ORIGINAL

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA WATERWORKS ASSOCIATION, Petitioner, vs. FLORIDA PUBLIC SERVICE COMMISSION, Respondent.	)	Case No. 96-3809RP
FLORIDA WATER SERVICES CORPORATION (formerly known as SOUTHERN STATES UTILITIES, INC.) Petitioner, vs. FLORIDA PUBLIC SERVICE COMMISSION, Respondent.	)	Case No. 96-3949RP
FLORIDA WATERWORKS ASSOCIATION, Petitioner, vs. PUBLIC SERVICE COMMISSION Respondent, and OFFICE OF THE PUBLIC COUNSEL, Intervenor.	)	Case No. 97-3480RP

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FLORIDA WATER SERVICES CORPORATION,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 97-3481RP
	)	
PUBLIC SERVICE COMMISSION,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
OFFICE OF THE PUBLIC COUNSEL,	)	
	)	
Intervenor.	)	
	)	

FINAL ORDER

A formal administrative hearing was conducted in these consolidated cases on December 8 through 12, December 17 and December 22, 1997, in Tallahassee, Florida, before Don W. Davis, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in these consolidated cases is whether the PSC's proposed rule 25-30.431, Florida Administrative Code, constitutes an invalid exercise of delegated authority.

PRELIMINARY STATEMENT

In these proceedings, Petitioners have challenged a rule proposed by the PSC which seeks to establish certain ratemaking policies for water and wastewater utilities. An initial version of the proposed rule (the "Initial Proposed Rule") was published in the August 2, 1996 Florida Administrative Weekly, Volume 22, No. 31, pages 4385-4386. Petitioners timely challenged the Initial Proposed Rule and those challenges are pending as DOAH Case Nos. 96-3809RP and 96-3949RP.[1]

The challenges to the Initial Proposed Rule were abated pending the results of a public hearing scheduled by the PSC for December 10, 1996. After the public hearing, the PSC voted during an agenda conference on June 10, 1997, to proceed with the Initial Proposed Rule with a few changes. The modifications to the Initial Proposed Rule were published by the PSC in a Notice of Change which appeared in the July 3, 1997 Florida Administrative Weekly, Volume 23, No. 27, pages 3335-3336. Petitioners timely filed challenges to the modifications set forth in the Notice of Change and those challenges are pending as DOAH Case Nos. 97-3480RP and 97-3481RP. The challenges to the modifications were consolidated with the challenges to the Initial Proposed Rule for hearing and disposition.[2]

At the hearing, the PSC presented testimony of five employees: John Williams; Robert Crouch, an expert in PSC water and sewer regulatory engineering; Marshall Willis, a Certified Public Accountant (CPA) and expert in water and wastewater regulatory accounting; Tom Ballinger; and Craig Hewitt, expert economist specializing in the preparation of statements of estimated regulatory costs and the analysis of proposed lower cost regulatory alternatives. In addition, the PSC presented the testimony of Kimberly Dismukes, an expert in water and wastewater utility regulatory accounting, finance, rate regulation and rate policy. The PSC offered nine exhibits into evidence, all of which were admitted without objection except PSC Exhibit 8. That exhibit was accepted as a report relied upon by PSC witness Craig Hewitt, but the hearsay content of the report has been noted.

OPC did not present any witnesses or offer any exhibits into evidence.

Florida Water presented the testimony of nine witnesses: Hal Wilkening, an expert in consumptive use permitting and water resource planning; John Wehle of the St. John's River Water Management District, an expert in water supply policy; W. Scott Burns of the South Florida Water Management District, an expert in consumptive use permitting and water policy; Hugh Gower, a CPA and expert in utility accounting and ratemaking; John Cirello, Ph.D., President and CEO of Florida Water, expert in environmental engineering, environmental science and the planning, design, construction and permitting of water supply and treatment and wastewater treatment and disposal facilities; Forrest Ludsen; Bill Goucher, a registered professional engineer and expert in water and wastewater facility planning, permitting design and construction; J. Dennis Westrick, a registered professional engineer, an expert in water and wastewater facility design, planning, permitting and construction; and David York of the Florida Department of Environmental Protection ("DEP"), an expert in wastewater facility engineering and reuse. Florida Water's Exhibits 1 through 17 were accepted into evidence.

The FWA presented the testimony of four witnesses: Frank Seidman, an expert in the preparation of water and sewer rate applications, the analysis of electric, water and sewer revenue requirements and rate applications, as well as PSC "used and useful" policy including margin reserve and imputation policy; Mike Acosta, an expert in planning, design, permitting, and

construction of water source, water and wastewater treatment and wastewater disposal facilities; Gerald Hartman, an expert in environmental engineering with special expertise in water resources, water quality, wellfield design, water treatment analysis and design, pumping system analysis and station design, hydraulic analysis and pipeline design; and James Perry, a CPA and expert in utility income taxation, utility accounting, utility finance, and water and sewer utility planning for capital expenditures. FWA Exhibits 1 through 23 were accepted into evidence without objection.

A transcript of the proceedings has been filed. At the conclusion of the hearing, the parties were granted leave to file proposed final orders more than 10 days from the filing of the transcript. Those post-hearing submissions have been reviewed in the course of preparation of this final order.

FINDINGS OF FACT

A. General Ratemaking Principles

1. The PSC regulates those investor-owned water and wastewater utilities in the state which are not subject to county jurisdiction. Section 367.171, Florida Statutes. Currently, the PSC regulates approximately 200 water utilities and 150 wastewater utilities in Florida.

2. The general framework for the setting of rates by public utilities is set forth in the Florida Statutes. Section 367.081(2), Florida Statutes, directs the PSC to establish rates for regulated utilities that are "just, reasonable and compensatory and not unfairly discriminating."

Section 367.081(2)(a) requires the PSC to consider the cost of providing service, which includes the utility's working-capital needs, depreciation and the expenses incurred "in the operation of all property used and useful; and a fair return on the investment of the utility that is used and useful in the public service."

3. If a utility's revenues are not sufficient to enable it to recover its expenses and earn a reasonable rate of return on its investment, it can file a rate case with the PSC. In such a rate proceeding, a "test year" is proposed by the utility and, upon approval by the PSC, is utilized to provide a 12-month period of utility operations for purposes of analyzing the reasonable rates for the period the new rates will be in effect.[3]

4. The rate base reflects the portion of the prudent investment of the utility which is factored into the establishment of rates. The rate of return to be earned on investment in rate base is factored into the final rates approved for the utility.

