all of the cities now before us), but it did not permit the introduction of any evidence. On November 4, 1975 the Commission entered its Order No. 6990, declaring that it indeed had the power to treat franchise fees [*969] as it had. Three days later, during our oral argument on the petitions of Plant City, Winter Haven and Tampa in this case, the existence of Order No. 6990 was brought to our attention by public counsel, who moved to supplement the record here with the record upon which Order No. 6990 was based. Shortly after oral argument the cities of Daytona Beach and Miami filed timely petitions for a writ of certiorari to the Commission, seeking to have us review [**6] Order No. 6990. (It is alleged that both cities have franchise agreements with Florida Power & Light Company, an investor-owned electric utility which in April 1975 had also been directed by the Commission to charge franchise fees to customers within municipal limits rather than systemwide.) Having denied public counsel's motion, we determined that the second Commission proceeding involves the same legal issue as that brought to us on review of Tampa Electric's rate increase order, and consolidated the petitions seeking review of Order No. 6990 with those seeking review of Order No. 6681.

Discussion of Legal Issues

1. *Standing to obtain review of Commission Order No. 6681.* The first issue we must decide is whether Plant City, Winter Haven and Tampa have standing to obtain review of an order entered by the Commission in a proceeding to which they were not parties. The municipalities argue that they are "persons in interest" under *Section 366.10, Florida Statutes* (1973), which provides:

> "Any public utility or any person in interest dissatisfied with any order of the commission may have it reviewed by the supreme court by certiorari."

The Commission [**7] disagrees, cautioning that we should not construe "person in interest" to include those who have not been a party to a proceeding or else the jurisdiction of this Court will be expanded infinitely by indiscriminate and unpredictable demands to review Commission orders. In our view, the right to seek review of Commission orders is no longer governed solely by Section 366.10, and the Legislature has by more recently-enacted legislation expressly and clearly delineated the class of "persons" who may seek judicial review of the Commission's final orders.

Effective January 1, 1975, the Legislature adopted a new Administrative Procedure Act which in relevant part provides:

> "The intent of the legislature in enacting this complete revision of chapter 120, Florida Statutes, is to make uniform the rulemaking and adjudicative procedures used by the administrative agencies of this state. To that end, it is the express intent of the legislature that the provisions of this act shall replace all other provisions in the Florida Statutes, 1973, relating to . . . judicial review of administrative action . . .." n1

Under this directive, the "judicial review" provisions found [**8] in *Section 366.10, Florida Statutes* (1973), as well as those found in Part III of Chapter 120, Florida Statutes (1973), were "replaced" by *Section 120.68, Florida Statutes* (1975) to the extent of the procedural inconsistencies. n2 That section specifically confines the right of judicial review to a "party who is adversely affected by final agency action . . . ." The statutory reference to "party" appears to [*970] have been advertent, n3 thereby confining the right of review to a class of persons defined precisely (for purposes of the act) in *Section 120.52(10), Florida Statutes* (1975). n4 It is undisputed that the municipalities seeking review of Commission Order No. 6681, as customers of the utility, were within that definition and entitled to participate in the rate proceeding. n5 If these provisions of the new act apply to the petitions filed in this case, and if the cities received adequate notice of the rate proceeding, they cannot here complain that they did not avail themselves of the right to appear in the proceeding.

n1 *Section 120.72(1), Fla.Stat.* (1975).

n2 Nothing in the Administrative Procedure Act purports to alter the legislative directive in Section 366.10 that review of Commission orders is had in the Supreme Court rather than in the district courts of appeal. In fact, the Act makes it clear that no such shift in the place of review was intended. See *Section 120.68(2), Fla.Stat.* (1975). See also, *Citizens of Florida v. Mayo, 324 So.2d 35 (Fla.1975).*

[**9]

n3 In *Lewis v. Judges of the District Court of Appeal, 322 So.2d 16 (Fla.1975),* we discussed the evolution of the new Administrative Procedure Act. In fn. 6, we identified source documents from which the act was developed. These documents are revealing on this issue. The fourth draft statute (dated Feb. 4, 1974) prepared by the Law Revision Council's Reporter would have authorized "persons" adversely affected by agency action to obtain judicial review. (See Sup.Ct.Libr. file No. 15). The reporter's notes of the Council's meeting of Feb. 8, 1974 show a directive to change "person" to "party" as defined in the act. (See Sup.Ct.Libr. file No. 16). The reporter's final draft statute (dated Mar. 1, 1974) reflected the change. (See Sup.Ct.Libr. file No. 17). The statute as enacted contained virtually the identical provision on judicial review which appeared in the final draft statute.

n4 Contrast *Section 120.52(11), Fla.Stat.* (1975) which defines "person" for purposes of the act.

n5 See *Section 120.52(10)(b), Fla.Stat.* (1975).

(a) *Applicability of new Act.* The new Administrative [**10] Procedure Act generally became effective on January 1, 1975. n6 *Section 120.72(2), Florida Statutes* (1975), however, directs that Florida's former Administrative Procedure Act will govern "administrative adjudicative proceedings" begun prior to January 1, 1975 unless all parties agree to use the newer act. The Commission proceeding on Tampa Electric's rate increase request began in 1974. In *Lewis v. Judges of the District Court of Appeal, 322 So.2d 16 (Fla.1975),* we held that the quoted term derives its definition from the former act, and in particular from Part II of that Act. n7 Judicial review under the former act was controlled by Part III of that act. n8 In light of the narrow definition contained in Section 120.72(2) of the new act, and consistent with the legislative directive for implementation of almost all other provisions of the new act effective on January 1, 1975, it seems clear that the provision of the new act pertaining to judicial review n9 was intended to apply to appellate court proceedings commenced after January 1, 1975. n10

n6 Chapter 74-310, § 6, Laws of Florida.

[**11]

n7 Sections 120.20-.28, Fla.Stat. (1973).

n8 Sections 120.30-.321, Fla.Stat. (1973).

n9 *Section 120.68, Fla.Stat.* (1975).

n10 We note that the 1976 Legislature, acting after this proceeding was initiated here, specifically directed an opposite result, saying that judicial review of pre-1975 proceedings should be governed by the old act. Ch. 76-207, Laws of Florida. The effective date of the 1976 legislation, however, is June 20, 1976. That legislation cannot apply retroactively to matters then pending in appellate courts. Whatever its effect in future

cases, the 1976 statute has no applicability to this proceeding.

(b) *Adequacy of notice*. The Commission's notice of public hearings on Tampa Electric's proposed rate increase was in what might be called its standard or traditional form. The notice set forth the time, place, prescribed procedures, and general purpose of the hearings, and it recited the new amount and rate of return Tampa Electric was seeking. The notice also contained this statement under the caption "Tariff Revisions":

> "Although the Petitioner [**12] has proposed certain revisions to its existing tariff in order to generate the additional revenues, the Commission is not bound by such proposals and will give consideration to applying said increases, if any are authorized, [*971] in the manner it deems fair, reasonable and proper."

The cities argue to us that they had no way of anticipating from the Commission's notice that the Commission would adopt a cataclysmic change from the historic treatment of municipal franchise fees. The Commission argues, essentially, (i) that rate design is and always has been an open issue in any rate proceeding, (ii) that the notices here were adequate in any event because they warned customers that increases, if any, would be spread among users in any manner the Commission found to be "fair, reasonable and proper", and (iii) that the complexities of rate-making make it impossible to give notice of all matters which a final rate order might encompass.

While we are inclined to view the notice given to customers in this case as inadequate for actual notice of the precise adjustment made, we must agree with the Commission that more precision is probably not possible and in any event [**13] not required. To do so would either confine the Commission unreasonably in approving rate changes, or require a pre-hearing proceeding to tailor the notice to the matters which would later be developed. We conclude, therefore, that the Commission's standard form of notice for rate hearings imparts sufficient information for interested persons to avail themselves of participation.

Our conclusion that the Commission's original notice was adequate is dispositive of the petition filed here by the City of Tampa. Since Tampa at no time attempted to intervene in the rate proceeding or to seek reconsideration of Commission Order No. 6681, it has absolutely no standing to obtain review of that order here. The same is not true of Plant City and Winter Haven, however, since both endeavored to have the Commission reconsider its new treatment of franchise fees shortly after Order No. 6681 was entered. The adequacy of the Commission's notice does not resolve the issue of these cities' standing.

The reconsideration and intervention petitions filed with the Commission by Plant City and Winter Haven were both denied as untimely. Winter Haven cannot here complain of that denial. Its petitions [**14] were filed with the Commission on June 24, 1975, more than one month after the entry of Order No. 6681 and six days after the Commission formally denied the reconsideration requests of all active intervenors and Plant City. Under the Commission's rules, Winter Haven's petitions were simply filed too late to be considered. n11

> n11 Fla.Admin.Code Rules 25-2.34, 25-2.64.

Plant City, on the other hand, responded to Order No. 6681 more promptly. It filed requests for intervention and reconsideration on June 5, only 15 days after Order No. 6681 was entered and during the pendency of timely reconsideration requests filed by active intervenors. Plant City argues with some force that the application of procedural rules to deny its petitions n12 is extremely harsh when significant, unanticipated rate design changes were first announced in a final rate order, and that even the Commission itself was obviously sensitive to the injustice. n13 Under these circumstances, Plant City suggests that the technical rules of appellate [**15] review should not be applied (as were the technical rules of Commission review) to bar their first and only opportunity [*972] to challenge the legal foundation for the Commission's action. n14

> n12 In its order denying Plant City's petitions the Commission expressly held: "A review of our procedural rules leads us to conclude that the Petitions should be denied." The Commission then ruled that intervention is inappropriate after a final order is entered (Fla.Admin.Code Rule 25-2.34) and that reconsideration is prohibited to non-parties (Fla.Admin.Code Rule 25-2.64).

