BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for rate increase and increase in service availability charges by Southern States Utilities, Inc. for Orange-Osceola Utilities, Inc. in Osceola County, and in Bradford, Brevard, Charlotte, Citrus, Clay, Collier, Duval, Highlands, Lake, Lee, Marion, Martin, Nassau, Orange, Pasco, Putnam, Seminole, St. Johns, St. Lucie, Volusia, and Washington Counties.	DOCKET NO. 950495-WS ORDER NO. PSC-99-0664-PCO-WS ISSUED: April 5, 1999

The following Commissioners participated in the disposition of this matter:

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

ORDER DENYING MOTION TO TRANSFER REMAND PROCEEDING, GRANTING PETITION FOR FORMAL HEARING CONCERNING SURCHARGES, AND APPROVING LIST OF ISSUES FOR CONSIDERATION ON REMAND

BY THE COMMISSION:

BACKGROUND

By Final Order No. PSC-96-1320-FOF-WS, issued October 30, 1996, the Commission disposed of the petition of Southern States Utilities, Inc., now Florida Water Services Corporation (Florida Water or utility) for a rate increase. On June 10, 1998, the First District Court of Appeal issued its opinion on review of the Final Order. Southern States Utils., Inc. v. FPSC, 714 So. 2d 1046 (Fla. 1st DCA 1998). Among other things, the Court reversed the Commission's decision to use annual average daily flows (AADF) in the numerator of the used and useful equation for eight wastewater treatment plants, and to use the lot count method in determining

used and useful percentages for the water distribution and wastewater collection systems serving mixed use areas. The Court remanded these issues to the Commission, giving us the discretion to reopen the record for the taking of evidence on these issues, if it exists. By Order No. PSC-99-0093-FOF-WS (First Order on Remand), issued January 15, 1999, by final agency action, we opted to reopen the record to take additional evidence on these discretionary issues. Accordingly, an administrative hearing has been scheduled to take place on June 23-25, 1999. Any potential surcharges that may result from our decision on remand concerning these discretionary issues will be determined after the hearing.

The Court also reversed the Commission on three other issues; including the used and useful adjustment for reuse facilities, the equity adjustment, and admitted errors. The Court did not provide us with the discretion to reopen the record on these issues. Therefore, we were required by law to correct these errors on remand. By Order No. PSC-99-0093-FOF-WS, by final agency action, we authorized the utility to implement increased rates to correct these errors.

Additionally, we proposed to authorize the utility to implement a surcharge related to these nondiscretionary issues, in order to provide the utility an opportunity to recover the revenue which it should have been authorized to collect had the Commission properly addressed these three issues in the Final Order. By the proposed surcharge methodology which we approved, the utility would have, among other things, used the same base facility surcharge of $.12 per month for water customers and $1.53 per month for wastewater customers for that portion of the 27 month appeal and remand period that each customer was served by the utility. This proposed surcharge methodology is set forth at pages 25-26 of the First Order on Remand. Moreover, we ordered that if protested, the issue of what action should be taken with regard to this surcharge shall be made an issue in the scheduled remand hearing.

At our March 16, 1999, agenda conference, we ruled upon a motion to transfer the remand proceeding, a petition for formal hearing concerning the above-described proposed surcharges, and a proposed list of issues to be considered on remand. At the request of the utility, at our March 30, 1999, agenda conference, we reconsidered our ruling upon the petition for formal hearing and the proposed list of issues to be considered on remand. By this Order, we dispose of all three of these issues.

MOTION TO TRANSFER REMAND PROCEEDING

On March 1, 1999, Florida Water filed a Motion to Transfer Remand Proceeding to the Division of Administrative Hearings (DOAH). In its motion, the utility accurately describes the Court's reversal of the Commission's final order, stating that, among other things:

> the [C]ourt reversed the Commission's use of average annual daily flows in the numerator of the calculation of used and useful for four wastewater treatment plants and the Commission's use of the lot count method in determining the level of used and useful investment in water transmission and distribution and wastewater collection facilities. The [C]ourt held that both of these determinations constituted departure from Commission policies that were not supported by record evidence. The [C]ourt authorized the Commission, on remand, to adduce evidence, if it can, to support the Commission's departure from established policies.

