

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for) DOCKET NO. 950387-SU
Increased Wastewater Rates by) ORDER NO. PSC-98-1577-PHO-SU
Florida Cities Water Company -) ISSUED: November 24, 1998
North Ft. Myers Division in Lee)
County.)
_____)

Pursuant to Notice, and in accordance with Rule 28-106.209, Florida Administrative Code, a Prehearing Conference was held on November 18, 1998, in Tallahassee, Florida, before Commissioner Joe Garcia, as Prehearing Officer.

APPEARANCES:

B. Kenneth Gatlin, Kathryn Cowdery, Wayne L. Schiefelbein, Esquires, Ruden, McClosky, et al., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301
On behalf of Florida Cities Water Company, North Fort Myers.

Harold McLean, Esquire, Office of Public Counsel, c/o The Florida Legislature, 111 West Madison Street, Suite 812, Tallahassee, Florida 32399-1400
On behalf of the Citizens of Florida.

Ralph R. Jaeger, Esquire, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0862
On behalf of the Commission Staff.

PREHEARING ORDER

I. CONDUCT OF PROCEEDINGS

Pursuant to Rule 28-106.211, Florida Administrative Code, this Order is issued to prevent delay and to promote the just, speedy, and inexpensive determination of all aspects of this case.

II. CASE BACKGROUND

Florida Cities Water Company (FCWC or utility) is a Class A utility that has two wastewater service divisions in Ft. Myers, Florida: a northern division and a southern division. The North Ft. Myers wastewater system, the applicant in this proceeding, was

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servicing about 2,559 customers at December 31, 1994. Because many multi-family units are master-metered, about 4,590 equivalent residential connections (ERCs) were actually being served. The utility serves an area that has been designated by the South Florida Water Management District (SFWMD) as a critical use area. Wastewater treatment is provided by a 1.0 MGD (million gallons per day) advanced wastewater treatment (AWT) facility, presently being expanded to 1.25 MGD. Effluent is disposed of by discharge to the Caloosahatchee River, and will soon be provided to a golf course in the service area.

On May 2, 1995, the utility filed an application for increased rates pursuant to Section 367.081, Florida Statutes. The petition did not satisfy the minimum filing requirements (MFRs) and submission of additional data was necessary. The missing information was received on May 19, 1995, which date was declared the official date of filing pursuant to Section 367.083, Florida Statutes. The utility's last rate case was finalized on July 1, 1992, by Order No. PSC-92-0594-FOF-SU, Docket No. 910756-SU. In 1994, the utility's rates were increased due to an index proceeding. The utility has asked the Commission to process this application under the proposed agency action (PAA) procedures identified in Section 367.081(8), Florida Statutes.

The utility did not request interim rates. Schedules in the filing indicate receipt of a 6.71 percent return on average investment in 1994. The utility's last allowed overall rate of return was 9.14 percent. The utility reported that rate indexing procedures helped it maintain a satisfactory rate of return. However, the utility now maintains that rate increases are needed to reflect added investments and expenses, including an expenditure of approximately \$1,600,000 in 1995 to increase the capacity of its wastewater plant from 1 MGD to 1.25 MGD. This construction project was scheduled to be completed prior to the close of 1995. The utility believes the magnitude of this investment justifies an end-of-period rate base determination.

The test year for this proceeding is the twelve-month period ending December 31, 1995. This period is based upon actual costs for the historical base year ended December 31, 1994, with applicable adjustments. During the base year, the utility's wastewater revenues were \$2,085,157, with a corresponding net operating income of \$474,319. The utility's proposed rates are designed to generate \$2,591,990 in annual revenues, reflecting a \$480,078 (22.73 percent) overall increase. The requested net operating income amount of \$763,108 will yield a 9.08% return on the projected \$8,404,278 rate base balance.

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On November 2, 1995, the Commission issued Proposed Agency Action Order No. PSC-95-1360-FOF-SU. However, this order was timely protested by twelve customers. Also, by Order No. PSC-96-0356-PCO-SU, issued March 13, 1996, the Commission acknowledged the intervention of the Office of the Public Counsel (OPC or Citizens). Pursuant to the above-noted protests and intervention by OPC, an administrative hearing was held on April 24-25, 1996.

Subsequent to this hearing, the Commission issued its Final Order, PSC-96-1133-FOF-SU, on September 10, 1996. However, on October 7, 1996, the utility filed its notice of administrative appeal of that Order. Pursuant to this appeal, the First District Court of Appeal (Court or First District), among other things, reversed the Commission's use of annual average daily flow (AADF) in the numerator of the used and useful equation. The First District said this was a departure from Commission policy which was not supported by competent substantial evidence (unsupported 'by expert testimony, documentary opinion, or other evidence appropriate to the nature of the issue involved').