> n13 In the order denying Plant City's petitions (Order No. 6718) the Commission considered the legal issues raised by Plant City "of material importance to not only Petitioner, but all other municipalities" served by electric utilities, indicating that it would consider these issues in a separate

investigatory proceeding.

n14 Plant City correctly observes that the Commission had given it a forum to argue its views in which a victory would have absolutely no financial or practical benefit. In its Order No. 6752 initiating the separate proceeding referred to in fn. 13 and which culminated in Order No. 6990, the Commission "emphasized" that its action in that proceeding "should in no way be construed as receding at this time from the positions set forth in Order . . . 6681 . . . nor will any change, if any is ultimately made, be applied in a retroactive fashion. Rather, any change in policy, if such is determined to be legally necessary, will be applied on a prospective basis."

[**16]

As we view these proceedings, we need not now decide whether the Administrative Procedure Act, due process, neither, or both are abridged when persons not a party to a proceeding in which a major policy change occurs unexpectedly and for purely procedural reasons are denied an opportunity to express their views before the Commission. n15 In this case, despite its formal denial of Plant City's petitions, the Commission in fact created a forum for the presentation of views on the legal issues which Plant City had raised. We therefore treat the separate investigative docket created by the Commission as a continuation of Plant City's request for reconsideration, and the order closing that proceeding as the Commission's denial of all reconsideration requests. n16

n15 Whenever the Commission utilizes the forum of an individual rate proceeding, for which non-specific notice is given, to effect a major change in rate-making policy, obviously some means should be provided to grant the persons directly affected an opportunity to be heard by the Commission. The Commission could, if it chooses, grant all affected persons a reasonable time to request reconsideration in light of the fact that changes of this type are completely unexpected and those who had not participated in the proceeding would have had no access to the alleged evidentiary foundation for the change. (In the present case, the Commission allowed only its customary seven calendar days for reconsideration petitions.) Preferably, the Commission could decide issues of statewide significance in rule-making proceedings under the Administrative Procedure Act, to avoid the lightning-like effect of adopting major policy shifts in select rate proceedings. Other alternatives may also exist, but whatever means are selected affected persons should not be notified for the first time in an announcement of imminent new utility charges that traditional billing practices or cost allocations have been replaced with procedures wholly new. Absent some reasonable way of allowing affected persons to test policy changes before they become effective, utility customers can always protect themselves by requesting intervention in all rate proceedings and thereby assure their right of judicial review as "parties". The toll in effort and paperwork for the Commission and for the courts suggests that this option should be avoided.

[**17]

n16 It is difficult to view the investigative proceeding as anything else. An agency such as the Commission acts through rules in a rulemaking proceeding or orders in a proceeding which does not result in a statement of general applicability. See Sections 120.52(2), (9) and (14), Fla.Stat. (1975). The separate proceeding of the Commission in this case produced no "rule" or "order", but simply declared the validity of previously-asserted legal authority. Unless the proceeding was the last inquiry into legal issues raised in the Tampa Electric rate proceeding, it was (as public counsel suggested at the one hearing the Commission held) "totally unnecessary, wasteful of Commission time and energy, and injurious to the citizens of Florida in that said docket is imposing on them an unnecessary and unreasonable expense."

2. *Review of Commission Order No. 6990.* In light of the way we view the Commission's second proceeding, we grant the petitions of Miami and Daytona Beach for review of Order No. 6990.

3. *Analysis of franchise fee treatment.* The cities argue to us that the direct assignment [**18] of franchise fees to city customers is improper for essentially three reasons:

(a) the fee is not a local "tax" as the Commission first said, but rather a form of consideration for a contract right to use municipal rights-of-way, and to that extent it is like all other general business expenses incurred in one locale for the operation of a farflung utility system;

(b) the direct assignment of franchise fees impairs the cities' contracts with Tampa Electric, in violation of the [*973] federal and Florida Constitutions; and

(c) the Commission lacked an evidentiary basis on which to change pre-existing treatment of this expense.

The Commission disputes these suggestions, stating that the characterization of these fees as "taxes" or as consideration is inconsequential, that contract amounts and terms have not been altered in any manner so that no aspect of the contracts between the cities and the utility have been legally "impaired", and that sufficient evidence was presented to support the policy change. Tampa Electric principally argues that the Commission's adjustment is merely one aspect of "rate design", a step necessary any time new rates have been approved [**19] and one peculiarly within the authority and responsibility of the Commission. Public Counsel essentially supports the Commission's authority to make the adjustment, although preferring that major changes like this be accomplished in a rule-making rather than in a rate proceeding. n17 We will analyze each of the major contentions individually.

n17 Public counsel also suggests that all costs identifiable separately by geographical source within a utility system should be isolated in the same manner. That policy view is not one which properly relates to the issues raised by the cities. The cities do not attack the correctness of a policy which assigns cost burdens to particular sources. Rather they argue that franchise fees do not constitute an expense which benefits only municipal consumers since out-of-city customers benefit from access lines through the cities.

(a) *"Tax" or "consideration".* In Order No. 6681 the Commission inappropriately described the cities' franchise fees as "taxes", causing unnecessary [**20] arguments here on the impropriety of treating taxes in isolation for rate-making. Although the label most appropriately assigned to the payments at issue is not determinative of the treatment or legal effect attendant to these costs, we have absolutely no difficulty in holding that the franchise fees payable by Tampa Electric are not "taxes". The cities would lack lawful authority to impose taxes of this type n18 and, unlike other governmental levies, the charges here are bargained for in exchange for specific property rights relinquished by the cities. The fact that fees are offset or reduced by taxes owed by the utility goes to the computation of their amount and not their character. n19

n18 Article VII, Section 9(a) of the Florida Constitution limits municipal taxation to ad valorem and other statutorily authorized taxes. No authority has been provided for "utility revenue taxes".

n19 The Attorney General of Florida viewed these fees in essentially the same way. Op. Att'y. Gen. 075-231.

(b) [**21] *Impairment of contract.* The amount paid by Tampa Electric to each city under its franchise fee contract is the same whether the utility collects the sum from some or all of its customers. Customers of Tampa Electric in each city have always paid some part of the amount the utility collects; the new procedure merely increases their burden. Nothing has changed as between the cities and the utility. We must conclude that the cities' contracts are no more impaired in the constitutional sense by the Commission's new collection procedure than they would be if rates were redesigned in other ways to increase their burden, for example by shifting rate levels among residential and industrial or commercial users. n20 The fact that the cities themselves are consumers and subject to higher charges does not "impair" their contract; it merely reduces the benefit of their bargain as any rate increase or rate design shift might do. n21

n20 For the same reasons, we see no violation of *Section 366.11, Fla.Stat.* (1975), which prevents the Commission from affecting a city's right to "continue to receive revenue from any public utility as is now provided . . . in any franchise." [**22]

n21 There is some suggestion in the briefs that some or all of the franchise contracts expressly recognize the possible variations in rate payments by the cities, stating that the parties recognize the paramount authority of the Commission to set rates which will affect the cities' net revenues. As no contracts were introduced into either proceeding, we have no way to verify this suggestion and we give it no significance. We necessarily reject attempts by one of the parties here to introduce the franchise contracts into evidence, for the first time, before this Court. § *120.68(4), Fla.Stat.* (1975). See also *Dade County v. Marca, S.A.,*

326 So.2d 183 (Fla.1976).

[*974] (c) *Commission authority*. Whether the adjustment approved in Order No. 6681 is characterized as "rate design" or ratemaking, it is clearly an element of rate setting which is within the exclusive authority of the Commission. n22

n22 *Sections 366.04(1), 366.05(1), 366.06(3), Fla. Stat.* (1975).

[**23]

(d) *Evidentiary basis for change*. In Order No. 6681, the Commission expressed as the bases for its change in the treatment of franchise fees two grounds: technical advances in billing which make the change feasible, and the inequity of system-wide payments from customers outside municipal limits who receive no benefits from the cities' fees. n23 No one contests the present feasibility of billing municipal customers differently from other customers. The record basis for the Commission's "no-benefit" theory is vigorously challenged, however. n24

n23 In its brief the Commission suggests a number of other reasons for relieving non-municipal customers of franchise fee burdens. These suggestions provide some insight into the philosophy undergirding the Commission's action, but they are legally irrelevant to support the reasons recited in Order No. 6681. *Section 120.68(4), Fla.Stat.* (1975).

n24 The Commission summarizes its "no-benefit" analysis on p. 44 of its brief as follows: "The Commission simply cannot see how people who live in unincorporated areas in the far extremes of a company's service area (e.g., Wakulla County, for example) can derive a benefit from a charge imposed by a distant city (e. g., St. Petersburg). While it is true that the electric systems of this state are interconnected, the benefit of lines extending through St. Petersburg is still quite remote and speculative for the people of Wakulla County."

[**24]

The test to be applied on our review is the presence of substantial and competent evidence to support the Commission's finding. n25 Although we do not have a complete record to review, no one in this proceeding disputes the representation that only two utility company witnesses in the rate proceeding commented on the subject of franchise fees, and that their testimony went in general terms to the source, legal basis, nature and prior treatment of franchise fees in utility regulation. The municipalities suggest that this generic evidence is insufficient, as a matter of law, to support the change of policy brought about in Order No. 6681, and we agree.

n25 *Gainesville Bonded Warehouse, Inc. v. Carter, 123 So.2d 336 (Fla.1960); Section 120.68(10), Fla.Stat.* (1975).

