

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Objection of ST. JOHNS NORTH)	DOCKET NO. 880207-WS
UTILITIES CORPORATION to notice by)	
GENERAL DEVELOPMENT UTILITIES, INC.)	ORDER NO. 23893
of intent to amend Certificates Nos.)	
461-W and 396-S in St. Johns county)	ISSUED: 12-17-90
and Application of GENERAL DEVELOPMENT)	
UTILITIES, INC. for amendment of)	
certificates.)	
)	

The following Commissioners participated in the disposition of this matter:

MICHAEL MCK. WILSON, CHAIRMAN
THOMAS M. BEARD

APPEARANCES:

RICHARD D. MELSON and CHERYL G. STUART, Hopping Boyd Green & Sams, Post Office Box 6526, Tallahassee, Florida 32314
On behalf of General Development Utilities, Inc.

JOSEPH E. WARREN, 1930 San Marco Boulevard, Suite 200, Jacksonville, Florida 32207
On behalf of St. Johns North Utility Corporation

SUZANNE F. SUMMERLIN, Florida Public Service Commission, 101 East Gaines Street, Tallahassee, Florida 32399-0863
On behalf of the Staff of the Florida Public Service Commission

PRENTICE P. PRUITT, Florida Public Service Commission, 101 East Gaines Street, Tallahassee, Florida 32399-0863
Counsel to the Commissioners

ORDER SPECIFYING AMOUNT OF ATTORNEYS' FEES AND COSTS
TO WHICH GENERAL DEVELOPMENT UTILITIES, INC., IS ENTITLED

BY THE COMMISSION:

General Development Utilities, Inc., (GDU or the Utility) is authorized to provide water and sewer service in St. Johns County by Certificates Nos. 451-W and 396-S. GDU completed the notice requirements for an extension of its service area in St. Johns County, pursuant to Section 367.061, Florida Statutes, on January 27, 1988. GDU also prematurely filed an extension application on

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PSC-RECORDS/REPORTING

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February 9, 1988. St. Johns North Utility Corp. (SJN) timely filed an objection to the notice and a request for hearing on February 5, 1988, essentially contending that such extension would result in competition with or duplication of SJN's systems and that SJN was better qualified to serve the disputed area. SJN's request for hearing was granted and the matter went to hearing on September 30, 1988.

By Order No. 20668, issued January 27, 1989, we dismissed SJN's objection, granting GDU's request to amend its certificates and awarding reasonable attorneys' fees and costs to GDU. SJN subsequently appealed Order No. 20668. On January 1, 1990, the First District Court of Appeals affirmed Order No. 20688's finding that GDU is entitled to reasonable attorneys' fees and costs. The purpose of this proceeding was to determine the amount of those reasonable attorneys' fees and costs. A prehearing conference was held August 8, 1990, in Tallahassee, Florida. SJN did not file a prehearing statement nor did SJN attend the prehearing conference. The hearing was held on Wednesday, August 29, 1990, in Tallahassee, Florida. SJN did not file testimony or exhibits; SJN did not put on a witness; nor did SJN file any post-hearing statement or brief.

I. The Amount of Attorneys Fees and Costs Appropriately Recoverable by GDU

A. Reasonable Hourly Rate

We find that the weighted average rate proposed by GDU of \$116.38 is a reasonable hourly rate for the services provided by its counsel in this proceeding. It is, of course, GDU's position that the record reflects that the hourly rates for its attorneys are reasonable, based on the current market rates in Tallahassee for attorneys of reasonably comparable skill, experience, and reputation, for similar services during the period in question. SJN attempted to establish by cross-examination that these rates are unusually high. However, we do not find any evidence in this record that disputes the reasonableness of the rates proposed by GDU for recovery here. Therefore, we find that GDU's weighted composite rate of \$116.38 is the reasonable hourly rate for its counsel's services in this proceeding.

B. Hours Reasonably Expended by GDU's Counsel in this Proceeding

GDU's position as reflected in its brief is that the billings from Hopping Boyd Green & Sams (HBGS), the law firm representing it in this proceeding, to GDU demonstrate that a total of 462.6 hours

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were reasonably expended in the proceeding that culminated in Order No. 20668. However, as pointed out in GDU's brief, SJN's cross-examination attempted to establish two bases for the reduction of the number of hours appropriately recoverable.

