

**GATLIN, SCHIEFELBEIN & COWDERY, P.A.**

**Attorneys at Law**

**3301 Thomasville Road, Suite 300  
Tallahassee, Florida 32312**

B. KENNETH GATLIN  
WAYNE L. SCHIEFELBEIN  
KATHRYN G.W. COWDERY

TELEPHONE (850) 385-9996  
TELECOPIER (850) 385-6755  
E-MAIL: bkgatlin@nettally.com

OF COUNSEL  
THOMAS F. WOODS

December 29, 1997

*971663-415*

Ms. Blanca S. Bayo, Director  
Division of Records and Reporting  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, Florida 32399-0850

In Re: Petition of FLORIDA CITIES WATER COMPANY, seeking recovery of environmental litigation costs in a Limited Proceeding for its NORTH and SOUTH FT. MYERS DIVISION in Lee County and BAREFOOT BAY DIVISIONS in Brevard County, Florida.

Dear Ms. Bayo:

The following is filed with this letter:

1. Florida Cities Water Company check no. 131703 dated December 15, 1997 in the amount of \$4,500.00 as the filing fee for this proceeding;
2. An original and fifteen copies of the following:

- (a) the Petition of Florida Waterworks Company; *- 13267-97*
- (b) testimony of Gerald Allen and accompanying exhibits \_\_\_\_\_ (GSA-1 thru GSA-27); *\_\_\_\_\_ 13268-97*
- (c) testimony of Michael Acosta and accompanying exhibits \_\_\_\_\_ (MA-1 thru MA-9); *\_\_\_\_\_ 13269-97*
- (d) testimony of Gary H. Baise and accompanying exhibits \_\_\_\_\_ (GHB-1 thru GHB-110); *\_\_\_\_\_ 13270-97*
- (e) testimony of John D. McClellan; *\_\_\_\_\_ 13271-97*
- (f) testimony of Michael Murphy and accompanying exhibits \_\_\_\_\_ (MM-1 thru MM-4); *\_\_\_\_\_ 13272-97*

ACK \_\_\_\_\_  
 AFA 2  
 APP \_\_\_\_\_  
 CAF \_\_\_\_\_  
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Check received with filing fee  
 forwarded to Florida Public Service  
 Commission. Please to forward copy of check  
 to RAR when possible.  
 Initials of person who forwarded check.  
*[Signature]*

Ms. Blanca S. Bayo, Director  
December 29, 1997  
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- (g) testimony of L. Gray Geddie, Jr. and accompanying exhibit\_\_\_\_(LGG-1); and *13213-97*
- (h) testimony of Dr. Abdul B. Ahmadi and accompanying exhibit\_\_\_\_(ABA-1 thru ABA-2). *13214-97*

Please acknowledge receipt of the foregoing by stamping the enclosed extra copy of this letter and returning same to my attention. Thank you for your assistance.

Very truly yours,



B. Kenneth Gatlin

BKG/pav  
Enclosures

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of FLORIDA )  
CITIES WATER COMPANY, seeking )  
recovery of environmental )  
litigation costs in a Limited )  
Proceeding for its NORTH and )  
SOUTH FT. MYERS DIVISION in )  
Lee County and BAREFOOT BAY )  
DIVISIONS in Brevard County, )  
Florida )

Docket No. 971663 - WS  
Filed: December 29, 1997

PETITION FOR LIMITED PROCEEDING

Florida Cities Water Company files this Petition for Limited Proceeding pursuant to Section 367.0822, Florida Statutes, and states:

1. Florida Cities Water Company (FCWC) is a water and wastewater utility operating under the Commission's jurisdiction in Lee and Brevard Counties. FCWC also operates as a water and wastewater utility in Collier, Sarasota and Hillsborough Counties which are not subject to the jurisdiction of this Commission.

2. Florida Cities Water Company is the exact name of the petitioner and the address of its principal place of business is:

4837 Swift Road, Suite 100  
Sarasota, Florida 34231

FCWC was incorporated in the State of Florida on March 22, 1965. FCWC Holdings Inc. owns all of FCWC's issued common stock.