The Commission chose to ground its new policy on new billing technology and the absence of benefits to non-municipal electric customers, two "facts" which wholly lack evidentiary support in this record. As to the former, the evidentiary deficiency [**25] is not significant because (1) no one has raised the issue here as a problem and (2) the ultimate fact on which the Commission relied is in any event well within the Commission's "expertise" as an administrative agency. n26 As to the latter, however, competent and substantial evidence is not available to support the Commission's finding. Most of the parties here have extensively briefed the Commission's "no-benefit" conclusion, suggesting economic, technological and geographical reasons for and against the Commission's result. The arguments are persuasive of one thing only - the issue is capable of fact-gathering on both sides and therefore properly requires an evidentiary hearing.

n26 In its brief the Commission observes that other utilities under its jurisdiction, such as gas companies, have directly assigned certain municipal costs for years without technological problems. Inasmuch as the Commission is necessarily familiar with Tampa Electric's technology (*Section 366.05(1), Fla.Stat.* (1975)), the agency's expertise would be adequate in lieu of evidence produced at a hearing. *Cf., Sections 120.57(1)(b)(5)(c), 120.57(1)(b)(7)* and 120.61, Fla.Stat. (1975), as to the authority for considering matters within the Commission's expertise in proceedings which commence after December 31, 1974.

[**26]

By way of clarifying our action in this case, we further state that we neither condone nor condemn the change of a traditional [*975] rate-making practice of general state-wide effect, such as treatment of municipal franchise fees as a system-wide cost of doing business, in an individual rate case filed by one utility company.

We are aware that the Commission has on occasion used more broad-based rule-making proceedings for changes in the treatment of utility company expenses, and as we have indicated that method appears to be superior for that purpose. But we see no statutory or constitutional impediment to implementations of change in the way it was attempted here, so long as interested and affected parties have a forum in which to challenge any change and the basis on which the action is taken is supported by the record.

For the foregoing reasons, we grant the petitions for certiorari. Order No. 6681, insofar as it relates to franchise fees imposed by municipalities, is set aside in that it is not supported by competent substantial evidence in the record. *Section 120.68(10), Florida Statutes* (1975). The Commission shall direct Tampa Electric to treat franchise fees [**27] charged by municipalities within its service area as general operating expenses chargeable to all customers of the utility, rather than to municipal customers alone.

We previously stated that we consider Order No. 6990 as a denial of the cities' petitions for reconsideration. On that basis, and because it would cause confusion to allow that order to remain outstanding in light of our disposition here, we also set aside Order No. 6990 on the authority of *Section 120.68(9)(a), Florida Statutes* (1975).

ROBERTS, Acting C. J., and ADKINS, BOYD and Sundberg, JJ., concur.

LEXSEE 668 SO. 2D 971

GTE FLORIDA INCORPORATED, Appellant, v. SUSAN F. CLARK, etc., et al., Appellees.

No. 85,776

SUPREME COURT OF FLORIDA

668 So. 2d 971; 1996 Fla. LEXIS 281; 21 Fla. L. Weekly S 101

February 29, 1996, Decided

PRIOR HISTORY: [**1] An Appeal from the Public Service Commission.

LexisNexis(R) Headnotes

Energy & Utilities Law > Utility Companies > Utility Rates
[HN1] The court views utility ratemaking as a matter of fairness. Equity requires that both ratepayers and utilities be treated in a similar manner.

Energy & Utilities Law > Utility Companies > Utility Rates
[HN2] Equity applies to both utilities and ratepayers when an erroneous rate order is entered. It would clearly be inequitable for either utilities or ratepayers to benefit, thereby receiving a windfall, from an erroneous order from a public service commission.

COUNSEL: Alan C. Sundberg and Sylvia H. Walbolt of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Tallahassee, Florida; and Marceil Morrell and Kimberly Caswell of GTE Florida Incorporated, Tampa, Florida, for Appellant.

Robert D. Vandiver, General Counsel and David E. Smith, Director of Appeals, Florida Public Service Commission, Tallahassee, Florida; and Jack Shreve, Public Counsel and Charles J. Beck, Deputy Public Counsel, on behalf of the Citizens of the State of Florida, Tallahassee, Florida, for Appellees.

JUDGES: OVERTON, J. GRIMES, C.J., and SHAW, KOGAN, HARDING, WELLS and ANSTEAD, JJ., concur.

OPINIONBY: OVERTON

OPINION: [*972] OVERTON, J.

GTE Florida Incorporated (GTE) appeals a Public Service Commission (PSC) order that implements a remand from this Court. In that remand, we affirmed in part and reversed in part a prior PSC order disposing of a requested rate increase by GTE. The PSC, in its initial proceeding, denied GTE's proposed rate increase and, instead, ordered that GTE revenues be reduced by $13,641,000. We reversed the PSC order insofar as it [**2] denied GTE recovery of certain costs simply because those expenditures involved purchases from GTE's affiliates. We found that those costs were clearly recoverable and that it was an abuse of discretion for the PSC to deny recovery. *GTE Florida Inc. v. Deason, 642 So. 2d 545 (Fla. 1994)*. Accordingly, we issued our mandate on July 7, 1994, and remanded for further action. The PSC, in implementing our decision, entered an order that only allowed recovery of the disputed expenses on a prospective basis from May 3, 1995. This effective date was over nine months after our mandate issued. As noted, our decision was final on July 7, 1994, and the initial erroneous order was entered by the PSC on May 27, 1993. The issue in this cause is whether GTE should be able to recover its expenses, erroneously denied in the first instance, for the period between May 27, 1993, and May 3, 1995. We have jurisdiction. Art. V, § 3(b)(2), Fla. Const.

We reverse the PSC's order implementing our remand. We mandate that GTE be allowed to recover its erroneously disallowed expenses through the use of a surcharge. However, no customer should be subjected to a surcharge unless that customer received GTE services [**3] during the disputed period of time.

In our decision reversing the PSC's original order insofar as it denied GTE recovery of certain expenses, we stated:

> We do find, however, that the PSC abused its discretion in its decision to reduce in

> whole or in part certain costs arising from transactions between GTE and its affiliates, GTE Data Services and GTE Supply. The evidence indicates that GTE's costs were no greater than they would have been had GTE purchased the services and supplies elsewhere. The mere fact that a utility is doing business with an affiliate does not mean that unfair or excess profits are being generated, without more. Charles F. Phillips, Jr., The Regulation of Public Utilities 244-55 (1988). We believe the standard must be whether the transactions exceed the going market rate or are otherwise inherently unfair. See id. If the answer is "no," then the PSC may not reject the utility's position. The PSC obviously applied a different standard, and we thus must reverse the PSC's determination of this question.

Deason at 547-48.

On remand, GTE proposed a surcharge as the appropriate mechanism by which to recover its expenses incurred during [**4] the appeal and remand. The PSC denied GTE's proposal. The PSC ruled that GTE's failure to request a stay during the pendency of the appellate and remand processes precluded it from recovering expenses incurred during that time period. In this review, the PSC also argues that the imposition of a surcharge would constitute retroactive ratemaking. We reject both contentions.

Both the Florida Statutes and the Florida Administrative Code have provisions by which GTE could have obtained a stay. n1 However, neither of those mechanisms is mandatory. [HN1] We view utility ratemaking as a matter of fairness. Equity requires that both ratepayers and utilities be treated in a similar manner. While the facts of *Village of North Palm Beach v. Mason, 188 So. 2d 778 (Fla. 1966)*, were different from those we now [*973] encounter, we find that Justice O'Connell's reasoning is appropriate in this case. He stated:

> n1 See § *120.68(3)(a), Florida Statutes* (1995); *Fla. Admin. Code R. 25-22.061*.

> It would be inequitable to defer [**5] the utility's right to the increased rates for approximately two years because of what we found to be a defect in the order entered by the commission. The soundness of what we do here is demonstrated by the fact that if the instant case had involved an order decreasing rates it would be equally inequitable to allow the utility to continue to collect the old and greater rates for the period between the entry of the first and second orders.

Id. at 781.

Justice O'Connell was stating that [HN2] equity applies to both utilities and ratepayers when an erroneous rate order is entered. It would clearly be inequitable for either utilities or ratepayers to benefit, thereby receiving a windfall, from an erroneous PSC order. The rule providing for stays does not indicate that a stay is a prerequisite to the recovery of an overcharge or the imposition of a surcharge. The rule says nothing about a waiver, and the failure to request a stay is not, under these circumstances, dispositive.

We also reject the contention that GTE's requested surcharge constitutes retroactive ratemaking. This is not a case where a new rate is requested and then applied retroactively. The surcharge we sanction is [**6] implemented to allow GTE to recover costs already expended that should have been lawfully recoverable in the PSC's first order. In this respect, this case is analogous to Mason. Additional support for our position is found by examining the method by which the PSC addresses the reciprocal situation. The PSC has taken a position contrary to its current stance when a utility has overcharged its ratepayers. In the order implementing the remand in *Citizens v. Hawkins, 364 So. 2d 723 (Fla. 1978)*, the PSC ordered that a refund be paid by the utility. In re Application of Holiday Lake Water System for Authority to Increase its Rates in Pasco County, 5 F.P.S.C. 630 (1979). If the customers can benefit in a refund situation, fairness dictates that a surcharge is proper in this situation. We cannot accept the contention that customers will now be subjected to unexpected charges. The Office of Public Counsel has represented the citizen ratepayers at every step of this procedure. We find that the surcharge for recovery of costs expended is not retroactive ratemaking any more so than an order directing a refund would be. We note that the PSC was advised by its staff that GTE's recovery [**7] of expenses and costs would not constitute retroactive ratemaking. Fla. Pub. Serv. Comm'n, Staff Memorandum at 4 (Docket No. 920188-TL, March 23, 1995).