Further, with respect to the Commission's used and useful determinations, the utility states that it argued before the Court that:

> the Commission had departed from established Commission policy without adequate record support, that the new policy produced used and useful levels below those previously authorized by the Commission, and that the lowering of previously established used and useful investments was a departure from Commission precedent, in violation of the doctrine of administrative finality and constituted an unconstitutional confiscation of Florida Water's property.

The utility argues that with respect to both of the used and useful issues, the Court has placed the burden on the Commission to justify its departure from existing policy, and that "[i]n essence, the Commission on remand must justify -- to itself -- that there is adequate record support for new policies which it has already endorsed and that the application of these new policies would not unlawfully confiscate Florida Water's property."

According to the utility, prior to oral argument before the Court in the appeal of the final order in this docket and also in

the recent Florida Cities remand proceeding, Commissioners and staff expressed support for using annual average daily flows to supposedly match a wastewater treatment plant permit that states annual average daily flows on the permit. The utility argues that in light of these expressions of support and advocacy by the Commission on an issue which is at the heart of this remand proceeding, and because the Commission has been cast into conflicting roles of advocate and decision-maker, it is necessary and appropriate to transfer the remand stage of this proceeding to an independent Administrative Law Judge (ALJ) assigned by DOAH.

In support of its motion, Florida Water analogizes the procedural posture of the present case to Cherry Communications, Inc. v. Deason, 652 So. 2d 803 (Fla. 1995), although it admits that the procedural posture of the present case is not identical to Cherry. In Cherry, the Court held that an interexchange carrier's due process rights were violated when the Commission allowed its staff attorney, who had prosecuted a license revocation action, to also serve as legal advisor to the Commission during its post-hearing deliberation. The Court held that "because the prosecution was given special access to the deliberation, this adjudicatory process 'can hardly be characterized as an unbiased, critical review.'" Id. at 805 (citation omitted). The utility argues that here, because we has been placed in the conflicting roles of advocate and decision-maker, and in view of the prior expressions of support and advocacy for positions opposed by the utility made by Commissioners in public meetings and hearings, it is essential that the remand stage of this proceeding be transferred to DOAH for hearing and the entry of a recommended order which we would address and consider in entering a final order in this proceeding.

We preliminarily note that our role is not adversarial in nature. In a rate case such as the one filed in this docket under the authority of Section 367.081, Florida Statutes, our role is to consider the positions of all parties as contained in and supported by the record of the case, in order to "fix rates which are just, reasonable, compensatory, and not unfairly discriminatory." As noted by the utility, upon appellate review of the Commission's Final Order, the Court authorized the Commission to adduce evidence on remand, if it can, to support its departure from certain established policies.

By Order No. PSC-99-0093-FOF-WS at 13, we elected to reopen the record on remand, not to advocate for our prior policy decisions, but to take additional evidence on which flows should be

used in the numerator of the used and useful equation and on the applicability of the lot count methodology in mixed use areas. We looked upon the Court's directive as an opportunity to clarify our policy on these issues so that no improper precedent will be set. Id. The utility evidently considers our decision to clarify our policy through reopening the record as a means to advocate for the policy we adopted in the Final Order. In fact, regardless of what may have been stated "off the record," we will consider and weigh all of the evidence collected on remand to determine whether our initial actions were indeed appropriate and whether they are supported by record evidence.

With respect to the utility's reliance on the Cherry case as support for its request, we note that this proceeding on remand is not an enforcement proceeding. By Order No. PSC-95-0965-FOF-SU, issued August 8, 1995, in Docket No. 940963-SU (in re: Application for transfer of territory served by Tamiami Village Utility, Inc., to North Fort Myers Utility, Inc.), per curiam aff'd, 670 So. 2d 942 (Fla. 1st DCA 1996), the Commission found that "[t]he Cherry Court narrowly held that it is a violation of the due process clause of our state constitution for this Commission to permit the same staff counsel who acts as prosecutor in a license revocation proceeding to later participate in deliberations." Moreover, it should be emphasized that we have not been placed in conflicting roles of advocate and decision-maker in this proceeding. The parties, and not the Commission, are the advocates.[1] The Commission is the fact finder and decision/policy maker. For these reasons, the Cherry case is wholly inapplicable to the utility's request to transfer the proceeding to DOAH.