3. The person authorized to receive notices and communications with the respect to this petition is:

B. Kenneth Gatlin  
Gatlin, Schiefelbein & Cowdery, P.A.  
3301 Thomasville Road, Suite 300  
Tallahassee, Florida, 32312

DOCUMENT NUMBER-DATE

13267 DEC 29 97

FPSC-REGULOS/REPORTING

4. The purpose of this petition is to seek approval to recover a portion of FCWC's legal expenses incurred by FCWC in its successful defense of a legal action brought by the United States relating to alleged violations of the Clean Water Act (CWA), plus rate case expenses. FCWC does not seek the recovery of the amount of the civil penalties assessed by the court. Recovery is sought through a monthly customer Surcharge applicable to FCWC's water and wastewater customers in South Ft. Myers, North Ft. Myers (Lee County) and Barefoot Bay (Brevard County). FCWC proposes that it be allowed to collect the Surcharge for a period of ten years or until such time as the expenses have been fully recovered, whichever occurs first. FCWC recognizes that the Commission does not have jurisdiction over FCWC's rates in Collier, Hillsborough and Sarasota Counties and upon approval of a Surcharge as sought in this proceeding, FCWC will seek approval by Collier, Hillsborough, and Sarasota Counties of a Surcharge to be applicable to its customers in those counties. FCWC incurred a total of legal expense in the amount of \$3,826,210 and is seeking to recover \$3,589,368 from customers regardless of jurisdiction. Of the \$3,589,368 FCWC is seeking to recover \$2,265,833 plus rate case expense from customers in Lee and Brevard counties.

5. The Commission policy is to allow the recovery of legal expense as sought by FCWC. The Commission has said:

"Although we find that fines associated with violations of DEP and EPA should be borne by the shareholders of the utility, we believe it is reasonable for UWF to recover the costs of defending such fines. As the Commission previously concluded, the legal expenses incurred for defending fines from DEP and EPA could facilitate avoided or reduced amount of fines."

Order No. PSC-97-0618-FOF-WS, May 30, 1997, Docket No. 960451.

6. The following is a summary of the events that caused FCWC to incur the legal expenses it seeks to recover:

Pre-Litigation

(a) From 1992 through 1997, FCWC was the subject of an enforcement action initiated by the United States Environmental Protection Agency ("EPA") and prosecuted by the United States Department of Justice ("DOJ"). This enforcement action addressed a number of alleged violations of the Clean Water Act ("CWA") at three FCWC wastewater treatment facilities, Waterway Estates ("Waterway") (Lee County), Barefoot Bay ("Barefoot") (Brevard County) and Carrollwood (Hillsborough County). At the height of the litigation, FCWC faced \$104,325,000 in potential civil penalties. As a result of FCWC's vigorous efforts to defend its very existence, the final penalty assessed by the United States District Court was \$309,710. In addition to this dramatically reduced penalty, the Court found that FCWC had acted in good faith in its dealings with state and federal regulators, and that none of FCWC's actions caused any environmental harm to the waters of the State of Florida.

(b) Historically, wastewater treatment facilities in

Florida have been regulated under a dual permitting system. Until 1995, Florida was a "non-delegated" state under the federal CWA. Because of the state's non-delegated status, wastewater treatment plants that discharged treated effluent into receiving waters were required to have both a federal National Pollutant Discharge Elimination System ("NPDES") permit, as well as a permit from the Florida Department of Environmental Protection ("FDEP") (formerly known as Florida Department of Environmental Regulation ("FDER")). FCWC's Waterway facility had operated under this dual permitting system since 1975, discharging secondarily treated effluent into the Caloosahatchee River. In 1986, FCWC applied to EPA Region IV to renew the Waterway NPDES permit. Although the facility was meeting the requirements of both of its permits, as well as water quality standards for the river, EPA denied the renewal application and issued an Administrative Order which included a schedule for ceasing the discharge to the river. As the basis of its denial action, EPA claimed that FCWC did not have a wasteload allocation to discharge into the Caloosahatchee River<sup>1</sup>. Although baffled by EPA's decision, FCWC began immediately to work with EPA and FDEP to resolve this issue. FCWC engaged a consulting engineer to assist in developing alternatives to a secondary treatment system. After an intensive review of the available options, FCWC obtained

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<sup>1</sup> The FDEP discharge permit for Waterway remained in effect during this period.

permission from FDEP and EPA to enlarge and upgrade the plant to advanced wastewater treatment ("AWT") status and to move the plant outfall to the six-foot contour of the river.

(c) In 1989, EPA issued an NPDES permit for AWT treatment and a corresponding Administrative Order that allowed the plant to continue discharging at secondary treatment level until the upgrades were completed. FCWC began to obtain the necessary permits to commence construction. To complete these modifications, FCWC was required to obtain a building permit, zoning variance and development order or an exemption from Lee County, an exemption from South Florida Water Management District, permits from the Army Corps of Engineers, and FDEP. The complicated nature of the permitting process, combined with other regulatory delays which were outside of FCWC's control, delayed the start of construction until the spring of 1990. FCWC completed the relocation of the outfall ahead of schedule; however, because of the permitting delays, the FDEP granted an extension to the construction schedule for the AWT facility calling for substantial completion by September 1, 1992. EPA refused to grant any extension to its AWT construction schedule. FCWC completed construction of the AWT upgrade and placed the facility in service in April, 1992. Despite the fact that the permitting delays were beyond FCWC's control and the fact that FCWC met the FDEP construction schedule, EPA referred the case to DOJ for prosecution.

