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OF COUNSEL  
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April 13, 1998

Blanca S. Bayo, Director  
Division of Records & Reporting  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

HAND DELIVERY

Re: Docket No. 950387-SU

Application for a rate increase for North Ft. Myers Division  
in Lee County by Florida Cities Water Company - Lee County  
Division.

Dear Ms. Bayo:

Enclosed on behalf of Florida Cities Water Company is an  
original and 15 copies of a Notice of Filing Transcripts of Agenda  
Conference and Internal Affairs Meeting.

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.

Sincerely,

*Wayne L. Schiefelbein*  
Wayne L. Schiefelbein

- ACK
- AFA 2
- APP \_\_\_\_\_
- CAF \_\_\_\_\_
- CMU \_\_\_\_\_
- CTR \_\_\_\_\_
- EAG \_\_\_\_\_
- LEG 1
- LIN 3
- OPC \_\_\_\_\_
- RCH \_\_\_\_\_
- SEC 1
- WAS Willis
- OTH \_\_\_\_\_

WLS/cas  
Enclosures

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BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

04231 APR 13 98

FLORIDA PUBLIC SERVICE COMMISSION  
DIVISION OF RECORDS & REPORTING

DOCUMENT NUMBER-DATE

04230 APR 13 98

FLORIDA PUBLIC SERVICE COMMISSION  
DIVISION OF RECORDS & REPORTING

DOCUMENT NUMBER-DATE

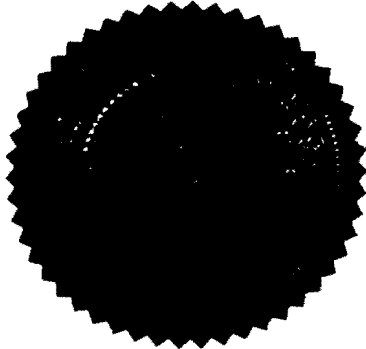
04229 APR 13 98

FLORIDA PUBLIC SERVICE COMMISSION  
DIVISION OF RECORDS & REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION  
TALLAHASSEE, FLORIDA

IN RE: Application for a rate increase for North Ft. Myers  
Division in Lee County by Florida Cities Water Company - Lee  
County Division.

DOCKET NO. 950387-SU



BEFORE:

CHAIRMAN JULIA A. JOHNSON  
COMMISSIONER J. TERRY DEASON  
COMMISSIONER SUSAN F. CLARK  
COMMISSIONER JOE GARCIA  
COMMISSIONER E. LEON JACOBS

PROCEEDING:

AGENDA CONFERENCE

ITEM NUMBER:

20

DATE:

March 24, 1998

PLACE:

4075 Esplanade Way, Room 148  
Tallahassee, Florida

- ACK \_\_\_\_\_
- AFA \_\_\_\_\_
- APP \_\_\_\_\_
- CAF \_\_\_\_\_
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- RCH \_\_\_\_\_
- SEC \_\_\_\_\_
- WAS \_\_\_\_\_
- OTH \_\_\_\_\_

JANE FAUROT, RPR  
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TALLAHASSEE, FLORIDA 32302  
(850) 561-5598

DOCUMENT NUMBER-DATE

04230 APR 13 88

FPSC-RECORDS/REPORTING

## APPEARANCES:

KEN GATLIN representing Florida Cities Water Company

HAROLD McLEAN representing Office of Public Counsel

STAFF RECOMMENDATION

Issue 1: Should parties be allowed to participate?

Recommendation: Yes. Participation should be limited to five minutes for each party.

Issue 2: Should the petition filed by Ms. Cheryl Walla for another hearing in the service area be granted?

Recommendation: No. The petition should be denied. Based on staff's recommendations in Issues 3 and 4, the record should be reopened only for the limited issue of determining what flows should be used in the numerator of the used-and-useful equation. Therefore, a general hearing to include issues on quality of service is not contemplated, and a hearing in the service area is not required or recommended.