5. The PSC does not currently have any rules delineating how it will determine whether an investment made by a utility is "used and useful in the public service," nor does the PSC have any rules delineating how it will consider for ratemaking purposes the investments necessary for a utility to comply with environmental regulations.

6. Section 367.111, Florida Statutes, provides that "each utility shall provide service to the area described in its certificate of authorization within a reasonable time period."

This statute also provides that a utility must provide "safe, efficient and sufficient service" in accordance with the provisions of Chapters 403 and 373 which delineate the environmental regulation and permitting responsibilities of the DEP and the five water management districts (WMDs) in the state. Accordingly, a utility's statutory obligation to serve includes the obligation to serve in accordance with the regulatory requirements of the state environmental permitting agencies. A utility must make investments to ensure its ability to meet the requirements of the environmental agencies and to be ready to timely serve future customers. A utility is entitled to recover its investment necessary to meet its statutory obligations.

7. The PSC has developed a non-rule policy approach which requires a delineation of the portion of an investment made by a utility that is directly utilized to provide service to existing customers. This portion of the investment is considered "used and useful" and is included in the utility's rate base.[4] The remainder of what is otherwise a prudent investment is deemed to constitute "non-used and useful" plant. "Non-used and useful plant" is not included in rate base. The PSC recognizes as "used and useful" a "margin reserve" which is added to the rate base so that a utility can earn on that portion of its investment that is deemed to be necessary reserve capacity to meet the fluctuating demands of existing customers and the anticipated demands of future customers.[5]

8. The PSC's "used and useful" approach results in the need for a "margin reserve" if a utility is to have adequate capacity to provide service as required. Nonetheless, whether to recognize a margin reserve has been a recurring issue in virtually every contested rate case since the late 1970's. OPC has consistently objected to the recognition of any margin reserve for water and wastewater utilities.

9. Also pertinent to this proceeding is the PSC's treatment of Contributions-In-Aid-Of-Construction (CIAC) for water and wastewater utilities. CIAC are cash or property donations or payments to a utility company to defray or repay the cost of constructing the utility system.[6] Some of the PSC's accounting staff in the late 1970's and early 1980's advocated the policy of offsetting a utility's recovery of the cost of plant related to reserve capacity with anticipated CIAC collections from future customers. As a result, a non-rule policy of imputing anticipated CIAC developed. This policy began sometime after the PSC started applying a "margin reserve."

10. During the mid to late 1980's, most of the PSC professional accounting staff came to recognize that imputing CIAC as an offset to margin reserve essentially defeated the purpose of recognizing a margin reserve. Since that time, there has been little or no support among the professional accounting staff of the PSC to continue the policy of imputing CIAC. However, the PSC has continued its policy throughout the late 1980's up to the present with the exception of only one case.

11. An additional ratemaking concept relevant to this proceeding is what is referred to as "AFPI." This acronym stands for Allowance for Funds Prudently Invested. The PSC developed AFPI as a cost recovery mechanism for non-used and useful plant. The general purpose of an AFPI charge is to allow utilities to recover the carrying charges such as depreciation and taxes on its non-used and useful plant. However, AFPI has not worked as intended. AFPI is based on estimated collections rather than actual receipts. Therefore, whether a utility actually recovers its investment is speculative and collection of AFPI charges is uncertain at best.

B. Rule Development

12. Sometime in 1991, the PSC studied the issues of margin reserve and the imputation of CIAC as part of an overall review of its water and wastewater policies and rules. As part of that analysis, the PSC staff recommended changing or discontinuing some of the long-standing PSC policies including the policy of imputing CIAC.

13. In 1995, the PSC conducted workshops on the issue of margin reserve and the imputation of CIAC. During that workshopping process, the PSC staff reached a general consensus that the PSC's long-standing policies on margin reserve and the imputation of CIAC needed to be re-evaluated and that the margin reserve period should be extended.

14. In March 1996, when no specific steps to modify the policies were forthcoming, the FWA filed a Petition To Initiate

Rulemaking in an effort to compel the PSC to adopt a rule that included a presumptively valid five-year margin reserve period without any imputation of CIAC.

15. The PSC voted to not accept the rule proposed by the FWA and instead decided to publish the Initial Proposed Rule.

16. The Initial Proposed Rule, published in August 1996, was intended to set forth the PSC's long standing non-rule policies and simply "get the ball rolling."

17. The PSC conducted an evidentiary hearing on the Initial Proposed Rule on December 10, 1996. Prior to that hearing, extensive testimony was pre-filed with the PSC. All of the PSC staff members who testified and submitted pre-filed comments as part of the December 10, 1996 hearing recommended in favor of modification of the long-standing policies. Extensive, unrefuted expert testimony was presented regarding the problems with the existing PSC policies and the detrimental impacts of those policies.

18. After the December 10, 1996 hearing, a team of PSC staff reviewed and analyzed the evidence. That team consisted of accountants, engineers, rate specialists, tax experts, and other personnel of the Division of Water and Wastewater of the PSC. The team prepared a staff recommendation dated April 2, 1997, which was intended to set forth a thorough, objective analysis of the evidence presented, and included a consensus conclusion that a rule should be adopted to provide for a margin reserve period

of five years with no imputation of CIAC. None of the PSC staff submitted a dissenting analysis or alternative recommendation to the April 2, 1997 report.

19. The PSC did not accept the April 2, 1997 staff recommendation. Instead, at a "decision conference" on June 10, 1997, where no further evidence was presented, the PSC voted to proceed with the Initial Proposed Rule with a few modifications, i.e., distribution systems were deleted and the imputation of CIAC was reduced from 100 to 50 percent. These modifications were published in the July 3 Notice of Change discussed in the Preliminary Statement. As revised, the proposed rule would continue the PSC's longstanding 18 month margin reserve policy and would continue the imputation of CIAC, although it would be at the rate of 50 percent rather than 100 percent.

C. Margin Reserve

20. Margin reserve is intended in part to provide a recognition in rate base of the time necessary to install the next economically feasible increment of plant capacity.