We additionally note that while Section 350.125, Florida Statutes, recognizes that ALJs are to be utilized to conduct hearings not assigned to members of the Commission, it gives no guidance on what sort of cases may be assigned to DOAH. Nevertheless, the Commission found in this very docket, by Order No. PSC-96-0500-FOF-WS, issued April 9, 1996, at page 6, that "[b]ecause ratemaking is primarily a legislative function and infused with policy making, it would be inefficient to send a rate

[1]Nor is the staff's role adversarial in nature. Staff's primary duty is to represent the public interest and see that all relevant facts and issues are clearly brought before the Commission for its consideration. See, e.g., South Fla. Natural Gas Co. v. FPSC, 534 So. 2d 695, 698 (Fla. 1988).

case to DOAH. As noted by the utility, the issues which will be heard on remand specifically concern Commission policy. Just as the Commission found to be true of the rate case hearing, to assign this remand proceeding to DOAH would be to effectively remove the Commission's expertise and special knowledge from being present at the hearing. See also Order No. PSC-96-0658-FOF-SU, issued May 10, 1996, in Docket No. 950615-SU (in re: Application for approval of reuse project plan and increase in wastewater rates in Pasco County by Aloha Utilities, Inc.).

Because the issues on remand concern policy making, which falls within our special expertise and responsibility, we believe that it would be inefficient to transfer this proceeding to DOAH. Accordingly, and for the foregoing reasons, Florida Water's Motion to Transfer Remand Proceeding to the Division of Administrative Hearings is denied.

PETITION FOR FORMAL HEARING CONCERNING PROPOSED SURCHARGES

On February 5, 1999, the Sugarmill Woods Civic Association, Inc. (Sugarmill Woods) timely filed a protest to the proposed agency action portion of Order No. PSC-99-0093-FOF-WS. The protest is styled as a petition for formal hearing, and complies with the procedural requirements of Rule 28-106.201, Florida Administrative Code.

With respect to whether its interests are substantially affected by our proposed decision concerning surcharges for the nondiscretionary issues, the petitioner points out that at page 21 of Order No. PSC-99-0093-FOF-WS, we recognized that "[b]ecause our decision on which surcharge option to require the utility to implement will affect the specific amount due from the customers, it will necessarily affect the substantial interests of the customers."

The petitioner further states that its substantial interests are affected because it is unlawfully and unconstitutionally deprived of its property. The petitioner argues that we proposed to approve surcharges that are based on a uniform rate structure, which is in direct opposition to the Court's decision on appeal. According to the petitioner, in its remand opinion, the Court minimally approved the Commission's use of the capband rate structure, having met petitioner's complaints of undue discrimination and an unlawful taking with the observation that this rate structure does not cause any customers to pay more than

seven percent subsidies to customers in other systems. The petitioner argues that the Court did not state that the capband rate structure would be judicially approved irrespective of the level of subsidies that were compelled from system to system, and it certainly did not approve the use of the uniform rate structure.

With respect to whether there are any disputed issues of material fact, in its petition, Sugarmill Woods disputes our finding that the proposed surcharge methodology "will be apportioned in such a manner that each affected customer will be held responsible for his or her pro-rata share." Order No. PSC-99-0093-FOF-WS at 25. According to the petitioner, this finding is not only factually incorrect, but dishonest. The surcharge revenues owing to the utility as a result of the nondiscretionary remand issues result from three issues; reuse, admitted errors in used and useful calculations, and equity adjustments. The petitioner claims that of the three, only the equity adjustment has any revenue implication on it's water and wastewater systems. The petitioner's prospective rate increases are $.13 per 10,000 gallons, which is a less than one percent increase, for water, and $.59 for 6,000 gallons, which is slightly more than a two percent increase, for wastewater. The petitioner argues that these are the comparative amounts or percentages that its customers should be required to pay as surcharges for the approximately 27 months that they were being undercharged as a result of the equity adjustment errors.

According to the petitioner, surcharges must be based only on the revenue impact of the Court's reversals that directly impacted the stand-alone revenue requirement of each water and wastewater system, or, at most, the rate impact of a given system's stand-alone rate increase from a reversal item as flowed through the capband rate structure, utilizing the same methodology approved by the Court. The petitioner demands that we withdraw approval of the proposed surcharges and approve surcharges that are based solely upon either the petitioner's stand-alone revenue increase as a result only of the equity adjustments compelled by the Court's reversal, or surcharges based upon the stand-alone revenue increases flowing from the equity adjustment and incorporated in the Court-approved capband rate structure.

