BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Interim and Permanent Rate Increase in Franklin County, Florida by ST. GEORGE ISLAND UTILITY COMPANY, LTD.	)	DOCKET NO. 940109-WU Filed: August 29, 1994

POST-HEARING MEMORANDUM OF LAW
OF ST. GEORGE ISLAND UTILITY COMPANY, LTD.

The Petitioner St. George Island Utility Company, Ltd. submits this post-hearing memorandum of law in accordance with Rule 25-22.056, Florida Administrative Code. The only issue addressed in this memorandum is "ISSUE 2: Has St. George accurately stated the original cost of the water system." As part of its post-hearing submission, Petitioner has also filed "Issue Statements" and "Proposed Findings of Fact." Petitioner offers the Issue Statements and Proposed Findings of Fact as additional support for its position on Issue 2, and will rely on the Issue Statements and Proposed Findings of Fact with regard to all other issues.

References

The Petitioner, St. George Island Utility Company, Ltd. will be referenced as "SGIU."

The Florida Public Service Commission will be referenced as "the Commission."

References to the transcript of the final hearing shall be designated "Tr." followed by the volume and page number. For example the opening of the hearing would be referenced "Tr. v.1, p.5."

ARGUMENTS

I.

The Commission is Foreclosed Under the Doctrines of Res Judicata or Collateral Estoppel from Revisiting the Issue of Original Cost.

The issue of the original cost of the SGIU plant in service was fully litigated in the last SGIU rate case (Docket No. 871177-WU). Indeed, the issue of original cost was the primary issue involved in the proceeding. In its Final Order, the Commission determined that the original cost of SGIU plant in service was $2,167,138 as of the 1987 test year. In re: Petition of St. George Island Utility Company, Ltd., Docket No. 871177-WU, Order No. 21122 (Florida Public Service Commission 1989). The issue of original cost presented in the prior rate case is identical to the issue of original cost presented in this proceeding. The same parties that were involved in that proceeding are involved in this proceeding. No evidence that was not offered in the prior proceeding, or that with reasonable diligence could not have been offered in the prior proceeding, has been offered in this proceeding. The doctrines of res judicata or collateral estoppel therefore bar the relitigation of the issue here.

It has long been established in Florida that the doctrines of res judicata and collateral estoppel apply to administrative agency decisions that are made pursuant to the agency's quasi-judicial decision making power. Florida Export Tobacco Co. v. Department of Revenue, 510 So. 2d 936 (Fla. 1st DCA 1987), rev. den. 519 So. 2d 986; Flesche v. Interstate Warehouse, 411 So. 2d 919 (Fla. 1st DCA 1982); Jet Air Freight v. Jet Air Freight Delivery, Inc., 261 So. 2d 35 (Fla. 3d DCA 1972). In Jet Air Freight the Court stated:

> Where an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it, as to which parties have had an opportunity to litigate, the court will apply res judicata or collateral estoppel to enforce repose.

261 So. 2d at p. 40, citing Metropolitan Dade County Board of County Commissioners v. Rockmatt Corp., 231 So. 2d 41 (1970).

It is sometimes inappropriate to invoke res judicata or collateral estoppel in administrative proceedings. In Thompson v. Department of Environmental Regulation, 511 So. 2d 989, 991 (Fla. 1987), our Supreme Court quoted from Professor Davis's *Administrative Law Treatise*, and noted that there are frequently good reasons for not invoking the doctrines in administrative proceedings. Changing policies, fluid facts, and the fact that parties are sometimes not represented by counsel were all cited as reasons why agencies should be circumspect about invoking the doctrine. The Court reversed a final order of the then Department of Environmental Regulation which had denied a dredge and fill permit application on the grounds that an application

for a similar project had been denied before. The Court noted that the applicant had made changes in its application and conducted a new study that was not available when the original application was denied, and held that it was inappropriate to prevent the applicant from having an opportunity to establish its entitlement to a permit.