Although the Court reversed the Commission on this issue, it went on to say that the Commission "must, on remand, give a reasonable explanation, if it can, supported by record evidence (which all parties must have an opportunity to address) as to why average daily flow in the peak month was ignored."

Based on this language, the Commission issued Order No. PSC-98-0509-PCO-SU on April 14, 1998. That Order, in compliance with the First District's remand, set the capacity of the wastewater treatment plant, reopened the record for limited purpose, and granted in part and denied in part the utility's request for consideration of additional rate case expense. Specifically, the Commission decided to reopen the record to take evidence on what flows should be used in the numerator of the used and useful equation when the Department of Environmental Protection (DEP) permits the wastewater treatment plant based on AADF. In addition to this issue, the Commission decided to take evidence on the issue of additional rate case expense associated with reopening the record and the non-legal rate case expense associated with the utility's successful appeal of Order No. PSC-96-1133-FOF-SU. No other issues were identified by Order No. PSC-98-0509-PCO-SU. This Prehearing Order addresses the issues identified by Order No. PSC-98-0509-PCO-SU, and recognizes that a second administrative hearing on these issues is now scheduled for December 8 and 9, 1998.

III. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

A. Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending a formal ruling on such request by the Commission, or upon the return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been used in the proceeding, it shall be returned expeditiously to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of the proceeding, it shall be returned to the person providing the information within the time periods set forth in Section 367.156, Florida Statutes.

B. It is the policy of the Florida Public Service Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 367.156, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding.

In the event it becomes necessary to use confidential information during the hearing, the following procedures will be observed:

- 1) Any party wishing to use any proprietary confidential business information, as that term is defined in Section 367.156, Florida Statutes, shall notify the Prehearing Officer and all parties of record by the time of the Prehearing Conference, or if not known at that time, no later than seven (7) days prior to the beginning of the hearing. The notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute.
- 2) Failure of any party to comply with 1) above shall be grounds to deny the party the opportunity to present evidence which is proprietary confidential business information.
- 3) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the Court Reporter, in envelopes clearly marked with the nature of the contents. Any party wishing to

examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.

- 4) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information. Therefore, confidential information should be presented by written exhibit when reasonably possible to do so.
- 5) At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Division of Records and Reporting's confidential files.

IV. POST-HEARING PROCEDURES

Each party shall file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. If a party fails to file a post-hearing statement, that party shall have waived all issues and may be dismissed from the proceeding.

A party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 60 pages, and shall be filed at the same time.

V. PREFILED TESTIMONY AND EXHIBITS; WITNESSES

Testimony of all witnesses to be sponsored by the parties and Staff has been prefiled. All testimony which has been prefiled in this case will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and associated exhibits. All testimony remains subject to appropriate objections. Each witness will have the opportunity to orally summarize his or her testimony at the time he or she takes the stand. Upon insertion of a witness' testimony, exhibits appended thereto may be marked for identification. After all parties and Staff have had the opportunity to object and cross-examine, the exhibit may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

Witnesses are reminded that, on cross-examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer.

The Commission frequently administers the testimonial oath to more than one witness at a time. Therefore, when a witness takes the stand to testify, the attorney calling the witness is directed to ask the witness to affirm whether he or she has been sworn.

VI. ORDER OF WITNESSES

<u>Witness</u>	<u>Proffered By</u>	<u>Issues #</u>
<u>Direct</u>		
Michael Acosta	FCWC	1, 2, 3
Thomas A Cummings	FCWC	1, 2, 3
Larry N. Coel	FCWC	4, 5
Ted L. Bidy, P.E./P.L.S.	OPC	1, 2, 3
Kimberly H. Dismukes	OPC	1, 2, 3
Robert J. Crouch	STAFF	1, 2, 3
Richard L. Addison	STAFF	1, 2, 3

Rebuttal

Michael Acosta	FCWC	1, 2, 3
Harley W. Young	FCWC	1, 2, 3

VII. BASIC POSITIONS

UTILITY: The Commission should include all investment in used and useful plant in FCWC's rate base, including investment in plant necessary to treat maximum and peak flows.

OPC: The Citizens believe that the extent to which FCWC's wastewater treatment plant is used and useful should be determined by a comparison of load with capacity, where load and capacity are expressed in similar units. If a variant of peak capacity is to be utilized, then the same variant of peak load should be utilized; if a variant of average capacity is to be used then the same variant of average load should be utilized.

