FLORIDA PUBLIC SERVICE COMMISSION
Capital Circle Office Center • 2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

# M E M O R A N D U M

DECEMBER 4, 1997

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (JABER, REYES, OTTINOT)
DIVISION OF WATER AND WASTEWATER (WILLIS, RENDELL, CHASE, VONFOSSEN) RUF

RE: DOCKET NO. 920199-WS - APPLICATION FOR RATE INCREASE IN BREVARD, CHARLOTTE/LEE, CITRUS, CLAY, DUVAL, HIGHLANDS, LAKE, MARION, MARTIN, NASSAU, ORANGE, OSCEOLA, PASCO, PUTNAM, SEMINOLE, VOLUSIA, AND WASHINGTON COUNTIES BY SOUTHERN STATES UTILITIES, INC.; COLLIER COUNTY BY MARCO SHORES UTILITIES (DELTONA); HERNANDO COUNTY BY SPRING HILL UTILITIES (DELTONA); AND VOLUSIA COUNTY BY DELTONA LAKES UTILITIES (DELTONA).

AGENDA: DECEMBER 15, 1997 - SPECIAL AGENDA - DECISION ON REMAND PARTICIPATION IS DEPENDENT UPON VOTE IN ISSUE NO. 2

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE LOCATION: I:\PSC\LEG\WP\920199RS.RCM

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## ABBREVIATIONS

The following is a list of abbreviations used in this recommendation:

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| FPSC or Commission | Florida Public Service Commission |
| FWSC, SSU or Utility | Florida Water Services Corporation (formerly Southern States Utilities, Inc.) |
| OPC | Office of Public Counsel |
| Associations | Senator Ginny Brown-Waite, Morty Miller, Spring Hill Civic Association, Inc., Sugarmill Manor, Inc., Cypress Village Property Owners Association, Inc., Harbor Woods Civic Association, Inc., Hidden Hills Country Club Homeowners Association, Inc., Citrus County, Amelia Island Community Association, Resident Condominium, Residence Property Owners Association, Amelia Surf and Racquet Property Owners Association and Sandpiper Association |
| Sugarmill Woods | Sugarmill Woods Civic Association |
| Keystone/Marion | City of Keystone Heights and the Marion Oaks Civic Association |
| Derouin, et al. | Joseph J. Derouin, Victoria M. Derouin, Peter H. Heeschen, Elizabeth A. Riordan, Carvell Simpson and Edward Slezak |
| First District or Court | First District Court of Appeal |

## CASE BACKGROUND

On May 11, 1992, FWSC filed an application to increase the rates and charges for 127 of its water and wastewater service areas regulated by this Commission. By Order No. PSC-93-0423-FOF-WS, issued March 22, 1993, the Commission approved an increase in the utility's final rates and charges, basing the rates on a uniform rate structure.

On April 6, 1995, Order No. PSC-93-0423-FOF-WS was reversed in part and affirmed in part by the First District. Citrus County v. Southern States Utils., Inc., 656 So. 2d 1307 (Fla. 1st DCA 1995). On October 19, 1995, Order No. PSC-95-1292-FOF-WS was issued, Order Complying with Mandate, Requiring Refund, and Disposing of Joint Petition (decision on remand). By that Order, FWSC was ordered to implement a modified stand-alone rate structure, develop rates based on a water benchmark of $52.00 and a wastewater benchmark of $65.00, and to refund accordingly. On November 3, 1995, FWSC filed a Motion for Reconsideration of Order No. PSC-95-1292-FOF-WS. At the February 20, 1996, agenda conference, the Commission voted, inter alia, to deny FWSC's motion for reconsideration.

On February 29, 1996, subsequent to the Commission's vote on the utility's motion for reconsideration but prior to the issuance of the order memorializing the vote, the Florida Supreme Court issued its opinion in GTE Florida, Inc. v. Clark, 668 So. 2d 971 (Fla. 1996). By Order No. PSC-96-0406-FOF-WS, issued March 21, 1996, after finding that the GTE decision may have an impact on the decision in this case, the Commission voted to reconsider on its own motion, the entire decision on remand.

By Order No. PSC-96-1046-FOF-WS, issued August 14, 1996, the Commission affirmed its earlier determination that FWSC was required to implement the modified stand-alone rate structure and to make refunds to customers. However, the Commission determined that FWSC could not impose a surcharge on those customers who paid less under the uniform rate structure. The utility was ordered to make refunds (within 90 days of the issuance of the order) to its customers for the period between the implementation of final rates in September, 1993, and the date that interim rates were placed into effect in Docket No. 950495-WS. This decision was appealed by the utility to the First District. On June 17, 1997, the First District issued its opinion in Southern States Utils., Inc. v. Florida Public Service Comm'n, reversing the Commission's order implementing the remand of the Citrus County decision. 22 Fla. L. Weekly D1492 (Fla. 1st DCA 1997).

By Order No. PSC-97-1033-PCO-WS, issued August 27, 1997, the Commission required FWSC to provide an exact calculation by service area of the potential refund and surcharge amounts with and without interest as of June 30, 1997. By that Order, the Commission also allowed all parties to file briefs on the appropriate action the Commission should take in light of the Southern States decision. By Order No. PSC-97-1290-PCO-WS, issued October 17, 1997, the Commission required FWSC to provide notice by October 22, 1997 to all affected customers of the Southern States decision and its potential impact. The notice provided that affected customers could provide written comments and letters concerning their views on what action the Commission should take. Further, the customers were given the Commission's Division of Consumer Affairs' 1-800 phone number. Order No. PSC-97-1290-PCO-WS also established the new deadline for filing briefs as November 5, 1997. On November 5, 1997, the parties timely filed their briefs.

On November 21, 1997, Charlotte County filed a petition to intervene. On December 2, 1997, Best Western Deltona Inn, Florida United Methodist Children's Home, Inc., and Sugar Mill Association, Inc., filed their petitions to intervene. All of the petitions to intervene will be discussed further in Issue 1.

On November 26, 1997, Charlotte County filed a Motion for Continuance or Request for Deferral, wherein it requests that this proceeding be continued until Charlotte County is provided the opportunity to review all the facts and ascertain all the positions in this case and until the Circuit Court resolves the St. Jude's Catholic Church v. Florida Public Service Commission case. The time for filing a response to the motion had not expired as of the date of filing this recommendation. Staff has not included this issue in the recommendation separately but will be prepared to discuss it at the Agenda Conference.

This recommendation relates to what action the Commission should take in light of the Southern States decision.

## DISCUSSION OF ISSUES

**ISSUE 1:** Should the petitions to intervene filed by Charlotte County, Best Western Deltona Inn, Florida United Methodist Children's Home, Inc., and Sugar Mill Association, Inc., be granted?

**RECOMMENDATION:** Yes. Based on the information filed by the date of filing this recommendation, the petitions to intervene should be granted. (JABER)

**STAFF ANALYSIS:** In its petition to intervene filed on November 21, 1997, Charlotte County requests intervention in this proceeding. In support thereof, it alleges that its substantial interests are affected in that it is a bulk water customer of FWSC and that it received service from September 15, 1993 through January 23, 1996, for resale to its customers in Pirate Harbor. Charlotte County cites to Rule 25-22.039, Florida Administrative Code, Section 120.57, Florida Statutes and Order No. PSC-97-1033-PCO-WS for the Commission's authority to grant intervention.

On December 2, 1997, Best Western Deltona Inn, Florida United Methodist Children's Home, Inc. and Sugar Mill Association, Inc. filed their petitions to intervene wherein they allege that their substantial interests are affected because they are all utility customers. They have all received notices from the utility for the estimated potential surcharge amounts. According to the notice received by Sugar Mill Association, its average potential surcharge is $568. The potential surcharge amount for Best Western is $35,100 and the potential surcharge amount for the Florida United Methodist Children's Home is $52,000.

No party has filed a response to the petitions to intervene. However, the time for doing so had not expired as of the date of filing this recommendation. Any responses will be addressed at the Agenda Conference.

The First District has directed the Commission to consider any petitions for intervention filed by groups subject to a potential surcharge in this case. Southern States Utils., Inc., 22 Fla. L. Weekly at D1493. These petitioners are potential surcharge customers substantially affected by the outcome of this proceeding. Therefore, based on the pleadings submitted to date, staff recommends that the petitions to intervene should be granted. All parties should furnish copies of future pleadings and other documents that are hereafter filed in this proceeding to John R. Marks, III, Knowles, Marks & Randolph, P.A., 215 South Monroe

Street, Suite 130, Tallahassee, Florida, 32301 (representing Charlotte County) and Joseph McGlothlin, 117 South Gadsden Street, Tallahassee, Florida 32301 (representing Best Western, Florida United Methodist, and Sugar Mill Association).

**ISSUE 2**: Should parties be allowed to participate in this proceeding?

**RECOMMENDATION**: Yes. Participation should be limited to five minutes for each party. (JABER)

**STAFF ANALYSIS**: Typically, recommendations which concern the appropriate actions the Commission should take on an order remanded by the First District have been noticed as "Parties May Not Participate," the rationale being that this is still a post-hearing decision, and participation should be limited to Commissioners and staff. However, in this case, the Commission has consistently allowed participation by the parties at the agenda conferences, stating that participation will aid the Commission in better understanding all of the complexities of this matter. Further, the Commission has interpreted the Southern States decision broadly to allow intervention and input by all substantially affected persons. See Order No. PSC-97-1094-PCO-WS, issued September 22, 1997. Therefore, in an effort to be consistent with the Commission's interpretation of the Southern States decision, staff recommends that participation at the agenda conference be allowed, but limited to five minutes for each party.

**ISSUE 3**: In light of Southern States Utils., Inc. v. Florida Public Service Comm'n, what is the appropriate action the Commission should take?

**RECOMMENDATION**: If the Commission does not construe the Southern States decision as an affirmation of the refund portion of Order No. PSC-96-1046-FOF-WS, the Commission has 2 main options available: no refund/no surcharge and refund/surcharge. Otherwise, the Commission must choose the refund/surcharge option. If the Commission adopts the refund/surcharge option, there are multiple methodologies for implementation as discussed further in staff's analysis. (ALL STAFF)

**STAFF ANALYSIS**: As stated earlier, the portion of Order No. PSC-93-0423-FOF-WS approving increased rates and charges for FWSC based upon a uniform rate structure was reversed by the First District. The First District stated that the Commission failed to make the requisite finding that the utility's facilities and land were functionally related. Citrus County at 1311. On remand, the Commission considered many issues, including whether the record in Docket No. 920199-WS should be reopened to take evidence on the issue of functional relatedness. Rejecting the option of reopening the record as a matter of policy, by Order No. PSC-95-1292-FOF-WS, the Commission reviewed the evidence already present in Docket No. 920199-WS and determined that it supported the implementation of a modified stand-alone rate structure. The implementation of the modified stand-alone rate structure resulted in a rate decrease for some customers. Accordingly, the Commission required the utility to make refunds with interest within 90 days to those customers. The Commission also noted that the modified stand-alone rate structure resulted in a rate increase for other customers. However, relying on the prohibition against retroactive ratemaking, the Commission stated that the utility could not collect the difference in rates from those customers. Finally, the Commission found that the utility's revenue requirement was never challenged as a point on appeal, and shall not be changed. Order No. PSC-95-1292-FOF-WS at 5.

GTE Florida, Inc. v. Clark

In the first GTE appeal, GTE Florida, Inc. v. Deason, 642 So. 2d 545 (Fla. 1994), the Florida Supreme Court affirmed in part and reversed in part a Commission order which denied GTE's request for a rate increase and ordered GTE to reduce revenues by $13,641,000. The order was reversed to the extent that it denied GTE recovery of costs because those costs involved purchases from GTE's affiliates. The Supreme Court found that the costs were clearly recoverable and

that it was an abuse of discretion for the FPSC to deny recovery. On remand, the Commission issued an order which only allowed recovery of the expenses prospectively from May 3, 1995, thirty days after the Commission's vote on the remand decision. The initial order was issued May 27, 1993. GTE appealed the Commission's order on remand, and in GTE Florida, Inc. v. Clark, 668 So. 2d 971 (Fla. 1996), that order was reversed by the Court. The Court held that GTE should be allowed to recover its erroneously disallowed expenses through the use of a surcharge from only those customers who received GTE services during the disputed period of time. In the opinion, the Court states that "utility ratemaking is a matter of fairness. Equity requires that both ratepayers and utilities be treated in a similar manner." Id. at 972. "It would clearly be inequitable for either utilities or ratepayers to benefit, thereby receiving a windfall, from an erroneous PSC Order." Id. at 973.

Order No. PSC-96-1046-FOF-WS

The Florida Supreme Court's decision in GTE resulted in the Commission's reconsideration of Order No. PSC-95-1292-FOF-WS in this docket. The GTE Court stated that the surcharge did not constitute retroactive ratemaking, and it stated that it viewed utility ratemaking as a matter of fairness. By Order No. PSC-96-1046-FOF-WS, the Commission recognized the principles set forth in GTE, but found GTE to be inapplicable stating that "there are crucial, dispositive differences between the GTE case and this one."

> SSU is before us now seeking relief from its decision to prematurely implement uniform rates. The utility wishes to recover, via a surcharge on these unrepresented customers, millions of dollars in the cost of making the required refunds. We find that the lack of representation, coupled with the lack of notice and the assumption of risk in early implementation of the uniform rate structure violates our sense of fundamental fairness and equity. As such this situation does not comport with the equitable underpinnings of the holding in GTE. Accordingly, we find that on this point the facts in the GTE decision are distinguishable from those in this case.

Order No. PSC-96-1046-FOF-WS at 9-10. Therefore, by Order No. PSC-96-1046-FOF-WS, the Commission affirmed its earlier decision to require the utility to implement the modified stand-alone rate structure and to make refunds.

Southern States Utils., Inc. v. Florida Public Service Comm'n

The Commission's decision in Order No. PSC-96-1046-FOF-WS, (which implemented the remand of the Citrus County decision), was appealed by FWSC to the First District, and on June 17, 1997, the First District issued its opinion stating in pertinent part:

> Because we find the PSC erred in relying on these reasons for finding Clark inapplicable, we reverse and remand its decision for reconsideration.
>
> Following the principles set forth by the supreme court in Clark, we find that the PSC erroneously relied on the notion that SSU "assumed the risk" of providing refunds when it sought to have the automatic stay lifted and therefore should not be allowed to impose surcharges. Just as GTE's failure to request a stay in Clark was not dispositive of the surcharge issue, neither is SSU's action in asking the PSC to lift the automatic stay. The stay itself was little more than a happenstance, in effect only because a governmental entity, Citrus County, appealed the original PSC order in this matter. See Fla. R. App. P. 9.310(b)(2); Fla. Admin. Code R. 25-22.061(3).
>
> We are unable to discern any logic in the PSC's contention that SSU, having merely acted according to the terms of the order establishing uniform rates, assumed the risk of refunds, yet is precluded from recouping charges from customers who underpaid because of the erroneous order. As the supreme court explained in Clark, "equity applies to both utilities and ratepayers when an erroneous rate order is entered" and "[i]t would clearly be inequitable for either utilities or ratepayers to benefit, thereby receiving a windfall, from an erroneous PSC order." 668 So. 2d at 973. Contrary to this principle, the PSC in this case has allowed those customers who underpaid for services they received under the uniform rates to benefit from its erroneous order adopting uniform rates. As a legal position, this will not hold water.
>
> In Clark, the supreme court also explained that "[e]quity requires that both ratepayers and utilities be treated in a similar manner." 668 So. 2d at 972. The PSC violated this directive by ordering SSU to provide refunds to customers who overpaid under the erroneous uniform rates without allowing SSU to surcharge customers who underpaid

> under these rates. As SSU asserts, rather than considering the interest of the utility as well as the two groups of customers, those who overpaid and those who underpaid, the PSC considered only the interests of the two groups of customers.

22 Fla. L. Weekly at D1493. In light of the Southern States decision, the Commission, by Order No. PSC-97-1033-PCO-WS, allowed all parties to file briefs, by November 5, 1997, regarding this matter and specifically requested that parties address the following possible options preliminarily identified by the Commission as well as any other options they may identify.

1. require refunds with interest/allow surcharges with interest;

2. do not require refunds/do not allow surcharges because the rates have been changed prospectively;

3. order refunds without interest/allow surcharges without interest;

4. allow the utility to make refunds and collect surcharges over an extended period of time to mitigate financial impacts; and

5. allow the utility to make refunds and collect surcharges over different periods of time.

Refund/Surcharge Report

By Order No. PSC-97-1078-PCO-WS, issued September 15, 1997, FWSC was required to provide a revised refund/surcharge report. This report was to provide an exact calculation by service area of the potential refund and surcharge amounts with and without interest as of June 30, 1997. This calculation covers the period from September 15, 1993, when uniform rates were first implemented, to January 23, 1996, when modified stand-alone rates were implemented for all affected service areas, excluding Spring Hill. For the Spring Hill service area, a separate calculation was performed for the period January 23, 1996 through June 14, 1997, the date new rates became effective in Hernando County. The Spring Hill service area is considered in Issue No. 5. In its refund and surcharge report submitted September 17, 1997, FWSC reports potential refunds of $11,059,486 (excluding the separate Spring Hill portion) and potential surcharges of $11,776,926. The separately calculated Spring Hill portion, amounts to $2,485,248.

The difference results from the differences in customer base, consumption, final rate structure, etc. Therefore, the refund amount will not exactly equal the surcharge amount.