Finally, we address the structure of the current surcharge. The PSC has acknowledged it has the ability to closely tailor the implementation of refunds and to accurately monitor refund payments to ensure that the

recipients of such refunds truly are those who were overcharged. While no procedure can perfectly account for the transient nature of utility customers, we envision that the surcharge in this case can be administered with the same standard of care afforded to refunds, and we conclude that no new customers should be required to pay a surcharge.

Accordingly, for the reasons expressed, the order below is reversed and the cause is remanded for further action consistent with this opinion.

It is so ordered.

GRIMES, C.J., and SHAW, KOGAN, HARDING, WELLS and ANSTEAD, JJ., concur.

7 of 12 DOCUMENTS

SUGARMILL WOODS CIVIC ASSOCIATION, INC., f/k/a Cypress and Oaks Villages Association, Appellant, v. FLORIDA WATER SERVICES CORPORATION f/k/a SOUTHERN STATES UTILITIES, INC., et al., Appellees.

CASE NO.: 1D98-727

COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

785 So. 2d 720; 2001 Fla. App. LEXIS 7326; 26 Fla. L. Weekly D 1308

May 24, 2001, Opinion Filed

SUBSEQUENT HISTORY: [**1] Released for Publication June 11, 2001.

PRIOR HISTORY: An appeal from an order of the Public Service Commission.

DISPOSITION: AFFIRMED.

LexisNexis(R) Headnotes

Energy & Utilities Law > Utility Companies > Utility Rates
[HN1] Equity applies to both utilities and ratepayers when an erroneous rate order is entered. It would clearly be inequitable for either utilities or ratepayers to benefit, thereby receiving a windfall, from an erroneous order of the Florida Public Service Commission.

Energy & Utilities Law > Utility Companies > Utility Rates
[HN2] The Florida Public Service Commission possesses certain equitable authority in its rate-making role. Utility rate-making is a matter of fairness. Equity requires that both ratepayers and utilities be treated in a similar manner.

Energy & Utilities Law > Utility Companies > Utility Rates
[HN3] Lack of notice is a crucial consideration when considering whether a surcharge and restitution are equitable to utility customers.

COUNSEL: Susan W. Fox of Macfarlane, Ferguson & McMullen, Tampa, and Michael B. Twomey, Tallahassee, for Appellant.

Arthur J. England, Jr. of Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., Miami; and Kenneth A. Hoffman of Rutledge, Ecenia, Purnell & Hoffman, P.A., Tallahassee, for Appellee Florida Water Services Corporation.

Catherine Bedell, General Counsel, Mary Anne Helton, Associate General Counsel, and Christiana T. Moore, Associate General Counsel, Tallahassee, for Appellee Florida Public Service Commission.

Charles R. Forman of Forman, Krehl & Montgomery, Ocala, for Appellees Joseph J. Derouin, Victoria M. Derouin, Peter H. Heeschen, Elizabeth A. Riordan, Carvell Simpson and Edward Slezak.

Joseph A. McGlothlin and Vicki Gordon Kaufman of McWhirter, Reeves, McGlothlin, Davidson, Decker, Kaufman, Arnold & Steen, P.A., Tallahassee, for Appellees City of Keystone Heights, Marion Oaks Civic Association, Florida United Methodist Children's Home, Inc., Best Western Deltona Inn, Sugar Mill Association, [**2] Inc., and Sugar Mill Country Club, Inc.

Darol H. M. Carr and David Holmes of Farr, Farr, Emerich, Sifrit, Hachet & Carr, Port Charlotte, for Appellee Burnt Shores Lakes Property Owners Association, Inc.

John Marks of Knowles, Marks & Randolph, P.A., Tallahassee, for Appellee Charlotte County.

JUDGES: VAN NORTWICK, J., BOOTH AND KAHN, JJ., CONCUR.

OPINIONBY: VAN NORTWICK

OPINION: [*721]

VAN NORTWICK, J.

The Sugarmill Woods Civic Association, Inc.

(Sugarmill Woods), formerly known as Cypress and Oaks Villages Association (COVA), appeals a final order of the Florida Public Service Commission (PSC or Commission) entered on remand of *Southern States Utils. v. Florida Pub. Serv. Comm'n, 704 So. 2d 555 (Fla. 1st DCA 1997)*(Southern States I). In the order on appeal, the Commission determined not to require refunds of utility payments made by customers of Florida Water Services Corporation under a uniform rate structure which had been reversed by this court in *Citrus County v. Southern States Utils., 656 So. 2d 1307 (Fla. 1st DCA 1995)*(Citrus [*722] County). We agree with the Commission's conclusion that, under the highly unusual circumstances of this case, it [**3] would be unfair and inequitable to surcharge some customers so that other customers might receive a refund. Accordingly, we find that the Commission did not err in declining to order a refund, and we affirm.

History of the Case

This case has a long and labyrinthine history, some of the more significant twists and turns of which we discuss briefly to provide a context for our holding. The case began in 1992, when Southern States Utilities (SSU), now Florida Water Services Corporation (Florida Water or utility), filed a petition for authority to increase the rates and charges for service it provided to 127 water and wastewater systems pursuant to *section 367.081, Florida Statutes* (1991). Sugarmill Woods intervened. In its petition, SSU proposed establishing a rate structure of modified standalone rates n1 for those systems. When the Commission approved a rate increase for SSU, however, it ordered the utility to implement a single uniform rate structure throughout the 127 systems.

> n1 As the terms have been used in this proceeding, "standalone rates" require each system to pay its own capital and operating costs plus a reasonable rate of return on the rate base for that system. "Modified standalone rates" would impose a cap on the charges for each customer in a system, notwithstanding the cost structure and rate base for that system.

[**4]

In its order, the PSC noted its statutory authority for such uniform rates and observed that it had approved uniform rates in other cases. The Commission noted the advantages of uniform rates: (1) administrative efficiencies in accounting, operations and maintenance; (2) rate stability; (3) insulation of customers from rate shock due to major capital improvements or increased operating costs; (4) recognition of economies of scale; (5) ease of implementation; and (6) lower rate case expense in the long run. Because of these advantages, combined with the wide disparity of rates among SSU's 127 systems when calculated on a standalone basis, the Commission determined that the advantages of uniform rates outweighed the benefits of the traditional approach of setting rates on a standalone basis. The uniform rates were effective as of September 15, 1993. Citrus County and Sugarmill Woods' predecessor, COVA, appealed. SSU filed a motion to vacate the automatic stay in effect as a result of the appeal by Citrus County, see *Florida Rule of Appellate Procedure 9.310(b)(2)*, which was granted upon SSU posting a bond.

Citrus County

In the initial appeal, this court affirmed SSU's [**5] final revenue requirement, but reversed the uniform rates as unlawful because there existed "no competent substantial evidence that the facilities and land comprising the 127 SSU systems are functionally related in a way permitting the PSC to require that customers of all systems pay identical rates." *Citrus County, 656 So. 2d at 1310.* Further, after summarizing the testimony of the various witnesses, the court observed that "it is clear that this testimony does not constitute competent substantial evidence to support the PSC's decision to set uniform statewide rates for the systems involved." Id.

On remand, the Commission ordered SSU to implement modified standalone rates, effective as of January 23, 1996, and to make a refund to those customers whose rates under the uniform rate structure had been higher than their rates under the modified standalone rate structure. [*723] The customers who would have received refunds under such order included the residents of Sugarmill Woods. In addition, the Commission refused to authorize SSU to surcharge customers who had paid lower rates under the uniform rate structure than they would have paid under the modified standalone [**6] structure, thus, requiring the utility to absorb the revenue loss of the refunds. SSU moved for reconsideration of the order.

Clark

While the rate case was on remand from Citrus County, the Florida Supreme Court issued its opinion in *GTE Florida, Inc. v. Clark, 668 So. 2d 971 (Fla. 1996)*, holding that equity required a utility and its customers to be treated similarly in rate-making proceedings. *Id. at 972.* Clark involved an appeal from a PSC order in a telephone utility rate case by which the Commission had implemented a previous opinion from the supreme court holding that GTE could recover costs related to

purchases from GTE's affiliates. See *GTE Florida, Inc. v. Deason, 642 So. 2d 545 (Fla. 1994)*. In its order on remand, the Commission allowed recovery of those costs on a prospective basis only, starting on a date over nine months after the supreme court's mandate issued. The Commission rejected GTE's contention that a surcharge could be used to recover such costs incurred during the period of the appeal and remand. *Clark, 668 So. 2d at 972*. In reversing, the supreme court rejected the Commission's [**7] rationale for denying the requested surcharge. Specifically, the court held that GTE's failure to request a stay during the pendency of the appellate and remand processes did not preclude GTE from recovering expenses incurred during that period through the use of a surcharge nor did the imposition of a surcharge constitute retroactive rate making. Id.