21. The concept of a "margin reserve" has been applied by the PSC on a non-rule policy basis and has been a source of great controversy for approximately two decades. While the PSC may consider margin reserve periods of greater than 18 months, the PSC has, with only a few exceptions, allowed only 18 months whenever a margin reserve has been authorized. The identical result in virtually every case despite wide factual differences has led the industry to conclude that 18 months is a foregone conclusion irrespective of the nature and extent of the evidence

presented. Moreover, with only one known exception, the PSC has consistently imputed CIAC as an offset to a recognized margin reserve. The proposed rule attempts to delineate the factors which the PSC has purportedly considered for the last 20 years in determining the appropriate margin reserve period.

22. The proposed rule defines "margin reserve" as the "amount of plant capacity needed to preserve and protect the ability of utility facilities to serve existing and future customers in an economically feasible manner that will preclude a deterioration in quality of service and prevent adverse environmental and health effects." The additional margin reserve capacity is placed in the rate base because it is necessary to meet the utility's continuing statutory obligation to meet the fluctuating and increased demands of existing customers as well as the demand of future customers. The proposed rule also: (1) applies a presumptively valid "margin reserve" period of 18 months in establishing the used and useful level of investment in water source and treatment facilities and wastewater treatment and effluent disposal facilities; and (2) reduces the margin reserve investment by imputing 50 percent of the anticipated CIAC collections expressed in terms of the number of Equivalent Residential Connections (ERCs), which may be collected by the utility over the authorized margin reserve period.

23. The consequences of not having adequate capacity available to serve the fluctuating demands of existing customers or to meet the demands of new customers as they are added to a system can be very serious. Excess flows from a wastewater plant

can cause spillage and environmental damage with the potential of adverse health effects. Lack of adequate reserve capacity also renders a wastewater plant more vulnerable to "plant upsets" with dire consequences from a health, as well as cost, standpoint. Further, excess demands on a water plant can result in shutdowns.

D. Imputation of CIAC

24. A utility's obligation to be ready to serve future customers is ongoing. By the time any new customer comes online, the utility has obligations with respect to the next group of future customers.

25. Investment decisions by a utility must be made in advance of future demand. Imputed CIAC is based on projected collections that may never materialize. Thus, anticipated post-test period contributions are being imputed into the test period. Imputation of anticipated post-test year CIAC as an offset to margin reserve can have the effect of eliminating some, if not all, of the margin reserve recognized in rate base.

26. During the hearing before the PSC on December 10, 1996, the only evidence presented regarding the imputation of CIAC was the testimony of PSC staff and expert witnesses on behalf of the industry who all opposed continuation of the imputation policy. No evidence was presented in support of the policy.

27. The April 2, 1997 PSC staff recommendation concluded that "Imputing CIAC reduces the allowed margin reserve [and] this adjustment often eliminates any investment in margin reserve from being counted in the allowed rate base amount." The report quotes with approval numerous arguments presented as to why the

imputation policy was ill-advised and illogical and concludes with a recommendation to adopt a rule that halts the long-standing practice.

28. Despite the staff recommendation and without the support of any additional evidence, the PSC voted to propose a rule that would continue imputing CIAC against a recognized margin reserve, although at a reduced rate of 50 percent.

29. At the hearing in these consolidated cases, the PSC sought to justify the proposed rule's imputation provisions through the testimony of Kimberly Dismukes, a former OPC employee and now a frequent witness on behalf of OPC, who has consistently testified against the recognition of any margin reserve. Dismukes' opinion as to what is appropriate to include within the margin reserve is not consistent with the definition of margin reserve in the proposed rule.

30. Dismukes does not believe that the needs of future customers should be included in a margin reserve. Her "matching principle" justification for imputation of CIAC has been rejected by all of the PSC professional staff who presented evidence in this rule proceeding.

31. Dismukes has conducted no analysis to determine whether any alternative method adequately allows a utility to recover on the investments necessary to be ready to meet the demands of future customers, and has admitted that if there is no such mechanism, a utility would be precluded under the policy she advocates from recovering and earning on its required investments.

32. The only other justification offered in support of the proposed rule's imputation provisions is the suggestion that CIAC could be taxable if not imputed. The prospect that CIAC could be taxable if not imputed was raised in the early 1980's when the policy was first developed. However, even before the imputation practice began, the PSC had been recognizing margin reserves and there were no tax decisions or opinions which found CIAC to be taxable.

33. In approximately 1987, the tax law changed and any potential argument about taxability became moot. Nonetheless, the PSC continued its non-rule policy of imputing CIAC.

34. The tax laws changed again during the summer of 1996. While there has been some suggestion that the changes in 1996 might result in the taxability of CIAC if there is no imputation, there are no tax opinions or interpretations that indicate those concerns are justified. Concerns about taxability were not noted in the staff recommendation of April 2, 1997 (which recommended against continuing the policy of imputing CIAC), even though the staff recommendation was initialed by the tax expert for the PSC.

E. DEP and WMD Requirements for Water & Wastewater Facilities

35. As noted above, the PSC's enabling statute requires water and wastewater utilities to comply with applicable DEP and WMD statutes and regulations. See Section 367.111(2), Florida Statutes. DEP regulates and has permitting authority over the construction and operation of water supply and treatment and wastewater treatment, reuse, and disposal facilities throughout the state pursuant to part VI of Chapter 403, Florida Statutes.

Florida's five WMDs regulate and have permitting authority over the uses of the water resources of the state pursuant to parts I and II of Chapter 373, Florida Statutes.

36. DEP Rule 62-600.405, Florida Administrative Code, mandates that utilities meet defined activity milestones for the timely planning, design, permitting and construction of expansions of wastewater treatment and effluent disposal/reuse capacity. The rule dictates that a five-year minimum is needed to fulfill the planning, design, permitting and construction of wastewater treatment and effluent disposal/reuse capacity expansions. Designed to insure that adequate treatment and disposal capacity are available when needed, Rule 62-600.405 is a pollution prevention measure. For purposes of the DEP rule, it does not matter whether the flow levels which trigger the activity milestones emanate from existing or new customers.

37. With regard to requiring specific planning horizons for expansions of water facilities, DEP intends to develop a rule to serve a purpose similar to Rule 62-600.405, Florida Administrative Code. In the meantime, DEP examines water facility capacity needs on a non-rule policy basis using similar standards.

38. DEP is charged with administering a State Revolving Loan Fund (SRLF) program whereby funds are loaned or granted to utilities for the purpose of constructing water facility improvements. DEP conditions fund eligibility on a cost-effectiveness evaluation. In this regard, DEP has found that for

a water facility improvement to be cost-effective, the improvement must have sufficient capacity to serve demand for no less than 5 years into the future.