Customer Comments

By Order No. PSC-97-1290-PCO-WS the Commission required FWSC to provide notice to all of its customers who were affected by the First District's decision. The notice provided a brief description of the circumstances that led to the First District's remand and mandate, the five preliminarily identified options as well as each customer's specific potential refund and/or surcharge. The notice stated that affected customers could provide written comments and letters concerning their views on what action the Commission should take. Further the customers were given the Commission's Division of Consumer Affairs' 1-800 telephone number. As of December 2, 1997, the Commission received a total of 2,852 letters and facimiles; 155 phone calls; and 3 e-mails, including Hernando County customers. A summary of the customers' comments follows:

- 215 were in favor of refunds and surcharges with interest;
- 533 were in favor of no refund and no surcharge;
- 100 were in favor of refunds and surcharges without interest;
- 19 were in favor of refunds and surcharges over an extended period of time;
- 28 were in favor of refunds and surcharges over different periods of time;
- 5 were in favor of requiring no refunds;
- 1,810 were in favor of requiring refunds only; and
- 217 were in favor of no surcharges

Some customers did not specifically choose an option or make a comment that related to the notice from the utility. For that reason, the tabulation by category does not equal the total number of responses received. Some of the customers expressed dissatisfaction with the Commission and its decisions, fifteen customers noted the poor quality of service, and twenty complained of the high rates charged. It is worthy to note that generally, customers who may receive a refund are in favor of a refund and customers who may be charged a surcharge are not in favor of refunds or surcharges.

On November 5, 1997, the Hernando County Edition of *The St. Petersburg Times* published an article that erroneously stated that customers had until the end of business that day to register with the Commission if they would like a refund. According to the article, November 5, 1997 was the last day the Commission would

accept letters from FWSC's customers as to whether the customers wanted refunds or future discounts. This article resulted in a overwhelming number of facsimiles and letters from customers to the Commission stating their desire for a refund. A follow-up article published on November 6, 1997 explained the error and stated that customers were not required to notify the Commission if they want a refund.

As of December 2, 1997, staff logged in approximately 1,721 responses from Hernando County customers alone. An overwhelming majority (1,664) have stated refunds should be made to the customers.

- 146 customers selected the refund/surcharge with interest option;
- 38 selected the no refunds/no surcharges option;
- 42 selected the refund/surcharge without interest option;
- 7 selected the refunds/surcharges over an extended period option;
- 8 selected the refunds/surcharges over different periods option; and
- 1,464 customers stated that they wanted refunds but did not state whether surcharges would be appropriate;

In addition, it was made clear in the responses that customers expected their refund in "one lump sum" rather than at a 10% discount over 20 years. The customers who made this statement were responding to a quote in the November 5, 1997, article in which customers were encouraged to tell the Commission that they wanted the refund payment immediately and not spread over time.

On November 10, 1997, members of the Commission staff participated in a town hall meeting for the customers of the Holiday Heights water system at the invitation of Representative Sindler. Others in attendance were representatives from the utility, Orlando Utilities Commission, Orange County Utilities Department, and Public Counsel. Approximately 50 customers attended the meeting. The customers were opposed to the Commission imposing a surcharge.

In its comments, Charlotte County states that its basic position is that no refunds should be granted and no surcharges should be imposed. Charlotte County supports the prospective application of the current rate structure. Further, Charlotte County adopts and supports Keystone/Marion's brief.

On November 26, 1997, the Sugar Mill Association, Inc., filed a petition signed by approximately 470 residents and a position paper. According to the position paper, the 638 customers within the Sugar Mill Community in Volusia County would be required to pay an average surcharge of $538. The paper also asserts that Sugar Mill residents pay among the highest rates for water and wastewater within Florida, the facilities are in disrepair and the water quality is marginal. Further, the association provides four recommendations for the Commission's consideration:

1. the Public Service Commission should choose their Option No. 2 requiring no refund;

2. although there appears to be a negative legal precedent in the past, a thorough evaluation should be made of the possible appeal of the First District's 1997 decision;

3. the December 15, 1997 "arbitrary" decision should be extended into 1998 because no hearings have been held; and

4. should a refund be required, the Commission should be certain that uncollectible surcharges be the utility's responsibility.

Summary of Briefs

All parties timely filed briefs on November 5, 1997. A brief summary of the parties' basic positions follows. A more detailed discussion of the parties' arguments will be included in staff's analysis of the possible options.

Sugarmill Woods

Sugarmill Woods contends that the Commission has no alternative but to implement the refunds already ordered within 90 days and make the necessary surcharges to pay for them. Sugarmill Woods states that the First District in no way criticized or even inferred that the portion of the Order requiring refunds was in any way incorrect. Sugarmill Woods states that FWSC has the ability to obtain financing to manage the refunds while collecting the surcharges over a more extended time period.

Keystone/Marion

Keystone/Marion take the position that given the unique circumstances of this case, no refund should be made and no surcharge should be levied. Instead, the Commission should continue the current rate structure on a prospective basis.

Derouin, et al.

Derouin, et al. contend that the only action the FPSC can take under the current state of the case is to not require refunds and to not allow surcharges. Derouin, et al. further state that any other action taken by the FPSC in regard to this matter would constitute appealable error because the FPSC is without statutory or administrative authority to impose surcharges.

FWSC

FWSC takes the position that the only way to avoid a repeat of this controversy and prevent further mistakes is to order, on remand, that FWSC not provide refunds to customers who overpaid under the uniform rate structure nor surcharge customers who underpaid. FWSC states that the number and complexity of issues entailed in attempting to pay refunds to and impose surcharges on customers of FWSC who received service from September 15, 1993 through June 14, 1997, make it almost impossible to fashion a truly equitable result. FWSC submits that should the Commission choose to pursue refunds and surcharges, the most equitable solution, given the magnitude of the refunds and surcharges, is to order the payment of refunds and the imposition of surcharges on all customers over a five year period. Customers who received service from September 15, 1993 through June 14, 1997 who are no longer customers of FWSC should be excluded from the mechanism ordered by the Commission for refunds and surcharges. Refunds and surcharges, determined on a service area basis, should be paid, without interest, by imposing a gallonage charge adjustment to each customer's bill based on each service area's net water and/or wastewater refund or surcharge. Each year's projected refunds and surcharges should be trued up on an annual basis for the purposes of establishing refund and surcharge gallonage adjustments for the following year. Further, FWSC argues that in the event that surcharges are ordered, the Commission must provide FWSC additional revenue to reflect income tax liability associated with interest to be paid to FWSC during the surcharge period. To do otherwise would not make FWSC whole.

Associations

The Associations state that the appellate decisions compel the payment of refunds to those customers overcharged by the erroneous order approving the uniform rate structure. Further, they state that Commission rule dictates that customer refunds be made with interest and prescribes the specific manner in which the interest is to be calculated. The Associations also offered another option which is to require FWSC to borrow the money necessary to make the immediate refunds. Surcharged customers should then be allowed to pay back the total of their individual unwarranted benefits over the course of 28 months, which is the same period over which they received them. The Associations further state that FWSC's costs and interests associated with borrowing the initial refund monies should be recovered from the surcharged customers over the 28 month surcharge period.

OPC

OPC's brief is limited to the issue of whether FWSC should be responsible for a refund to Spring Hill customers for the period January 1996, through June 1997. Therefore, OPC's brief will be discussed in greater detail in Issue No. 5, which specifically addresses the Spring Hill customers.

Introduction to Options

Inherent in staff's discussion is a recognition that the change in FWSC's rate structure to a modified stand-alone rate structure results in a lower rate for the customers who paid "too much" with uniform rates; that a modified stand-alone rate structure results in a higher rate for customers who paid "too little" with uniform rates; and that FWSC's revenue requirement was affirmed on appeal and cannot change. "As the PSC observed in its order, '[t]he utility's revenue requirement was never challenged as a point on appeal' and '[a]ccordingly, it shall not be changed.'" 22 Fla. L. Weekly at D1492. See also, Hinnant, Inc. v. Spottswood, 481 So. 2d 80, 82 (Fla. 1st DCA 1986), which holds that the doctrine of the law of the case requires adherence to the principle that questions of law decided on an appeal to a court of ultimate resort must govern the case in the same court and the trial court throughout all stages of the proceeding so long as the facts on which the decision was predicated continue to be the facts in the case.

Accordingly, consistent with the GTE and Southern States decisions and the principles of fairness and equity, the Commission is guided by the following objectives: to ensure that neither the utility nor the ratepayers receive a windfall as a result of the erroneous Commission order, to treat the utility and ratepayers in a similar manner, and to allow the utility the opportunity to earn a fair rate of return. "The rate of return 'cannot be set so low as to confiscate the property of the utility, nor can it be made so high as to provide greater than a reasonable rate of return, thereby prejudicing the consumer.'" United Tel. Co. v. Mayo, 345 So. 2d 648, 653 (Fla. 1977). Although these objectives are not the only considerations used by staff, they do provide the foundation for the analysis of the options discussed below. In their briefs, the parties have identified additional considerations and in the appropriate places in this recommendation those considerations are addressed. Some arguments, e.g. procedural due process and retroactive ratemaking, apply to various portions of this recommendation. Rather than repeat those arguments in each place, staff has discussed procedural due process and retroactive ratemaking directly below.

Procedural Due Process

FWSC states in its brief that it files its brief under protest in light of the violation of due process rights which are inherent in any proceeding where a body with judicial authority fails to provide a mechanism where parties and/or interested persons identify and know all of the issues confronting them. Furthermore, FWSC states that if refunds are to be made, it objects to the absence of due process in terms of issue identification, the right to present evidence, notice, and the inability to respond to briefs of other parties.

Derouin, et al. cite in their brief to Article X, Section 6 of the Florida Constitution in support of their basic argument that before a surcharge can be implemented to take private funds from a citizen, fundamental fairness dictates that the substantially affected persons have a meaningful opportunity to appear and be heard in this proceeding. Derouin, et al. state that any intervenors to this proceeding take the case as they find it without an opportunity to present any evidence in defense of the taking of their property or the ability to cross-examine the manner or method of their surcharge calculation. Derouin, et al. also state that no notice was given regarding the uniform rate structure.

First, staff does not believe Article X, Section 6 of the Florida Constitution is implicated in these proceedings as these proceedings do not constitute eminent domain proceedings, nor do they constitute an inverse condemnation. Eminent domain is the confiscation or "taking" of private property by the state for common use for which compensation is due to the owner, and inverse condemnation is the regulation of private property by the state under its police power in such a manner that the regulation deprives the owner of the economically viable use of that property for which compensation must be paid to the owner. Joint Ventures, Inc. v. Dept. of Transportation, 563 So. 2d 622, 624 (Fla. 1990).

However, staff believes that the crux of Derouin, et al.'s argument is applicable to the due process requirements mandated by Article I, Section 9 of the Florida Constitution and the fourteenth amendment of the United States Constitution. As previously stated, FWSC argues due process requirements in its brief as well. Due process is, of course, applicable to all Commission proceedings and actions. Since there is no dispute that due process must be afforded by the state before depriving any persons of their property, what process is due becomes the question.

"[T]he extent of procedural due process protections varies with the character of the interest and nature of the proceeding involved." Hadley v. Dept. of Administration, 411 So. 2d 184, 187 (Fla. 1982). "There is, therefore, no single, unchanging test which may be applicable to determine whether the requirements of procedural due process have been met." Id. "[P]rocedural due process in the administrative setting does not always require the application of the judicial model." Id. "Thus the formalities requisite in judicial proceedings are not necessary in order to meet the due process requirements in the administrative process." Id. The Court further stated that in determining the propriety of the procedure followed, the competing interests of the parties involved must be considered, i.e. a "balancing of interests" test is applied. Id.

In the case at hand, staff believes that all substantially affected persons have been given notice and a meaningful opportunity to appear and be heard in this proceeding. By Orders Nos. PSC-97-1033-PCO-WS, PSC-97-1094-PCO-WS, PSC-97-1210-PCO-WS, issued August 27, 1997, September 22, 1997, and October 6, 1997, respectively, the Commission granted intervention to certain petitioners who might be substantially affected by the Commission's decision in this matter. Furthermore, the Commission explicitly recognized its obligation to consider any petitions for intervention filed by other such groups subject to a potential

surcharge in this case pursuant to the express directions of the First District. In this regard, this was the only direction by the First District. The First District has not directed the Commission to hold a hearing for the potential surcharge payers. In addition, by Order No. PSC-97-1290-PCO-WS, issued October 17, 1997, the Commission again stated that it had interpreted the First District's opinion broadly to allow intervention to all substantially affected persons, and by that same Order, the Commission ordered the utility to provide notice by October 22, 1997 to all affected customers of the Southern States decision and its potential impact. The notice provided that affected customers could provide written comments and letters concerning their views on what action the Commission should take. Additionally, the customers were given the Commission's Division of Consumer Affairs 1-800 telephone number.

By Order No. PSC-97-1033-PCO-WS, the Commission stated that it did not believe it had all the information or input from the parties necessary to help it make a decision at that time. Accordingly, the Commission requested that parties file briefs, by September 30, 1997, to address the appropriate action to be taken in light of the decision in Southern States Utils., Inc. v. Florida Public Service Comm'n. In addition to responding to this overall question, the Commission requested that the parties respond specifically to the potential options which had been preliminarily identified and set forth within the Order. Parties were encouraged to further brief other possible options, if any, for final resolution of this matter. In Order No. PSC-97-1290-PCO-WS, the Commission also stated that it was concerned with the amount of time taken to address the remand decision in this docket and that the Commission saw no need for public hearings because this is an implementation of a remand. In addition, the Commission extended the deadline for filing briefs to November 5, 1997 due to the timing of the required notice.

Second, with regard to Derouin, et al.'s argument that adequate notice of the uniform rate structure was not given, staff refers to City of Plant City v. Mayo, 337 So. 2d 966, 971 (Fla. 1976), wherein the Court found that precision is not required for the notice of rate case proceedings because to do so would confine the Commission unreasonably in approving rate structure changes.

> While we are inclined to view the notice given to customers in this case as inadequate for actual notice of the precise adjustment made, we must agree with the Commission that more precision is probably not possible and in any event not required. To do so would either

> confine the Commission unreasonably in approving rate changes, or require a pre-hearing proceeding to tailor the notice to the matters which would later be developed. We conclude, therefore, that the Commission's standard form of notice for rate hearings imparts sufficient information for interested persons to avail themselves of participation.

Id. at 971. Derouin, et al. cite to other cases to support the argument that a more specific notice should have been given regarding rate structure. The argument made regarding notice is correct in that notice must be given; however, the Court addressed the sufficiency of rate case proceeding notices by stating that precision cannot be attained nor is it required. Finally, staff believes that in Southern States the First District has addressed the "lack of notice" argument. In requiring refunds without surcharges on remand, the Commission expressed a concern with the "lack of notice." The First District stated that "the PSC erred in relying on these reasons for finding Clark inapplicable" and even further, the First District directed the PSC to allow intervention to potential surcharge groups. Id. at D1493.

Based on the above, staff recommends that the argument regarding procedural due process be rejected by the Commission. The Commission has comported with the due process requirements applicable to this matter. All substantially affected persons have been given notice, the opportunity to intervene in this proceeding, and the opportunity to be heard.

Retroactive Ratemaking

In their brief, Derouin, et al. state that the imposition of surcharges upon certain customers of FWSC will result in retroactive ratemaking by the FPSC. Derouin, et al., contend that the Florida Supreme Court and others have enunciated countless times, that ratemaking is prospective in nature, not retroactive. Further, the new rates are prospective as of the day they are fixed. Derouin, et al., contend that the FPSC cannot simply set rates at a level which it thinks ought to have been charged in the past. According to Derouin, et al., rates must be set on a going forward basis to be charged in the future and the FPSC cannot arbitrarily go back and adjust rates to the beginning of the rate case or to any other point in the past. They cite to Westwood Inc. v. Dade County, 264 So. 2d 7 (Fla. 1972); United Telephone Co. v. Mann, 403 So. 2d 962 (Fla. 1981) and City of Miami v. Florida Public Service Comm'n, 208 So. 2d 249, 260 (Fla. 1968).

The issue of whether the imposition of surcharges upon certain customers would constitute retroactive ratemaking has been addressed in the GTE and Southern States decision. In GTE, the Supreme Court rejected the contention that the imposition of a surcharge upon certain customers would constitute retroactive ratemaking where the utility is seeking to recover expenses and costs that should have been lawfully recoverable in the Commission's first order. Indeed, the Court states that it "views utility ratemaking as a matter of fairness". 668 So. 2d 971, 972 (Fla. 1996) In the Court's opinion, "if the customers can benefit in a refund situation, fairness dictates that a surcharge is proper in this situation". Id. at 973. The First District in Southern States concluded that a surcharge is appropriate in this situation because the utility was seeking to recoup charges from customers who underpaid because of an erroneous order and, therefore, a surcharge in these circumstances does not run afoul of the prohibition of retroactive ratemaking.

Notwithstanding the principles set forth in GTE and the affirmation of those principles in Southern States, Derouin, et al., claim that the instant action is distinguishable from GTE because the revenue requirement in this case was not specifically in dispute, only the revenue recovery methodology. In Southern States, in addressing the Commission's finding that GTE was limited to its unique facts and did not mandate that a surcharge be authorized in this case, the First District states in quoting GTE that "equity applies to both utilities and ratepayers when an erroneous rate order is entered and [i]t would clearly be inequitable for either utilities or ratepayers to benefit, thereby receiving a windfall, from an erroneous PSC order". 22 Fla. L. Weekly at D1493. Therefore, staff believes that the Courts in GTE and Southern States have made it abundantly clear that the imposition of surcharges upon certain customers of FWSC will not result in retroactive ratemaking.

Discussion of Options

There are really only two options in staff's opinion that the Commission can choose in this case: require neither refunds nor surcharges, or require both refunds and surcharges. Certainly there are many technical and practical ramifications of each choice and several legal concerns that must be resolved before choosing either option. Staff has organized this part of the recommendation by first discussing the legal and policy considerations of choosing the no refund/no surcharge option. Following that is a discussion of the legal and policy concerns of requiring refunds and

surcharges as well as several methodologies for implementing the refund/surcharge.