On February 12, 1999, Florida Water filed an answer to Sugarmill Woods' petition for formal hearing, pursuant to Rule 28-106.203, Florida Administrative Code. According to the utility, because the petitioner failed to allege a disputed issue of

material fact, the legal issues raised in the petition should be addressed in a Section 120.57(2), Florida Statutes, informal proceeding.

Florida Water argues that Sugarmill Woods' petition should be addressed in the same manner in which the Commission resolved the Office of Public Counsel's (OPC) petition for formal administrative hearing in the GTE remand proceeding in Docket No. 920188-TL. In that remand proceeding, following the reversal and remand by the Florida Supreme Court in GTE Florida Inc. v. Clark, 668 So. 2d 971 (Fla. 1996), the Commission issued a proposed agency action order requiring surcharges. OPC protested the order and requested a Section 120.57(1) formal hearing. GTE filed a motion to dismiss OPC's protest, which the Commission denied. However, by Order No. PSC-96-1021-FOF-TL, issued August 7, 1996, the Commission set the matter for a Section 120.57(2) informal hearing upon finding that there did not appear to be any disputed issues of material fact, but that there did appear to be disputed issues of law, especially with regard to the appropriate interpretation of the Court's decision.

The utility argues that as in the GTE remand proceeding, Sugarmill Woods' petition fails to present any disputed issue of material fact and raises only questions of law by alleging that the Commission has unlawfully utilized a uniform rate structure to collect surcharges in violation of the Court's decision on appeal and by criticizing the Commission for failing to impose surcharges pursuant to the capband rate structure. According to the utility, addressing the legal issues raised by Sugarmill Woods through an expedited Section 120.57(2) proceeding will benefit all ratepayers by limiting the interest on surcharges which continues to accrue.

We note that Florida Water does not dispute that Sugarmill Woods' substantial interests are affected by the proposed action which we took concerning the calculation of the surcharge. As noted by Sugarmill Woods, our decision on which surcharge option to require the utility to implement will affect the specific amount due from the customers. Because its substantial interests will be affected by our decision, pursuant to Section 120.569, Florida Statutes, we must afford Sugarmill Woods its right to a hearing on the matter.

The question remaining is whether Sugarmill Woods should be afforded a formal hearing, as requested by the petition, or an informal hearing, as argued by the utility. At the March 30, 1999,

agenda conference, counsel for Sugarmill Woods and for the utility orally proposed to stipulate that there are no disputed issues of material fact at issue. Counsel for the City of Marco Island (City) expressed agreement with the proposed stipulation, as well. However, the proposed stipulation was not submitted in writing. Not all parties were present at the agenda conference. Consequently, not all parties were privy to the orally proposed stipulation.

Section 120.569, Florida Statutes, requires that unless waived by all parties, a Section 120.57(1) formal proceeding applies whenever the proceeding involves a disputed issue of material fact, and that unless otherwise agreed, a Section 120.57(2) informal proceeding applies in all other cases. We disagree that Sugarmill Woods' petition fails to present any disputed issue of material fact. At issue here is the methodology by which surcharges should be collected. As evidenced by the First Order on Remand, there are several methodologies that could potentially be used to calculate the surcharges, from which we must choose.

This determination differs from the surcharge determination that the Commission made in the GTE case. In GTE, OPC's protest concerned whether local rates should have been surcharged, and whether GTE should have been required to surcharge both current and former customers. Order No. PSC-96-1021-FOF-TL at 3. In that case, the utility proposed, and the Commission approved, a one-time surcharge of $8.65 per access line, applicable to those subscribers of local exchange access services, including flat and measured residential and business access lines, network access registers, semipublic coin lines, PATS lines, and shared tenant service trunks, who received service during the period of time that incorrect rates were being charged. Orders Nos. PSC-96-0667-FOF-TL, issued May 17, 1996, and PSC-96-1021-FOF-TL. No other methodology for calculating the surcharge was proposed or considered. Therefore, unlike in the instant case, the surcharge methodology by which the surcharge was to be calculated was not a disputed issue of material fact.