### Complaint

(d) During 1992 and 1993, FCWC negotiated with DOJ in an attempt to resolve this dispute. Counsel for DOJ made an initial settlement demand of \$5,000,000. FCWC made a counteroffer of \$250,000, and later raised this offer to \$500,000. On October 1, 1993 DOJ brought a civil enforcement action for discharge without an NPDES permit, discharges in an unpermitted location, and violations of the Waterway NPDES permit. The civil action was filed in the United States District Court, Middle District of Florida as United States of America v. Florida Cities Water Company, Inc., Case Number 93-281-Civ.FTM-21.

(e) Throughout the winter and spring of 1994, both FCWC and DOJ exchanged court ordered preliminary written discovery. During this same period, counsel for FCWC began to review the EPA Region IV file regarding the permit renewal application for Waterway. As a result of this investigation, FCWC determined that the EPA permit writer made a critical error in her review of FCWC's 1986 renewal application. In reaching her determination that FCWC did not have a wasteload allocation, the EPA permit writer relied erroneously upon two pages of a 1981 "planning document." She made no effort to review the entire document, no effort to discuss the application with EPA's own wasteload allocation staff, and no effort to review the status of FCWC's Florida discharge permit. DOJ's response to this development was to begin to expand its



investigation into other FCWC facilities. Throughout the summer and fall of 1994, EPA conducted broad discovery into all of FCWC's wastewater facilities, including extensive written discovery, document review, and depositions. This activity culminated in DOJ's motion to amend its complaint to allege CWA violations at FCWC's Barefoot Bay ("Barefoot") and Carrollwood wastewater treatment facilities. A review of the history of these facilities demonstrates the reasons why FCWC vigorously opposed DOJ's efforts to expand this case.

#### Barefoot Bay

(f) The Barefoot facility discharged secondarily treated effluent to two percolation ponds located on the facility's grounds. As loading on the plant increased over several years of operation, the ponds would no longer totally contain the treated effluent on a consistent basis resulting in discharges of treated effluent to an adjacent agricultural canal through a pipe incorporated in the original plant design. Despite FCWC's offer to construct a state of the art AWT treatment facility, FDEP was unwilling to grant a discharge permit to Barefoot. Accordingly, Barefoot was ineligible to obtain a federal NPDES permit for the facility. FDEP did allow the facility to continue to operate pursuant to consent orders, that authorized discharge into the canal. FCWC undertook strenuous efforts to find alternatives to discharge at Barefoot. FCWC explored various options, including

building a larger percolation pond, purchasing nearby grove land for spray fields, constructing deep injection wells, and selling the effluent for agricultural irrigation. None of these alternatives proved to be either feasible or prudent.

(g) On September 14, 1989, EPA observed the discharge from Barefoot into the canal and found that the facility was operating without an NPDES permit. FCWC applied for an NPDES permit on February 28, 1990. Because EPA lost this application, FCWC refiled its request on March 6, 1990. In September of 1991, EPA and FCWC entered into a "Consent Agreement and Order Assessing Penalty." The "Notes On Proposed Penalty assessment," section of the EPA's administrative record, stated that the agency found that FCWC's CWA violations were not serious, that FCWC had acted and was working with EPA and FDEP in good faith to resolve these issues, and that these discharges did not cause environmental harm. EPA assessed FCWC a \$6,000 administrative penalty for these discharges without a permit. All parties to this administrative settlement believed that the issues at Barefoot Bay had been resolved.

#### Carrollwood

(h) FCWC's Carrollwood WWTP had been operating as a secondary treatment facility since the late 1960s. It received its first NPDES permit in 1976. In 1979, FDEP, acting upon its own internal policy, ordered FCWC to connect Carrollwood to a proposed new regional WWTP to be built by Hillsborough County. From 1979

onward FDEP would only grant temporary operating permits (TOPs) to Carrollwood. As a result, EPA denied FCWC's permit renewal application in 1984. Carrollwood was forced to continue operations throughout the 1980s because it was never able to connect with any of Hillsborough County's facilities. Because Carrollwood was located in an urban residential area, alternatives to discharge such as percolation ponds, spray fields, and agricultural reuse were not feasible. Throughout the 1980s, FCWC continued to request permission to connect to a Hillsborough County wastewater treatment facility. However, it was not until 1990 that prospects of such connections became firm.