## I. NO REFUNDS/NO SURCHARGES

### Questions of Law

Law of the Case

Keystone/Marion and Derouin, et al. are in basic agreement with the utility that "no refunds, no surcharges" is a valid option. They contend that on remand, the Commission cannot simply begin at the point of treating a refund proposition as a given and add a surcharge. Instead, Keystone/Marion contend that the Commission must conduct its analysis of the situation anew and factor into that analysis a full consideration of the impact of a surcharge upon customers exposed to that possibility. In its brief, the utility states that the only logical and meaningful interpretation of Southern States is that the First District intended to give potential surcharge customers an opportunity for meaningful, substantive participation on the issue of refunds and surcharges on remand. If the potential surcharge customers are precluded from opposing refunds on remand, FWSC states that the court-mandated intervention is rendered meaningless and futile.

The Associations and Sugarmill Woods contend that the First District has eliminated this option for the Commission. They argue that the First District has affirmed the Commission's order requiring refunds. Therefore, that part of the order has become the law of the case. They state that the First District only found error with regard to an application of a surcharge to the customers who underpaid under the erroneously approved uniform rate, and the First District in no way criticized the refund portion of the order.

The law of the case doctrine requires adherence to the principle that questions of law decided on appeal govern the case. See Hinnant, 481 So. 2d at 82. Staff believes that the Citrus County decision left the Commission with some flexibility to reopen the record to take evidence on the functional relatedness issue or to make a finding that a revenue-neutral rate structure change did not create a refund situation. However, now that the Commission (by its order implementing the remand of Citrus County) has ordered a refund, staff believes that the Southern States opinion can be interpreted to preclude the Commission from reconsidering that portion of its decision. Therefore, staff believes that the

ability to legally implement the no refunds/no surcharge option is questionable at this point.

A reading of the Southern States opinion reveals that the First District found error with three separate aspects of the Commission's decision, and, accordingly, reversed and remanded with language specifically addressed to each particular aspect. First, the First District determined that the Commission erred in denying petitions to intervene as untimely in the circumstances of this case and directed the Commission on remand to "reconsider" its decision denying intervention. 22 Fla. L. Weekly at D1493. Second, after finding that the Commission erred in determining that the GTE case was inapplicable to this case based on the reasons articulated in the Commission's order, the First District also reversed and remanded that part of the Commission's decision for "reconsideration." Id. Finally, with regard to the issue of whether FWSC may surcharge those customers who underpaid under the erroneously approved uniform rates, the First District reversed that part of the Commission's decision disallowing surcharges and specifically remanded "for further proceedings." Id. at D1492.

The Commission's role at this point is ministerial, and its function is limited to obeying the appellate court's order. See Torres v. Jones, 652 So. 2d 893 (Fla. 3d DCA 1995), and O.P. Corp. v. Village of North Palm Beach, 302 So. 2d 130 (Fla. 1974). In attempting to comply with the Court's mandate, the question that staff has considered is whether the Court has left the entire remand order open for reconsideration or only a portion of it given that the Court specifically states "[b]ecause the PSC erred, however, in its consideration of GTE Florida Inc. v. Clark, 668 So. 2d 971 (Fla. 1996), with regard to the issue of whether SSU may surcharge the customers who underpaid under the erroneously approved uniform rates, we reverse and remand this case for further proceedings." (emphasis added) 22 Fla. L. Weekly at D1492. The Court's mandate also states that "further proceedings, if required, be had in accordance with said opinion, the rules of the Court, and the laws of the State of Florida."

Staff researched cases regarding options on "reconsideration." There are cases which suggest that the Court's use of "reconsideration" implies that the decision comes back to the Commission "in the same condition as if the order appealed had not been entered." Tampa Electric Co. v. Crosby, 168 So. 2d 70, 73 (Fla. 1964). However, in the issue relevant here, the First District has not used "reconsideration," but instead used "for further proceedings." In any case, staff believes that the

Commission's actions on remand are limited by "the law of the case."

After considering the entire Southern States opinion and reviewing the case law on the law of the case doctrine, staff believes that the First District's statements specifically framing the issue on remand as to whether SSU can surcharge its customers has limited the Commission's options on remand to the implementation of a surcharge -- a concept used in GTE which the First District expressly has stated is applicable to this case.

Section 421, 3 Fla. Jur. 2d, Appellate Review (1996), states that the rule of the law of the case can be applied only to questions actually or impliedly presented to and decided by the reviewing court. The law of the case doctrine has been applied where the issue could have been but was not raised on appeal, or where the question was decided by the appellate court by implication. See Craven v. Metropolitan Dade County, 545 So. 2d 932, 933 (Fla. 3d DCA 1989). See also Rogers v. State Ex Rel. Board of Public Instruction of Alachua County Florida, 23 So. 2d 154 (Fla. 1945) where the court states:

> Questions necessarily involved in the decision on a former appeal will be regarded as the law of the case on a subsequent appeal although the questions are not expressly treated in the opinion of the Court, as the presumption is that all the facts in the case bearing on the points decided have received due consideration whether all or none of them are mentioned in the opinion. The records on a former appeal may be looked into for the purpose of ascertaining what facts and questions were then before the court.

After much research, Staff is unable to find a case directly on point to definitively answer the question posed here. The cases regarding the law of the case are similar to Hinnant cited by Sugarmill Woods and the Associations, and Craven cited in the previous paragraph. In the cases that staff researched with arguably some similarities, the courts have stated that the law of the case precludes consideration of points of law which were, or should have been, adjudicated in a prior or former appeal of the same case. Valsecchi v. Proprietors Ins. Co., 502 So. 2d 1310, 1311 (Fla. 3d DCA 1987).

On a second appeal, the Valsecchi Court found that the issue now presented was decided in the former appeal. In the first appeal, the primary issue questioned the choice of law to be

applied to the determination of damages and liability. During that appeal the Courts found that the trial court erred in applying North Carolina law, rather than Florida law and reversed the trial court's decision. Accordingly, the trial court used Florida law. On the second appeal, parties argued that the District Court only decided which law should apply between Florida and North Carolina, but did not decide which law should apply between Florida, New York, and Massachusetts. In the second opinion, the District Court affirmed the trial court and stated that the purpose of the law of the case doctrine is "to lend stability to judicial decisions, to avoid piecemeal appeals, and to bring litigation to an end as expeditiously as possible." Id.

Similarly, staff believes that implicit in the Southern States decision is a decision by the Court that GTE is applicable in this case and that pursuant to GTE it would be inequitable for either ratepayers or utilities to benefit, thereby receiving a windfall, as a result of an erroneous Commission order. 22 Fla. L. Weekly at D1493. The Court specifically states, "[c]ontrary to this principle, the PSC in this case has allowed those customers who underpaid for services they received under the uniform rate to benefit from its erroneous order adopting uniform rates. As a legal position, this will not hold water." Id. Staff believes that this language constitutes an implicit affirmance by the Court of the Commission's decision to require refunds. In fact, the only portion of the order that the Court criticized and found to be in error was the Commission's failure to require surcharges, not the decision to require refunds. Therefore, staff believes that the refund portion of the Commission's order may have been decided by the Court and accordingly has become the law of the case.

Furthermore, staff has reviewed the briefs filed with the District Court in this case and the "no refund, no surcharge" argument was raised in briefs filed by FWSC. FWSC specifically requested that the District Court vacate the Commission's Final Order and remand the case to the Commission with directions to reinstate uniform rates for the utility's customers or implement modified stand-alone rates either without any refund or with offsetting surcharges. The First District has not vacated the order. In reviewing the opinion, staff believes that the Commission can reasonably infer that the refund portion of the order has been affirmed by the Court. Staff believes that if the Court intended to vacate the Commission's order, it would have so stated.

However, consistent with the positions of Keystone/Marion, Derouin, et al., and FWSC, it can reasonably be argued that since

the refund issue was a material issue before the First District, the Court would not impliedly affirm by silence such a core issue. If the court intended to affirm the refund portion of the Commission's order, it could have expressly done so. Further, courts do not always reach all issues presented to them, answering only those questions that need to be answered to dispose of a matter. Thus, a good-faith argument can be made that the Commission should review not only the issue of surcharge but the issue of refund also.

Regardless of that view, after reviewing the Southern States decision and relevant case law, staff believes that the refund portion of the Commission's order may have been decided by the Court and accordingly has become the law of the case. In the event that the Commission rejects the interpretation of Southern States which eliminates the "no refund, no surcharge" option, staff has prepared a separate analysis below under "Questions of Policy."

Questions of Policy

FWSC's primary position is that the Commission should decline to order refunds and surcharges. FWSC states that this option is the only fair and equitable option because the customers who have "paid too much" under the uniform rate structure received a lower rate in January of 1996 and the Spring Hill customers have received a rate decrease pursuant to the settlement agreement reached with Hernando County. Under this option, the utility states that the potential surcharge customers could be relieved from the responsibility of paying more and the utility would remain whole consistent with Southern States. In its brief, Keystone indicates that the surcharge amounts for certain customer groups is enormous and no one has had an opportunity to adjust consumption. In its brief, FWSC indicates that the capband/modified stand-alone rate structure recently approved by the Commission by Order No. PSC-96-1320-FOF-WS has been appealed. If reversed, the Commission would be confronted with another surcharge/refund scenario which would likely overlay this one and cause unfathomable complexity and confusion.

Ratemaking is Prospective in Nature

The Commission often makes changes in rate structure in the water and wastewater industry without ordering refunds and surcharges. Rate structure is reviewed in every rate case, and changes are often made. Some of the common rate structure changes include a change from a flat to metered rate (water and wastewater), elimination of a minimum charge structure, and a

change in the percentage revenue allocation between base facility and gallonage charges. All of these rate structure changes impact customers' bills to some degree. In other words, some customers will see an increase in their bills due to the rate structure change in addition to the revenue increase that was granted. The Commission has consistently held in the past that a change in rate structure does not warrant a refund since ratemaking is prospective in nature.

This principle is consistently applied in rate cases when determining the need for refunds for interim rates. As noted in Order No. PSC-96-1320-FOF-WS, issued in FWSC's most recent rate case in Docket No. 950945-WS, even though individual final rates may be less than interim rates due to rate structure changes, no interim refund is warranted unless the newly authorized final rate of return is less than the rate of return authorized on an interim basis. It should be noted that the Commission's decision on interim refunds in this most recent rate case is on appeal at the First District.

In addition, the Commission has made rate structure changes in cases involving only a rate restructuring in the water and wastewater industry without ordering refunds to those customers that paid more under the old structure. Of course, the Commission has never ordered surcharges in those instances where a change in rate structure has meant an increase in rates. In Docket No. 940950-SU, Benson's, Inc., a management company acting on behalf of certain condominium associations which were customers of Forest Utilities, Inc., filed a complaint and requested, as a result of the utility's billing practice, that refunds be made to each of the condominium associations represented by Benson's. Benson's challenged the application of the residential rate schedule to individual units in the condominiums, and suggested that the general service rate schedule would be more appropriate for the master metered condominiums. The residential rate schedule provides a flat rate applicable to wastewater service for all purposes in private residences and individually metered apartment units. The general service rate schedule provides a base facility and gallonage rate structure, applicable to any customer for which the residential service rate schedule does not apply. Specifically, Benson's position was that Forest Utilities' billing classification should be corrected, permitting the application of the general service rate schedule to the individual association members, and that the association members were entitled to retroactive application of the general service rate schedule, requiring Forest Utilities to refund the alleged overcharges. In Order No. PSC-94-1461-FOF-SU, issued November 29, 1994, the

Commission determined that the utility had acted in good faith throughout. Therefore, the Commission denied Benson's request for a rate reclassification and found that the rate structure of the utility must be corrected for **prospective application**. The utility was ordered to file a revenue-neutral rate restructuring application. With respect to the refund issue, the Commission found that it was not fair or equitable to the other customers in the same situation for the Commission to require any such refunds for Benson's clients, and not Forest Utilities' other master metered customers. On the other hand, it would not be fair and equitable for Forest Utilities to have to make refunds to all such customers without allowing it to recover revenues lost as a consequence.

Further, in Docket No. 950232-WU, the Commission restructured rates for Lake Utility Services, Inc. (LUSI). Pursuant to Order No. PSC-95-1228-FOF-WU, issued October 5, 1995, the Commission approved LUSI's application for a restructuring of rates to a uniform rate structure for twelve of its fourteen subdivisions. The issue of refunds was not addressed. This order was subsequently protested by LUSI; however, by Order No. PSC-96-0504-AS-WU, issued April 12, 1996, the Commission approved a settlement proposal by LUSI wherein the uniform rate structure was approved.

In both of the above cases, the Commission recognized that a change in rate structure meant a lower rate for some customers and a higher rate for others. In the Forest Utilities case, no refund was ordered. In the LUSI case, the refund issue was not addressed.

Inherent in the decisions in all of the cases in which the Commission changed rate structure is the notion that the previous rate structure was, for some reason, improper. The Commission would not change a utility's rate structure if it believed the current structure was appropriate and proper. The situation in this case is analogous in that the Commission discontinued a rate structure that the Citrus County court found may not lawfully be implemented without a finding that the facilities and land are functionally related. In the past, even though a rate structure was found to be improper and a change was ordered, no refund or surcharge has been required. This is consistent with the longstanding principle that ratemaking is prospective in nature.

In addition, rate structure changes are sometimes made to affect water conservation efforts. In its brief, FWSC alludes to the fact that any decision in this case will affect current developing policy on conservation rates for water and wastewater utilities. FWSC states that no utility will be willing to propose

any deviation in rate structure, i.e., a conservation rate structure, if the risk is refund/surcharge scenario in the event a court subsequently finds fault, even on a technicality, with such structure. Staff shares this concern that any decision made in this case could have a long lasting impact on future cases.

In its brief, FWSC states that the Commission's decision on remand in this proceeding potentially affects rate cases in every industry regulated by the Commission. By ordering refunds and surcharges, every rate case before the Commission presents the potential for a rate structure appeal and reversal, and the dilemma of refunds and surcharges. FWSC further contends that the FPSC can and should establish an express precedent that a change in rate structure occasioned by a court's reversal of a Commission-imposed rate structure is prospective only and thereby avoid continued litigation and controversy over refunds and surcharges for FWSC, other water and wastewater utilities, and investor-owned electric and gas utilities regulated by the FPSC.

Administration of Refund/Surcharge, Fairness and Affordability

FWSC stated in its brief that as of November 5, 1997, approximately 114,000 notices have been mailed to customers, and that FWSC's current number of active customers in the Docket No. 920199-WS service areas is approximately 84,000 customers. As of this date, approximately 12,000 of the notices mailed to customers have been returned to FWSC, and FWSC anticipates this number to be significantly higher, with a potential for approximately 30,000 returned notices. Therefore, thousands of individuals and businesses who would be due refunds are no longer customers of FWSC. Similarly, thousands of individuals and businesses required to pay surcharges are no longer customers of the utility. This concern was also mirrored by Keystone/Marion. Keystone/Marion state that many customers who benefitted from uniform rates five years ago are no longer on the FWSC system. Similarly, there may be many present customers who were not the beneficiaries of uniform rates during the full time they were in effect. Any refund/surcharge scenario would have to be administered in a way that does not unfairly penalize or unduly reward any customer or group of customers. Keystone/Marion state that such precision will be impossible.

Further, as discussed later in this recommendation, FWSC may charge customers who have left the system. This could result in uncollectible surcharges for FWSC. Any refund/surcharge scenario would have to consider how these uncollectible surcharges should be treated.

There are two considerations to be addressed with requiring refunds and imposing surcharges if the Commission attempts to do surcharges consistent with the GTE decision. First, staff does not believe that fairness and equity necessarily mean that entities or persons must be made whole from a purely monetary standpoint. Second, there is a totally different group of customers to consider here. In staff's opinion, the GTE court defined equity very broadly: "Equity requires that both ratepayers and utilities be treated in a similar manner." (emphasis added). 668 So. 2d at 972. In focusing on the entire principle of "fairness," it is important to remember that there were both winners and losers under the uniform rate structure; therefore, basing a decision on the impact of only a portion of the utility's customer base is improper. From a policy standpoint and now confirmed by law, the FPSC must make its decisions after considering the impact on all customers and the utility. See GTE Florida, Inc., 668 So. 2d at 972 and Southern States Utils., Inc., 22 Fla. L. Weekly at D1493.

In its brief, Keystone/Marion state that this case differs fundamentally from the facts of the GTE case. In GTE, there was no issue regarding whether one group of customers should be surcharged to fund the refund to other customers of the same utility who had overpaid during the same period of time. Further, Keystone/Marion contend that in exercising its discretion, the Commission must consider equity to all customers.

Staff believes that the utility and the two groups of customers could be treated in a "similar" manner if the Commission simply applies the rates prospectively. In terms of fairness and equity, the customers who paid "too much" have received a prospective rate reduction, customers who paid "too little" have received a prospective rate increase, and FWSC maintains its revenue requirement.

With respect to affordability, Keystone/Marion state that the magnitude of the surcharge that the Commission would have to impose on certain customer groups is enormous. Asking customers to take on the burden of these huge surcharges at this late point in the process would be grossly unfair and would impose a dramatic hardship on many. In determining the appropriate action and the appropriate timeframe under various options, staff analyzed the data provided by FWSC concerning the refunds and surcharges. Specifically, staff has analyzed the customer-specific data per service area. In the Burnt Store Service area, one surcharge exceeds $74,000 to Charlotte County School Board. Some surcharges exceed $40,000 per customer in service areas such as Beecher's

Point and South Forty, several exceed $30,000 per customer in areas such as Deltona and Florida Central Commerce Park, while numerous exceed $20,000 in areas such as Park Manor, Sunshine Parkway, Grand Terrace, Marion Oaks and Marco Shores. Staff notes that these larger surcharges apply to general service customers, including condominium associations. However, there are high residential surcharges ranging from a few hundred dollars to several thousand dollars. This is shown on Attachment A.