STAFF: Nontestifying Staff's positions are preliminary and based on materials filed by the parties and on discovery. The final positions will be based upon all the evidence in the record and may differ from the preliminary positions. The preliminary positions are offered to assist the parties in preparing for the hearing.

Consistent with Florida Cities v. PSC, 705 So. 2d 620 (Fla. 1st DCA 1998), the Commission has reopened the record to consider what flows should be used in the numerator of the used and useful equation when DEP permits the wastewater treatment plant on the basis of annual average daily flows (AADF). Staff believes that the flows in the numerator must match the flows designated in the denominator. If the flows are not designated in the denominator, then Staff believes the average daily flows for the maximum month (MMADF) should be used. Staff further believes that the utility should be allowed to recover its prudently incurred non-legal appellate rate case expense and additional rate case expense from this portion of the proceeding.

VIII. ISSUES AND POSITIONS

RATE BASE

ISSUE 1: Should the Commission ignore average daily flow in the peak month in determining used and useful plant to be included in rate base?

POSITIONS:

UTILITY: No. (Acosta, Cummings, and Young)

OPC: No. The Commission should not ignore any legitimate aspect of plant capacity. However, where, as here, the utility's wastewater treatment plant is permitted in terms of average annual daily flow, it is appropriate to compute the used and useful percentage utilizing flows expressed in the same units (Dismukes, Bidy, cross)

STAFF: No. Staff witness Crouch believes that the Commission is not ignoring the average daily flow in the peak month any more than the utility. The Commission is insuring that the period of reference for the average daily flows (annual, three month, or maximum) selected by the utility for its permitted capacity is also used when specifying the average daily flow when calculating used and useful. If the utility selects peak or maximum month for the permit, the Commission should use peak or maximum month for the average daily flows. (Crouch, Addison)

ISSUE 2: Does a change in the wording of the DEP permit application so that the permit and application now indicate the time frame for design capacity, i.e. annual average daily flow, maximum monthly average daily flow or three month average daily flow correspond to a real change in operating capacity?

POSITIONS:

UTILITY: No. (Acosta, Cummings, and Young)

OPC: No. A given wastewater treatment plant can be described and/or permitted utilizing several parameters; that is, with the actual capacity held constant, that capacity might be described in average terms, peak terms, or some variant of peak or average terms. The selection of one

of these descriptors of capacity dictates that the same be used for comparison with the load in used and useful calculations. (Bidly, cross)

STAFF: No. Staff witnesses Crouch and Addison believe that a properly designed and constructed wastewater treatment plant has the capacity to handle short term peak flows greater than the permitted capacity. Unlike a water treatment plant which must have the capacity to respond to instantaneous demands, a wastewater treatment plant is designed to handle peak daily flows and even peak hourly flows larger than the permitted capacity of the plant based upon average daily flows. (Crouch, Addison)

ISSUE 3: Where the DEP permits the wastewater treatment plant based on annual average daily flows, what flows should be used in the numerator of the used and useful equation to calculate used and useful plant?

POSITIONS:

UTILITY: Consistent with Commission policy, the average daily flow in the peak or maximum month should be used. Whatever method the Commission uses, all of the investment in used and useful plant, including investment in plant necessary to treat peak and maximum flows, should be considered used and useful and included in rate base.

OPC: Because the permitted capacity issued for FCWC's wastewater treatment plant (WWTP) is expressed in terms of annual average daily flows, the load presented to the WWTP must also be expressed in terms of annual average daily flows. Where the utility offers a statement of capacity which fails to include a time dimension, the customers should be given the benefit of the doubt: maximum, instantaneous capacity should be used in the denominator. (Dismukes, Bidly, cross)

STAFF: Staff witnesses, Crouch and Addison, believe that the flows in the numerator must match the flows designated in the denominator. If the flows are not designated in the denominator, then Staff witness Crouch believes the utility should be given the benefit of any doubt and average daily flows for the maximum month (MMADF) should be used. (Crouch, Addison)

NET OPERATING INCOME

ISSUE 4: What is the appropriate provision for rate case expense since the remand by the First District Court of Appeal?

POSITIONS:

UTILITY: The total rate case expense that should be allowed is \$229,399. The separation of rate case expense before and after remand is shown on Exhibit ____ (LC-1).

OPC: No position pending further development of the record.

STAFF: The Commission has allowed \$90,863 for rate case expense up to the filing of the appeal. Since the remand and for the reopening of the record, only prudently incurred rate case expense should be allowed. Staff takes no position on the final amount pending further development of the record.

ISSUE 5: What is the appropriate provision for appellate non-legal rate case expense?

POSITIONS:

UTILITY: The total rate case expense that should be allowed is \$229,399. The separation of rate case expense before and after remand is shown on Exhibit ____ (LC-1).