(i) In 1987, the Florida Legislature enacted the Grizzle-Figg Act, which allowed for AWT discharges into certain of the state's water bodies, provided that the discharge would have a "minimal negative impact" upon the stream bed. FCWC immediately engaged a consultant to undertake a "minimal negative impact" study. FDEP finally accepted the results of this study in 1990 and granted permission for FCWC to construct an AWT facility at Carrollwood.

(j) Throughout the 1980s, FCWC forwarded monthly discharge monitoring reports ("DMRs") to EPA and FDEP. Even after its NPDES permit expired in 1984, FCWC continued to operate pursuant to EPA administrative orders. In 1990, FCWC applied for an NPDES permit for the Carrollwood AWT facility. Although EPA

indicated that it would grant such a permit as early as July of 1990, it did not issue the permit until April of 1991. At the same time, FCWC and EPA entered into a Consent Agreement and Order Assessing Penalties for Carrollwood mirroring the process for Barefoot, highlighting FCWC's good faith efforts to work with FDEP to find alternatives to discharge. The final de minimis penalty levied by EPA was \$15,000. By January 6, 1992, FCWC had connected Carrollwood with one of the new Hillsborough County facilities. After FCWC gave notice that Carrollwood was offline, EPA closed the administrative order.

#### Amended Complaint

(k) After the administrative processes were closed, EPA took no additional enforcement actions for Barefoot and Carrollwood facilities until DOJ amended its complaint on March 30, 1995. FCWC moved to strike DOJ's allegations of discharge without an NPDES permit, violations of administrative order effluent limitations, and violations of permit effluent limitations. The District Court struck these allegations initially, and then, following one of DOJ's many motions for reconsideration, reinstated these counts. FCWC was forced to undertake extensive discovery throughout the spring and summer of 1995 regarding Barefoot and Carrollwood. This discovery demonstrated that DOJ made no effort to examine the administrative record and no effort to interview the EPA officials who conducted these investigations. Following cross-motions for

summary judgment, the District Court entered an Order on November 22, 1995 striking the majority of DOJ's allegations regarding Barefoot and Carrollwood, eliminating approximately \$52,000,000 in potential penalties.

(l) During November and December all parties began the process of creating their respective exhibit lists, exchanging exhibits, and drafting the Joint Pretrial Statement. In addition, DOJ filed a motion to reconsider the November 22, 1995 order. The Court rejected DOJ's motion without the necessity of FCWC filing a response.

#### Trial

(m) The District Court scheduled the trial for the March 18, 1996 trial term. During January, February, and early March, FCWC prepared for trial by finalizing its exhibit list, preparing witnesses, and preparing direct and cross-examination.

(n) The trial began on March 25, 1996 in Tampa and lasted eight trial days. The CWA violations at issue were strict liability offenses. At trial, FCWC bore the burden of proof to establish the presence of mitigating factors under Section 1319(d), (CWA § 309(d)). DOJ's case lasted three days and FCWC's case lasted almost five days. During the trial, FCWC's expert witnesses demonstrated that none of its actions caused environmental harm. Through its own witnesses, FDEP officials, and through the use of EPA's own documents, FCWC was able to establish that it acted in

good faith in attempting to resolve the issues at all three facilities.

(o) At the end of the trial, the District Court ordered the parties to submit post-trial briefs on June 6, 1996. Although the post-trial briefs were to be the final submissions, in July 1995 DOJ filed yet another motion for reconsideration of the November 22, 1995 Order. The District Court ordered two additional rounds of briefing regarding the applicability of res judicata. On August 16, 1996 the District Court rejected DOJ's Motion For Reconsideration and on August 20, 1996, the District Court issued its Order on the issues presented at trial. The District Court levied penalties totally \$309,710 against FCWC, finding that the majority of the violations at issue were minor. The District Court also found the FCWC acted in good faith in its efforts to resolve the various problems at the three facilities.

Recovery of Costs and Attorneys' Fees

p. Pursuant to Rule 68 of the Federal Rules of Civil Procedure FCWC sought the recovery of its costs incurred in the litigation. FCWC sought the recovery of its attorneys' fees pursuant to the Equal Access to Justice Act ("EAJA"). The Court ruled that where the United States is the Plaintiff, Rule 68 for costs cannot be put into effect without an underlying waiver of sovereign immunity. Because the CWA is silent on this issue, the Court concluded that the EAJA was the only other provision that

could provide such a waiver in this instance, and it held that the EAJA's waiver was only for "prevailing parties." As FCWC was found liable for at least some penalties, FCWC was held not to be a prevailing party, notwithstanding FCWC's offer of judgment. On attorneys' fees, the Court ruled that the government's action did not amount to litigation undertaken vexatiously, wantonly or for oppressive reasons. Accordingly, the Court ruled that FCWC was not entitled to recover its costs and attorneys' fees as a strict matter of law.