Numerous potential surcharge customers have submitted comments indicating that they cannot afford to pay surcharges and they have indicated that they will not pay them. As discussed later, the utility may legally discontinue service to customers who refuse to pay the surcharge. However, if the majority of customers either refuse or are unable to pay the surcharge, it may be impractical for FWSC to disconnect service. This raises other issues, such as bad debt. If there is a large amount of bad debt due to non-collection of the surcharge, this will impair the utility's opportunity to earn the revenue requirement. The utility should be able to recover the amount associated with the bad debt since its revenue requirement cannot be affected.

The Commission should also consider that customers who are to be surcharged had no knowledge of any potential surcharges or increased rates during the 28 months that uniform rates were in effect. Keystone/Marion address this fact in their briefs, stating that during the five-plus years this proceeding has been pending, customers have paid Commission-approved rates. They have had no ability to adjust consumption to offset increased additional charges in the future to pay for service rendered many years ago.

Conclusion on No Refunds/No Surcharges

In conclusion, staff believes that the Commission can reasonably infer that the refund portion of its order has been affirmed by the Court, and/or that the Southern States decision requires refunds and surcharges to be made because to do otherwise would result in one group of customers receiving a windfall. If the Commission adopts either or both of these views, then it should rule that "no refunds/no surcharges" is not an option because it cannot legally be implemented. Alternatively, in the event the Commission rejects this interpretation, staff believes the Commission should look to the overall fairness issue and attempt to balance the interests of all parties to decide whether the no refunds/no surcharges option is the best solution.

The decision on what was fair and equitable in GTE was much simpler than in this case -- there were only two interests to balance. The Court was not faced with the issue of whether one group of customers should provide the revenue for a refund to another group of customers. Staff believes that this is a very important point because in the instant case, fairness has to be determined from three perspectives: the utility's and two very different groups of customers with opposing interests. In balancing the interests of all parties, and taking into account the impact on the customers forced to pay the surcharge, the problems inherent in administering a refund and surcharge of this magnitude, and the impact on future decisions of this Commission, a strong argument can be made that the optimal solution to this situation is no refunds and no surcharges. When determining if the no refund/no surcharge option is the optimal solution, the Commission should consider that this was strictly a rate structure change; the affected customers who may be subject to a surcharge have not had the ability to adjust consumption; the timing problem of customers leaving the system would be eliminated; and the utility's revenue requirement will assuredly remain unchanged. As has been pointed out, under this scenario all customers are treated similarly in that those customers that paid too much under the uniform rate are now billed under a lower rate, those customers that paid too little under the uniform rate have received a higher rate, and the utility's opportunity to earn its authorized rate of return is maintained.

## II. REQUIRE REFUNDS/ALLOW SURCHARGES

### Questions of Law

#### Authority to Surcharge

In its brief, Derouin, et al. contend that Sections 367.081 and 367.082, Florida Statutes, are the statutes pertaining to rate proceedings, and since these sections are silent as to surcharges, the FPSC has no authority to impose surcharges. Further, they argue that Rules 25-22.0407, 25-22.0408, 25-30.135, 25-30.140, and 25-30.335 through 25-30.475 are silent as to surcharges. On the other hand, Sugarmill Woods argues that, as a matter of due process, restitution is necessary to restore the parties to their positions before the erroneous judgement.

While there is no specific statutory provision which provides the FPSC with the authority to allow a utility to surcharge its customers who underpaid under an erroneously approved rate order, the FPSC does have broad statutory authority to prescribe fair and

reasonable rates and charges. Specifically, Section 367.121 (1)(a), Florida Statutes, provides that the FPSC shall have the power "to prescribe fair and reasonable rates and charges, classifications, standards of quality and measurements, and to prescribe service rules to be observed by each utility". Moreover, pursuant to Section 367.121(1)(g), Florida Statutes, the FPSC can "do all things necessary or convenient to the full and complete exercise of its jurisdiction and the enforcement of its orders and requirements". Additionally, the FPSC has the authority to fix rates which are just, reasonable, compensatory, and not unfairly discriminatory under the provisions of Section 367.081(2)(a), Florida Statutes. Thus, staff believes that the FPSC has the statutory authority to require a utility to surcharge its customers who underpaid under an erroneous rate order.

Case law also provides the FPSC with the legal authority to allow a utility to surcharge its customers. Specifically, in GTE, the Court mandated that the utility be allowed to recover its erroneously disallowed expenses through the use of a surcharge. Further, the principles set forth in Southern States provide the Commission with an even stronger basis to allow FWSC to surcharge customers. On appeal, the Court, relying on the authority of GTE, stated that the FPSC erred in denying FWSC's request to surcharge customers who underpaid when it had ordered the utility to provide refunds to customers who had overpaid under an erroneous order. The Court specifically states that the FPSC order violated the principle set forth in GTE that equity requires both ratepayers and utilities to be treated in a similar manner. In this docket, if the FPSC requires the utility to provide a refund to customers who overpaid, it must require the utility to surcharge customers who underpaid according to the foregoing.

Florida courts have affirmed the Commission's authority to allow surcharges in other situations. In the City of Tallahassee v. Florida Public Service Comm'n, 441 So. 2d 620, 624 (Fla. 1983), the Court affirmed the fact that the FPSC stated that it would allow the City of Tallahassee to charge nonresidents a surcharge in an amount equal to what residents pay as a utility tax. In addition, in Polk County v. Florida Public Service Comm'n, 460 So. 2d 370 (Fla. 1984), the Court affirmed that the FPSC has jurisdiction and authority to issue a rule allowing municipal electric utilities to impose a surcharge on customers outside their corporate limits. In Lake Worth Utils. v. Barkett, 433 So. 2d 1278 (Fla. 4th DCA 1983), the Court affirmed that the FPSC had exclusive jurisdiction to determine the reasonableness of a surcharge. Finally, in City of Tallahassee v. Florida Public Service Comm'n, 433 So. 2d 505 (Fla. 1983), the Court found that Section 366.06(1),

Florida Statutes, in conjunction with the other factors referred to in this opinion, provide adequate general standards under which the City surcharge may be tested. Moreover, it is a well settled rule that a tribunal has the authority to compensate a party for its loss under an erroneous judgment.

Furthermore, a trial judge has the power to compel restitution under various circumstances when his judgment has been reversed by a higher court. Admittedly there are situations where the ordering of restitution would be considered error upon review. Nevertheless, the rule appears to be quite clearly established that a trial court in a proper case may require restitution of money collected under a judgment when such judgment has been set aside by an appellate court. Hill v. Hearn, 99 So. 2d 231, 233 (Fla. 1957). With respect to restitution, the law states that:

> [T]he trial court shall determine entitlement to restitution and the extent, manner and form in which it shall be made through the application of equitable principles to the facts adduced before it. In this connection, the court's discretion exercised pursuant to its inherent power to correct its errors will not be disturbed absent a showing of abuse.

Mann v. Thompson, 118 So. 2d 112, 114 (Fla. 1st DCA 1960). Therefore, staff recommends that Derouin et al.'s argument in this regard be rejected because the foregoing statutes, case law and equitable principles of restitution clearly evidence the Commission's authority to require a surcharge in this situation.

Authority to Surcharge Former Customers

Staff also analyzed whether FWSC could surcharge prior customers who have left the system. There is no specific statutory authority or administrative authority directly on point. The rules are silent on the procedures which the utility can use to surcharge customers who are no longer customers of the utility. However, the GTE case may provide the Commission with some guidance in resolving this issue. In GTE, the Supreme Court opined that "while no procedure can perfectly account for the transient nature of utility customers, we envision that the surcharge in this case can be administered with the same standard of care afforded to refunds." 668 So. 2d 971, 973 (Fla. 1996). Rule 25-30.360(5), Florida Administrative Code, prescribes the methodology for distributing refunds. In providing refunds to customers who have left the service area, the Commission requires the utility to mail a refund check to the last known billing address except that no refund for

less than $1.00 will be made to those customers no longer on the system. Moreover, the Commission will treat any unclaimed refunds as cash contributions-in-aid-of-construction pursuant to Rule 25-30.360(8), Florida Administrative Code. Therefore, staff believes that the procedures for implementing refunds could be followed in implementing surcharges. Likewise, the Commission should monitor the surcharge issue within the same framework that refunds are monitored to be consistent with the GTE decision.

Authority to Surcharge New Customers

In GTE, the Supreme Court concluded "that no new customers should be required to pay a surcharge". 668 So. 2d 971, 973 (Fla. 1996). This conclusion is based on the Court's viewpoint that utility ratemaking is "a matter of fairness". Id. at 972. A plain reading of GTE provides that fairness dictates that "no customer should be subjected to surcharge unless that customer received services from the utility during the disputed period". Id. Accordingly, for the reasons expressed in GTE, staff believes that the notion of surcharging customers who did not receive FWSC services during the disputed period of time would be inconsistent with GTE. Furthermore, the imposition of a surcharge to new customers would only create a new inequity since the new customers received no benefit during the disputed period. Treating the new customers as potential surcharge customers would be contrary to the principles set forth by the Supreme Court in GTE.

Interest

The Courts have decided several times that interest on refunds cannot be waived. Specifically, the Court has said:

> Even though rule 25-6.106(2) does not specifically authorize the payment of prejudgment interest as part of the overcharge refund due a customer, we agree with the district court that a regulated public utility has the legal obligation to pay interest on overcharge refunds. In light of our decision in Argonaut, it is unnecessary for the Public Service Commission to specifically refer to prejudgment interest in its rules to assure utility customers are fully compensated in the event of an over billing.

Kissimmee Util. Authority v. Better Plastics, Inc., 526 So. 2d 46,47 (Fla. 1988). See also, Argonaut Ins. Co. v. May Plumbing Co., 474 So. 2d 212 (Fla. 1985).

A fair rate of interest is calculated pursuant to Rule 25-30.360, Florida Administrative Code, which provides:

> (1) All refunds ordered by the Commission shall be made in accordance with the provisions of this Rule, unless otherwise ordered by the Commission.
>
> (4)(a) In the case of refunds which the Commission orders to be made with interest, the average monthly interest rate shall be based on the 30 day commercial paper rate for high grade, unsecured notes sold through dealers by major corporations in multiples of $1,000 as regularly published in the Wall Street Journal.

Further, it has been a longstanding Commission practice to require a utility to provide refunds with interest. In Order No. 20474, issued December 20, 1988, in Docket No. 880606-WS: In re: Complaint by Tractor Co. Inc. against Meadowbrook Utility Systems, Inc. regarding refund for overpayments in Palm Beach County, the Commission stated:

> Rule 25-30.360, Florida Administrative Code, the Commission's rule on refunds for water and sewer utilities contains a provision regarding interest. It is the Commission's policy to require refunds with interest in recognition of the time value of the customer's money when it was in the utility's hands.

Order No. 20474 at 3 (emphasis added). Furthermore, in Order No. PSC-96-1046-FOF-WS, issued August 14, 1996, In re: Application for Rate Increase in Brevard, Charlotte/Lee, Citrus, et al. by Southern States Utilities, Inc., the Commission ordered the utility to provide refunds with interest to the customers who overpaid. For the reasons expressed herein, staff believes that interest should not be waived for any potential refund amounts.

The utility asserts that the addition of interest would increase the burden on potential surcharge payers. The Associations contend that there are no applicable exceptions or waivers that would excuse the payment of interest in this case. Keystone/Marion state that the customers should not be required to pay interest and, in effect, be penalized twice for following the Commission's orders.

There is no statutory authority or case law which specifically provides that a utility can recover surcharges with interest. The principles set forth in Southern States and GTE also do not specifically provide any guidance in determining whether the utility can surcharge with interest. In GTE and Southern States, the Courts did not answer the question whether the utility can recover its costs with interest. The Courts only stated that utilities can recover the cost incurred as a result of an erroneously approved order on the basis that equity requires both ratepayers and utilities to be treated in a similar manner. Therefore, the decision to allow a surcharge with interest will depend on an interpretation of the statement that equity requires both ratepayers and utilities to be treated in a similar manner. A strict interpretation suggests that the utility may not be able to surcharge with interest because the courts merely stated that it can recover its cost without mentioning interest. In contrast, a broad interpretation suggests that FWSC should be able to recover a surcharge with interest because equity requires both ratepayers and utilities to be treated in a similar manner. For instance, if the customers are provided a refund with interest (recognizing the time value of money), the utility should be able to surcharge with interest.

To this end, if the refunds and surcharges are required, FWSC should be provided with a reasonable opportunity to recoup its costs of providing service to customers who underpaid because of an erroneous order. Costs may include interest depending on the Commission's interpretation of the Southern States and GTE decisions.

Discontinuance of Service for Non-payment

Pursuant to Rule 25-30.320(2), Florida Administrative Code,

> As applicable, the utility may refuse or discontinue service under the following condition provided that, unless otherwise stated, the customer shall be given written notice and allowed a reasonable time to comply with any rule or remedy any deficiency: (g) For nonpayment of bills.

Although this rule does not specify whether the utility can refuse or discontinue service for refusal to pay a surcharge, it does provide discontinuance of service for nonpayment of bills. Staff believes that failure to pay a surcharge would constitute nonpayment of a utility bill, and thus a utility may refuse or

discontinue service for customers who are required to be surcharged according to the aforementioned rule.

Questions of Policy

Staff has analyzed four categories of methodologies for implementing the refunds and surcharges if the Commission determines that is the appropriate action in this case. These categories include: requiring refunds and allowing surcharges over some set period of time; requiring a refund within 90 days and establishing a regulatory asset to recover the surcharge amount; establishing a clause mechanism similar to the fuel adjustment clause to administer the surcharges; and using regulatory assessment fees to fund the refund. In addition, the Commission may choose to combine two or more or a variation of these methodologies as discussed herein. There are policy considerations under each of these methodologies as staff has identified in the following discussion.

In reviewing staff's analysis of these methodologies, the Commission should be cautioned that staff believes that all of these methods are fraught with problems of implementation and result in inequities. Staff has had extreme difficulty trying to reconcile the First District's various decisions, and the interpretation of those decisions, with the practical aspects of implementation. What is legally correct may be impossible to implement in any reasonable and equitable manner.

A. REFUNDS/SURCHARGES OVER SET PERIOD OF TIME

Customer Specific vs. Average Surcharge and Refund

Pursuant to Rule 25-30.360(3), Florida Administrative Code, "[w]here the refund is the result of a specific rate change, including interim rate increases, and the refund can be computed on a per customer basis, that will be the basis of the refund.... Per customer refund refers to a refund to every customer receiving service during the refund period." (Emphasis added)

Rule 25-30.360(5), Florida Administrative Code states that:

> For those customers still on the system, a credit shall be made on the bill.... For customers entitled to a refund but no longer on the system, the company shall mail a refund check to the last known billing address except that no refund for less than $1.00 will be made to these customers.

If the Commission determines that individual affected customers must be made whole on a purely monetary basis, customer-specific refunds and surcharges should be made. However, as discussed earlier, some surcharges are very large. The higher surcharges range from a few hundred dollars up to tens of thousands of dollars. If both groups of customers can be treated in a "similar" rather than in a precise manner, the Commission could order average surcharges and refunds by service area. This approach would lessen the impact on some surcharge customers.

Staff analyzed the data submitted by FWSC on a service area basis. Although this data appears to indicate that on a simple average basis the surcharges would be more economically feasible, this methodology may create a "windfall" for some surcharge customers. As shown on Attachment A, the simple average approach causes many customers to pay far more or less than the subsidy they received. For example, in the Jungle Den service area, the highest surcharge is $2,720.83, while the lowest surcharge is 31¢. On a simple average basis, the average surcharge would be $931.28. The Commission would have to make the determination that it would be equitable for a customer whose obligation is 31¢ to pay close to $1,000, while a customer whose obligation is $2,721 pays less than half that amount. Also, in the Burnt Store service area the highest surcharge is $74,861 while the lowest is 28¢. Using a simple average method, would it be equitable for either of these customers to pay $725.76?

If a simple average is chosen, the Commission should be cognizant of the fact that this will also combine general service customers with residential, and higher water users with low users. This raises the issue of whether this methodology should be done as a simple average or whether meter equivalencies should be considered. If averages are based upon the meter equivalency of customers, this inequity will be minimized. Thus, the fact that larger meters permit higher consumption minimizes the subsidies between low users and high users. Also, in general, general service customers are served by larger meters. This average could be accomplished by taking the total refund and/or surcharge amount by service area and dividing by the factored ERCs. This would result in the basic refund and/or surcharge for a 5/8 inch x 3/4 inch meter customer. These basic amounts could then be factored up for each meter size. This methodology would thereby minimize subsidies not only between classes, but also within classes of customers.

Staff recommends that the issue of whether refunds/surcharges should be customer-specific or based on an average per service area should be fully explored in the short evidentiary hearing recommended in the next issue. In this way, the impact on all customers can be better explored, as well as whether averaging the surcharge or refund would result in a "windfall" for some customers that would violate the concept of the GTE and Southern States decisions.

Policy Considerations for Surcharging Prior Customers and Discontinuing Service for Nonpayment of Surcharge

In determining a methodology for administering the refund and surcharge, the Commission should be aware of the above-cited legal opinions that the utility can impose a surcharge on customers that have left the system and can discontinue service for nonpayment of a surcharge. However, there are practical aspects of this that must also be considered. The Commission should consider what incentive prior customers would have to pay the surcharge, especially since their service could not be disconnected because they are no longer customers. The only recourse available to FWSC would be to pursue legal remedies through the courts. Likewise, there are practical problems associated with discontinuing service for nonpayment of a surcharge amount. Staff believes that these practical considerations should be fully explored in the short evidentiary hearing discussed in the following issue so that the Commission can develop an implementation methodology that addresses these concerns.