Accordingly, courts and administrative agencies have not invoked the doctrine where circumstances litigated in the first proceeding have changed [Coral Reef Nurseries, Inc. v. Babcock, 410 So. 2d 648, 655 (Fla. 3d DCA 1982)]; when determinations are made by separate and distinct governmental units [Newberry v. Florida Department of Law Enforcement, 585 So. 2d 500, 501 (Fla. 3d DCA 1991)]; when the prior determination was merely dicta [Greynolds Park Manor v. Department of Health and Rehabilitative Services, 496 So. 2d 164, 166 (Fla 1st DCA 1986)]; where issues or parties are not identical [Walley v. Florida Game and Fresh Water Fish Commission, 501 So. 2d 671, 674 (Fla. 1st DCA 1987)]; or where, as in the case of an injured employee in a workers' compensation proceeding, invoking the doctrine would result in injustice. Flesche v. Interstate Warehouse, supra.

This is not to say that invoking the doctrine is a matter merely of discretion. Where the elements that give rise to the doctrines are present, it is error not to invoke them. DeBusk v. Smith, 397 So. 2d 327 (Fla. 1980); Brown v. Department of Professional Regulation, 602 So. 2d 1337 (Fla. 1st DCA 1992); Florida Export Tobacco Co. v. Department of Revenue, supra.;

Rimes and Lannon, "Res Judicata and Collateral Estoppel in Administrative Proceedings," The Florida Bar Journal 41 (April, 1988).

The Commission has had occasion to invoke res judicata and collateral estoppel principles in proceedings before it. It has expressed great reluctance to invoke the doctrines, and has specifically declined to do so when it was clear that there were changed circumstances that demonstrated that the prior decision was wrong [In re: Application of Miles Grant Water and Sewer Co., 88 FPSC 9:445, 9:468-69, Order No. 20066 (FPSC 1988)]; where a clear error was made in the prior proceeding [In re: Investigation of Rates of Sunshine Utilities, 90 FPSC 5:264, 5:276-77, Order No. 22969 (FPSC 1990)]; where a petition for a rate increase is based upon a different projected test year than was a prior petition [In re: Petition of Florida Power and Light Co., 1982 FPSC 418, Order No. 10948 (FPSC 1982)]; where policies were continuously shifting [In re: Resolution by City of Plant City, 1988-7 FPSC 297, Order No. 19732 (FPSC 1988)]; or where the doctrines were invoked in an effort to prevent discovery [In re: Application of Southern States Utilities, Inc., 93 FPSC 2:249, Order No. PSC-93-0186-PCO-WS (FPSC 1993)].

While the Commission has held that it is not compelled to invoke the doctrines in rate cases on account of public policy concerns, it has in each instance that it has declined to invoke them identified important reasons why the doctrines should not apply. The Commission has invoked the doctrines despite the

existence of important public policy issues under appropriate circumstances. In re: Petition of the Florida Industrial Power Users Group, 89-12 FPSC 40, Order No. 22268 (FPSC 1989).

None of those reasons that would render it inappropriate to apply res judicata or collateral estoppel principles apply in the instant proceeding. There is an absolute identity of the issue in this proceeding with the issue resolved in Order No. 21122. While there have been changes in SGIU's original cost on account of plant additions made since the 1987 test year, no issues have been raised in this proceeding regarding those additions. Instead Public Counsel and the Intervenor are seeking to relitigate the precise issues litigated in the prior docket--the rate base as of sometime in 1979, or as of 1987. These are the same parties who sought to litigate the same issues in the prior docket.

There have been no changes in the facts. The determination in the prior docket was made with full knowledge that SGIU's original cost records had been lost. The Commission knew that there had been audited financial statements reflecting plant investment. The evidence that has been placed in evidence in this proceeding was, with the exception of annual reports, the same as evidence that has been placed before the Commission in this proceeding.

There have been no changes in Commission policy, and no evidence presented in the record of this proceeding that would justify any change in policy.

Despite the importance of the public policy issues relating to utility rates, there is no justification for not invoking res judicata and collateral estoppel to prevent the relitigation of the original cost issue in this proceeding.

ARGUMENTS

II.

The Evidence Presented in This Proceeding Does Not Demonstrate that The Commission Determination of Original Cost in the Prior Proceeding was Erroneous, and the Evidence Supports a Determination that the Prior Determination was Correct.