Issue 3: In light of the decision and mandate of the First District Court of Appeal, what action should the Commission take regarding the Court's reversal of the Commission's calculation of used-and-useful percentage for the wastewater treatment plant using annual average daily flows in the numerator when the Department of Environmental Protection permits the wastewater plant based on annual average daily flows?

Recommendation: The Commission should reopen the record for the very limited purpose of taking evidence on what flows should be used in the numerator of the used-and-useful fraction when the Department of Environmental Protection, as of 1994, stated the denominator, the permitted capacity of this wastewater plant, on the basis of annual average daily flows. If the Commission does reopen the record to take evidence on this issue, staff believes that the additional issues of rate case expense for reopening the record and appellate rate case expense as discussed in Issue 5 below can be considered at that time.

Issue 4: Should the Commission adjust the wastewater plant capacity to 1.25 MGD in accordance with the First District Court of Appeal's remand?

Recommendation: Yes.

Issue 5: Should the utility's Petition to Allow Additional Rate Case Expenses be granted?

Recommendation: The portion of FCWC's request to true-up \$18,617 of its estimated rate case expenses incurred prior to the appeal is inappropriate and should be denied. Any future costs associated with reopening the record, as well

as the requested non-legal appellate costs of \$14,036 not included in rates, should be considered an issue that will be addressed at hearing.

Issue 6: Should the amount of security that was previously deemed appropriate pursuant to Order No. PSC-96-1390-FOF-SU, issued November 20, 1996, be modified at this time?

Recommendation: No. Staff believes that the amount of security that was previously deemed appropriate pursuant to Order No. PSC-96-1390-FOF-SU, issued November 20, 1996, should not be modified at this time.

P R O C E E D I N G S

1  
2 CHAIRMAN JOHNSON: Item 20 is a panel item  
3 consisting of Johnson, Deason, and Garcia.

4 MR. WALDEN: Commissioners, Item 20 is a decision  
5 after remand from the First District Court of Appeal  
6 involving Florida Cities Water Company, the North Fort  
7 Myers system. This originally was a PAA case that was  
8 protested. It went to hearing, the Commission issued  
9 a final order, and that final order was appealed to  
10 the First DCA.

11 We are here today on a couple of issues. The  
12 first issue is a procedural issue concerning allowing  
13 parties to participate. The other issues we are here  
14 for is whether to reopen the record, where to hold the  
15 hearing, items to be addressed at the hearing, which  
16 we are proposing be limited to used-and-useful flows  
17 and rate case expense. The other issue is security  
18 required by the utility.

19 We have two persons here to talk today to address  
20 the Commission. We have the utility's attorney, Mr.  
21 Gatlin, and Office of Public Counsel attorney, Mr.  
22 McLean.

23 CHAIRMAN JOHNSON: Okay. I guess, Commissioners,  
24 the first issue is should parties be allowed to  
25 participate.

1 COMMISSIONER GARCIA: Move staff.

2 CHAIRMAN JOHNSON: Okay. And in staff's motion  
3 it limits the parties to five minutes. There is a  
4 motion, is there a second?

5 COMMISSIONER DEASON: Second. Am I on this?

6 CHAIRMAN JOHNSON: I think Deason is on it and --

7 COMMISSIONER DEASON: I will gladly give up my  
8 spot. I don't know how I was so lucky to get assigned  
9 to this case.

10 CHAIRMAN JOHNSON: There is a motion and a  
11 second. Show it approved unanimously.

12 Mr. Gatlin.

13 MR. GATLIN: Madam Chairman, I think that -- I  
14 would ask for ten minutes instead of five minutes. I  
15 don't believe I can cover it in five minutes.

16 CHAIRMAN JOHNSON: There has been a motion for  
17 five, and there is --

18 COMMISSIONER GARCIA: Do you need more than five?

19 MR. McLEAN: No. I was going to say I could  
20 probably yield to him about four.

21 MR. GATLIN: I don't think it will be much over.  
22 What the question is that the staff has put to the  
23 Commission is whether the Commission should reopen  
24 this docket to receive additional evidence to support  
25 using annual average daily flows in the numerator of

1 the used-and-useful fraction. And we say no, you  
2 should not reopen the docket.