Time Period of Payment/Surcharge

The most straightforward method of accomplishing the refunds and surcharges would be to require the utility to refund over a 90 day period and allow it to surcharge over that same time period. Rule 25-30.360(2), Florida Administrative Code, would require FWSC to make refunds within 90 days of the Commission's order, unless a different timeframe is prescribed by the Commission. However, there are several practical considerations that must be recognized before this methodology is chosen.

In its brief, Sugarmill Woods argues that refunds should be made within 90 days consistent with Commission rules, and that FWSC has the ability to obtain financing to manage this while collecting the surcharges over a more extended period. Keystone/Marion state in their brief that if the Commission decides to impose a refund and surcharge, it should ensure that such surcharge is collected in a way which will have the least impact on customers, and that

allowing an extended period of time for collection of the surcharge will mitigate the impact for some customers. Equity and fairness may dictate that refunds and surcharges should be made during the same timeframe.

Associations argue in their brief that there is no basis for altering the Commission's earlier requirement that refunds be made within 90 days of the entry of the Final Order. They state that an immediate refund could be financed through borrowing with the costs associated with the loan being borne by the surcharged customers. According to the Associations, surcharged customers should be allowed to pay back their unwarranted benefits over the course of 28 months, which is the same period over which they received them. Alternatively, the Commission could establish a longer period of surcharge repayment if it finds doing so will reduce the economic inconvenience occasioned by the surcharges. Associations conclude by stating that under no circumstances should the lengthening of the time for surcharge payments be used as an excuse for extending the 90 day refund requirement. Likewise, Sugarmill Woods believes a 90 day refund period, consistent with Commission rule, is appropriate for refunds with an extended period for surcharges. Finally, FWSC argues that if the Commission chooses to order refunds and surcharges, both the payment of refunds and the imposition of surcharges on all customers should be done over a five year period.

If the Commission requires FWSC to refund and surcharge, an important consideration will be over what period of time the refunds and surcharges should be finalized. As noted throughout staff's analysis, the Commission's decision regarding refunds/surcharges should not impact FWSC's established revenue requirement. This necessitates special consideration based upon the unique nature of requiring refunds and surcharges which are not based upon a change in revenue requirement. Since this is the Commission's initial experience with this circumstance, there is no precedent upon which to base a decision.

In order to avoid impacting revenue requirement, the funds received through the surcharges should fund the refunds. While the Commission can mandate when refunds are made, it cannot control when and if surcharges will be paid. The Commission can order FWSC to issue credits and checks for the entire refund within a specific time period. However, based upon the magnitude of the surcharges and the customers' inability or refusal to pay, the timeframe or expectancy that all surcharges will be paid cannot be controlled.

Fairness and equity dictate that the Commission consider the financial impact upon both customer groups as well as the utility. Further, the Commission should recognize that extending the time period over which refunds and surcharges should be completed would lessen the financial impact of the decision.

As stated earlier, some surcharges are extremely large. Based upon the magnitude of this unexpected surcharge, staff believes that it is unreasonable and unrealistic to ask customers who have not had the ability to plan or budget for this expense to satisfy this liability with a single payment. While the Commission had previously ordered FWSC to make refunds within 90 days, that prior decision was made in the context of refunds only without consideration of surcharges. Although an extended timeframe will delay the refunds to customers, interest will continue to accumulate on the unpaid balance, compensating customers for such delay. In order to reduce monthly surcharge installments to a more reasonable level, staff recommends that the refund and surcharge process be completed over an extended period of time.

Requiring FWSC to borrow funds to make an immediate refund would impact its liquidity and interest coverage ratio, as well as impacting revenue requirement, if corresponding surcharges were to be collected over an extended time period. While there may be problems with uncollectible accounts, it is both fair and equitable that refunds and surcharges be completed over the same extended timeframe. Further, both groups of customers will be treated in a similar manner. The extended timeframe would allow for a better matching of funds associated with the refunds and surcharges. Accordingly, staff recommends that refunds/surcharges be completed over the same extended timeframe if the Commission determines that refunds and surcharges are required.

B. REFUND/SURCHARGE AS A REGULATORY ASSET

Another option considered by staff was to require a refund within 90 days, and instead of requiring surcharges at the same time, create a regulatory asset equal to the total surcharge amount and allow the utility to recoup the asset by surcharging customers over an extended period of time. A regulatory asset is an asset that results from rate actions of regulatory agencies. A regulatory asset arises from specific revenues, expenses, or losses that would have been included in the determination of net income in one period under the general requirements of the uniform system of accounts but for it being probable that such items will be included in a different period or periods for purposes of developing the rates the utility is authorized to charge for its services. A

regulatory asset can also be created in reconciling differences between the requirements of generally accepted accounting principles, regulatory practice, and tax laws. The creation of a regulatory asset brings with it many new questions that must be answered. To properly analyze whether the creation of a regulatory asset is a viable option, staff was guided by several considerations. These are discussed below.

Effect on Revenue Requirement

If the Commission decides to implement the regulatory asset option, it will require an increase in the utility's revenue requirement and a concomitant increase in rates to the surcharge customers. As stated numerous times throughout staff's analysis, GTE stands for the principle that "utility ratemaking is a matter of fairness. Equity requires that both the ratepayers and utilities be treated in a similar manner." 668 So. 2d at 972. The revenue requirement as set by this Commission was upheld by the Court and therefore should not be changed by the outcome of this decision. This would be interpreted in an accounting sense that the rate of return should not be changed; therefore, the utility should be kept whole. To keep the utility whole under the regulatory asset option, the utility's revenue requirement will have to be increased to achieve a neutral effect on the utility's overall rate of return. This is required to compensate the utility for not only the annual amortization of the asset but also a rate of return on the unamortized balance, the income tax effect generated by the rate of return, and regulatory assessment fees on the rate of return.

Who Pays for the Regulatory Asset

Normally, when a regulatory asset is created, it is included in rate base which results in the entire customer base paying both the return on the asset, as well as the annual amortization, income taxes and regulatory assessment fees associated with it. However, in this case the Commission cannot allow the costs to be spread over the entire customer base because of the two distinct customer groups. Following the decision of the Court, the cost of the regulatory asset can only be paid by the surcharge customers, the group of customers in the service areas that received subsidies. To do otherwise and require the refund customers to pay a portion of the regulatory asset would not appear to be equitable as the two customer groups would not then be treated similarly as the Court required.

Further, as stated before, the Court in GTE held that no customer should be subjected to a surcharge unless that customer received service during the period of time in dispute. 668 So. 2d at 973. This decision further limits the number of customers who are eligible to pay for the regulatory asset by eliminating the customers who were not a customer of the utility during the period of time that the uniform rates were in effect. The refund customer group is defined in the same manner.

It seems that to follow the Court's definition of equity and fairness, the calculation of customers' refunds would have to be calculated in the same manner as the surcharge, even though they would not be done over a period of time. This would assure that the two customer groups are treated in a similar manner. The Commission is left with a range of options depending on the breadth of the Commission's definition of "equity" and "fairness". The following options fall within that range starting from the broadest to the narrowest:

1. Calculate two regulatory assets; one for water and one for wastewater. They should equal the total surcharge amount for each. Then collect an average or equal surcharge based on equivalent meter size from each water or wastewater surcharge customer over a set period of time.

2. Calculate individual regulatory assets for each of the 104 water and wastewater service areas equal to each service area's total surcharge. Then collect an average or equal surcharge based on equivalent meter size in each of the 104 service areas from the surcharge customers over a set period of time.

3. Calculate thousands of individual regulatory assets by customer, based on each individual water or wastewater customer's surcharge and collect each individual customer's surcharge over a set period of time.

Option 1 is the broadest. (See Attachment B, Schedule 1 of 3) The advantages of this option are: 1) that it is easily administered; 2) surcharges are averaged which eliminates the extreme highs; and 3) this option would have the least number of amortization periods. The disadvantages are: 1) since it is not based on consumption or service area it causes many customers to pay far more or less than the subsidy that they received; 2) it allows subsidies to flow from one service area to another; and 3)

even though based on meter equivalents it treats commercial and general service customers similar to residential customers, which in most cases would allow them to be subsidized and pay far less than they should actually pay. The disadvantages of this first option make it very unpalatable as an option and therefore, staff believes that it should not be considered.

This option also may not be in accordance with the First District's decision in Citrus County. Any uniform-based subsidies may not be appropriate. In Citrus County, the Court reversed the Commission's approval of uniform statewide rates for the utility systems which were operationally unrelated. (Citrus County at 1311) Thus a statewide application of a surcharge based upon Option 1 may not be viable.

Option 2 falls between the two extremes. (See Attachment B, Schedule 2 of 3) The advantages of this option are: 1) the surcharges are calculated by service area, which seems more equitable since the subsidies are contained in each service area based on each service area's revenue deficiency; 2) it is still easy to administer; and 3) the actual surcharge that most customers would pay would be much closer to the actual subsidy received, thus minimizing subsidies. The disadvantages to this option are: 1) since it is still not based on consumption some customers will pay more than the actual subsidy received; 2) since the surcharges are done based on service area, some surcharges will be much higher than in Option 1; and 3) even though the charge would be equated to meter size, commercial and general service customers may end up paying less than they should, since they are treated the same. Staff believes that Option 2 has merit and should be considered.

Option 3 is the narrowest. (See Attachment B, Schedule 3 of 3) The advantages of this option are: 1) since it is based on the consumption of each individual customer, the calculation of the surcharge is the most accurate of the three options; and 2) because some customers' surcharge will be fairly small, they could pay the surcharge immediately. The disadvantages are: 1) it will be extremely difficult to administer; 2) a large number of the surcharges will be extremely high; and 3) as explained below, it would require an extremely large number of different amortization periods. Option 3 does have some merit but it may be outweighed by the extreme difficulty of its application.

Under any of these options, it has to be understood that the surcharge customers will end up paying more in the long run than the subsidies that they received. This is due to the rate of

return, income taxes and regulatory fees that will have to be paid over the life of the regulatory asset.

It must be pointed out that the administrative cost to the utility of implementing any of the three options above has not been taken into account. The administrative cost of a regulatory asset option can be very material, especially with Option 3. In following the Court's decisions, this may be a cost that cannot be passed on to the utility without a commensurate revenue increase. The administrative cost is an issue that will have to be explored in further proceedings. This is discussed in Issue 4.

Amortization Period

The amortization period is dependent upon the rates currently being charged for each service area. The determination of an appropriate amortization period will have to be a judgement call based on the Commission's determination of what fair, reasonable and equitable rates would be for these surcharge customers. The monthly surcharge along with the monthly bill should be affordable. Therefore, affordability will be the major driving force in setting the amortization period(s). Unfortunately, since the rates now vary greatly for different service areas under the new cap band rate structure, there may very well have to be groups of service areas under different amortization periods. The higher the number of service area groups, the more complicated administering the process becomes.

Without determining the actual surcharges under each of the three options above in conjunction with the capband rates currently being charged, staff cannot make a determination of what the amortization period should be. This information will have to be gathered through further evidentiary proceedings. This is discussed in Issue 4.

C. REFUND/SURCHARGE THROUGH A MECHANISM SIMILAR TO FUEL COST RECOVERY

An option suggested by FWSC in its brief is to allow the utility to administer the refunds and surcharges through a mechanism similar to the fuel cost recovery clause used in the electric industry. In its brief, FWSC submits that the most equitable solution for all of its customers would be to provide refunds and impose surcharges over a five-year period, without interest. Under the utility's proposal, refunds and surcharges would be imposed on all existing customers of FWSC as they may change from month to month, based on adjustments to the gallonage

charge on a service area basis. True-up accounts would need to be established so that FWSC could true-up refunds and surcharges on an annual basis for the establishment of the applicable gallonage charge adjustments for the following year.

Before exploring the merits of this option, staff researched whether the Commission has the legal authority to implement a mechanism similar to that suggested by FWSC for the purpose of administering a refund and surcharge. Staff looked to the authority for the fuel adjustment clause, which is a mechanism that has been employed for many years in the electric industry pursuant to the Commission's general ratemaking authority for that industry. Sections 366.05 and 366.06, Florida Statutes, provide that the Commission has the authority to determine and fix fair, just, and reasonable rates. No specific statutory authority exists for the implementation of the clause. Therefore, by analogy, staff believes that the Commission would also have the authority to implement a similar procedure for the water and wastewater industry under its general ratemaking authority set forth in Sections 367.081(2) and 367.121, Florida Statutes. As long as the mechanism is similar in nature and characteristics to the fuel adjustment clause, this general ratemaking authority should be sufficient to legally uphold the mechanism.

Given that a mechanism similar to the fuel adjustment clause is a legally valid option, staff examined the merits of this proposal. According to FWSC, this mechanism would avoid extreme complications which would arise when FWSC attempts to identify, contact, collect from or pay to former customers no longer served by the utility. To highlight this problem, FWSC notes that there may be up to 30,000 former customers who have left FWSC's service areas affected by Southern States. This would mean that the net of the surcharge/refunds applicable to the anticipated 30,000 former customers would have to be recovered from the remaining surcharge customers.

Staff agrees with FWSC that a methodology requiring refunds and surcharges on a per customer basis and applicable only to those customers during the period the uniform rate was in effect would potentially create a heavy burden on the surcharge customers. Under a customer-specific methodology, the net of the surcharge amount applicable to former customers less the unrefundable amount would have to be borne by the surcharge customers, since the utility's revenue requirement must not be changed. A mechanism as suggested by FWSC would lessen the impact on the surcharge customers. However, staff has concerns with certain aspects of the utility's proposal as discussed below.

The utility's proposed mechanism includes the following elements: applicable to existing customers as a surcharge or credit to the gallonage charge; 2) it would be in effect for a five-year period; 3) it would include no interest on either refunds or surcharges; 4) it would be applied by service area rather than customer-specific; and 5) it would include a true-up adjusted on an annual basis. As discussed earlier in this recommendation, it is staff's opinion that the idea of implementing the refund or surcharge without interest is not a legally valid option. Therefore, this aspect of the utility's proposal must be eliminated.

Staff's main concern with this mechanism is that it would be applicable to all existing customers. As mentioned earlier, the GTE decision required that no customer should be subjected to a surcharge unless that customer received service during the disputed period of time. To be consistent with this decision, the surcharge in this case should only be applicable to customers that received service during the period of time the uniform rate was in effect, which was September 15, 1993 through January 23, 1996.

However, as noted above, if staff follows this aspect of the GTE decision while not impacting the utility's revenue requirement, the remaining surcharge customers would be forced to absorb not only the surcharge amount applicable to them individually, but also any amount the utility cannot collect from former customers. The argument set forth that these customers should pay a surcharge at all is that they benefitted from the uniform rate by paying less than they should have. In their brief, the Associations refer to these benefits as "undeserved economic windfalls". However, if these customers must absorb all of the uncollectible surcharge amounts, they would be paying more through a surcharge (perhaps substantially more) than any benefit they may have received under the uniform rate. Staff believes this would not be fair or equitable to the surcharge customers, nor would it be treating them in a "similar" manner as the refund customers or the utility.

It is difficult to find a solution to this case that can reconcile all of the court mandates and constraints set forth in the GTE and Southern States decisions as well as current statutory requirements. However, staff believes the Commission must attempt to comply as closely as possible and practicable with these court decisions. It is important to note, however, that the Court relied on the concepts of fairness and equity to all affected groups in both decisions. Staff believes any decision made in this instance should be with those basic concepts in mind.

In that regard, staff considered a methodology which requires refunds but employs a clause mechanism similar to the electric fuel adjustment clause for the surcharge. Under this methodology, refunds could be done either customer-specific or by service area as discussed previously. The clause would be applicable only to the surcharge customers.

If approved, the utility proposes that such a clause remain in effect for a five-year period. Staff believes the length of time should depend on the amount of uncollectible surcharges, which cannot be estimated at this time. Staff suggests that the clause could be administered similar to the fuel adjustment clause, in that a hearing would be held annually to determine the amount of the surcharge that should be recovered over the following year and the calculation of the surcharge based on projected consumption in the upcoming year. Staff agrees with FWSC that such a clause would require a true-up mechanism to address the accuracy of the projected consumption and any future unclaimed refunds and uncollectible surcharges.

The clause could be specific to each service area or apply to all affected service areas on a combined basis. In staff's opinion, this should depend on the feasibility of administering a separate clause for each of the 127 service areas involved in this docket. Without specific information from the utility on the cost of collecting the information and setting up a billing system to handle it, staff is unable to determine whether a service area specific clause would be feasible. However, as noted earlier, if it applies to all affected service areas, it may violate the Court's finding in Citrus County, which requires a finding by the Commission of functional-relatedness of a utility's facilities and land prior to the implementation of a uniform rate. Because no finding regarding the functional-relatedness of FWSC's facilities and land has been made in this docket, a uniform clause may be illegal.

If the Commission desires to pursue the cost recovery true-up mechanism, staff believes that an evidentiary proceeding would be necessary to address all of the details Staff is unable at this time to address, including:

1. How long the clause should be in effect.

2. Whether the clause should be applied on a service area basis or collectively to all affected service areas.

3. What should be included in the true-up mechanism.

A hearing would allow all parties to explore the administration of the clause and would ensure that it would be implemented as easily and equitably as possible. This is addressed further in Issue No. 4.

D. COMMISSION REFUNDS TO CUSTOMERS FROM REGULATORY ASSESSMENT FEES

Another option analyzed by staff was whether or not the FPSC, in resolving the refund/surcharge dilemma associated with FWSC's rate structure change, could utilize either completely or partially funds generated by regulatory assessment fees to fund refunds to those customers who overpaid. The answer to this question hinges upon the determination of whether the dilemma created by the FPSC's actions in this case constitutes a "cost of regulating water and wastewater systems. Section 367.145(3), Florida Statutes. Unfortunately, Chapter 367, Florida Statutes, does not set forth a definition or offer any explicit guidance as to what constitutes a cost of regulating water and wastewater utilities. In addition, there exists no case law interpreting this statute, and the legislative history sheds no light on the proper interpretation.