SJN suggested first that the fees for the contested hearing should be allocated between the portion of the requested area that was in dispute and the portion of the requested area that was not in dispute. SJN's second basis for an allocation was that GDU's fees for legal work prior to the Commission's rejection of a settlement agreement between SJN and GDU should be disallowed. Naturally, it is GDU's position that neither of these bases for an allocation of its requested fees is justified. GDU states that our consideration of GDU's certificate extension would not have required a hearing if there had been no objection filed by SJN. It is GDU's view, therefore, that all of the hearing costs are directly attributable to SJN's objection, which this Commission has subsequently found to have been brought for an improper purpose. Without a hearing, GDU states, its attorneys' fees would have been minimal. GDU states that its fees, without a hearing, would have been at most 10 hours or less of time for its attorneys to review the application.

Regarding SJN's allegation that there should be an allocation of the fees in connection with negotiation of the settlement, GDU states that, like the fees in connection with the hearing, these would not have been incurred if there had been no objection by SJN. In addition, GDU asserts, much of the time expended by GDU prior to the settlement related to preparation of its case for the hearing and, therefore, would have been required regardless of the attempted settlement. We find both of SJN's allocation arguments inappropriate. This is because the fees incurred for the portion of the proposed certificate extension area not in dispute and the fees incurred for the settlement negotiation would not have been incurred but for SJN's objection.

However, we do find legitimate bases for disallowance of portions of the attorneys fees requested by GDU. During the Staff Counsel's cross-examination of Witness Melson, it was pointed out that this Commission has occasionally disallowed, in rate cases, recovery for two attorneys involved in the same activity. When he was asked whether any of the attorneys' fees for which recovery is requested here by GDU represent two attorneys involved in one activity, he responded that the participation by two attorneys in selected activities was justified by the nature of the activities in this case. These activities, Witness Melson responded, were not duplicative. He specifically mentioned activities such as witness

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preparation and attendance at the prehearing conferences and final hearing. We do not agree. Recovery by GDU, or any prevailing party in an attorneys' fees case, for the participation of two attorneys in one activity is not appropriate. This is not to say that such activity was not prudent and judicious on the part of the client and the particular law firm involved. It is simply that the intent of an award of attorneys' fees under any attorneys' fees statute is that the prevailing party is entitled to reasonable attorneys' fees. The term reasonable does not, in our view, include premium attorneys' fees. To allow GDU to recover the attorneys' fees generated by two attorneys for attendance at prehearing conferences or a hearing or for witness preparation is to allow GDU to recover premium attorneys' fees. Therefore, we hereby deny GDU recovery for two attorneys' participation in the same activity in the following instances:

1. For April 15, 1988, 9.0 hours for Miami trip;
2. For May 6, 1988, 11.5 hours for Jacksonville trip;
3. For July 5, 1988, 1.7 hours for attendance at Agenda Conference;
4. For August 1, 1988, 3.0 hours for attendance at motion hearing and prehearing conference;
5. For September 7, 1988, 4.8 hours for preparation for and attendance at prehearing conference;
6. For September 21, 1988, 10.0 hours for trip to Miami for witness preparation;
7. For September 29, 1988, 11.0 hours for trip to Orange Park for hearing preparation;
8. For September 30, 1988, 15.5 hours for attendance and travel for hearing; and
9. For January 3, 1989, 1.5 hours for attendance at Agenda Conference.

In each of the above instances, based on our review of the invoices and billing statements in the record, we find it is appropriate to disallow recovery for one of the attorneys. The total number of such disallowed hours is 68.0 hours.

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In addition, we find it appropriate to disallow 10 hours for time that would have been expended by GDU had there been no objection filed by SJN. When questioned by Counsel for SJN, Witness Melson responded that his firm would have expended less than 3 or 4 hours if there had been no objection to GDU's certificate extension application. However, when questioned by Staff Counsel regarding this matter, Witness Melson responded that 10 hours or less might have been expended for his firm's review of GDU's application if no objection had been filed by SJN. For all of the above adjustments, we find a total disallowance of 78.0 hours to be appropriate. Therefore, based on our determination that the reasonable hourly rate for attorneys' fees in this case is \$116.38, we find that the total dollar disallowance is \$9,077.64. We find this weighted average rate to be appropriate here because it is not possible to discern which of the two attorneys involved would have been utilized if GDU and its Counsel had been planning for the recovery of only one attorneys' fees in this proceeding.