In the instant case, *sua sponte*, the Commission ordered the parties to file briefs addressing the impact of Clark on the refund and surcharge issues raised here. Following such briefing, the Commission's staff recommended that no refunds be ordered and that a surcharge was neither necessary or appropriate, based upon the rationale that the customers who had paid higher rates under a uniform rate structure would have a prospective rate reduction and the utility would continue to maintain its revenue requirement. The Commission, however, found that SSU had assumed the risk of making refunds by moving to vacate the automatic stay and that by posting its bond the utility had led the Commission to believe that it would stand behind any refund obligation. Accordingly, the Commission ordered the utility to make refunds to its customers [**8] who had paid higher rates under the uniform rate structure than the rates the customers would have paid if the modified standalone rates originally requested by SSU had been put in place in September 1993. The Commission construed the holding in Clark to be limited to the facts of that case and concluded that Clark did not mandate a surcharge. Further, the Commission denied the petition to intervene of some of the so-called underpaying customers, appellees herein, who sought to be heard on the surcharge issue.

Southern States I

The utility appealed. On appeal, this court held that the Commission's decision to require the utility to make a refund to some customers without authorizing a corresponding surcharge on other customers was contrary to the principles of Clark and reversed. *Southern States I, 704 So. 2d at 557*. The Southern States I court explained:

Following the principles set forth by the supreme court in Clark, we find that the [*724] PSC erroneously relied on the notion that SSU "assumed the risk" of providing refunds when it sought to have the automatic stay lifted and therefore should not be allowed to impose surcharges. Just [**9] as GTE's failure to request a stay in Clark was not dispositive of the surcharge issue, neither is SSU's action in asking the PSC to lift the automatic stay. The stay itself was little more than a happenstance, in effect only because a governmental entity, Citrus County, appealed the original PSC order in this matter. See *Fla. R. App. P. 9.310(b)(2)*; *Fla. Admin. Code R. 25-22.061(3)*.

We are unable to discern any logic in the PSC's contention that SSU, having merely acted according to the terms of the order establishing uniform rates, assumed the risk of refunds, yet is precluded from recouping charges from customers who underpaid because of the erroneous order. As the Supreme Court explained in Clark, "[HN1] equity applies to both utilities and ratepayers when an erroneous rate order is entered" and "it would clearly be inequitable for either utilities or ratepayers to benefit, thereby receiving a windfall, from an erroneous PSC order." *668 So. 2d at 973*.

704 So. 2d at 559. In Southern States I, this court did not address whether it would be appropriate for the Commission to order neither a refund nor a surcharge under the particular facts of this case. The [**10] court, however, did reverse the Commission's decision to deny intervention to customers who might be subject to a potential surcharge on remand.

On remand from Southern States I, the Commission directed the utility to calculate the exact amount of potential refunds and surcharges. Of the so-called underpaying customers, some commercial customers would have been required to pay surcharges ranging between $20,000 and $75,000 and individual residential customers would have been required to pay surcharges ranging from several hundred to several thousand dollars. At a special Commission hearing, those customers exposed to the possibility of surcharges described the hardships that would be caused by surcharges of the magnitude calculated by the utility.

Thereafter, the Commission entered the order on appeal, determining to require neither refunds nor surcharges. Applying Clark, the Commission determined that requiring refunds would require new and even greater inequities. The Commission reasoned that allowing the newly authorized rate structure to take effect prospectively, with neither refunds nor surcharges, presented the most equitable solution because it gave some customers [**11] a prospective rate increase and others a prospective rate decrease. Sugarmill Woods appealed.

Southern States II

During the pendency of this appeal, the administrative division of this court n2 sitting en banc issued its opinion in Southern States Utils. n/k/a *Florida Water Servs. Corp. v. Florida Pub. Serv. Comm'n, 714 So. 2d 1046, 1051 (Fla. 1st DCA 1998)*(Southern States II), an appeal of a Commission order in a subsequently filed rate proceeding involving SSU. The Southern States II court held "that, whenever the PSC has jurisdiction to set water and sewer rates for multiple systems, inter-system functional relatedness is no prerequisite to the PSC's setting rates that are uniform across a group of systems" and [*725] receding *"pro tanto"* from that portion of the Citrus County opinion that required a finding of functional relatedness as a prerequisite to uniform rates. Thus, Southern States II overruled the legal principle adopted three years earlier in Citrus County — the principle which has generated the refund-surcharge dispute that is the subject of this appeal.

n2 The divisions of this court were abolished in 1998 by order of the court. In re: Abolishment of Court Divisions, Administrative Order 98-3, February 15, 1998.

[**12]

Analysis

It is after traveling this bumpy jurisprudential road that the instant case is before us. At issue in this appeal is Sugarmill Woods' contention that the Commission was required to order refunds for the amount customers "overpaid" under the uniform rate structure, beginning when the uniform rate structure was implemented September 15, 1993 and ending when the modified standalone rate structure was implemented on January 23, 1996. The refund issue arises because of the difference between the rates paid under the uniform rate structure, overturned by this court in Citrus County, and the rates that would have been paid under the modified standalone rate structure. Sugarmill Woods asserts that, during the pendency of the Citrus County appeal, the utility collected more than $11 million of excess rates under the uniform rate structure from Sugarmill Woods customers, and others similarly situated, causing each of the Sugarmill Woods' residents to be overcharged by an average of $543 for such period.

In the order on appeal, the Commission interpreted Clark and Southern States I as supporting its denial of Sugarmill Woods' claim of refund. The Commission [**13] explained:

We find that a number of problems and inequities arise in trying to make any type of refund. It is more inequitable to surcharge customers who had no ability to change consumption or choose to remain a utility customer. We cannot cure one inequity by creating a newer, greater inequity. We are guided by the mandates from the [Southern States I] and [Clark] decisions and the overall issue of fairness in determining the appropriate methodology. The guidelines from the Court include that neither the utility nor the ratepayers should receive a windfall from an erroneous Commission order, new customers cannot be surcharged, and ratepayers and the utility should be treated similarly. We note that any methodology of refunds and surcharges other than customer-specific may be contrary to the First District Court of Appeal's decisions that no customer group should receive a windfall due to an erroneous order. However, even the customer-specific refund and surcharge methodology is fraught with inequities in reconciling the First District Court of Appeal's decision that the [utility's] revenue requirement shall not be changed.

* * *

In determining that the no refund [**14] and no surcharge option is the optimal and most equitable solution, we have recognized that this was strictly a rate structure change; the affected customers who may be subject to a surcharge have not had the ability to adjust consumption; the timing problem of customers leaving the system would be eliminated; and the utility's revenue requirement will remain unchanged. As has been pointed out, under this scenario all customers are treated similarly in that those customers who paid too much under the uniform rate are now billed under a lower rate, those customers who paid too little under the uniform rate have received a higher rate, and the [*726] utility's opportunity to earn its authorized rate of return is maintained.

In arriving at its conclusion, the Commission noted the practical impossibility of collecting surcharges from all potential surcharge customers, because, since the 1993-1996 surcharge period, many customers had moved and, thus, had left Florida Water's system. While Florida Water could induce current customers to pay a surcharge by disconnecting service for nonpayment of the surcharge, no similar tool existed for effecting the collection of the surcharge from former customers. [**15] Instead, Florida Water would be required to bring a civil action against those former customers who could be located and refused to pay. The Commission found that it was questionable whether Florida Water could collect sufficient surcharges to off-set any refunds. Thus, the Commission concluded that "if the utility can-

not, from a practical standpoint, collect the entire surcharge amount, the fairness and equity principles espoused in the [Southern States I] and [Clark] decisions have not been fulfilled."

In Clark, the Supreme Court confirmed that [HN2] the Commission possessed certain equitable authority in its rate-making role. Specifically, the court explained that "we view utility rate-making as a matter of fairness. Equity requires that both ratepayers and utilities be treated in a similar manner." *Clark, 668 So. 2d at 972.* Reviewing the record, we agree that the Commission appropriately exercised its equitable powers in considering the substantial difficulties that would be faced in fairly collecting the necessary surcharges to offset the refunds which Sugarmill Woods proposed. Compare *Department of Revenue v. Kuhnlein, 646 So. 2d 717, 726 (Fla. 1994)* [**16] (holding that trial court was justified in rejecting proposal allowing state to collect retroactive tax because record indicated that responsible state agency would be unable to collect tax from very substantial percentage of titleholders, whose addresses could not be kept current, and agency further averred that it lacked resources necessary to track down such titleholders).

Equally important though, we are persuaded that Clark's direction to treat ratepayers equitably required the Commission to consider the monetary impact these surcharges would have on the customers who would pay the surcharges, especially given the circumstances of this proceeding. The customers who would be subject to the surcharge did not participate as parties in the 1992 rate case or the 1996 and 1997 remand proceedings. These customers would have no real choice but to pay the surcharge rates authorized and, because the surcharge would be retroactive, would have no opportunity to adjust their consumption to lessen the impact of the surcharge. At no time were these customers on notice that they may be responsible for a retroactive surcharge, if the Commission-created uniform rate structure was reversed. [**17] This [HN3] lack of notice is a crucial consideration when considering whether a surcharge and restitution are equitable. See, e.g., Stefan H. Krieger, The Ghost of Regulation Past: Current Applications of the Rule Against Retroactive Rate-Making in Public Utility Proceedings, *1991 U. Ill. L. Rev. 983, 1046.* ("In regard to retroactive relief for the period of the rate proceeding, the proposed analysis indicates that the crucial issue is notice. If, through the entry of an interim order, the commission has given proper notice to both the utility and the ratepayers that certain funds may be subject to retroactive recovery, the parties have no rational expectation that such relief is prohibited.").