Section 367.145, Florida Statutes, provides for the collection of regulatory assessment fees from each water and wastewater utility regulated by the FPSC. More specifically, Section 367.145(3), Florida Statutes, provides that "[f]ees collected by the Commission pursuant to this section may only be used to cover the cost of regulating water and wastewater systems." In addition, Section 350.113(2), Florida Statutes, provides that all fees collected by the Commission are to be credited to the Florida Public Service Regulatory Trust Fund to be used in the operation of the Commission.

While it is arguable that the FPSC's decisions have created the refund/surcharge dilemma and that the FPSC should bear the responsibility of resolving this matter, it is doubtful that such use of regulatory assessment fees could legitimately be considered a cost of regulating water and wastewater systems. The legislature intended regulatory assessment fees to be used to fund the everyday operations of the FPSC and not to remedy extraordinary circumstances such as those present in this case, especially when they can be remedied through other appropriate measures. Therefore, based on this rationale, a statutory change probably would be needed in order to utilize regulatory assessment fees in a situation such as this.

Notwithstanding the statutory concerns, staff is also concerned whether this approach would set precedent for future cases. If this option is employed here, the FPSC should be prepared to utilize it in other cases if the situation presents itself and so warrants. Further, depending upon the parameters defined in the use of these funds and the resulting financial magnitude, there exists the potential for the impairment of the performance of the FPSC's operations, functions, and duties. Finally, the practical effect of using regulatory assessment fees in this manner is that the customers of other regulated utilities will be subsidizing the change in FWSC's rates.

Therefore, staff does not believe that the Commission should nor can, absent a statutory revision, utilize funds generated by regulatory assessment fees to refund to those FWSC's customers who overpaid under the uniform rate structure.

Other Issues

In the event that surcharges are ordered with interest, FWSC states in its brief that the Commission must provide FWSC additional revenue to reflect income tax liability associated with the interest to be paid to FWSC during the surcharge period. To do otherwise, according to the utility, would not make FWSC whole and, thus, would be inconsistent with the Southern States decision. Further, FWSC contends that in the event surcharges are ordered, the utility should not be required to pay regulatory assessment fees on such amounts since they have already been paid to the Commission when the revenue first was collected. A refund/surcharge order would simply force a refund of the prior revenue to be replaced by identical revenue under a surcharge. While staff does not agree that the revenues would be identical, staff does agree that regulatory assessment fees should not be collected on the net amount of the refunds/surcharges. However, if the Commission determines that a regulatory asset is the appropriate action, regulatory assessment fees will be payable only on the rate of return portion of the surcharge. The rate of return on the regulatory asset was discussed earlier. Staff agrees with FWSC that the regulatory assessment fees have been previously paid to the Commission. To require the payment of regulatory assessment fees on this amount would constitute double recovery by the Commission.

Conclusion on Requiring Refunds/Surcharges

In conclusion, based on the foregoing, staff believes that if the Commission requires refunds, the utility has a legal obligation to do so with interest, and that the Commission has the authority to allow a utility to surcharge customers who underpaid. The Commission must allow the utility an opportunity to recoup its costs for providing services to customers who underpaid, which may include interest. The utility may surcharge customers who have left the service area, but it cannot surcharge new customers. The utility may refuse or discontinue service to customers who refuse to pay the surcharge if the Commission determines such refusal is a violation of Rule 25-30.320(2)(g), Florida Administrative Code.

If the Commission determines that FWSC should be required to refund and allowed to surcharge, it should be guided by the mandates from the Southern States and GTE decisions and the overall issue of fairness in determining the appropriate methodology. The guidelines from the court include that neither the utility nor the ratepayers should receive a windfall from an erroneous Commission order, new customers cannot be surcharged, and ratepayers and the utility should be treated similarly. Staff notes that any methodology of refunds and surcharges other than customer-specific may be contrary to the First District's decisions that no customer group should receive a windfall due to an erroneous order. However, even the customer-specific refund and surcharge methodology is fraught with inequities in reconciling the First District's decision that the revenue requirement shall not be changed. For this reason staff is not making a specific recommendation as to which methodology should be adopted. However, once an option is chosen, staff recommends that the Commission conduct a short evidentiary hearing to analyze the implementation questions consistent with the discussion in the following issue.

**ISSUE 4**: If the Commission determines that FWSC should be required to make refunds and surcharges to comply with Southern States Utils., Inc. v. Florida Public Service Comm'n, should an evidentiary proceeding be scheduled to determine guidelines for implementation?

**RECOMMENDATION**: Yes. If the Commission chooses any variation of the refund/surcharge option, it should hold a one-day hearing to determine the guidelines for implementation and final resolution. The dates for filing testimony, etc. should be established by the Prehearing Officer by order. (ALL STAFF)

**STAFF ANALYSIS**: FWSC requests that the Commission postpone a decision in this proceeding until:

1. a prehearing conference is ordered so that all relevant issues may be identified;

2. hearings are scheduled for the introduction of evidence of financial impacts, interest rates, recovery periods, customer base and other issues including those as may be raised by other parties;

3. all customers, including existing customers, receive notice of the issues being addressed in this proceeding and are given adequate time to prepare for hearing; and

4. the parties are given an opportunity to file briefs addressing all issues after evidentiary hearings are concluded.

Derouin, et al. cite to Florida Gas Co. v. Hawkins, 372 So. 2d 1118 (Fla. 1979), and state that when factual matters affecting the fairness of utility rates are being considered by a regulatory commission, the rudiments of fair play and due process require that the company must be afforded a fair hearing and an opportunity to explain or rebut those matters. Keystone/Marion state that if the Commission imposes a surcharge, it should determine that the utility has the ability to refund/surcharge with the requisite precision as a precondition to any decision to proceed in that manner.

As stated earlier, the Commission's role at this point is purely ministerial and the Commission must expeditiously comply with the Court's mandate. In that regard, staff does not believe that a decision on the appropriate action can or should be

postponed. Based upon the reading of the Court opinions, all relevant case law, the record in Docket No. 920199-WS, the briefs, and the input from the parties and customers, staff believes that the Commission has sufficient foundation to reach a decision on the appropriate option. However, as discussed in the previous issue, staff does not have all of the information necessary to adequately recommend how the appropriate action should be implemented. The information necessary was not provided by the parties in their briefs, nor was it contained in the record in this docket.

Therefore, staff recommends that if the Commission chooses any variation of the refund/surcharge option, the record should be reopened for a one-day hearing to address the guidelines for implementation (specific questions identified below). The dates for filing testimony should be established by the Prehearing Officer by order. Staff believes that this will not conflict with the mandate issued by the First District. In the mandate, the Court remanded the cause "for further proceedings consistent with the opinion." "A remand of this type does not preclude a deputy from exercising a quasi-judicial discretion to receive additional testimony if he deems it necessary to enable him to comply with the mandate. Tampa Electric Co. v. Crosby, 168 So. 2d 70, 73 (Fla. 1964), Basic Energy Corp. v. Hamilton County, 667 So. 2d 249 (Fla. 1st DCA 1995), Nielsen v. Paneil, Inc., 227 So. 2d 883 (4th DCA 1969).

If the Commission approves refunds and surcharges, the following issues should be addressed:

1. Should the refunds and surcharges be done on a customer specific basis or by service area;

2. If refunds and surcharges are done by service area, should they be calculated on a simple average or should meter equivalencies be considered;

3. Over what period of time should the refunds be issued and surcharges be collected;

4. How should the uncollectible surcharges for current and prior customers be treated;

5. Should the surcharge be implemented for customers who have left the system;

6. What interest rate is applicable to the refunds and surcharges;

7. How should the administrative costs of refunds and surcharges be treated and/or recovered;

8. Should FWSC be allowed to collect the income tax effect of the surcharges, and if so, how; and

9. Should the utility disconnect service for nonpayment of the surcharge?

If the Commission determines that a regulatory asset should be established to recover the surcharge amount, the following issues should be addressed:

1. How does the creation of a regulatory asset affect the utility's revenue requirement;

2. Whether the return on such asset should be charged to all FWSC ratepayers;

3. Should the regulatory asset be calculated on a customer-specific basis, service area basis, or collectively to affected service areas;

4. How long the regulatory asset should be amortized;

5. How the administrative costs of refunds and surcharges should be treated and/or recovered;

6. Whether FWSC should be allowed to collect the income tax effect of the surcharges, and if so, how; and

7. Whether the utility should disconnect service for nonpayment of the surcharge.

If the Commission determines that a cost recovery/true-up mechanism should be utilized for the surcharges, the following issues should be addressed:

1. How long the clause should be in effect;

2. Whether the clause should be applied on a service area basis or collectively to all affected service areas;

3. What should be included in the true-up mechanism;

4. How the administrative costs of refunds and surcharges should be treated and/or recovered;

5. Whether the clause should include a provision for the income tax effect of the surcharges; and

6. Whether the utility should disconnect service for nonpayment of the surcharge.

**ISSUE 5:** Should FWSC be required to refund to its Spring Hill facilities the difference between revenues collected through the uniform rate and modified stand-alone rate for the period January 23, 1996 through June 14, 1997?

**RECOMMENDATION:** Yes, FWSC should be ordered to refund to its Spring Hill service area the difference between revenues collected through the uniform rate and the modified stand-alone rate for the period January 23, 1996 through June 14, 1997. The refunds should be made in accordance with Rule 25-30.360, Florida Administrative Code. (ALL STAFF)

**STAFF ANALYSIS:** Staff has listed below an outline of the events which have transpired in this docket regarding the Spring Hill issue:

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| 09/15/93 | Uniform rates implemented. |
| 04/06/95 | Order No. PSC-93-0423-FOF-WS is reversed (Citrus County) |
| 10/19/95 | Order No. PSC-95-1292-FOF-WS issued on remand requiring implementation of modified stand-alone rates and requiring refund (includes Spring Hill). |
| 01/23/96 | Interim rate implemented in Docket No. 950495-WS based upon modified stand-alone rates for the facilities in that docket (does not include Spring Hill). |
| 02/29/96 | GTE opinion issued. |
| 03/21/96 | Order No. PSC-96-0406-FOF-WS issued - FPSC reconsiders entire decision in light of GTE and requests briefs. |
| 08/14/96 | Order No. PSC-96-1046-FOF-WS issued - second order on remand affirms implementation of modified stand-alone rates, requires refunds, but no surcharge. Denies petition to intervene. |
| 09/03/96 | Utility appeals Order No. PSC-96-1046-FOF-WS. |

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| 09/03/96 | Utility files Motion for Stay of Order No. PSC-96-1046-FOF-WS with the Commission. |
| 09/12/96 | City of Keystone Heights files appeal of Order No. PSC-96-1046-FOF-WS. |
| 10/28/96 | Order No. PSC-96-1311-FOF-WS issued - granting utility's motion for stay. |
| 02/14/97 | Order No. PSC-97-0175-FOF-WS issued - modified stay to reflect that only the refund was stayed by Order No. PSC-96-1311-FOF-WS, not the implementation of modified stand-alone rates for Spring Hill. |
| 02/28/97 | Utility files motion for reconsideration of Order No. PSC-97-0175-FOF-WS and motion for stay. |
| 05/14/97 | Order No. PSC-97-0552-FOF-WS - denies Utility's motion for reconsideration. |
| 06/11/97 | Utility files emergency motion to review denial of stay at First District. |
| 06/14/97 | Utility implements new rates in Spring Hill pursuant to Settlement Agreement. |
| 06/17/97 | Southern States opinion issued. |
| 06/25/97 | First District denies utility's emergency motion to review denial of stay. |

FWSC's Spring Hill service area was one of the facilities affected by the uniform rate structure originally approved by Order No. PSC-93-0423-FOF-WS. On April 5, 1994, Hernando County rescinded Commission jurisdiction. However, pursuant to Section 367.171(5), Florida Statutes, the Commission retained jurisdiction of the pending case. Accordingly, the Spring Hill facility will remain part of Docket No. 920199-WS, until final disposition by the Commission.

In its original decision on remand of the uniform rate order, the Commission, by Order No. PSC-95-1292-FOF-WS, ordered FWSC to implement a modified stand-alone rate structure for all 127

facilities in Docket No. 920199-WS and to make corresponding refunds. However, as stated earlier, the Commission reconsidered this order in light of the GTE court decision. By Order No. PSC-96-1046-FOF-WS, the Commission reaffirmed in all respects that portion of Order No. PSC-95-1292-FOF-WS related to the implementation of a modified stand-alone rate structure. This order was appealed by several parties including FWSC and the City of Keystone Heights. However, prior to the City's appeal, FWSC had filed a motion for stay which the Commission granted by Order No. PSC-96-1311-FOF-WS.

Subsequently, by Order No. PSC-97-0175-FOF-WS, upon motion by OPC, the Commission modified Order No. PSC-96-1046-FOF-WS to reflect that only FWSC's refund obligation was stayed pending appeal, and that FWSC should implement the modified stand-alone rate structure for the Spring Hill customers consistent with prior Commission Orders Nos. PSC-95-1292-FOF-WS and PSC-96-1046-FOF-WS. On February 28, 1997, FWSC filed a motion for reconsideration and motion for stay of Order No. PSC-97-0175-FOF-WS. On May 14, 1997, the Commission issued Order No. PSC-97-0552-FOF-WS which denied the petition for reconsideration and again affirmed that modified stand-alone rates were to be implemented for the Spring Hill customers.

For the facilities that were part of the most recent rate proceeding, Docket No. 950495-WS, the modified stand-alone rates were implemented on January 23, 1996, when the interim rates were approved. In Order No. PSC-96-0125-FOF-WS, the Commission found that consistent with the First District's mandate and Order No. PSC-95-1292-FOF-WS, it was appropriate to base interim rates on a modified stand-alone rate structure. The Commission further determined that even though the modified stand-alone rates had not been implemented by FWSC, those were the final approved rates for those facilities included in Docket No. 920199-WS.

By Order No. PSC-95-1385-FOF-WS, issued November 7, 1995, the Spring Hill facility was excluded from Docket No. 950495-WS; therefore, the customers of the Spring Hill facility remained on the uniform rate structure until the June 14, 1997 rate change. In its brief, FWSC states that Hernando County settled a rate case filed by FWSC by establishing stand-alone rates for Spring Hill. Although not within the Commission's jurisdiction, staff has analyzed the settlement agreement for informational purposes and notes that the implemented rates are based upon the modified stand-alone rates approved in Order No. PSC-95-1292-FOF-WS, not upon pure stand-alone rates.

FWSC's position is based upon a legal argument and its affidavit stating it did not exceed its authorized rate of return during 1996. In its brief, FWSC argues that the automatic stay triggered by the City of Keystone Heights' appeal of Order No. PSC-96-1046-FOF-WS barred FWSC's implementation of the modified stand-alone rate structure for all 127 service areas, including Spring Hill because no party moved to modify or vacate the automatic stay. FWSC contends that it had no authority to implement the modified stand-alone rates for the Spring Hill facilities during the stay. The effect of the automatic stay was to confirm that FWSC had no choice but to charge Spring Hill customers the approved and effective tariffed uniform rates while Order No. PSC-96-1046-FOF-WS was on appeal by Keystone Heights until disposition of the appeal, withdrawal of the appeal, or modification or vacation of the automatic stay which never occurred. The other service areas only experienced a change to modified stand-alone rates in a separate docket, not in this docket. According to FWSC, had FWSC not filed the 1995 rate application, the uniform rate structure would still be in place to this day for all 127 service areas absent some modification or vacation of Keystone Heights' automatic stay.

FWSC states that OPC never disputed the fact that the uniform rates were the only rates FWSC could lawfully charge the Spring Hill customers during the stay. Further, FWSC contends that OPC mischaracterizes the charging of such rates as a "windfall" to FWSC. FWSC also states that effective September 1, 1997, it reduced its stand-alone rates for the Spring Hill customers in an amount which totals a $1.6 million revenue requirement decrease which is below the cost of service. FWSC asserts that this decision constitutes a material reparation for any alleged overpayments based on modified stand-alone rates dating back to 1993. FWSC argues that refunds for the stay period would be clearly duplicative. Additionally, FWSC contends that confiscation of the revenues collected during the stay pursuant to legally established rates would violate its state and federal constitutional rights to due process. FWSC believes that the principles of equity and fairness emphasized in GTE and Southern States eliminate the option of requiring FWSC to bear the financial burden of any refunds to the Spring Hill customers for the stay period. Therefore, if the Commission does order a refund for the Spring Hill customers, then the surcharges necessary to recover the cost of such refunds should be borne by all of FWSC's customers in the remaining 125 service areas in this docket.

In its brief, OPC states that while Order No. PSC-95-1292-FOF-WS never became final, it was the intent of the Commission as affirmed in Order No. PSC-97-0175-FOF-WS that all systems included

in Docket No. 920199-WS implement modified stand-alone rates. Once FWSC implemented the interim rate increase in Docket No. 950495-WS based on modified stand alone rates, there was no longer any reason for Spring Hill's customers to continue paying uniform rates. The interim rates provided the full revenue requirement for the service areas included in that docket without requiring a subsidy from Spring Hill. OPC asserts that after the modified stand-alone rates went into effect on January 23, 1996, FWSC, not any customer group received a windfall equal to the difference between uniform rates and the modified stand-alone rates. OPC believes that in accordance with the equity principles set forth in GTE and Southern States, FWSC should refund over-collections for this time period.

Automatic Stay

As previously discussed, FWSC asserts that the City of Keystone Heights triggered an automatic stay when it appealed Order No. PSC-96-1046-FOF-WS on September 12, 1996. FWSC contends that the City's appeal triggered a second stay which barred FWSC's implementation of the modified stand-alone rate structure for all 127 service areas, including Spring Hill. No party moved to modify or vacate the automatic stay. Therefore, FWSC contends that it had no authority to implement the modified stand-alone rates for the Spring Hill facilities during the stay.