3 I think you need to put it in the context, as Mr.  
4 Walden pointed out, this started with an application  
5 in 1995 by Florida Cities Water Company, there was a  
6 proposed agency action order, and in that order the  
7 Commission found that the plant was 100 percent  
8 used-and-useful. The PAA was protested by OPC and Ms.  
9 Walla. There were two days of hearings in April of  
10 1996 in Fort Myers. The Commission entered its final  
11 order and reduced the rates. An appeal was taken to  
12 the district court and as relevant here today, the  
13 court reversed the Commission and remanded the case to  
14 the Commission.

15 I think we ought to recognize what the court said  
16 relevant to this case. They said all the plant that  
17 was added was pursuant to governmental regulation.  
18 The Commission acknowledged that. The court said that  
19 -- the PSC told the court, in fact, that the PSC had  
20 never used, never used annual daily flow in the  
21 numerator for used-and-useful before this case. This  
22 was the first time it had ever done that. And the PSC  
23 told the court that to use anything else, to use max  
24 flow in the fraction was a miscalculation.

25 The court told the Commission that that was not a

1           miscalculation, it was a change in policy. The court  
2           cited six Public Service Commission orders in which  
3           the Commission used max day flows to determine  
4           used-and-useful.

5           Now, the staff was told --

6           COMMISSIONER DEASON: Mr. Gatlin, what was the  
7           numerator in those cases? Not the numerator, the  
8           denominator? What was the basis of the denominator in  
9           those cases?

10          MR. GATLIN: The permitted capacity in most  
11          cases.

12          COMMISSIONER DEASON: And that permitted  
13          capacity, what was it based on.

14          MR. GATLIN: Well, in most cases it was based on  
15          annual average day. The staff has told you that that  
16          DEP rule was changed in '94. They told you in a  
17          previous conference it was changed in '92. I have a  
18          permit here from Florida Cities Water Company that was  
19          issued in '89 that sets forth annual average day. I  
20          have them here from '93 into '94 that the annual  
21          average day was used in the permit. It says so in the  
22          application for the permit, it says so in the permit.  
23          So I don't believe there was -- I don't believe that  
24          is a correct statement that staff has given you. I  
25          disagree with it. I won't say it's not correct, I'll



1 say I disagree with it.

2 The staff has told you it has looked at 20 or 30  
3 cases, and the only two cases in which there wasn't  
4 this so-called matching were two, there were two out  
5 of the 20 or 30.

6 The court recognized that a utility has to serve  
7 the hydraulic capacity and the hydraulic flows that go  
8 into the plant. And in this instance the court  
9 recognized there were 1.5 million gallons per day of  
10 flows going into the plant for the maximum month. And  
11 what the court asked the Commission to do was to  
12 justify -- it didn't say anything about a numerator or  
13 a denominator, it said justify how you can ignore  
14 those peak flows.

15 Now, in spite of what -- staff cites the Coe case  
16 and says that is the case that controls whether you  
17 reopen this docket or not. And the staff says you  
18 ought not to have a second bite of the apple. And the  
19 test as to whether you should reopen the proceeding or  
20 not is did the parties have an opportunity to present  
21 the evidence at the first hearing. And I would like  
22 to give you a document if I may, Madam Chairman.

23 Now, the staff says the test is did the parties  
24 have an opportunity to present at the hearing these  
25 issues, and the answer is yes, absolutely. And I've

1 given you a package of documents there, and I would  
2 like for you to look at them.

3 The first one -- I'm sorry. The first one is  
4 from the prehearing order in this case and you will  
5 notice Issue 4. It says what capacity of the  
6 wastewater plant and what flows should be used to  
7 calculate used-and-useful. We said you should use the  
8 annual average day and should use the maximum flows  
9 over that number to determine used-and-useful. We  
10 have cited the exhibits that supported that. It's  
11 Exhibit 1, it's Schedule F-6. We presented three  
12 witnesses on it. OPC's position was that you ought to  
13 match the numerator and the denominator in the context  
14 that the Commission has been using it here today. And  
15 Ms. Walla didn't take a position.