#### Appeal

(q) EPA appealed the District Court's decision to the United States Court of Appeals for the Eleventh Circuit in October of 1996. FCWC filed a cross-appeal seeking reversal of the District Court's denial of its motion for cost and attorneys' fees. Throughout the winter of 1996 and spring of 1997 the parties, through the auspices of the Eleventh Circuit Mediation Office attempted to settle the case. Ultimately, all parties agreed to withdraw their respective appeals, leaving the District Court's opinion in place.

7. The Amended Complaint filed by DOJ on March 30, 1995 sought a total of \$104,325,000 in civil penalties from FCWC. FCWC was not financially able to pay or fund these penalties. Thus, FCWC had no choice but to defend itself against the DOJ claims.

8. Filed with and in support of this petition is prepared

testimony as follows:

(a) Gerald S. Allen, President of FCWC. The purpose of Mr. Allen's testimony is to (1) explain the purpose of FCWC's application in this docket, (2) describe the legal action brought against FCWC by the United States causing the legal expenses which FCWC is seeking to recover in this docket, (3) provide an overview of the history of the events and circumstances leading to this litigation, (4) describe efforts made by the FCWC to settle the matter before the litigation started, and (5) discuss the final outcome of the litigation.

(b) Mr. Michael Acosta who will provide testimony pertaining to permitting issues and construction of facilities at the Waterway Estates Wastewater Treatment Plant to upgrade it to Advanced Wastewater Treatment (AWT) standards and the relocation of the effluent outfall.

(c) Mr. Gary H. Baise, Attorney, Baise and Miller, P.C. will cover the legal issues, legal proceedings, settlement discussions and offers after filing of the complaint by the United States Department of Justice (USDOJ) on behalf of the United States, and the outcome of the litigation. Mr. Baise was the lead attorney representing FCWC in the litigation.

(d) Mr. John D. McClellan, Regulatory Consultant, Deloitte & Touche LLP, will cover the prudence of FCWC's defense against the complaint from a financial perspective and the



regulatory principles applicable to FCWC's request for rate relief.

(e) Mr. Michael Murphy, Vice President and Chief Financial Officer, FCWC, will cover the litigation expenses, the method of recovery proposed by FCWC in this docket and the Surcharge which FCWC proposes to collect from customers.

(f) Mr. L. Gray Geddie, Jr., Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., will provide testimony regarding the reasonableness of the conduct of the defense of the complaint by FCWC's attorneys and the fees and charges associated therewith.

9. The legal expenses incurred by FCWC were expensed "below the line" meaning that the expenses were not included in operating income. Therefore, no matter what accounting treatment is allowed by the Commission, the recovery of the legal expense through the Surcharge should not affect net operating income. It is requested that the total legal expenses to be recovered be recorded as a regulatory asset and included in Rate Base. This regulatory asset would then be amortized over a ten year period. As the Surcharge is collected it would be recorded as revenue which would be off-set by the amortization of the regulatory asset. Only the unamortized regulatory asset would remain in rate base.

10. Petitioner does not request that the Commission process this Petition using the proposed agency procedure.

WHEREFORE, FCWC requests that the Commission:

1. take jurisdiction over this petition;
2. process the petition as a limited proceeding pursuant to

Section 367.0822, Florida Statutes;

3. approve Surcharge rates that will allow FCWC to collect \$2,265,833 from its customer in Lee and Brevard counties over a period of ten years or until \$2,265,833 is collected, which ever occurs first;

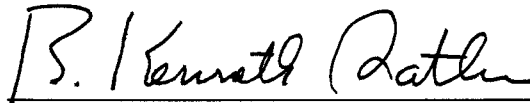
4. allow the recovery of FCWC's expenses of this proceeding over a period of ten years;

5. allow the accounting of the recovery of the legal expense as set forth in paragraph nine above; and

6. grant other relief as may be appropriate and just.

DATED this 29th day of December, 1997.

Respectfully submitted,



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B. Kenneth Gatlin  
Fla. Bar #027966  
Gatlin, Schiefelbein & Cowdery, P.A.  
3301 Thomasville Road, Suite 300  
Tallahassee, Florida 32312  
(904) 877-7191

Attorneys for  
FLORIDA CITIES WATER COMPANY