39. Wastewater facilities operating at the edge of capacity are often at the edge of environmental compliance and public health problems. Similarly, water facilities with insufficient capacity also pose environmental compliance issues and risks to the public health.

40. Recognizing that Florida's water resources are limited, the Legislature directed Florida's WMDs to develop plans for meeting the water supply needs of existing and future users over the next 20 years. In formulating these plans, the WMDs assess both the needs and sources of water over the required planning horizon. The assessment of needs and sources and plan formulation process has revealed that cooperative efforts by multiple users, in conjunction with WMD programs, as well as development of alternative water supplies, such as reuse, will be necessary for future supply needs to be met without unacceptable impacts on other users and natural systems. Future uses may not be permitted or more expensive new sources of water will have to be developed if proposed future uses are inconsistent with the WMD's consumptive use permit criteria/water supply plans. The WMD's permit criteria and supply plans are designed to achieve long-term, cost-effective solutions to the state's supply needs for existing and future users.

41. To receive a consumptive use permit, the permit applicant must submit proposals and projections for its water resource needs and the means and facilities for accessing the source for the proposed permit duration.

42. Short-term planning for water supply needs has adverse impacts on the utility, customers, and environment. Five years is a base minimum for planning water supply needs.

43. Consumptive use permits of a long-term duration, i.e. up to 20 years, are desirable and cost-effective for the user because they provide certainty as to the availability of the source and protection against potential competing uses and changes in circumstance.

F. Reuse

44. "Reuse" refers to the application of reclaimed water in accordance with DEP's rules for a beneficial purpose. "Reclaimed water" refers to water that has received at least secondary treatment and basic disinfection upon exiting a domestic wastewater treatment facility. DEP Rule 62-610.200 (46) and (49), Florida Administrative Code. "Reuse" and "effluent disposal" are mutually exclusive terms under DEP's rules and mutually exclusive categories for disposing of treated wastewater. DEP Rule 62-610.810, Florida Administrative Code.[7]

45. The promotion of reuse has been declared by the Florida Legislature to be a state objective. Since water resources in Florida are limited and much of Florida's supply sources of cheap, readily available water have been or will be maximized,

reuse is a matter of significant concern to the state and its environmental agencies. See Sections 373.016, 373.250, 403.064, Florida Statutes.

46. Reuse projects require significant time and investment to implement. DEP's reuse rules impose specific redundancy and reliability requirements on the reuse facility's treatment unit processes and application capabilities above and beyond what is imposed for standard treatment and effluent disposal, thereby increasing treatment and disposal costs.

47. A utility's ability to recover its reuse costs is essential to promoting reuse; conversely, a utility's inability to recover its reuse costs as a result of the restricted application of margin reserve and "used and useful" adjustments is a disincentive to reuse.

48. In 1989, the Legislature passed Chapter 89-324, Laws of Florida, creating Section 403.064, Florida Statutes. Subsection (6) of that law provided, "Pursuant to Chapter 367, the Florida Public Service Commission shall allow entities which implement reuse projects to recover the full cost of such facilities through their rate structure." In 1994, the Legislature passed Chapter 94-243, Laws of Florida, amending Section 403.064, Florida Statutes. Subsection (6) was moved to Subsection (10) and amended as follows:

> (10) Pursuant to chapter 367, the Florida Public Service Commission shall allow entities under its jurisdiction which conduct studies or implement reuse projects, including but not limited to, any study required by s. 403.064(2) or facilities used for reliability purposes for a reclaimed

> water reuse system, to recover the full, prudently incurred cost of such studies and facilities through their rate structure. (emphasis supplied.)

This 1994 legislation also created a new Section 367.0817(3), Florida Statutes, providing, "All prudent costs of a reuse project shall be recovered in rates."

49. The legislative history contained in the April 25, 1994, House Staff Report for Ch. 94-243 clearly identifies the cost deprivation which would be worked by the PSC's used and useful practices as an issue the law was designed to address:

> Previously, recovery of [reuse] costs (which do not necessarily benefit present customers of the utility, i.e., "used and useful in the public service") might have arguably been denied by the commission.

50. Cognizant of the incentive posed by full cost recovery, the WMDs and DEP supported development of the foregoing legislation in part to specifically require 100 percent used and useful treatment for reuse projects.

51. The PSC does not have a current policy on reuse projects even though Section 403.064(10), Florida Statutes, was enacted in 1989 and directed the PSC to allow utilities to recover the cost of reuse facilities in their rates.

52. The PSC has adopted rules which define reuse and reclaimed water in a manner consistent with DEP's definitions. However, the PSC continues to apply its "used and useful" and "margin reserve" policies to all water source, water treatment, wastewater treatment and wastewater disposal investments, including wastewater facilities that are classified as reuse by DEP.

53. The proposed rule would treat reuse facilities the same as effluent disposal or any other water or wastewater facility and would apply the PSC's margin reserve and imputation policies to such reuse facilities. This approach will deprive utilities of full cost recovery for reuse projects.

G. The Proposed Rule is Not Supported by Competent, Substantial Evidence

54. The PSC's "used and useful policies" in conjunction with the proposed rule overlook the cost analysis involved in sizing new plant increments and actually creates incentives to build in smaller increments rather than increments that take advantage of economies of scale.

55. Construction in the water and wastewater industry is often dependent upon threshold and standard sizing. The proposed rule fails to take into account the economies of scale involved in the sizing of new plant increments and penalizes utilities for sizing their plants based upon economies of scale.

56. Adding plant increments in smaller sizes results in duplication of planning, engineering, permitting, and other administrative and operational startup costs.

57. Sizing facilities with larger reserve capacity so as to take advantage of economies of scale provide a safeguard for meeting environmental standards, reduces overhead costs, and provides for long-term cost containment.

58. The financial disincentives created by the PSC's used and useful and margin reserve policies make it economically illogical for a utility to add plant in increments that are sized

to take advantage of economies of scale. As a result, the PSC's regulations are resulting in higher cost to customers in both the short and long term.

59. The presumptively valid 18-month margin reserve period set forth in the proposed rule is a continuation of the non-rule policy followed by the PSC for approximately the last 20 years. The selection of the presumptively valid 18-month margin reserve period was not based upon any serious or recent analysis of the time and effort involved in the planning, design, permitting, construction and testing of new plant increments.