16 There was Issue 6 that was what was  
17 used-and-useful, and OPC took the position and  
18 presented their expert. The company did the same  
19 thing. The staff's position was the proposed agency  
20 action order states that the plant is 100 percent  
21 used-and-useful, but staff has no position pending  
22 further development of the record.

23 The next attachment is the exhibit presented by  
24 Florida Cities Water Company, which is F-6, it's from  
25 Exhibit 1, and I have highlighted the plant capacity,

1           which is 1.250, which the Commission didn't use, but  
2           the court said you should. And I have highlighted  
3           what we used, what we presented. You know, it was no  
4           secret; we were presenting average daily flow in the  
5           max month. And every party got an opportunity to  
6           address that.

7           Two witnesses that we presented to support that  
8           position were Mr. Young and Mr. Cummings. If you look  
9           at the testimony on Page 272 of the transcript, Mr.  
10          Young said clearly we were using F-6 numbers, that the  
11          projected maximum month should be used to determine  
12          used-and-useful. There was no rebuttal testimony to  
13          that. The testimony from Mr. Cummings, the expert  
14          engineer from Black and Veech on Page 577 of the  
15          transcript, testified that the plant was designed on  
16          the annual daily flow basis. There was no question  
17          about it. He was the guy, he was the engineer that  
18          designed the plant.

19          He testified further -- Mr. Cummings testified  
20          that the actual constructed plant was 1.25 on Page 578  
21          of the transcript, based upon the average annual daily  
22          flow. The staff recommendation in this case discussed  
23          this problem, discussed this issue, discussed the  
24          testimony, pro and con, both ways, and the staff  
25          recommendation is adopted, and if you look on Page 23

1 of the staff recommendation, the staff says that the  
2 flows to be considered should be the annual average  
3 flows. No secret yet as to what everybody was  
4 proposing.

5 In the order, on Page 16 of the order, the  
6 Commission discussed this issue and said the flows to  
7 be considered should be the annual average flows as  
8 specified by the DEP permit, and discussed it in  
9 several other places in the order.

10 It seems clear to me that if the test is as the  
11 staff says, and I think it probably is, did the  
12 parties have an opportunity to address this issue in  
13 the proceeding, we did, we had the opportunity and we  
14 did.

15 And I think what the staff is proposing is just  
16 what they say you ought not do. They are recommending  
17 a second bite of the apple. I'm not sure who is  
18 supposed to get that second bite. You know, we have  
19 done this once. And I would like to tell the  
20 Commission that if you adopt the staff recommendation,  
21 we have estimated the additional rate case expenses to  
22 be \$75,000. And we would, of course, ask to recover  
23 those in the rates.

24 And our position is that the court did not  
25 authorize the Commission to reopen the record. If

1           they were going to do that they would have said so.  
2           We respectfully suggest that to reopen the record, and  
3           we respectfully suggest this, would be a gross abuse  
4           of this Commission's discretion as contemplated by  
5           Section 120.595 of the Administrative Procedures Act.

6           Thank you.

7           CHAIRMAN JOHNSON: Thank you, Mr. Gatlin. Public  
8           Counsel.

9           MR. McLEAN: First of all, Madam Chairman and  
10          Commissioners, I appear to support the staff  
11          recommendation with the exception of those items  
12          discussed in Issue Number 2.

13          First, let me respond to what Mr. Gatlin has  
14          said. There is a general precept of administrative  
15          law that says an agency may not suddenly change its  
16          mind without providing explanation to the parties or  
17          based upon record evidence. The argument here is  
18          really whether the parties can have a chance to expand  
19          the existing record or not. I'm not so sure that the  
20          staff test is the only thing you should look at. I  
21          think you should look at whether you are comfortable  
22          going forward on the existing record whether you  
23          believe everyone had an adequate opportunity to  
24          address that specific numerator or denominator is a  
25          consideration. But are you comfortable going forward,

1           somehow compelled by some existing policy when your  
2           own staff recommends a change.