C. Costs Appropriately Recoverable by GDU in this Proceeding

We find that GDU established in the record of this proceeding that its recoverable costs include \$10,245.47 in expert witness fees for Mr. Hammack and Mr. Maddox, whose professional services were reasonably necessary in connection with the certificate dispute. We also find that GDU established the reasonableness of the additional \$1,507 for copies filed with this Commission and \$154 of attorney travel for discovery and the final hearing. Therefore, we find that GDU is entitled to \$11,906.47 in costs for this proceeding.

D. Interest Recoverable by GDU in this Proceeding

GDU has asserted that an attorneys' fees applicant is entitled to an award of interest at the statutory rate from the date that the right to recover the fee became fixed. GDU states that in a case where the award is based on a "prevailing party" statute, and the applicant has paid or is obligated to pay its attorneys' fees, interest begins to run on the date that the applicant became the "prevailing party." GDU cites several cases for this proposition in its brief, as follows: Tallahassee Memorial Regional Medical Center v. Poole, 547 So.2d 1258, 1260-1261 (Fla. 1st DCA 1989); Inacio v. State Farm Fire & Casualty Co., 550 So.2d 92, 97 (Fla. 1st DCA 1989). On the facts of this case, GDU asserts, it is therefore entitled to recover interest beginning on January 27, 1989, the date of Order No. 20668. The applicable rate is 12% per annum, as set forth in Section 55.03, Florida Statutes. GDU states that based on recoverable fees and expenses of \$65,745.47, the

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interest totals \$12,491.64 for the nineteen months through August 29, 1990, and \$21.61 per day thereafter until the date of the final order. Based upon our review of the case law cited by GDU, we find that GDU is entitled to interest at the 12% statutory rate from the date of Order No. 20668 through the date of the final order in this proceeding. However, based on our earlier adjustments, the actual interest figures are different. We hereby award GDU 12% annual interest on total attorneys' fees and costs of \$44,761.36 and \$11,906.47, respectively, for the nineteen months beginning January 27, 1989, through August 29, 1990, and \$18.63 per day until the date of the final order in this proceeding.

II. Attorneys' Fees Recoverable by GDU Related to this Attorneys' Fees Proceeding

Based upon our review of the evidence in this record and the case law cited by GDU in its brief, we hereby award GDU reasonable attorneys' fees and costs for its representation in this attorneys' fees proceeding of \$3,666.

III. Total Attorneys' Fees and Costs Recoverable by GDU

We find GDU's calculation of its total attorneys' fees and costs and interest, with the exception of the adjustments we have made, to be accurate. With those adjustments, we find that GDU is entitled to total attorneys' fees and costs and interest of \$71,100.73 plus \$18.63 per day in interest until the final order is issued in this proceeding.

Based upon our review of the record, we find that GDU actually incurred the attorneys' fees and costs we have awarded above. Based upon the record in this proceeding, specifically the details of GDU's agreement with its Counsel, we find that the payment of the attorneys' fees incurred by GDU was not contingent upon the outcome of this proceeding.

Based upon our adjustments to the hours requested by GDU, we find the lodestar amount is 384.6 hours times the reasonable hourly rate of \$116.38, or \$44,761.36 for the initial portion of this proceeding culminating in Order No. 20668 and it is \$3,666 for the attorneys' fees portion of this proceeding.

GDU states in its brief, and the record does not contradict this, that payment of the attorneys' fees incurred by GDU in this proceeding was not contingent, so we find no upward adjustment is appropriate based on contingencies. Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145, 1551 (Fla. 1985). GDU also asserts

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in its brief that Order No. 20668 reflects that GDU prevailed on every issue in the case, therefore no downward adjustment is appropriate based on the results obtained. Rowe, 472 So.2d at 1151; Ganson, 554 So.2d at 527-528. We completely agree with these assertions of GDU and SJN provided no contrary evidence. Therefore, we shall make no adjustment based on any contingencies.

Because no further action in this docket will be necessary, this docket shall be closed upon the issuance of our final order awarding attorneys' fees and costs.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that General Development Utilities, Inc., is hereby awarded attorneys' fees and costs in the amount of \$71,100.73 plus \$18.63 per day since August 29, 1990, until the date of the issuance of this Order. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this
17th day of DECEMBER, 1990.



STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

SFS

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice

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should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.