Sugarmill Woods argues that the equitable principle of restitution requires the [*727] payment of refunds in the instant case. We conclude, however, that equity would be offended if restitution was ordered and the underpaying customers, who neither had notice that the uniform rates approved were subject to retroactive alteration nor had a chance to adjust their consumption, were required to pay the surcharges necessary to balance the payment of refunds. We recognize that restitution [**18] has been required in rate cases, see, e.g., *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Serv. Comm'n, 585 S.W.2d 41, 59-60 (Mo. 1979)*(en banc)(restitution was awarded as remedy for unlawfully collected utility charges); *People of Illinois ex rel. Hartigan v. Illinois Commerce Comm'n, 218 Ill. App. 3d 168, 578 N.E.2d 46, 160 Ill. Dec. 867 (Ill. App. Ct. 1991)*(refunds of excess rates proper); *Atlantic Richfield Co. v. District Court, Montrose County, 794 P.2d 253 (Colo. 1990)*(trial court erred in declining to determine refunds of excess rate collected by public utility during pendency of appeal). Nevertheless, none of these cases addressed the equitable considerations in determining whether some customers should be surcharged so that other customers could receive a refund. Rather, in each of these cases, the issue was whether the utility was required to refund because the utility had received erroneous rates. The situation in the case on appeal is vastly more complex. Here, the utility's revenue requirement was unchanged following the implementation of uniform rates, and the uniform rates did not result [**19] in the utility earning revenue in excess of that requirement - one of the factors which led this court in Southern States I to reject the Commission's order requiring the utility to bear the financial burden of a refund. Further, the obligation of the Commission to address both a refund and a surcharge under the facts of this case, see *Southern States I, 704 So. 2d at 559,* distinguishes the instant case from cases involving a straightforward restitution.

Based on the above, given the highly unique facts and background of this case, we conclude that the order on appeal is within the Commission's equitable powers under Clark. Accordingly, we AFFIRM.

BOOTH AND KAHN, JJ., CONCUR.

LEXSEE 646 SO. 2D 717

DEPARTMENT OF REVENUE, et al., Appellants/Cross-Appellees, v. DAVID KUHNLEIN, et al., Appellees/Cross-Appellants. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, et al., Appellants/Cross-Appellees, v. RICHARD ADAMS, et al., Appellees/Cross-Appellants.

CASE NOS. 82,994, 82,995 CONSOLIDATED CASES

SUPREME COURT OF FLORIDA

646 So. 2d 717; 1994 Fla. LEXIS 1976; 20 Fla. L. Weekly S 5

November 30, 1994, Decided

SUBSEQUENT HISTORY: [**1]

646 So. 2d 717 at 726

PRIOR HISTORY:

Circuit Court No. CI 92-6224 (Orange). District Court of Appeal, 5th District - No. 93-2848. Circuit Court No. CI 92-5912 (Orange). District Court of Appeal, 5th District - No. 93-2849.

Original Opinion of September 29, 1994, Reported at: *1994 Fla. LEXIS 1479.*

JUDGES: OVERTON, SHAW, KOGAN and HARDING, JJ., and McDONALD, Senior Justice, concur. GRIMES, C.J., dissents. GRIMES, C.J., OVERTON, SHAW, KOGAN and HARDING, JJ., and McDONALD, Senior Justice, concur.

OPINION:

[*726] Appellees/Cross-Appellants Adams and Crows' Motion for Rehearing or Clarification as to Case No. 82,995 is hereby denied.

OVERTON, SHAW, KOGAN and HARDING, JJ., and McDONALD, Senior Justice, concur

GRIMES, C.J., dissents

Appellants/Cross-Appellees Department of Revenue, et al.'s Motion to Strike That Part of Appellees' Reply Brief Not In Accordance With the Florida Rules of Appellate Procedure and This Court's Order of January 12, 1994, is hereby denied.

GRIMES, C.J., OVERTON, SHAW, KOGAN and HARDING, JJ., and McDONALD, Senior Justice, concur

Appellees/Cross-Appellants David Kuhnlein, et al.'s Motion to Remand Pursuant to Appellate Rule 9.600(b), or in the Alternative to Stay Defendants From Sending Class [**2] Notice Without Court Approval, and supplement thereto, is hereby denied.

GRIMES, C.J., OVERTON, SHAW, KOGAN and HARDING, JJ., and McDONALD, Senior Justice, concur

Appellees/Cross-Appellants Adams and Chow's Motion for Attorneys Fees is hereby denied.

OVERTON, SHAW, KOGAN and HARDING, JJ., and McDONALD, Senior Justice, concur

GRIMES, C.J., dissents

The Florida Legislature moves for leave to appear in this case as amicus curiae solely for the purpose of asking for a clarification of our opinion with regard to the fiscal prerogatives of the legislative branch. The motion is granted, and we readopt and clarify our opinion as follows.

We agree with the Legislature that it has authority to fashion a retroactive remedy under McKesson with respect to taxes declared illegal under the Commerce Clause. As McKesson notes, that remedy need not be perfect. In the present case, however, any conceivable retroactive remedy the Legislature might fashion necessarily would be so highly imperfect and involve such delays as to result in fundamental injustice. Accordingly, we believe the trial court was within its discretion in ordering a refund based on the facts at hand.

[*727] We do not imply, [**3] however, that the courts of this state can order refunds in any or even most cases of this type. The facts of the present case are

unusual because the number of individuals not subject to the illegal tax is enormous, the ability of the state to locate a very substantial percentage of them is unlikely, and the delays that inevitably would result from the effort of locating them would be grossly unfair to all involved — most especially those who paid the tax. This situation is substantially different from the facts of McKesson.

In so saying we strongly emphasize that the courts should show great deference to the legislative prerogative. If there is any reasonable way that prerogative may be honored without substantial injustice to the taxpayers of this state, then a court reviewing a tax case of this type should give the Legislature the opportunity to fashion a retroactive remedy within a reasonable period of time. As a general rule, a "reasonable period of time" means by the end of the next regular legislative session plus the period of time in which the Governor must review bills approved by both houses.

We also note that the Legislature in its motion has represented to this [**4] Court that it will not attempt to fashion a retroactive remedy even if given leave to do so. This is a fact that factors in our decision on clarification, if only because it tacitly acknowledges our conclusions as to this case. We do believe, however, that it would be of great benefit to the courts if the Legislature sought leave to intervene at the trial level in Commerce Clause cases of this type to address the question of a retroactive remedy. When such leave is sought, a trial court clearly would abuse its discretion by denying leave to intervene. Then the record on appeal would contain a full account of the Legislature's views as to a retroactive remedy.

GRIMES, C.J., OVERTON, SHAW, KOGAN and HARDING, JJ., and McDONALD, Senior Justice, concur

M A N D A T E

from

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

SECOND DISTRICT

THIS CAUSE HAVING BEEN BROUGHT TO THIS COURT BY APPEAL, AND AFTER DUE CONSIDERATION THE COURT HAVING ISSUED ITS OPINION;

YOU ARE HEREBY COMMANDED THAT SUCH FURTHER PROCEEDINGS BE HAD IN SAID CAUSE , IF REQUIRED, IN ACCORDANCE WITH THE OPINION OF THIS COURT ATTACHED HERETO AND INCORPORATED AS PART OF THIS ORDER, AND WITH THE RULES OF PROCEDURE AND LAWS OF THE STATE OF FLORIDA.

WITNESS THE HONORABLE JOHN R. BLUE CHIEF JUDGE OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, SECOND DISTRICT, AND THE SEAL OF THE SAID COURT AT LAKELAND, FLORIDA ON THIS DAY.

DATE: September 24, 2002

SECOND DCA CASE NO. 2D01-5717

COUNTY OF ORIGIN: Pinellas

TRIAL COURT CASE NO. 00006487 CI 07

CASE STYLE: FLORIDA POWER CORPORATION v. TOWN OF BELLEAIR,

James Birkhold
Clerk

cc: (Without Attached Opinion)
Lee Wm. Atkinson, Esq. Joel Randall Tew, Esq. R. Alexander Glenn, Esq.

Joseph H. Lang, Jr., Esq. James Michael Walls, Esq. Sylvia H. Walbolt, Esq.

bl

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

FLORIDA POWER CORPORATION,
a Florida corporation,

Appellant,

v.

TOWN OF BELLEAIR,
a Florida municipal corporation,

Appellee.

Case No. 2D01-5717

Opinion filed August 30, 2002.

Appeal from nonfinal order of the Circuit Court for Pinellas County; W. Douglas Baird, Judge.

Sylvia H. Walbolt, Robert W. Pass, James Michael Walls, Joseph H. Lang, and Robert E. Biasotti of Carlton Fields, P.A., St. Petersburg, and R. Alexander Glenn, St. Petersburg, for Appellant.

Lee Wm. Atkinson of Tew, Barnes & Atkinson, L.L.P., Clearwater, for Appellee.

FULMER, Judge.

Florida Power Corporation (FPC) challenges the partial summary judgment and temporary injunction entered in favor of the Town of Belleair (Belleair).

We affirm the partial summary judgment and reverse the temporary injunction.

FPC has been the sole supplier of electric service within the town limits of Belleair since 1971 pursuant to Ordinance 119, which granted FPC a franchise for thirty years. The franchise agreement required FPC to pay a franchise fee equal to 6% of FPC's revenues from the sale of electricity within the town limits. It also provided that upon expiration of the franchise agreement on December 1, 2001, Belleair had the right to purchase the electrical plant and facilities located within the town, the valuation of which would be fixed by arbitration. Prior to the expiration of the franchise agreement, the parties were unable to negotiate an extension of the agreement, and a dispute arose regarding the parties' rights and obligations under it. FPC took the position that the buy-out provision of the franchise agreement was no longer enforceable because of changes in state law. FPC also indicated that it was not interested in conveying its facility to any party and that it would continue to serve the town as required by law regardless of the existence of a franchise agreement. However, FPC did not intend to continue paying the 6% franchise fee at the expiration of the existing franchise agreement because recent Florida decisions found that attempts by local governments to unilaterally impose a "franchise fee" constituted illegal taxation.