60. The 18-month margin reserve period set forth in the proposed rule is a perpetuation of a policy that was developed during the late 1970's during a time when the permitting requirements and environmental regulations were significantly different. The 18-month margin reserve period is inconsistent with the planning horizons utilized in determining concurrency requirements for purposes of the state's growth management laws. There is no credible evidence that 18 months is an appropriate staging increment for water or wastewater facilities. Its appearance in the proposed rule is the result of long-standing historical practices rather than any analysis or evidence. Under the current permitting and regulatory requirements, the time frame for bringing a new water facility online ranges from three to ten years and would typically take between three and one-half to five or six years. This time frame does not include construction delays or other possible problems.

61. During the last several years, many environmental permitting agencies have expressed concerns that the PSC's cost recovery policies are not consistent with what is required of utilities by the environmental permitting agencies. Even so, there has been no updated analysis by the PSC in terms of what is involved in the planning, design, permitting, and construction aspects of having reserve capacity available and no analysis of the impacts of the PSC's policies on the long-range planning and long-term costs to utilities and their customers.

62. The minimum planning requirements imposed by the environmental agencies were developed subsequent to the time that the PSC developed its non-rule policies on margin reserve and imputation of CIAC. The overwhelming evidence demonstrated that those long-standing PSC policies conceived 15 years ago are ill-advised in view of the changes facing the water and wastewater industry.

63. DEP and WMD regulations and permitting criteria have changed significantly since the development of the PSC's non-rule policy regarding an 18-month margin reserve and CIAC imputation. The evidence indicates that the PSC has been slow to recognize the existence and significance of environmental requirements imposed on utilities, including DEP Rule 62-600.405, Florida Administrative Code. These regulatory changes have impacted the time necessary to plan, design, permit, and construct water and wastewater facilities.

64. Because of the way the PSC's margin reserve and "used and useful" determinations influence utilities' planning and plant-sizing decisions, the policies are inconsistent with the public interest determinations contained within DEP's regulatory requirements, (Rule 62-600.405, Florida Administrative Code in particular), and inconsistent with WMD-determined measures needed to sustain viable long-term water supply for the utilities.

65. Eighteen months of reserve capacity is insufficient to insure environmental compliance and protection of public health.

66. The proposed rule does not clearly delineate what a utility must demonstrate or what standard will be utilized in determining whether a margin reserve period of other than 18 months should be approved.

67. As established at hearing, water in Florida has been underpriced. Both water and wastewater are unavoidably an increasing cost industry. The policies of the PSC with respect to the water and wastewater industry were developed at a time when water was readily available, cheap, and viewed as virtually endless. In addition, the policies regarding wastewater were developed at a time when the environmental regulations were much less stringent and there were virtually no organized efforts to reuse water.

68. None of the PSC's professional staff assigned to look at the evidence presented in the rule development process believed that continuation of the 18-month margin reserve period was appropriate. The shortest margin reserve term that any PSC professional felt was appropriate was three years. The PSC's

coordinator for the rule development process, John Williams, testified that, in his professional opinion, a five-year period was appropriate. This conclusion was the consensus opinion reflected in the April 2, 1997 staff recommendation.

69. The inadequacy of the 18-month margin reserve period is exacerbated by the perpetuation of the PSC's long-standing non-rule policy of imputing CIAC as an offset to a recognized margin reserve.

70. The Revised Proposed Rule calls for the imputation of only 50 percent of CIAC as opposed to the 100 percent called for in the Initial Proposed Rule. This reduction was intended to respond to some of the complaints voiced by the utilities. However, the selection of 50 percent as opposed to 100 percent was not based upon any analysis or study. Imputing 50 percent of CIAC will, in many instances, still obliterate any margin reserve that is recognized. Even 50 percent imputation is inconsistent with the purposes of recognizing a margin reserve and fails to take into account the continuing obligation of a utility to be available to serve.

71. The imputation of potential post-test year collections of CIAC against the margin reserve precludes a utility from the opportunity to earn a return on the margin reserve investment included in rate base. Moreover, the imputation of CIAC can create incentives for a utility to keep its investment in reserve capacity at a minimum.

72. The decision to codify the long-standing non-rule policies of the PSC was made without any serious analysis of the long-term consequences to utilities or customers. It was made despite the recommendation to change the long-standing policy--a recommendation of most of the staff who looked at the issue.

73. The PSC acknowledged at hearing that utilities should be encouraged to undertake planning that recognizes conservation, environmental protection, and economies of scale. The persuasive evidence in this case established that the proposed rule is contrary to those goals.

74. Adoption of the proposed rule will lead utilities to build plants in small uneconomical increments that will strain the ability of utilities to comply with environmental regulations. The ability of PSC regulated utilities to compete for scarce new water resources and develop alternative water resources will be jeopardized. It will also contravene the legislative mandate that reuse be encouraged. Finally, implementation of the proposed rule could preclude utilities from the opportunity to earn a return of the investments they must make to meet their statutory obligations. In summary, as established by the evidence presented at hearing, the proposed rule is arbitrary and capricious in that there is no competent evidence to support it, and it is contrary to the legislative direction to the PSC to allow utilities to recover the full costs of reused facilities in their rate base.

H. EIS

75. At the time the Initial Proposed Rule was published, the 1996 amendments to the Administrative Procedure Act, Chapter 120, Florida Statutes ("APA"), had not gone into effect. Accordingly, the PSC prepared an economic impact statement (EIS) under the earlier version of the APA.

76. The EIS analyzed the impacts of the proposed rule based upon how much money the PSC would save in rate cases from not having to litigate the margin reserve issue in every case.[8] The EIS did not analyze the impact on customers and did not analyze the impact of the policies embodied in the proposed rule on utilities. Furthermore, the EIS did not analyze the impact of adopting the proposed rule on the environmental permitting agencies.

77. The Revised Proposed Rule was published on August 2, 1996. Within 21 days after the publication of the Revised Proposed Rule, Florida Water submitted a proposed lower cost regulatory alternative in accordance with the provisions of the 1996 amendments to the APA. The proposed lower cost regulatory alternative called for a margin reserve of five years with no imputation of CIAC. Florida Water contended that the adoption of that proposed lower cost regulatory alternative would significantly reduce the cost to utilities, the cost to the permitting agencies and the long-term cost to customers.

78. The PSC did not conduct any serious economic analysis of the differences between adopting the proposed rule as opposed to the proposed lower cost regulatory alternative.