Which surcharge methodology we choose to authorize in this case is a mixed question of law and fact. Whether we must authorize the collection of surcharges as calculated through the capband rate structure is, as the utility argues, a disputed issue of law. This is a threshold issue which may drive our decision on which surcharge methodology to authorize. However, if we determine, as we proposed to do by the First Order on Remand, that

we are not bound by law to authorize the utility to calculate the surcharge pursuant to the capband rate structure, the issue becomes which surcharge methodology should be authorized. This is a disputed issue of material fact. Various factual matters should be considered in determining which methodology to choose, including, but not necessarily limited to: the cumulative amount of surcharge by service area; how the utility should be allowed to recover the uncollectible surcharge amount; whether customers who left the system should be charged; which methodology should be used to calculate customer specific surcharges; and whether interest should be allowed and if so, how it should be calculated.

We could conceivably set for an informal Section 120.57(2) hearing the threshold issue of whether we must authorize the collection of surcharges as calculated through the capband rate structure. If we determine, after the preliminary informal hearing, that we are not legally bound to authorize that methodology, which methodology should be used to calculate the surcharge could then be included as an issue for the formal hearing. However, all direct testimony for the formal hearing on remand is due to be filed on April 20, 1999. Parties and staff need to know now whether to proffer evidence on surcharge methodologies in their prefiled testimonies and/or exhibits. Due to these time constraints, and because we will conduct a formal hearing on the remand issues regardless of whether the issue of surcharge methodologies is included therein, we find that rather than scheduling an additional, informal hearing on the legal surcharge issue, which may necessitate the rescheduling of prehearing activities and potentially the formal hearing, it would be more time- and cost-efficient to include surcharge methodologies as an issue to be heard at the formal hearing already scheduled. The legal issue(s) involved can, of course, be briefed by the parties after the hearing, and we will thus consider them in making our post-hearing decision.

Due to the above-mentioned time constraints, and for the foregoing reasons, we find it appropriate to grant Sugarmill Woods' petition for formal hearing, as filed. Pursuant to Order No. PSC-99-0093-FOF-WS, because the issue of what action should be taken with regard to surcharges has been protested, it shall be made an issue in the scheduled remand hearing.

LIST OF ISSUES TO BE CONSIDERED ON REMAND

On February 19, 1999, our staff met with the parties in an effort to identify the issues for the hearing on remand for the purposes of assisting all parties and staff in focusing on the appropriate issues when preparing testimony. As previously stated, direct testimony is due to be filed on behalf of all parties and staff on April 20, 1999. Because there was some disagreement as to what issues should be considered on remand, it was suggested that either the Prehearing Officer or the Commission establish the issues. The Prehearing Officer agreed that it would be more expedient to bring this issue to the full Commission for consideration.

At the meeting, staff provided a preliminary list of issues, and requested that the parties provide their suggested changes in writing. After the meeting, in response to staff's request, the utility, the City, and OPC provided responses to staff's proposed issues list.

The following is a discussion of the parties' suggestions regarding the issues.

The City suggests that Issue 1 be worded as follows:

ISSUE 1: What method should be used to calculate used and useful plant for Florida Water Service Corporation's Buenaventura Lakes, Citrus Park, Marco Island and Marco Shores wastewater treatment plants, and what is the appropriate used and useful percentage?

OPC suggests that Issue 1 be worded in substantially the same way, as follows:

ISSUE 1: What method should be used to calculate the used and useful percentages serving Buenaventura Lakes, Citrus Park, Leisure Lakes, Marco Island and Marco Shores, and what are the appropriate used and useful percentages?

We find that the issue, as worded both by the City and by OPC, is too broad. The reviewing Court expressly directed us to "give a reasonable explanation, if [we] 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." Southern States Utils., Inc. v. FPSC, 714 So. 2d at 1056 (citing Florida Cities

Water Co. v. FPSC, 705 So. 2d 620, 626 (Fla. 1st DCA 1998). The Court concluded that "[w]hile [it did] not rule out the possibility that evidence can be adduced on remand to show that calculating a used and useful fraction by comparing average annual daily flows to plant capacity as stated on operating permits is preferable to the PSC's prior practice, . . . remand for the taking of such evidence (if it exists) is necessary." Id. Staff's suggested language for Issue 1 is "what flows should be used in the numerator of the used and useful equation to calculate used and useful plant for Florida Water Service Corporation's Buenaventura Lakes, Citrus Park, Leisure Lakes, Marco Island, and Marco Shores wastewater treatment plants?" We find that the issue, as suggested by staff, is more closely tailored to comply with the Court's directive.