In September 2000, Belleair filed a two-count complaint seeking, in count one, a declaratory judgment concerning the rights and obligations of Belleair and FPC under the franchise agreement. In count two, Belleair sought a mandatory injunction requiring FPC to continue paying the 6% franchise fee after the expiration of the franchise agreement. Thereafter, Belleair filed a motion for partial summary judgment seeking to enforce the buy-out provision and to compel FPC to arbitrate the value of its

facilities. Belleair also filed a motion for temporary injunctive relief seeking a mandatory injunction to force FPC to continue to collect and forward fees, for the use of the rights-of-way, equaling 6% of its revenues in the same manner it did under the franchise agreement. The trial court granted both of Belleair's motions.

FPC raises three issues in this appeal: (1) the trial court erred by issuing the mandatory injunction; (2) the trial court erred by ordering FPC to arbitrate the value of its Belleair facilities instead of deferring to the jurisdiction of the Florida Public Service Commission; and (3) the trial court's arbitration order was unauthorized and violated due process. Issues (2) and (3) have been addressed in Florida Power Corp. v. Casselberry, 793 So. 2d 1174 (Fla. 5th DCA 2001). On these issues, we align ourselves with the Fifth District and affirm without discussion.

The remaining issue concerns a challenge to the mandatory injunction, in which the trial court compelled FPC to continue paying to Belleair an amount equal to the 6% franchise fee as reasonable compensation for FPC's continued use and occupation of Belleair's rights-of-way. A temporary injunction is an extraordinary and drastic remedy and, therefore, should be granted sparingly. Agency for Health Care Admin. v. Cont'l Car Servs., Inc., 650 So. 2d 173 (Fla. 2d DCA 1995). A party seeking a temporary injunction must prove that: (1) it will suffer irreparable harm unless the status quo is maintained; (2) there is no adequate remedy at law; (3) the party has a clear legal right to the relief granted; and (4) a temporary injunction will serve the public interest. Liberty Fin. Mortgage Corp. v. Clampitt, 667 So. 2d 880 (Fla. 2d DCA 1996). The purpose of a temporary injunction is to maintain the status quo until full relief can be granted following a final hearing. Id.

Here, the trial court determined that Belleair had "a clear legal right to a temporary injunction to maintain the status quo." We disagree. The trial court was without authority to order FPC to continue paying the franchise fee after the franchise agreement expired. The trial court cannot, by injunction, extend the terms of a contract after its expiration. Sanz v. R.T. Aerospace Corp., 650 So. 2d 1057, 1059 (Fla. 3d DCA 1995). Additionally, without the franchise agreement to support the negotiated franchise fee, a 6% flat fee constitutes an illegal tax pursuant to Alachua County v. State, 737 So. 2d 1065 (Fla. 1999), because it bears no relationship to the actual cost of regulation or maintenance of Belleair's rights-of-way. However, as explained in Alachua County, Belleair does have the authority to charge a reasonable regulatory fee for the use of the rights-of-way, and FPC has conceded that it is obligated to pay such fee and stands ready to do so.

Because we conclude that Belleair failed to demonstrate a clear legal right to continue receiving the 6% fee after the expiration of the franchise, we reverse the trial court's order granting the temporary injunction. Our reversal renders moot FPC's remaining challenges to the issuance of the injunction.

Accordingly, we affirm the partial summary judgment, reverse the temporary injunction, and remand for proceedings consistent with this opinion.

WHATLEY and SILBERMAN, JJ., Concur.

2 of 3 DOCUMENTS

FLORIDA POWER CORPORATION, Petitioner, vs. CITY OF WINTER PARK, Respondent.

No. SC02-2272

SUPREME COURT OF FLORIDA

887 So. 2d 1237; 2004 Fla. LEXIS 1877; 29 Fla. L. Weekly S 630

October 28, 2004, Decided

SUBSEQUENT HISTORY: [**1] As Corrected November 4, 2004. As Corrected November 10, 2004.

PRIOR HISTORY: Application for Review of the Decision of the District Court of Appeal - Certified Direct Conflict of Decisions Fifth District - Case No. 5D01-2470 and 5D02-87 (Orange County). *Fla. Power Corp. v. City of Winter Park, 827 So. 2d 322, 2002 Fla. App. LEXIS 13475 (Fla. Dist. Ct. App. 5th Dist., 2002)*

DISPOSITION: Approved.

COUNSEL: Sylvia H. Walbolt, Joseph H. Lang, Jr., and Hunter W. Carroll, St. Petersburg, Florida, and Gary L. Sasso, Tampa, Florida, of Carlton Fields, P.A., and R. Alexander Glenn, Associate General Counsel of Progress Energy Service Company, LLC, St. Petersburg, Florida, for Petitioner.

Thomas A. Cloud, Tracy A. Marshall, and George N. Meros, Jr., of Gray, Harris and Robinson, P.A., Orlando, Florida, Gordon H. Harris, Orlando, Florida, for Respondent.

Kenneth R. Hart and J. Jeffry Wahlen of Ausley and McMullen, Tallahassee, Florida, on behalf of Tampa Electric Company; William B. Willingham and Michelle Hershel, Tallahassee, Florida, on behalf of Florida Electric Cooperatives Association, Inc.; Ron A. Adams of Steel Hector and Davis, LLP and Jean G. Howard, Office of General Counsel, Miami, Florida, on behalf of Florida Power and Light Company; and Harry Morrison, Jr., and Rebecca A. O'Hara, Tallahassee, Florida, on behalf of Florida League of Cities, Inc. [**2] , as Amici Curiae.

JUDGES: LEWIS, J. PARIENTE, C.J., and WELLS, ANSTEAD, QUINCE, CANTERO, and BELL, JJ., concur.

OPINIONBY: LEWIS

OPINION: [*1238] **CORRECTED OPINION**

LEWIS, J.

We have for review the decision in *Florida Power Corp. v. City of Winter Park, 827 So. 2d 322 (Fla. 5th DCA 2002)*, which certified conflict with the decision in *Florida Power Corp. v. Town of Belleair, 830 So. 2d 852 (Fla. 2d DCA 2002)*, review granted, *852 So. 2d 862 (Fla. 2003)*. We have jurisdiction. See *art. V, § 3(b)(4), Fla. Const.* For the reasons stated below, we approve the Fifth District Court of Appeal's decision in Winter Park, and disapprove the decision in Belleair to the extent described herein.

The instant action arises from the Fifth District's affirmance of the trial court's decision requiring Florida Power Corporation (FPC) to continue paying a franchise fee that had been due under a now-expired franchise agreement. n1 See *Winter Park, 827 So. 2d at 323*. FPC's electrical system was originally built by the City of Winter Park, (hereinafter City) and sold to FPC's predecessor along with the franchise to serve as the sole provider of electricity in the area. [**3] The original franchise agreement, and each subsequent iteration thereof, contained a buy-back provision, granting the City the right to purchase the electrical system at the end of the franchise term. Each franchise agreement also contained a franchise fee. The franchise agreement underlying the instant action assessed a fee of six percent of gross receipts based on the sale of electricity [*1239] within the territorial limits of the City. n2

n1 In 1913, Winter Park built and operated the City's electric system. In 1927, the City sold the

system to FPC's predecessor. FPC acquired the electrical system in 1944, and renewed the franchise agreement twice with Winter Park, once in 1947 and again in 1971. The agreement signed in 1971 expired on January 12, 2001, but was extended by mutual agreement of the parties until June 12, 2001.

n2 Although for the sake of brevity we refer to the fee as six percent of gross revenues, the franchise agreement provides that the fee, when "added to the amount of all taxes, licenses, and other impositions levied or imposed by the grantor upon the Grantee's electric property, . . . will equal 6% of Grantee's revenues" from the sale of electricity.

[**4]

When the most recent franchise agreement expired by its terms, the parties' negotiations reached an impasse. FPC retained possession of the City's rights-of-way, and continued to operate as the sole provider of electricity, but refused to remit the franchise fee. The City filed an action for declaratory judgment, seeking to have the trial court confirm its right to continue receiving the franchise fee for as long as FPC occupies and utilizes the public rights-of-way. After a non-jury trial, the circuit court determined that the City indeed had the right to charge a franchise fee reasonably related to the costs of regulating and maintaining FPC's use of the public rights-of-way, and the value of that use to FPC. The trial court further determined that the six percent fee bore a reasonable relation to such expenses and value. The trial court likened FPC to a holdover tenant in the public-rights-of-way, and determined that the company would be subject to the six percent fee until the parties execute the buy-back provision or reach a new agreement.

The district court affirmed the trial court's determination. The district court adopted the trial court's analogy to principles of landlord/tenant [**5] law, and endorsed the notion that FPC was a holdover tenant subject to the terms of the original "rental" agreement. The Fifth District also noted the inequity and public harm that would result from relieving FPC of its obligation to pay the franchise fee while the City's responsibilities in regulating and maintaining the rights-of-way would continue unabated. In rendering this decision, the district court certified a conflict with the decision reached by the Second District Court of Appeal in *Florida Power Corp. v. Town of Belleair, 830 So. 2d 852 (Fla. 2d DCA 2002)*. There, upon review of a substantially similar set of facts, the district court determined that the trial court erred in granting a temporary injunction requiring FPC to continue to pay the six percent fee after expiration of the franchise agreement. See *id. at 854*.