Staff believes that FWSC's reliance on this argument is misguided. While staff agrees that pursuant to Rule 25-22.061(3), Florida Administrative Code, an automatic stay is triggered by a public body's appeal of a Commission order, in this case, the Commission also granted FWSC a stay of the order subsequent to the creation of the automatic stay as a result of the City's appeal. OPC then filed a motion for reconsideration or in the alternative motion to modify the stay. Having found that Rule 9.310(a), Florida Rules of Appellate Procedure, provided the Commission with continuing jurisdiction, in its discretion, to grant, modify, or deny such relief, the Commission granted OPC's alternative motion to modify the stay to reflect that only FWSC's obligation to provide refunds was stayed pending appeal. Subsequently, FWSC's emergency motion to review this decision by the Commission was denied by the First District.

Staff is particularly cognizant of the fact that the Commission's decisions to grant and then modify the stay requested by the utility transpired after the automatic stay was created by Keystone Heights' appeal. Therefore, staff believes the practical effect of the Commission's modification of the stay requested by FWSC was to eliminate or vacate that portion of any and all stays

pertaining to the utility's obligation to implement the modified stand-alone rate structure for Spring Hill, which included the City's automatic stay. Therefore, staff believes that when the Commission granted OPC's motion to modify FWSC's stay, the City's automatic stay was modified as well. FWSC's argument would in essence amount to the existence of two separate stays of the same order with only one of those stays being modified. This interpretation not only would be impractical, but would be non-sensical as well. Staff conducted research on this issue, but was unable to find any precedent for this situation. Accordingly, staff believes that FWSC's argument is unfounded and recommends that FWSC be required to refund the difference between revenues collected through the uniform rate and the modified stand-alone rate for the period January 23, 1996 through June 14, 1997.

However, even assuming arguendo that the automatic stay resulting from Keystone Heights' appeal prevented FWSC from implementing the modified stand-alone rate, staff still believes the utility is legally obligated to refund the difference in revenues collected. The law in Florida is very clear regarding the effects of a stay. In Florida, the term supersedeas means stay. A supersedeas or stay is preventive in nature and maintains the status quo pending appellate proceedings. In re: Purifiner Distribution Corp., 188 B.R. 1007, 1009 (Bankr. M.D. Fla. 1995); Hudson v. Keene Corporation, 445 So. 2d 1151 (Fla. 1st DCA 1984), rehearing denied 472 So. 2d 1142 (Fla. 1985) (Opinion would not affect interests of parties against whom case had been stayed); Green v. Green, 254 So. 2d 802 (Fla. 3rd DCA 1971) (A party in whose favor judgment was rendered shall not suffer by stay of which was entered); Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co. v. Barrett, 174 So. 2d 417, 418 (Fla. 3rd DCA 1965) (The supersedeas, being preventive in nature, does not set aside what the trial court has adjudicated, but stays further proceedings in relation to the judgment until the appellate court acts thereon).

An automatic stay does not undo or set aside what the trial court has adjudicated; it merely suspends the order. City of Plant City v. Mann, 400 So. 2d 952 (Fla. 1981), citing Henry v. Whitehurst, 66 Fla. 567, 64 So. 2d 233 (1914) and El Prado Restaurant, Inc. v. Weaver, 259 So. 2d 524 (Fla. 3d DCA 1972). Indeed, an automatic stay during the initial appeal ends when the district court of appeal issues its mandate. City of Miami v. Arostegui, 616 So. 2d 1117, 1120 (Fla. 1st DCA 1993).

In the Plant City case, the Supreme Court affirmed a Commission order directing the utility to refund excess franchise fees collected from customers during the pendency of an appeal

while an automatic stay was in effect. 400 So. 2d at 953. In support of its decision, the Supreme Court stated that "a supersedeas on appeal from a final judgment stays the execution but does not undo the performance of the judgement". Id.

Therefore, an automatic stay is a mechanism that merely delays the enforcement of the judgment and does not annul it like a reversal. Id. Thus, even assuming the automatic stay which resulted from Keystone Heights' notice of appeal was not modified in any sense, the stay still does not release FWSC from its obligation to provide refunds to customers in the Spring Hill area because the stay did not set aside or undo the performance of Order No. PSC-95-1292-FOF-WS, but merely stayed the execution of the order until the appeal was decided.

Straube v. Bowling Green Gas Co.

In its brief, FWSC cites to Straube v. Bowling Green Gas Co., 227 S.W.2d 666 (Mo. 1950), to support its argument that it should not be compelled to refund legally established rates obtain during the stay period. In particular, FWSC asserts that the facts in Straube are parallel to the facts in this docket. However, staff believes that this assertion is incorrect. Straube did not involve a Commission order directing the utility to provide a refund for funds collected under an erroneous Commission order. Moreover, Straube did not involve rates that were found to be improper and illegal as in this docket by the Citrus County decision.

Notwithstanding the decision in Citrus County, FWSC argues in its brief that to confiscate revenues collected by FWSC from Spring Hill's customers during the stay period pursuant to the legally established uniform rates would, as recognized in Straube, violate FWSC's state and federal constitutional rights to due process. However, staff believes that this argument is flawed because the uniform rates in this docket were found by the Court to be improper and illegal. Moreover, the "windfall" reaped by the utility in Straube was in a "non-ratemaking setting". Reinhold v. Fee Fee Trunk Sewer, 664 S.W.2d 599, 603 (Mo. Ct. App. 1984). Furthermore, the Straube case dealt with the legal theory of unjust enrichment, not the state and federal constitutional rights of a utility as argued by FWSC.

Based on the foregoing, staff believes that the automatic stay that resulted from Keystone Heights' notice of appeal does not release FWSC from its obligation to provide refunds to the customers in the Spring Hill area. Staff does not believe that the

case cited by FWSC in its brief is analogous or applies to the circumstances in this docket.

Refund to Spring Hill

At issue is whether FWSC should have implemented modified stand-alone rates at its Spring Hill facility on January 23, 1996 when the interim rates in Docket No. 950495-WS went into effect and whether a refund is required to Spring Hill customers based upon the difference between the uniform rate and stand-alone rate from January 23, 1996 through June 14, 1997.

This issue is created, in part, by the approval of rates in two separate dockets with the approved rates being applicable to Spring Hill in only one docket. When interim rates were approved, a portion of the Remand Order was satisfied since all service areas, except Spring Hill, ceased to use the uniform rate on January 23, 1996. At that time, only refunds associated with the uniform rate were still under appeal. Staff agrees with OPC that there was no rationale for Spring Hill to remain on its uniform rate after modified stand-alone rates were implemented for all other systems. It was the uniform rate structure which created the so called "winners/losers" scenario to meet the utility's total revenue requirement, and subsidies were an inherent part of the uniform rate structure. The interim modified stand-alone rates implemented on January 23, 1996 were based upon a new revenue requirement which made the utility whole for all service areas, excluding Spring Hill. Therefore, after that date, a subsidy from Spring Hill was not needed to compensate for under-recovery from any of the other systems. Maintaining the uniform rate for this period resulted in excess revenues being collected and retained by FWSC from the Spring Hill customers and "[a]s the supreme court explained in Clark, '[i]t would clearly be inequitable for either the utilities or ratepayers to benefit, thereby receiving a windfall, from an erroneous PSC order." 22 Fla. L. Weekly at D1493.

Regardless of the stay argument, the fair and equitable approach, as the Commission intended in Order No. PSC-97-0175-FOF-WS, was that all facilities subject to the uniform rate change to the modified stand-alone rate structure. FWSC argues that in 1996, even though the Spring Hill rate contained a subsidy, it did not overearn and if a refund is ordered, corresponding surcharges must be collected from other customers. To borrow a phrase from Southern States, staff does not believe this argument holds water. Rates are established to allow the utility the **opportunity** to earn its authorized rate of return. (emphasis added). The actual

return to be earned is not guaranteed. Circumstances may occur after the rates are set that may affect the achieved rate of return. These factors may include turnover of customers, usage, an increase or decrease in expenses, etc. Therefore, whether or not FWSC overearned or underearned during this time is of no consequence.

Pursuant to Citrus County, uniform rates were clearly invalid which thereby negates any argument based on the utility's earnings level. The fact remains that Spring Hill customers were required to continue paying the uniform rate long after all other customers had changed to the modified stand-alone rate, and the Commission can and should correct this error by ordering a refund.

Accordingly, staff recommends that FWSC be required to refund to its Spring Hill service area the difference between revenues collected through the uniform rate and modified stand-alone rate for the period January 23, 1996 through June 14, 1997. The refunds should be made in accordance with Rule 25-30.360, Florida Administrative Code.

**ISSUE 6**: Should the docket be closed?

**RECOMMENDATION**: No, the docket should remain open to conduct further evidentiary hearings on the implementation and final resolution of this matter if the Commission approves the refund/surcharge option. To that extent, the order should be issued after the final resolution of this matter. However, if the Commission determines further hearings are not required, the docket should be administratively closed upon staff's verification that the utility has completed the required refunds and surcharges. Further the utility's bond can be released upon staff's verification that the refunds have been completed. If the Commission approves the no refund, no surcharge option, no further action is required and the docket should be closed. (All STAFF)

**STAFF ANALYSIS**: The docket should remain open to conduct further evidentiary hearings on the implementation and final resolution of this matter if the Commission approves the refund/surcharge option. To that extent, Staff believes that the order should be issued after the final resolution of this matter. However, if the Commission determines further hearings are not required, the docket should be administratively closed upon staff's verification that the utility has completed the required refunds and surcharges. Further the utility's bond can be released upon staff's verification that the refunds have been completed. If the Commission approves the no refund, no surcharge option, no further action is required and the docket should be closed.

**FLORIDA WATER SERVICE CORPORATION**

| | REFUND | | | | SURCHARGE | | | |
|---|---|---|---|---|---|---|---|---|
| Service Area | HIGHEST | LOWEST | CUSTOMERS | CUSTOMER AVERAGE | HIGHEST | LOWEST | CUSTOMERS | CUSTOMER AVERAGE |
| AMELIA ISLAND | $107,600.72 | $0.06 | 2,186 | $314.63 | | | | |
| APACHE SHORES | | | | | $1,836.30 | $3.16 | 226 | $411.86 |
| APPLE VALLEY | $1,124.10 | $0.16 | 1,242 | $119.29 | | | | |
| BAY LAKE ESTATES | | | | | $1,122.65 | $7.21 | 69 | $397.69 |
| BEACON HILLS | $13,430.19 | $0.01 | 4,631 | $253.45 | $53.96 | $0.01 | | |
| BEECHER'S POINT | | | | | $46,136.29 | $16.49 | 56 | $1,819.89 |
| BURNT STORE | | | | | $74,861.38 | $0.28 | 941 | $726.76 |
| CARLTON VILLAGE | | | | | $951.66 | $0.82 | 227 | $68.94 |
| CHULUOTA | | | | | $18,205.47 | $0.35 | 940 | $522.78 |
| CITRUS PARK | | | | | $3,814.62 | $0.01 | 629 | $406.94 |
| CITRUS SPRINGS | | | | | $5,084.54 | $0.09 | 2,416 | $206.00 |
| CRYSTAL RIVER HIGHLANDS | | | | | $3,182.44 | $3.30 | 123 | $455.38 |
| DAETWYLER SHORES | | | | | $1,211.88 | $1.90 | 162 | $141.97 |
| DELTONA | | | | | $31,510.98 | $0.02 | 32,927 | $11.09 |
| DOL RAY MANOR | | | | | $9,441.52 | $5.99 | 82 | $366.30 |
| DRUID HILLS | | | | | $756.79 | $2.67 | 290 | $118.45 |
| EAST LAKE HARRIS EST. | | | | | $691.50 | $0.83 | 210 | $156.40 |
| FERN PARK | | | | | $946.30 | $0.41 | 250 | $107.49 |
| FERN TERRACE | | | | | $71.66 | $0.04 | 160 | $11.22 |
| FISHERMAN'S HAVEN | | | | | $428.96 | $0.06 | 269 | $90.50 |
| FLA CNTRL COMM PARK | | | | | $31,233.14 | $0.07 | 47 | $3,108.86 |
| FOUNTAINS | | | | | $2,969.96 | $9.26 | 70 | $832.22 |
| FOX RUN | | | | | $2,829.66 | $7.98 | 148 | $1,131.86 |
| FRIENDLY CENTER | | | | | $2,118.92 | $16.89 | 30 | $383.81 |
| GOLDEN TERRACE | | | | | $2,971.66 | $5.11 | 135 | $282.04 |
| GOSPEL ISLAND ESTATES | | | | | $2,201.02 | $515.54 | 9 | $1,087.06 |
| GRAND TERRACE | | | | | $2,383.99 | $2.66 | 127 | $666.30 |
| HARMONY HOMES | | | | | $768.79 | $2.30 | 81 | $246.66 |
| HERMITS COVE | | | | | $2,662.19 | $5.60 | 212 | $356.86 |
| HOBBY HILLS | | | | | $939.32 | $0.48 | 144 | $206.33 |
| HOLIDAY HAVEN | | | | | $6,186.98 | $4.37 | 133 | $678.04 |
| HOLIDAY HEIGHTS | | | | | $58.66 | $4.76 | 70 | $313.38 |
| IMPERIAL MOBILE TERRACE | | | | | $486.27 | $1.92 | 295 | $84.49 |
| INTERCESSION CITY | | | | | $5,072.04 | $0.66 | 397 | $500.23 |
| INTERLACHEN LK ESTATES | | | | | $793.54 | $0.76 | 301 | $213.99 |
| JUNGLE DEN | | | | | $2,720.83 | $0.31 | 149 | $931.28 |
| KEYSTONE HEIGHTS | | | | | $11,107.46 | $0.02 | 1,308 | $127.12 |
| KINGSWOOD | | | | | $979.78 | $3.37 | 97 | $266.27 |
| LAKE AJAY ESTATES | | | | | $3,301.28 | $10.84 | 129 | $1,104.39 |
| LAKE BRANTLEY | | | | | $558.35 | $0.44 | 87 | $192.90 |
| LAKE CONWAY PARK | | | | | $1,116.41 | $0.97 | 108 | $230.35 |
| LAKE HARRIET ESTATES | | | | | $81.20 | $0.01 | 372 | $7.96 |
| LAKEVIEW VILLAS | | | | | $1,496.90 | $14.82 | 17 | $614.06 |
| LEILANI HEIGHTS | | | | | $2,976.70 | $0.16 | 604 | $96.16 |
| LEISURE LAKES | $1,436.80 | $0.50 | | | $498.17 | $0.02 | 38,930 | $44.76 |
| MARCO SHORES | | | | | $21,636.16 | $1.40 | 603 | $726.58 |
| MARION OAKS | | | | | $21,636.16 | $0.04 | 3,984 | $562.81 |
| MEREDITH MANOR | $51.76 | $0.01 | | | $1,850.21 | $0.01 | 958 | $29.67 |
| MORNING VIEW | | | | | $3,026.36 | $430.70 | 40 | $1,439.33 |
| OAK FOREST | | | | | $857.44 | $0.54 | 173 | $162.16 |
| OAKWOOD | | | | | $856.47 | $1.03 | 295 | $207.53 |
| PALISADES COUNTRY CLUB | | | | | $11,283.91 | $9.36 | 121 | $1,097.62 |
| PALM PORT | | | | | $936.48 | $4.21 | 120 | $436.67 |
| PALM TERRACE | | | | | $1,814.67 | $0.67 | 1,462 | $433.32 |
| PALMS MOBILE HOME PK | | | | | $624.90 | $9.44 | 82 | $162.96 |
| PARK MANOR | | | | | $20,414.40 | $12.14 | 50 | $1,121.90 |

**FLORIDA WATER SERVICE CORPORATION**

| Service Area | REFUND | | | | SURCHARGE | | | |
|---|---|---|---|---|---|---|---|---|
| | HIGHEST | LOWEST | CUSTOMERS | CUSTOMER AVERAGE | HIGHEST | LOWEST | CUSTOMERS | CUSTOMER AVERAGE |
| PICCIOLA ISLAND | | | | | $214.82 | $0.12 | 165 | $52.73 |
| PINE RIDGE | | | | | $1,106.09 | $0.02 | 1,114 | $168.23 |
| PINE RIDGE ESTATES | | | | | $1,476.39 | $0.56 | 362 | $326.90 |
| PINEY WOODS | | | | | $474.47 | $0.31 | 220 | $122.06 |
| POINT O'WOODS | | | | | $1,662.38 | $0.02 | 432 | $440.91 |
| POMONA PARK | | | | | $3,728.16 | $1.71 | 224 | $183.92 |
| POSTMASTER VILLAGE | | | | | $695.94 | $19.02 | 208 | $336.56 |
| QUAIL RIDGE | | | | | $4,620.96 | $43.77 | 37 | $586.66 |
| RIVER GROVE | | | | | $1,604.02 | $3.29 | 130 | $487.31 |
| RIVER PARK | | | | | $1,133.88 | $0.47 | 437 | $212.66 |
| ROLLING GREEN | | | | | $2,090.26 | $3.04 | 94 | $903.36 |
| ROSEMONT | | | | | $1,657.70 | $3.86 | 60 | $647.47 |
| SALT SPRINGS | | | | | $29,682.20 | $9.73 | 149 | $2,549.74 |
| SAMIRA VILLAS | | | | | $9,846.78 | $3,234.30 | 2 | $4,923.39 |
| SARATOGA HARBOUR | | | | | $1,098.27 | $26.74 | 57 | $409.72 |
| SILVER LAKE ESTATES | $9,956.16 | $0.17 | 1,292 | $340.0 | $0.40 | $0.40 | | |
| SILVER LAKE OAKS | | | | | $2,895.42 | $3.12 | 84 | $554.24 |
| SKYCREST | | | | | $528.26 | $0.15 | 162 | $135.12 |
| SOUTH FORTY | | | | | $43,383.78 | $19.02 | 47 | $1,788.68 |
| SPRING HILL | $47,811.00 | $0.04 | 33,329 | $161.7 | | | | |
| STONE MOUNTAIN | | | | | $2,711.66 | $1,298.24 | 7 | $1,733.64 |
| ST. JOHNS HIGHLANDS | | | | | $1,037.91 | $5.07 | 102 | $278.48 |
| SUGAR MILL | | | | | $8,374.02 | $0.36 | 754 | $426.59 |
| SUGARMILL WOODS | | | | | $116.79 | $0.03 | | |
| SUNNY HILLS | | | | | $2,350.59 | $3.01 | 530 | $701.34 |
| SUNSHINE PARKWAY | | | | | $24,223.86 | $114.47 | 25 | $2,469.57 |
| TROPICAL PARK | | | | | $2,295.67 | $0.04 | 789 | $156.91 |
| UNIVERSITY SHORES | $29,436.09 | $0.03 | 5,263 | | $9.54 | $0.41 | | |
| VENETIAN VILLAGE | | | | | $1,312.40 | $0.42 | 164 | $544.11 |
| WELAKA | | | | | $1,218.04 | $5.04 | 135 | $368.61 |
| WESTERN SHORES | $833.21 | $0.50 | 393 | | | | | |
| WESTMONT | | | | | $834.29 | $0.05 | 204 | $108.81 |
| WINDSONG | | | | | $1,072.27 | $1.13 | 147 | $383.55 |
| WOODMERE | $388.10 | $0.02 | 1,589 | $8.30 | $4,974.35 | $0.01 | | |
| WOOTENS | | | | | $1,648.24 | $16.10 | 25 | $516.04 |
| ZEPHYR SHORES | $17,232.91 | $0.11 | 697 | $60.38 | | | | |

Footnotes
Data unaudited; supplied by FWSC.
Zero (.00) surcharges and refunds omitted.
Individual customer specific amounts are net of refund/surcharge.
Customer average is simple average net of refunds an surcharges and water and wastewater.