Issue 2, as approved below, is worded as suggested by the City in response to staff's request for written input into the phrasing of issues, except that the last phrase was suggested by the City in singular form (i.e., "and what is the appropriate used and useful percentage"), and staff recommends the use of the plural form, as suggested by OPC. OPC suggested very similar language for Issue 2, as follows:

ISSUE 2: What method should be used to calculate the used and useful percentages for the water and wastewater lines serving mixed use areas, and what are the appropriate used and useful percentages?

Because the language as suggested by the City more specifically defines the lines as being the water distribution and wastewater collection systems, its suggested language for this issue is approved with the modification that water transmission lines be included therein.

Florida Water argues that Issues 1 and 2 should be worded as follow:

ISSUE 1: What grounds justify departure from Commission policy of using average daily flow in the peak month in the calculation of the level of used and useful investment for Florida Water Services Corporation's Buenaventura Lakes, Citrus Park, Marco Island and Marco Shores wastewater treatment plants?

ISSUE 2: What grounds justify departure from Commission policy of rejecting the use of the lot count method for calculating

> the level of Florida Water Services Corporation's used and useful investment in water transmission and distribution and wastewater collection lines for areas served by meters larger than 5/8" x 3/4" meters?

Florida Water submits that the wording of these two issues, as originally proposed by staff, ignores the holding of the Court in Southern States Utils. v. FPSC, 714 So. 2d 1046 (Fla. 1st DCA 1998). This argument maintains its relevancy with respect to Issues 1 and 2 as approved below. The utility points out that the Court held that the Commission unlawfully departed from its established policy by using AADF in the maximum month in the used and useful calculation and by using the lot count method to calculate used and useful for water transmission and distribution lines and wastewater collection lines serving mixed use areas. Because the Court remanded these issues to the Commission to give us an opportunity to give a reasonable explanation on remand and adduce supporting evidence, if we can, to justify these policy shifts, the utility argues that these two issues should be worded to respond to the Court's holdings.

We agree with the utility's characterizations of the Court's holdings concerning these two issues. However, we believe that Issues 1 and 2, as approved below, are responsive to the Court's holdings on these issues. It is not necessary to expressly state what the Court held in the wording of the issues in order to be responsive to the Court's directives. The issues concern the methodologies that should be used in the used and useful calculations. Regardless of how the issues are phrased, if we choose to use a methodology which represents what the Court has found to be a policy shift, we must give a reasonable explanation therefor on remand, which explanation must be supported by the record. Parties will, of course, be given an opportunity to brief the issues after the hearing, and can provide their legal opinions at that time concerning whether any particular methodology can lawfully be used based on the Court's opinion and upon the evidence that will have been adduced at hearing.

Florida Water and OPC concur with our staff's wording for proposed Issues 3-11. The City substantially concurs with staff's wording for these proposed issues, as well. Issue 3, as approved below, is worded as suggested by the City, to change the word "provision," as originally suggested by staff, to "amount," which does not change the meaning of the issue. Issues 4-11, as approved below, are worded as initially proposed by staff.

Finally, Florida Water submits that the following additional issue must be resolved on remand:

ADDITIONAL ISSUE: If the used and useful calculations result in used and useful percentages lower than those allowed in previous rate cases, which percentages should be used?

The utility argues that in appealing the Final Order, it raised both evidentiary and constitutional infirmities in the Commission's conclusions with respect to the use of AADF in calculating used and useful for wastewater treatment plants and the use of the lot count method for calculating used and useful for water transmission and distribution and wastewater collection lines. With respect to both issues, the Court agreed with the utility that the record lacked competent substantial evidence to support the Commission's policy shift and remanded both issues for further proceedings. According to the utility, having reversed on the evidentiary deficiencies undermining the Commission's used and useful determinations, the Court found it unnecessary to address any of the constitutional questions that the utility raised. Southern States Utils., Inc. v. FPSC, 714 So. 2d at 1059.