Throughout the proceedings below and before this Court, FPC has maintained that continued assessment of the six percent fee amounts to unconstitutional taxation under this Court's decision in *Alachua County v. State, 737 So. 2d 1065 (Fla. 1999)*. According to FPC, expiration of the franchise agreement and the [**6] concomitant termination of its franchise right to operate as the city's sole electric service provider have eliminated the bargained-for exchange that previously supported the franchise fee. Now, FPC would have this Court believe that requiring FPC to pay the six percent fee constitutes the unilateral imposition of an impermissible tax, and is prohibited by our decision in Alachua.

The reality, however, is that Alachua does not support FPC's position. FPC misinterprets judicial precedent because it divorces the principles of law established in Alachua from the underlying facts as it attempts to invoke the decision to serve its own ends. The trial court deflated FPC's argument by distinguishing the instant matter from Alachua. The district court echoed that refrain. We now add our voice to the chorus.

The distinctions between the instant matter and the scenario in Alachua are as clear as they are numerous. In Alachua, this Court reviewed a trial court order declaring a proposed bond issue invalid. [*1240] See *Alachua, 737 So. 2d at 1066*. A central issue in the bond validation proceeding was whether a privilege fee imposed by Alachua County on electric [**7] utilities using the public rights-of-way constituted an illegal tax. See *id. at 1067*. The ordinance at issue imposed a fee of three percent of the gross revenues generated by electric utilities within the county, and permitted the utilities to pass the expense through to their customers. See *id. at 1066*. To avoid having the fee declared an unconstitutional tax, the county argued that the fee was justifiable as a reasonable rental fee, user fee, or franchise fee. See *Alachua, 737 So. 2d at 1067*.

This Court disagreed, determining that there was no nexus between the privilege fee and the reasonable rental value of the land occupied by the utilities or the county's expenses in regulating its rights-of-way. See *Alachua, 737 So. 2d at 1065*. In rejecting the county's franchise fee argument, we noted that the fee was not bargained for, but unilaterally imposed, and did not require Alachua County to relinquish a property right or bestow anything upon the utilities in exchange for the fee. See *id. at 1068*. We also recognized that the privilege fee was imposed on utilities that were already occupying the rights-of-way [**8] and providing services, see

Alachua, 737 So. 2d at 1068, and that the stated purpose of the fee was to relieve what had been perceived as a disproportional ad valorem tax burden on taxable property owners. See *id. at 1066*. For these reasons, we determined that the privilege fee imposed by Alachua County was in actuality an unconstitutional tax. See *id. at 1069*.

While it is true that the instant matter also involves the assessment of a percent-of-revenue fee against an electric utility, that is where the similarities between this action and Alachua end. Importantly, the fee at issue here is not a novel attempt by a local government to exact revenue from a right-of-way user, but arose from a decades-old electric utility franchise granted by Winter Park to FPC. The franchise gave FPC the "right, privilege and franchise to construct, operate and maintain in the said City of Winter Park, all electric power facilities" for the purpose of supplying electricity to the City's inhabitants. Thus, during its effective period, the franchise agreement constituted a permissible bargained-for exchange pursuant to which FPC ceded six percent of [**9] revenues in exchange for access to the City's rights-of-way, the monopoly electricity franchise, and the City's corresponding relinquishment of its power to provide electric service in the community. See *City of Plant City v. Mayo, 337 So. 2d 966, 973 (Fla. 1976)*.

> We flatly reject the implication, propounded by FPC, that when the clock struck midnight on the final day of the franchise agreement, the six percent fee was transformed from a proper franchise fee into an unconstitutional tax. To the contrary, we endorse the district court's view that if a franchisee and a governing body agree to a reasonable fee for access to the city's residents and the use of the public property to provide services during the term of the franchise then such a fee has not been 'unilaterally imposed' and will be enforced during a holdover period in which renegotiation occurs.

Winter Park, 827 So. 2d at 324. Our decision in Alachua does not permit a utility subject to a maturing franchise agreement to wait out the contract term so that it may withhold fees upon its expiration. Such an interpretation would gravely impact the renegotiation process by vitiating [**10] any motive the utility would have for entering into contractual arrangements beyond the initial franchise agreement.

[*1241] Moreover, we reiterate that Alachua validates fees that are reasonably related to the government's cost of regulation or the rental value of the occupied land, as well as those that are the result of a bargained-for exchange. See *Alachua, 737 So. 2d at 1067*. In the instant case, the trial court specifically found that the City had "offered sufficient evidence that the six percent fee was reasonably related" to the costs of regulation, and had "also presented strong evidence that the six percent fee is a fair 'market rate' for such use, occupation, or rental." n3 FPC attacks these findings, arguing that the data provided at trial was not directly tied to FPC's occupation and use of the rights-of-way. The trial court recognized this point, but determined that the City had established the required nexus between expenses and fees. The petitioner provides no basis upon which this Court should divert from the usual deference accorded such findings of fact.

> n3 Evidence adduced at trial included the total acreage occupied by FPC in the area, the total cost to the City of maintaining all of its rights-of-way, and the frequency with which City services responded to downed power lines.

[**11]

Neither are we persuaded by FPC's assertion, seemingly subscribed to by the Second District in Belleair, that the courts cannot extend the terms of otherwise expired franchise agreements. See *Belleair, 830 So. 2d at 854*. As a threshold matter, the decision reached today does not force either party to perform under the terms of the expired agreement. To the contrary, each has maintained performance from the onset of the instant action. The City has maintained the rights-of-way, and has kept them safe and presentable for the public, and will continue to do so, regardless of whether FPC pays the franchise fee. Likewise, FPC has continued to accept and enjoy the benefits of access to the City's rights-of-way, and its status as the area's sole electricity provider.

Under this scenario, it is perfectly proper to imply a contract at law. See *Incorporated Town of Pittsburg v. Cochrane, 1945 OK 88, 195 Okla. 593, 159 P.2d 534, 538 (Okla. 1945)* (determining that upon expiration of a franchise agreement, if the company "continues to furnish and the town accepts the service, an implied contract of indefinite duration arises"); see also *B-C Cable Co. v. City and Borough of Juneau, 613 P.2d 616, 619 n.5 (Alaska 1980)*; [**12] *Village of Lapwai v. Alligier, 69 Idaho 397, 207 P.2d 1025, 1027 (Idaho 1949)*. By specifically enforcing the payment provision of the implied contract, we satisfy the City's clear legal right to receive compensation reasonably related to FPC's use and occupation of the rights-of-way, and the regulatory and maintenance expenses incurred by the City as a result

of that use.

In the absence of an implied contract, on the other hand, FPC would be unjustly enriched. n4 FPC continues to collect fees from consumers for electric service which include a pass-through component earmarked for payment of the six percent franchise fee. To the extent FPC discontinues its payments to Winter Park, it would receive a windfall in the form of a corresponding increase in revenue. It would be wholly inequitable to allow FPC to profit in this manner while the city's maintenance and public safety responsibilities continue unabated. See City of Las Cruces v. El Paso Electric Co., No. Civ-95 [*1242] -385-*LCS/JHG, 1997 WL 1089567,* at *3 (D.N.M. 1997), aff'd, *166 F.3d 1220 (10th Cir. 1999).*

n4 The elements of an unjust enrichment claim are "a benefit conferred upon a defendant by the plaintiff, the defendant's appreciation of the benefit, and the defendant's acceptance and retention of the benefit under circumstances that make it inequitable for him to retain it without paying the value thereof." *Ruck Bros. Brick, Inc. v. Kellogg & Kimsey, Inc., 668 So. 2d 205, 207 (Fla. 2d DCA 1995)* .

[**13]

Moreover, any argument that franchise fee payments should cease during the pendency of protracted contract negotiations and follow-on litigation ignores the economic realities of utility service. By virtue of natural attrition and replacement, FPC's customer base in the City of Winter Park is constantly changing. Retroactive application of a pass-through fee would, therefore, unfairly benefit some customers and penalize others. The district court applied a far more appropriate remedy by maintaining the parties' status quo, likening FPC to a holdover tenant, and subjecting the utility to the six percent franchise fee until the current impasse is broken through either execution of the contractual buy-back provision or a new franchise agreement.

The conclusion we reach today requires that we disapprove the Second District's decision in Belleair, which we deem to be in error in two respects. First, the district court in that case determined that "without the franchise agreement to support the negotiated franchise fee, a 6% flat fee constitutes an illegal tax pursuant to Alachua because it bears no relationship to the actual cost of regulation or maintenance of Belleair's rights-of-way. [**14] " *Belleair, 830 So. 2d at 854.* If by this the court meant that percent-of-revenue fees, by definition, do not bear the required nexus to the actual costs of regulation, the decision has no foundation in controlling precedent. This Court has never determined that percent-of-revenue fees are per se unreasonable. Indeed, our effort to address the reasonableness of the fee in Alachua as an inquiry distinct from determining whether it was the product of a bargained-for exchange indicates that such is not the state of the law.

Second, we disapprove Belleair to the extent it provides that courts cannot extend the terms of expired franchise agreements to cover an interim period during which a holdover utility and the local government resolve the status of their relationship going forward. As explained above, the conduct and interaction of the parties, and balance of equities involved, may render such action necessary and proper. To exclude such a remedy from the reach of the courts would upset the balance of franchise negotiations and renegotiations, and threaten to disrupt sustainable electric service to the citizens of this state.

Conclusion

Based on the [**15] foregoing, we approve the decision of the district court below and disapprove the Second District's decision in Belleair as described herein.

It is so ordered.

PARIENTE, C.J., and WELLS, ANSTEAD, QUINCE, CANTERO, and BELL, JJ., concur.