Attachment B
Schedule 1 of 3

| Regulatory Asset - Option 1 | | | | |
|---|---|---|---|---|
| Years (a) | $416.71 Surcharge (416.71(a)*12) (b) | Monthly Payment for Regulatory Asset (c) | Total Surcharge (d) | Total Regulatory Asset Paid (e) |
| 1 | 34.73 | 37.13 | 416.71 | 445.61 |
| 2 | 17.36 | 19.73 | 416.71 | 473.42 |
| 3 | 11.58 | 13.95 | 416.71 | 502.32 |
| 4 | 8.68 | 11.09 | 416.71 | 532.29 |
| 5 | 6.95 | 9.39 | 416.71 | 563.32 |
| 6 | 5.79 | 8.27 | 416.71 | 595.40 |
| 7 | 4.96 | 7.48 | 416.71 | 628.52 |
| 8 | 4.34 | 6.90 | 416.71 | 662.64 |
| 9 | 3.86 | 6.46 | 416.71 | 697.75 |
| 10 | 3.47 | 6.12 | 416.71 | 733.83 |
| 15 | 2.32 | 5.15 | 416.71 | 927.61 |
| 20 | 1.74 | 4.75 | 416.71 | 1,140.77 |

Notes:

1. Assumes $14,168,000 in surcharges reported by utility is correct.
2. Assumes 40,000 surcharge customers.
3. Assumes 6,000 surcharge customers have left utility.
4. Option A surcharge would be $416.71 using the above assumptions.
5. Assumes that all customers are equal meter equivalents.

Attachment B
Schedule 2 of 3

| Regulatory Asset - Option 2 | | | | |
|---|---|---|---|---|
| Years (a) | Morningview Average Surcharge $1,439.33 (1,439.33/(a)*12) (b) | Monthly Payment for Regulatory Asset (c) | Total Surcharge (d) | Total Regulatory Asset Paid (e) |
| 1 | 119.94 | 128.26 | 1,439.33 | 1,539.15 |
| 2 | 59.97 | 68.13 | 1,439.33 | 1,635.22 |
| 3 | 39.98 | 48.20 | 1,439.33 | 1,735.02 |
| 4 | 29.99 | 38.30 | 1,439.33 | 1,838.54 |
| 5 | 23.99 | 32.43 | 1,439.33 | 1,945.73 |
| 6 | 19.99 | 28.56 | 1,439.33 | 2,056.54 |
| 7 | 17.13 | 25.84 | 1,439.33 | 2,170.92 |
| 8 | 14.99 | 23.84 | 1,439.33 | 2,288.79 |
| 9 | 13.33 | 22.32 | 1,439.33 | 2,410.06 |
| 10 | 11.99 | 21.12 | 1,439.33 | 2,534.66 |
| 15 | 8.00 | 17.80 | 1,439.33 | 3,204.01 |
| 20 | 6.00 | 16.42 | 1,439.33 | 3,940.27 |

Notes:
1. Assumes $57,573 in surcharges reported by utility is correct for Morningview.
2. Uses 40 surcharge customers reported by utility.
3. Assumes all customers are equal meter equivalents.

Attachment B
Schedule 3 of 3

| Regulatory Asset - Option 3 | | | | |
|---|---|---|---|---|
| Years (a) | Morningview Customer #1017 Surcharge $3026.35 (3,026.35/(a)*12) (b) | Monthly Payment for Regulatory Asset (c) | Total Surcharge (d) | Total Regulatory Asset Paid (e) |
| 1 | 252.20 | 269.69 | 3,026.35 | 3,236.24 |
| 2 | 126.10 | 143.26 | 3,026.35 | 3,438.22 |
| 3 | 84.07 | 101.34 | 3,026.35 | 3,648.07 |
| 4 | 63.05 | 80.54 | 3,026.35 | 3,865.73 |
| 5 | 50.44 | 68.19 | 3,026.35 | 4,091.11 |
| 6 | 42.03 | 60.06 | 3,026.35 | 4,324.11 |
| 7 | 36.03 | 54.34 | 3,026.35 | 4,564.60 |
| 8 | 31.52 | 50.13 | 3,026.35 | 4,812.42 |
| 9 | 28.02 | 46.92 | 3,026.35 | 5,067.42 |
| 10 | 25.22 | 44.41 | 3,026.35 | 5,329.41 |
| 15 | 16.81 | 37.43 | 3,026.35 | 6,736.78 |
| 20 | 12.61 | 34.52 | 3,026.35 | 8,284.85 |

Notes:

1. Assumes highest surcharge in Morningview service area is correct as reported by utility.

State of Florida



# Public Service Commission

-M-E-M-O-R-A-N-D-U-M-

**DATE:** December 9, 1997

**TO:** CHAIRMAN JOHNSON
COMMISSIONER DEASON
COMMISSIONER CLARK
COMMISSIONER KIESLING
COMMISSIONER GARCIA

**FROM:** JOANN CHASE, DIVISION OF WATER AND WASTEWATER

**RE:** DOCKET NO. 920199-WS - ATTACHMENT A TO STAFF RECOMMENDATION DATED DECEMBER 4, 1997

It has come to our attention that Attachment A to the staff recommendation (pages 69 and 70) is unreadable on most copies. This attachment is a lotus schedule and had to be reduced to fit into the margins of the recommendation. In that process, many of the numbers were blurred. We are attaching a more readable copy for your convenience.

By copy of this memorandum, we are also sending copies to the parties of record in this docket.

Attachment

cc: Parties of Record
William Talbott, Executive Director
Dr. Mary Bane, Deputy Executive Director, Technical
Rob Vandiver, General Counsel
Noreen Davis, Director, Division of Legal Services
Divison of Records and Reporting

FLORIDA WATER SERVICE CORPOR. .ON
DOCKET NO. 920199-WS
DECEMBER 4, 1997

ATTACHMENT A

| Service Area | REFUND HIGHEST | REFUND LOWEST | REFUND CUSTOMERS | REFUND CUSTOMER AVERAGE | SURCHARGE HIGHEST | SURCHARGE LOWEST | SURCHARGE CUSTOMERS | SURCHARGE CUSTOMER AVERAGE |
|---|---|---|---|---|---|---|---|---|
| AMELIA ISLAND | $107,600.72 | $0.06 | 2,186 | $314.53 | | | | |
| APACHE SHORES | | | | | $1,836.30 | $3.15 | 225 | $411.85 |
| APPLE VALLEY | $1,124.10 | $0.15 | 1,242 | $119.29 | | | | |
| BAY LAKE ESTATES | | | | | $1,122.65 | $7.21 | 89 | $397.88 |
| BEACON HILLS | $13,430.19 | $0.01 | 4,631 | $253.45 | $53.96 | $0.01 | | |
| BEECHER'S POINT | | | | | $46,136.29 | $15.49 | 56 | $1,819.88 |
| BURNT STORE | | | | | $74,861.38 | $0.28 | 941 | $725.76 |
| CARLTON VILLAGE | | | | | $651.56 | $0.02 | 227 | $68.94 |
| CHULUOTA | | | | | $18,205.47 | $0.35 | 940 | $522.78 |
| CITRUS PARK | | | | | $3,814.62 | $0.01 | 629 | $406.84 |
| CITRUS SPRINGS | | | | | $5,084.54 | $0.09 | 2,415 | $206.00 |
| CRYSTAL RIVER HIGHLANDS | | | | | $3,182.44 | $3.30 | 123 | $455.39 |
| DAETWYLER SHORES | | | | | $1,211.68 | $1.90 | 162 | $141.97 |
| DELTONA | | | | | $31,510.08 | $0.02 | 32,927 | $11.09 |
| DOL RAY MANOR | | | | | $9,441.52 | $5.99 | 82 | $366.30 |
| DRUID HILLS | | | | | $796.79 | $2.67 | 290 | $118.45 |
| EAST LAKE HARRIS EST. | | | | | $591.50 | $0.83 | 210 | $158.40 |
| FERN PARK | | | | | $845.30 | $0.41 | 250 | $107.49 |
| FERN TERRACE | | | | | $71.68 | $0.04 | 160 | $11.22 |
| FISHERMAN'S HAVEN | | | | | $425.06 | $0.05 | 269 | $90.50 |
| FLA CNTRL COMM PARK | | | | | $31,233.14 | $0.07 | 47 | $3,108.86 |
| FOUNTAINS | | | | | $2,989.86 | $9.25 | 70 | $832.22 |
| FOX RUN | | | | | $2,829.55 | $7.99 | 148 | $1,131.86 |
| FRIENDLY CENTER | | | | | $2,118.92 | $16.89 | 30 | $383.81 |
| GOLDEN TERRACE | | | | | $2,971.55 | $5.11 | 135 | $282.04 |
| GOSPEL ISLAND ESTATES | | | | | $2,201.02 | $515.94 | 9 | $1,087.06 |
| GRAND TERRACE | | | | | $2,383.99 | $2.66 | 127 | $656.30 |
| HARMONY HOMES | | | | | $759.79 | $2.30 | 81 | $246.66 |
| HERMITS COVE | | | | | $2,562.19 | $5.60 | 212 | $356.88 |
| HOBBY HILLS | | | | | $939.32 | $0.48 | 144 | $208.33 |
| HOLIDAY HAVEN | | | | | $6,185.98 | $4.37 | 133 | $678.04 |
| HOLIDAY HEIGHTS | | | | | $56.65 | $4.78 | 70 | $313.38 |
| IMPERIAL MOBILE TERRACE | | | | | $455.27 | $1.92 | 295 | $84.49 |
| INTERCESSION CITY | | | | | $5,072.04 | $0.66 | 397 | $500.23 |
| INTERLACHEN LK ESTATES | | | | | $793.54 | $0.76 | 301 | $213.99 |
| JUNGLE DEN | | | | | $2,720.83 | $0.31 | 149 | $931.28 |
| KEYSTONE HEIGHTS | | | | | $11,107.46 | $0.02 | 1,308 | $127.12 |
| KINGSWOOD | | | | | $979.78 | $3.37 | 97 | $255.27 |
| LAKE AJAY ESTATES | | | | | $3,301.28 | $10.84 | 129 | $1,104.39 |
| LAKE BRANTLEY | | | | | $558.85 | $0.44 | 87 | $192.90 |
| LAKE CONWAY PARK | | | | | $1,115.41 | $0.97 | 108 | $230.35 |
| LAKE HARRIET ESTATES | | | | | $81.20 | $0.01 | 372 | $7.96 |
| LAKEVIEW VILLAS | | | | | $1,496.90 | $14.62 | 17 | $614.06 |
| LEILANI HEIGHTS | | | | | $2,975.70 | $0.16 | 504 | $96.16 |
| LEISURE LAKES | $1,435.80 | $0.50 | | | $498.17 | $0.02 | 38,930 | $44.76 |
| MARCO SHORES | | | | | $21,536.16 | $1.40 | 503 | $726.58 |
| MARION OAKS | | | | | $21,536.16 | $0.04 | 3,984 | $562.81 |
| MEREDITH MANOR | $51.75 | $0.01 | | | $1,850.21 | $0.01 | 958 | $29.67 |
| MORNING VIEW | | | | | $3,026.35 | $430.70 | 40 | $1,439.33 |
| OAK FOREST | | | | | $867.44 | $0.54 | 173 | $162.15 |
| OAKWOOD | | | | | $856.47 | $1.03 | 295 | $207.53 |
| PALISADES COUNTRY CLUB | | | | | $11,283.91 | $9.36 | 121 | $1,097.52 |
| PALM PORT | | | | | $936.48 | $4.21 | 120 | $435.67 |
| PALM TERRACE | | | | | $1,814.57 | $0.67 | 1,462 | $433.32 |

FLORIDA WATER SERVICE CORPOR. .ON
DOCKET NO. 920199-WS
DECEMBER 4, 1997

ATTACHMENT A

| Service Area | REFUND HIGHEST | REFUND LOWEST | REFUND CUSTOMERS | REFUND CUSTOMER AVERAGE | SURCHARGE HIGHEST | SURCHARGE LOWEST | SURCHARGE CUSTOMERS | SURCHARGE CUSTOMER AVERAGE |
|---|---|---|---|---|---|---|---|---|
| PALMS MOBILE HOME PK | | | | | $624.80 | $9.44 | 82 | $162.96 |
| PARK MANOR | | | | | $20,414.40 | $12.14 | 50 | $1,121.90 |
| PICCIOLA ISLAND | | | | | $214.82 | $0.12 | 165 | $52.73 |
| PINE RIDGE | | | | | $1,106.09 | $0.02 | 1,114 | $168.23 |
| PINE RIDGE ESTATES | | | | | $1,476.39 | $0.56 | 352 | $325.90 |
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| POINT O'WOODS | | | | | $1,662.38 | $0.02 | 432 | $440.91 |
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| QUAIL RIDGE | | | | | $4,620.95 | $43.77 | 37 | $585.65 |
| RIVER GROVE | | | | | $1,604.02 | $3.29 | 130 | $487.31 |
| RIVER PARK | | | | | $1,133.88 | $0.47 | 437 | $212.65 |
| ROLLING GREEN | | | | | $2,090.26 | $3.04 | 94 | $903.35 |
| ROSEMONT | | | | | $1,657.70 | $3.56 | 60 | $547.47 |
| SALT SPRINGS | | | | | $29,682.20 | $9.73 | 149 | $2,549.74 |
| SAMIRA VILLAS | | | | | $9,846.78 | $3,234.30 | 2 | $4,923.39 |
| SARATOGA HARBOUR | | | | | $1,098.27 | $26.74 | 57 | $409.72 |
| SILVER LAKE ESTATES | $9,950.15 | $0.17 | 1,292 | $340.05 | $0.40 | $0.40 | | |
| SILVER LAKE OAKS | | | | | $2,895.42 | $3.12 | 84 | $554.24 |
| SKYCREST | | | | | $528.25 | $0.15 | 162 | $135.12 |
| SOUTH FORTY | | | | | $43,383.78 | $19.02 | 47 | $1,788.68 |
| SPRING HILL | $47,811.00 | $0.04 | 33,329 | $151.72 | | | | |
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| ST. JOHNS HIGHLANDS | | | | | $1,037.91 | $5.07 | 102 | $278.48 |
| SUGAR MILL | | | | | $8,374.02 | $0.35 | 754 | $426.59 |
| SUGARMILL WOODS | $8,200.84 | $0.19 | 3,327 | $543.85 | $116.79 | $0.03 | | |
| SUNNY HILLS | | | | | $2,350.59 | $3.01 | 530 | $701.34 |
| SUNSHINE PARKWAY | | | | | $24,223.86 | $114.47 | 25 | $2,459.57 |
| TROPICAL PARK | | | | | $2,295.67 | $0.04 | 789 | $156.91 |
| UNIVERSITY SHORES | $29,436.09 | $0.03 | 5,253 | $109.02 | $9.94 | $0.41 | | |
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| WELAKA | | | | | $1,218.04 | $5.04 | 135 | $368.61 |
| WESTERN SHORES | $833.21 | $0.50 | 393 | $138.04 | | | | |
| WESTMONT | | | | | $534.29 | $0.05 | 204 | $108.81 |
| WINDSONG | | | | | $1,072.27 | $1.13 | 147 | $383.55 |
| WOODMERE | $388.10 | $0.02 | 1,586 | $8.30 | $4,974.35 | $0.01 | | |
| WOOTENS | | | | | $1,646.24 | $16.10 | 25 | $516.04 |
| ZEPHYR SHORES | $17,232.91 | $0.11 | 597 | $60.88 | | | | |

Footnotes

Data unaudited; supplied by FWSC.

Zero (.00) surcharges and refunds ommitted.

Individual customer specific amounts are net of refund/surcharge.

Customer average is simple average net of refunds an surcharges and water and wastewater.