79. The PSC prepared a document entitled Revised Statement of Estimated Regulatory Costs (the "Revised SERC") which was intended to comply with the requirements of the 1996 APA amendments.

80. No analysis has been done as to the extra permitting costs incurred by the agencies, cost to the utilities, or cost to customers as a result of the 18-month margin reserve period in contrast with a longer period. The evidence established that costs to the permitting agencies would be reduced with a margin reserve period of greater than 18 months.

CONCLUSIONS OF LAW

81. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this proceeding pursuant to Section 120.56(2), Florida Statutes.

82. Any substantially affected person may seek an administrative determination of the invalidity of a proposed rule on the grounds that the proposed rule is an invalid exercise of delegated legislative authority. See Section 120.56(2), Florida Statutes.

83. The parties have stipulated to the standing of Petitioners to challenge the proposed rule on the grounds set forth in their petitions.

I. Burden of Proof

84. Under the Florida APA, Chapter 120, Florida Statutes, an invalid exercise of delegated authority is defined as an:

> [A]ction which goes beyond the powers, functions and duties delegated by the Legislature. A proposed rule is an invalid exercise of delegated legislative authority if any one or more of the following apply:
>
> (a) The agency has materially failed to follow the application rulemaking procedures set forth in this Chapter.
>
> (b) The agency has exceed its grant of rulemaking authority, citation to which is required by Section 120.54(3)(a)1.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by Section 120.54(3)(a)1.;
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency; or
>
> (e) The rule is arbitrary or capricious.
>
> (f) The rule is not supported by competent substantial evidence; or
>
> (g) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

Section 120.52(8), Florida Statutes.

85. Prior to the 1996 Amendments to the APA, a challenger had the burden to show by a preponderance of the evidence that a proposed rule contravened Section 120.52(8), Florida Statutes.[9]

86. Under the 1996 APA Amendments, an agency proposing a rule now has the burden of proof with respect to the issues raised in the petitions. See Section 16 of Chapter 96-159, Laws of Florida, codified at Section 120.56(2)(a), Florida Statutes.

87. Since Petitioners have invoked several of the subsections of Section 120.52(8) in their various challenges, it is appropriate to summarize how certain of these provisions have been interpreted and applied.

88. In determining whether a rule is arbitrary or capricious, the administrative law judge should determine whether the agency; (1) has considered all the relevant factors; (2) has given actual, good faith consideration to those factors; and (3) has used reason rather than whim to progress from consideration of these factors to its final decision. Adam Smith Enterprises, Inc. v. Dept. Of Environmental Regulation, 553 So. 2d 1260 at 1274 n. 23.

89. A rule is impermissibly vague if its fails to establish adequate standards for agency decisions or is written in such a way that persons of common intelligence must necessarily guess at its meaning and differ as to its application. State v. Cummings, 365 So. 2d 153 (Fla. 1978) (wildlife permit rules vague for failing to define key words).[10]

90. The 1996 APA Amendments retained the arbitrary and capricious standard and added a new standard for declaring a rule an invalid exercise of delegated authority. That standard is included in subsection (f) of Section 120.52(8). Under that provision, a rule is an invalid exercise of delegated authority if it is not supported by competent substantial evidence. This is a significant modification to the APA and all prior decisions should be viewed in the context of this amendment. The agency

proposing a rule now has the burden of proof to demonstrate that there is competent substantial evidence to support its rule. No such evidence was presented in this case.

91. Under the pre 1996 version of the APA, an agency had the implied authority to adopt criteria necessary to implement its legislative mandates. See Department of Professional Regulation, Board of Professional Engineers v. Florida Society of Professional Land Surveyors, 475 So. 2d 939, 942 (Fla. 1st DCA 1985); see also General Telephone Company of Florida v. Marks, 500 So. 2d 142 (Fla. 1986). An agency's interpretation only needed to be within the range of possible interpretations of a statute not necessarily the most desirable one.[11] Moorhead v. Dept. of Professional Regulation, 503 So. 2d 1318, 1320 (Fla. 1st DCA 1987); Florida Waterworks Association v. Florida Public Service Commission, 473 So. 2d 237, 240 (Fla. 1st DCA 1985). The 1996 Amendments clearly modified some of these concepts. In any event, an agency's interpretation must always be consistent with the statute.

92. There are many general statutory construction principles which have not been given effect by the PSC. For example, "the provisions of statutes enacted in the public interest should be construed liberally in favor of the public." Department of Environmental Regulation v. Goldring, 477 So. 2d 532, 532 (Fla. 1985); Dept. of State v. Hamilton, 388 So. 2d 561 (Fla. 1980). In this regard, it should be noted that Chapter 367 directs consideration of the long-term interest of utility customers, not just the short-term needs of existing customers.

93. Section 120.52(8)(d), Florida Statutes requires an agency to establish adequate standards for decisions in its rule; failure to do so renders the rule invalid. Even a broad grant of rulemaking authority does not insulate from challenge an agency's rules that confer unbridled discretion.

> "An administrative rule which creates discretion not articulated in the statute it implements must specify the basis on which the discretion is to be exercised. Otherwise, the 'lack of . . . standards . . . for the exercise of discretion vested under the . . . rule renders it incapable of understanding . . . and incapable of application in a manner susceptible of review' . . . an agency rule that confers standardless discretion insulates agency action from judicial scrutiny."

Cortes v. State Bd. of Regents, 655 So. 2d 132, 138 (Fla. 1st DCA 1995) citing Staten v. Couch, 507 So. 2d 702 (Fla. 1st DCA 1987).

94. The proposed rule in this case fails to give utilities adequate notice of what they must prove to obtain a margin reserve period of more than 18 months. Because utilities must make investment decisions before knowing what the PSC will approve, utilities are likely to run the risk of investing in large increments thereby exacerbating many of the problems discussed in the Findings of Fact.

95. Appellate courts have recognized that "considerable - if not extraordinary - deference" should be given to an agency's exercise of delegated discretion in respect to technical and scientific matters.[12]

96. Admittedly, the role of an administrative law judge in a rule challenge proceeding is not to substitute his judgment for that of the agency. Nonetheless, Chapter 120, Florida Statutes, imposes requirements on an agency's rulemaking which are properly the focus of this proceeding.

> [T]he statutory construction must be a permissible one and the agency cannot implement any conceivable construction of a statute...irrespective of how strained or ingenuously reliant on implied authority it might be.