Florida Water asserts that on remand, we must address the issue of whether an existing level of used and useful investment may be lowered by importing a new used and useful methodology. The utility states that this issue raises questions of fact, policy and constitutional law which are integrally tied to the used and useful determinations which we will make on remand. According to the utility, by ignoring this issue, we invite a piecemeal approach to the issues on remand, potentially requiring additional appeals, Commission hearings, and unnecessary additional expenditures.

We disagree that this additional issue should be included as an issue on remand in this docket. The Court gave us specific authority to reopen the record to adduce additional evidence, if we can, on Issues 1 and 2 only. All other issues as approved below are fallout issues from Issues 1 and 2 (with the exception of the surcharge issues contained in Part II, below, which stem from our duty, derived from case law, to allow the utility an opportunity to collect those revenues which it would have collected had we not erred in issuing our final action.) The Court did not provide us with the authority to resolve the utility's suggested additional

issue.[2] Nor did the Court state why it found it unnecessary to rule upon this or any of the constitutional questions raised by the utility on appeal of the Final Order.

We decline to rule upon this, or any, additional issue which the Court has not specifically provided us the authority to rule upon. Moreover, resolution of this suggested additional issue requires the interpretation of constitutional law; specifically the taking of property without just compensation. This Commission is a creature of statute, and Chapter 367 does not provide us the authority to resolve such constitutional questions. The appellate court, sitting in its review capacity, is the proper forum "to resolve this type of constitutional challenge because [it has] the power to . . . require any modifications in the administrative decision-making process necessary to render the final agency order constitutional." Key Haven Associated Enters., Inc. V. Board of Trustees of Internal Improvement Trust Fund, 427 So. 2d 153, 158 (Fla. 1982).

Upon consideration of the foregoing, and in order to put all parties on notice of what the issues are in advance of the due date for the prefiling of direct testimony, we approve the following issues for inclusion in the Prehearing Order to be considered at the formal hearing scheduled to take place on remand in this docket:

PART I

ISSUE 1: What flows should be used in the numerator of the used and useful equation to calculate used and useful plant for Florida Water Service Corporation's Buenaventura Lakes, Citrus Park, Leisure Lakes, Marco Island, and Marco Shores wastewater treatment plants?[3]

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[2]"A remand phrased in language which limits the issues for determination will preclude consideration of new matters affecting the cause." City of Palm Bay v. DOT, 588 So. 2d 624, 627 (Fla. 1st DCA 1991) (citations omitted).

[3]We have included the Leisure Lakes wastewater treatment plant in this issue upon determining that by the Final Order, we calculated used and useful plant based on maximum month average daily flows when we intended to calculate it based on AADF because

ISSUE 2: In mixed use areas, for the water transmission and distribution and the wastewater collection systems, what method should be used to calculate used and useful transmission, distribution, and collection facilities, and what are the appropriate used and useful percentages?

ISSUE 3: What is the appropriate amount for reconsideration, appellate, and remand rate case expense for this proceeding?

ISSUE 4: What are the final water and wastewater revenue requirements?

ISSUE 5: What are the water and wastewater rates for Florida Water Services Corporation?

ISSUE 6: What is the 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?

ISSUE 7: Should any portion of the interim increase granted be refunded, and if so, what is the amount?

ISSUE 8: Based on the changes to the used and useful percentages, what are the allowance for funds prudently invested charges, and are any refunds of the charges collected required?

PART II

ISSUE 9: What is the appropriate action that should be taken with regard to surcharges?

ISSUE 10: Should the utility be allowed to collect interest on the surcharges, and, if so, how should interest be calculated?

ISSUE 11: Should the utility be required to file tariff sheets and a proposed customer notice reflecting approved surcharges?

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the Department of Environmental Protection permitted this plant using AADF.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Water Service Corporation's Motion to Transfer Remand Proceeding to the Division of Administrative Hearings is hereby denied. It is further

ORDERED that Sugarmill Woods Civic Association, Inc.'s, Petition for Formal Hearing concerning the proposed surcharges is hereby granted. It is further

ORDERED that the list of issues to be considered on remand as set forth at pages 15-16 of this Order is hereby approved.

By ORDER of the Florida Public Service Commission this 5th day of April, 1999.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

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 25-22.0376, 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.