OPC: No position; however, the Citizens believe that the Commission should include adequate provision in its order to ensure that should there be any award of attorneys' fees by any appellate court, that FCWC does not recover rate case expense from the customers through rates for the same work done.

STAFF: The Commission has already been ordered to pay the utility's appellate attorneys' fees. Therefore, only prudently incurred appellate non-legal rate case expense should be allowed. Staff takes no position on the final amount pending further development of the record.

ISSUE 6: What is the appropriate revenue requirement?

POSITIONS:

UTILITY: The revenue requirement is subject to the resolution of other issues.

OPC: This is a fall-out number driven by Commission resolution of contested issues.

STAFF: The revenue requirement is subject to the resolution of other issues.

ISSUE 7: What are the appropriate wastewater rates for Florida Cities Water Company - North Fort Myers Wastewater Division?

POSITIONS:

UTILITY: The final rates are subject to the resolution of other issues.

OPC: No position.

STAFF: The final rates are subject to the resolution of other issues.

ISSUE 8: What is the appropriate amount by which rates should be reduced four years after the established effective date to reflect the removal of the amortized rate case expense as required by Section 367.0816, Florida Statutes?

POSITIONS:

UTILITY: The appropriate amount by which rates should be reduced is subject to the resolution of other issues.

OPC: No position.

STAFF: The appropriate amount by which rates should be reduced is subject to the resolution of other issues.

ISSUE 9: Should the utility be required to refund a portion of the revenues implemented pursuant to Order No. PSC-95-1360-FOF-SU, issued November 2, 1995?

POSITIONS:

UTILITY: The final amount, if any, is subject to the resolution of other issues.

OPC: This is a fall-out number driven by Commission resolution of contested issues.

STAFF: The final amount, if any, is subject to the resolution of other issues.

VIII. EXHIBIT LIST

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
<u>Direct</u>			
Michael Acosta	FCWC	MA-1	Page 6 of 7 of Waterway Estates Advanced Wastewater Treatment Plant Permit Application.
		MA-2	Design of Municipal Wastewater Treatment Plants, Manual of Practice No. 8, Vol. 1, Water Environmental Federation, pg. 74-74.
		MA-3	Letter: FDEP (Edwards) to FCWC (Overton) requiring submission of construction/expansion permit application, 11/9/92.
		MA-4	A copy of rule 62-600.405, FAC.
Thomas A. Cummings	FCWC	TAC-1	Preliminary Engineering Design Report Waterway Estates Wastewater Treatment Plant.

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
<u>Direct</u>			
Thomas A. Cummings	FCWC	TAC-2	Table 1-II and 1-III in the chapter entitled Wastewater Parameters of Significance to the Design Engineer of MOP-8.
Larry N. Coel	FCWC	LC-1	Rate Case Expense
Ted L. Bidy	OPC	TLB-1	FDEP Construction Permit DC36-237227 page 1 of 15.
		TLB-2	Operation Permit Application Form, Pages 2A-3 and 2A-6.
Robert J. Crouch	STAFF	RJC-1	Page 7 of University Physics, Seventh Edition
		RJC-2	DEP Permit Form A2
		RJC-3	Harvey Letter Dated July 30, 1992
<u>Rebuttal</u>			
Michael Acosta	FCWC	MA-5	DEP Permit application submitted 9/1/93.
		MA-6	FDEP Application, 5/18/89.
		MA-7	A copy of Rule 62-699.310-311, FAC.

Parties and Staff reserve the right to identify additional exhibits for the purpose of cross-examination.

IX. PROPOSED STIPULATIONS

It was agreed that the testimony of Harley W. Young would be taken on the afternoon of December 8, 1998.

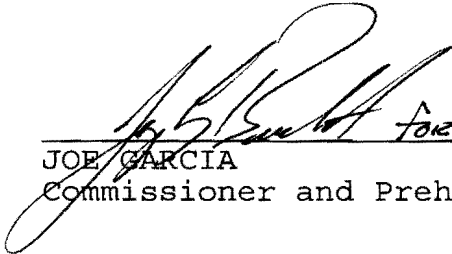
X. RULINGS

1. At the Prehearing Conference, the Office of the Public Counsel tendered an *ore tenus* motion for the Commission to accept its November 16, 1998 Prehearing Statement out of time. This motion was granted.

It is therefore,

ORDERED by Commissioner Joe Garcia, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

By ORDER of Commissioner Joe Garcia, as Prehearing Officer, this 24th Day of November, 1998.



JOE GARCIA
Commissioner and Prehearing Officer

(S E A L)

RRJ

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 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 this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or 3) 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 wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.