State Bd. Of Optometry v. Florida Soc'y of Ophthalmology, 538 So. 2d 878, 885 (Fla. 1st DCA 1988), rev. denied, 542 So. 2d 1333 (Fla. 1989).

97. The deference granted an agency's interpretation was not absolute even under the pre-1996 APA.

> Florida law clearly mandates that rules cannot enlarge, modify or contravene the provisions of a statute. State, Dept of Business Regulation v. Salvation Limited, Inc., 452 So. 2d 65 (Fla. 1st DCA 1984). The rulemaking process cannot be used to make legal that for which there was no authority in the first place. Great American Banks, Inc. v. Division of Admin. Hearings, 412 So. 2d 373 (Fla. 1st DCA 1981);

Dept. of Natural Resources v. Wingfield Dev. Co., 581 So. 2d 193, at 197-98 (Fla. 1st DCA 1991).[13]

98. An agency's rule cannot be contrary to or enlarge a provision of a statute, particularly the statute cited as the law implemented, "no matter how admirable the goal may be."[14]

J. Rulemaking Authority and Statutory Framework

99. In order to resolve the challenges to the proposed and existing rules in this case, it is necessary to consider the

nature and scope of the PSC's rulemaking authority and the legislative goals embodied in the organic statute under which the PSC operates.

100. The basic components of ratemaking for water and wastewater utilities are found in Section 367.081, Florida Statutes.

101. Section 367.111(2), Florida Statutes, charges the PSC with insuring that utilities provide safe, efficient and sufficient service in accordance with the environmental regulations and reasonable engineering standards. The evidence in this case established that the policies embodied in the proposed rule will inhibit utilities from building new plant in increments that are the most cost efficient and most desirable from an engineering standpoint. In fact, the proposed rule creates incentives for utilities to design and construct facilities in the smallest possible increments necessary to meet only immediate demand. Rather than encouraging the sizing of plant increments based upon sound engineering practices and long-term cost considerations, adoption of the proposed rule would result in utilities expanding in smaller, less cost efficient increments that will increase the risk of health and environmental problems and require utilities to engage in a continuous cycle of construction and rate cases in order to address reasonably foreseeable growth. Moreover, the proposed rule would handcuff the ability of utilities to participate in the process of developing alternative supplies of water which the state critically needs.

102. The PSC must treat capital improvements required by governmental regulations as having been made "in the public interest," and the PSC must at least consider such improvements for "used and useful" treatment. Section 367.081(2)(a), Florida Statutes; Florida Cities Water Co. v. Fla. Pub. Serv. Comm'n., No. 96-3812 (Fla. 1st DCA January 12, 1998).

103. A utility is entitled to recover its costs of providing safe, efficient, and sufficient service as prescribed by part VI of chapter 403 and parts I and II of chapter 373, consistent with the approved engineering design and proper operation of water/wastewater facilities in the public interest as required by Section 367.111(2), Florida Statutes, Florida Cities v. FPSC, supra. In developing the proposed rule, the PSC failed to provide a mechanism for full-cost recovery of capital improvements required by governmental regulations. Such expansions could include plant expansions consistent with DEP Rule 62-600.405, Florida Administrative Code, and water supply projects required pursuant to WMD water supply permits or plans. While there may be methods other than full "used and useful" treatment for a utility to recover its investments in capital improvements, the evidence in this case established that the PSC's existing alternatives are inadequate and, when combined with the proposed rule, would serve in many instances to preclude a utility from earning and recovering on the investments it is obligated to make in the public interest.

104. The evidence established that AFPI does not work as intended and does not allow full recovery of non-"used and useful" costs. Accordingly, the proposed rule improperly fails to provide a way for a utility to recover the costs for capital improvements required by governmental regulations and made in the public interest. The proposed rule is neither supported by competent substantial evidence nor consistent with the law implemented; it is therefore an invalid exercise of delegated legislative authority. Section 120.52(8), Florida Statutes.

105. The artificially short margin reserve period included in the proposed rule would deprive utilities of investment and facilities prudently planned and economically sized. While the PSC contends that the proposed rule permits a utility to present evidence justifying a longer margin reserve period, it is impossible for a utility to determine the nature and extent of the presentation necessary to obtain a margin reserve period of longer than 18 months.

106. Nowhere in Chapter 367, Florida Statutes, is distinction made between existing and future customers. Instead Chapter 367, Florida Statutes, directs the PSC to consider the long term impact to customers, not just the impact to existing customers. The testimony in this case established that, in the long term, the PSC's proposed rule will cost customers more than the proposed lower cost regulatory alternative submitted by Florida Water.

K. Reuse

107. As supported by the plain and ordinary meaning, as well as statement of legislative intent, Sections 403.064(10) and 367.0817(3), Florida Statutes, require the PSC to allow utilities to "recover the full, prudently incurred cost" of reuse studies and reuse facilities through rates, not through AFPI or any other cost recovery mechanism.[15] No ambiguity in these statutory provisions exists. No rule of statutory construction supports a different interpretation. The legislature first directed the PSC to allow full cost recovery for reuse facilities in 1989. See Section 7 of Chapter 89-324, Laws of Florida. To treat reuse facilities the same as other effluent disposal facilities for "used and useful" or ratemaking purposes under Section 367.081(2), Florida Statutes, defeats the stated purpose of the specific statutory language on reuse, rendering the reuse provisions superfluous and meaningless. Ellis v. State, 622 So. 2d 991, 1002 (Fla. 1995) (statutes should not be construed to render them meaningless); see also, Christo v. State, Dept. of Banking and Finance, 649 So. 2d 318, 321 (Fla. 1st DCA), rev. den. 660 So. 2d 712 (Fla. 1995) (more specific statute covering particular subject is controlling over statutory provision covering same subject in more general terms).

108. The proposed rule would have the unlawful effect of denying a utility recovery of its reuse costs through rates, contrary to Sections 403.064(10) and 367.0817(3), Florida Statutes. The PSC general grant of rulemaking authority in Section 367.121(1)(f), Florida Statutes, does not empower it to

adopt a rule that would apply a cost recovery mechanism, i.e. "margin reserve," to all wastewater treatment facilities including reuse facilities when that mechanism fails to allow the full cost recovery mandated by the legislature. The PSC has thus exceeded its grant of rulemaking authority, and the proposed rule is an invalid exercise of delegated legislative authority. Section 120.52(8), Florida Statutes.