None of the evidence presented by Public Counsel in this proceeding would justify any change in the Commission's determination of original cost as set out in Order No. 21122. The determination in Order No. 21122 was based upon an original cost study undertaken by Wayne H. Coloney. The Commission did not accept the study outright. Indeed it made several specific adjustments and then applied an 84% factor to adjust all of the studies conclusions downward by that factor. Public Counsel and Intervenors have offered nothing to undercut the original cost study as adjusted by the Commission.

Evidence Public Counsel and Intervenor have presented includes the 1978 "Billy Bishop Appraisal" that was received in evidence as Exhibit 6. The Bishop appraisal, far from being inconsistent with the Coloney study; however, demonstrates that the Coloney study erred on the side of stating original cost too

low (Tr. v. 2, pp. 200-01). Mr. Coloney testified that if he had had the 1978 Bishop appraisal his original cost estimates would have been higher because he believed that some improvements that the Bishop study indicates were not in place when the study was undertaken were in place by then (Tr. v. 2, pp. 202-03). Accordingly, he attached lower costs to the improvements than should have been used (Tr. v. 2, p. 202). Mr. Coloney also testified that his original cost studies are accurate to within a factor of ten percent (Tr. v. 2, p. 197). The Commission has already reduced Mr. Coloney's conclusions regarding original cost by a factor of 84 percent, and it is apparent that his appraisal erred on the low side.

Public Counsel and Intervenor provided a 1979 financial statement of Leisure Properties, Ltd. which shows, under the label "investment in utility" a figure that was less than the appraisal conducted by Bishop a year and a half before, less than an appraisal conducted in 1976, and less than was determined based upon an Internal Revenue Service audit. However, it is clear that the 1979 financial statement did not include all of the hard costs associated with developing the utility and included none of the soft costs (Tr. v. 11, pp. 1579-83). Ms. Withers, SGIU's accountant, testified that none of the costs of improvements undertaken by SGIU after the sale of the utility but before the end of 1979 were included, and further testified that NARUC standards were not applied in assessing investment in utility in the 1979 statement (Tr. v. 11, pp. 1582-83).

Furthermore, since Leisure Properties was not a utility, but instead was a land development company, there is no reason to believe that any accountant reviewing the statement would have applied NARUC standards (Tr. v. 11, p. 1583).

After the 1979 Leisure Properties financial statement was completed and audited, the Internal Revenue Service conducted a simultaneous audit of Leisure and SGIU, and determined that depreciable assets which equate to original cost were nearly three times the entry on Leisure's financial statement (Tr. v. 11, p. 1584). IRS did include all hard costs and soft costs in its analysis of utility assets (Tr. v. 11, p. 1585).

Public Counsel presented annual statements that SGIU filed with the Commission from 1980 until 1987. While these statements do include entries for investment in plant, it is clear that these entries did not include soft costs relating to plant investment (Tr. v. 11, pp. 1570, 1589). What they did include were hard costs associated with invoices paid to third party vendors. NARUC standards allow hard costs not paid to third party vendors to be included in original cost as well as soft costs.

None of the evidence offered in this proceeding in an effort to discredit the Commission's determination of SGIU's original cost in 1989 creditably accomplishes that. It is clear that the Commission's determination in Order No. 21122 was conservative and that it was based upon competent, substantial evidence--the best evidence that was then or that is now available with regard

to the original cost of SGIU plant--and that there is no competent evidence to justify revisiting the determination.

CONCLUSION

The Commission should base its analysis of original cost on its determination in Order No. 21122 as adjusted by depreciation and plant investment between 1987 and the end of the 1992 test year.

Respectfully submitted this 29th day of August, 1994.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Robert Pierson and Suzanne Summerlin, Florida Public Service Commission, 101 East Gaines Street, Tallahassee, Florida 32399-0863; and to Harold McLean, Associate Public Counsel, Claude Pepper Building, Room 812, 111 West Madison Street, Tallahassee, Florida 32399-1400; and a copy has been furnished by U.S. Mail to Barbara Sanders, St. George Island Water and Sewer District, Post Office Box 157, Apalachicola, Florida 32320 this 29th day of August, 1994.

Attorney