109. The rulemaking provisions of the APA provide affected parties with an opportunity to require an agency to demonstrate that its rules are a valid exercise of delegated legislative authority. In this case under the 1996 version of the APA, the PSC has the burden of proof to demonstrate that the proposed rule at issue is not an invalid exercise of delegated authority. Based upon all of the evidence presented in the case, the PSC has failed to meet that burden.

L. EIS

110. The PSC's economic analysis of the proposed rule and the proposed lower cost regulatory alternative of Florida Water do not meet the requirements of Section 120.541, Florida Statutes, and constitutes a material failure to follow the applicable rulemaking procedures under 120.52(8)(a), Florida Statutes.

DISPOSITION

Proposed Rule 25-30.431, Florida Administrative Code is an invalid exercise of delegated legislative authority and may not be utilized by the PSC for its stated regulatory purposes. Jurisdiction is retained in this matter solely for consideration of the issue of attorney fees in a subsequent proceeding to be initiated by Petitioners.

DONE AND ORDERED this 2nd day of March, 1998, in Tallahassee, Leon County, Florida.

Don W. Davis

DON W. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 2nd day of March, 1998.

ENDNOTES

[1]/ The challenges to the Initial Proposed Rule were consolidated by order dated September 4, 1996.

[2]/ Because the Initial Proposed Rule was not withdrawn, the challenges to the Initial Proposed Rule were not dismissed. For purposes of this proceeding, the "proposed rule" consists of the Initial Proposed Rule as modified by the July 3, 1997 Notice of Change. Where necessary to separately identify the modifications set forth in the July 3, 1997 Notice of Change, that publication will be referred to as the "Revised Proposed Rule."

[3]/ A test year may be based upon a historical test year with various adjustments to make it reasonably representative of expected operations or it can be based upon a projected test year.

[4]/ In making its "used and useful" calculations, the PSC first determines if an investment in total was prudent. Assuming that it was, the PSC then takes the dollars reflected by the investment and applies a "used and useful" calculation to determine how much of the prudent investment will serve existing customers. This calculation is made by determining a percentage of the demand of the customers to total capacity during the test year and applying the percentage so derived to the prudent investment.

[5]/ As discussed in Section H below, the PSCs "margin reserve" and "used and useful" concepts as applied to water and wastewater utilities are unique. The PSC does not make a similar delineation of investment currently utilized for existing customers in the rate making for electric or gas utilities even though the statues are remarkable similar.

[6]/ CIAC can include contributions from developers, government grants and impact fees from customers.

[7]/ Under DEP Rule Chapter 62-600.610 there are six basic categories of reuse, including one referred to as public access reuse systems, which are permitted under part III of that chapter.

[8]/ Such litigation has been prompted because of OPC's consistent position in every contested rate case that no margin reserve period should be recognized. As a consequence, the PSC has been obligated to make extensive findings in each of those cases explaining why a margin reserve period has been recognized. The EIS simply noted that the PSC would save money by adopting this rule and not having to litigate in every case whether or not a margin reserve is necessary.

[9]/ See Agrico Chemical Co. v. Dept. of Environmental Regulation, 365 So. 2d 759 (1st DCA 1978); Cert. denied sub nom, Askew v. Agrico Chemical Co., 376 So. 2d 74; Adam Smith Enterprises, Inc. v. Dept. of Environmental Regulation, 553 So. 2d 1260 (Fla. 1st DCA 1989); see also, Department of Labor and Employment Security v. Bradley, 636 So. 2d 802, 807 (Fla. 1st DCA 1994).

[10]/ The principle enunciated in Cummings, supra, i.e., that a rule is impermissibly vague if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application," has been applied to rules in several recent decisions. See Witmer v. Department of Business and Professional Regulation, 662 So. 2d 1299, 1302 (Fla. 4th DCA 1995), quoting, Bouters v. State, 659 So. 2d 235, 238 (Fla. 1995), cert. denied., -- U.S. --, 116 S.Ct. 245, 133 L.Ed.2d 171 (1995). See also Department of Health and Rehabilitative Services v. Health Care and Ret. Corp., 593 So. 2d 539 (Fla. 1st DCA 1992).

[11]/ Some old decisions have held that when an agency interprets a statute through rulemaking, the presumption of correctness is stronger. See Dept of Administration v. Nelson, 424 So. 2d 852, 858 (Fla. 1st DCA 1983); Dept. of Health and Rehabilitative Services v. Framat Realty, 407 So. 2d 238, 241 (Fla. 1st DCA 1981). These decisions do not vitiate the statutory grounds for challenging a rule. Furthermore, it should be noted that these decisions predate the legislative directive that "no agency shall have authority to adopt a rule only because it is reasonably related..." See Sections 120.52(8)(g), and 120.536(1), Florida Statutes.

[12]/ See Island Harbor Beach Club, Ltd. v. Department of Natural Resources, 495 So. 2d 209, 223-224 (Fla. 1st DCA 1986), rev. denied, 503 So. 2d 327 (1987). St. Joseph Land and Development Co. v. Florida Department of Natural Resources, 596 So. 2d 137 (Fla. 1st DCA 1992), rev. denied, 604 So. 2d 487 (Fla. 1992), Florida Hospital Association v. Health Care Cost Containment Board, 593 So. 2d 1137 (Fla. 1st DCA 1992).

[13]/ See also Booker Creek Preservation, Inc. v. Southwest Florida Water Management District, 534 So. 2d 419 (Fla. 5th DCA 1988) rev. denied, 542 So. 2d 1334 (Fla. 1989); Department of Business Regulation v. Salvation Ltd., Inc., 452 So. 2d 65 (Fla. 1st DCA 1984).

[14]/ Capeletti Bros. V. Department of Transportation, 499 So. 2d 855, 857 (Fla. 1st DCA 1986) rev. denied, 509 So. 2d 1117 (Fla. 1987); See also Department of Health and Rehabilitative Services v. Florida Psychiatric Society, Inc., 382 So. 2d 1280 (Fla. 1st DCA 1980).

[15]/ Indeed, the PSC has ruled that the term "rates" does not include the term "AFPI." In Re: Application for Rate Increase and Increase in Service Availability Changes by Southern States Utilities, 97 F.P.S.C. 1:542, 544.

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NOTICE OF RIGHT TO APPEAL

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of the notice of appeal with the Agency Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.