3           We think the correct course for you to follow is  
4           to reopen the record and let's look at that issue  
5           fairly carefully. You are going to see that issue  
6           again. You already heard it one time today in Mr.  
7           Melson's case, you're going to hear it in the Palm  
8           Coast case and you're going to hear it in the  
9           SSU/Florida Water Services Corporation case  
10          eventually. That is a recurring issue. This is a  
11          good time to begin to build a record upon which you  
12          can base your thoughts. You have also heard that the  
13          staff is going to propose a rule.

14          Our general position is that you should reopen  
15          the record and give all of us an opportunity to  
16          develop that record before you. If it is a second  
17          bite of the apple, and I don't think that it is, but  
18          if it is a second bite at the apple, it certainly is a  
19          second bite that all parties get to partake of.

20          Concluding with that issue and moving to Issue 2,  
21          we join in Ms. Walla's request that you hold the  
22          hearing, if any is to be held, in the service area of  
23          the utility. I can tell you that nothing beats a live  
24          performance of the Commission in the service area in  
25          terms of bolstering the credibility of this entire

1 process.

2 And there are some things which make this case a  
3 little bit different from some of the other cases that  
4 you have considered. First of all, this utility came  
5 in asking for a rate increase. It emerged from the  
6 process with a rate decrease. That's somewhat  
7 unusual. It was widely reported in the press, widely  
8 enjoyed by the customers.

9 There has been litigation since then in the  
10 appellate court which has taken every bit of two years  
11 to conclude. The case took an inexplicably long time  
12 to come out of the First DCA in my opinion, but in any  
13 case here we are two years later. The last the  
14 Commission -- the last the customers heard from you  
15 folks is that they were to enjoy a rate decrease.

16 The very likely outcome of this remand, the  
17 capacity issue on the one hand and the numerator  
18 versus the denominator issue on the other hand is very  
19 likely to turn into a rate increase. We think that is  
20 an unusual circumstance which you should recognize and  
21 perhaps go down there and do the hearing in front of  
22 the customers  
23 where they can see what is going on and have full  
24 confidence in the process.

25 There was very active customer participation in

1           this case, you will recall, Commissioners Deason and  
2           Johnson, you all were there. Commissioner Garcia will  
3           learn, I think, that Ms. Walla is a very active  
4           customer intervenor who, in fact, cross examines  
5           witnesses and so forth.

6           COMMISSIONER DEASON: Mr. McLean, I was not  
7           there. I just got assigned to this case.

8           MR. McLEAN: Well, you look familiar, I'm sorry.  
9           It has been awhile. It has been two years, in fact.  
10          I apologize.

11          CHAIRMAN JOHNSON: I was there. I do remember  
12          Ms. Walla.

13          MR. McLEAN: Ms. Walla is a very active -- there  
14          is an element of the staff recommendation that says  
15          Ms. Walla can appear by teleconference. I think that  
16          is inadequate. Ms. Walla will cross examine all  
17          witnesses who appear, and she is very likely to  
18          present her own.

19          It is a convenient forum from the standpoint of  
20          -- the DEP is likely to play some role if you decide  
21          to reopen the record. DEP witnesses may be called by  
22          any one of the parties, and they will be local DEP  
23          witnesses from the Fort Myers area, as they were  
24          before.

25          As I pointed out, there has been a significant



1 change, more significant than I thought in the panel.  
2 The Commissioners -- the customers last time had a  
3 given panel and got a rate decrease. If they learn in  
4 the paper and only through the paper, and by letters  
5 and so forth that a change -- they may conclude that a  
6 change in panel yielded a change in the direction of  
7 the rates. They might say with the old panel we got a  
8 decrease, with the new panel we got an increase. We  
9 don't think that is a legitimate thing for them to  
10 think, but nothing beats a live performance, as I  
11 said.

12 There is another issue, and I am embarrassed that  
13 I don't know who the panel is on the litigation  
14 expense docket, which is to be held down around that  
15 area somewhere. It seems to me that a little bit of  
16 imagination, which is usual on the part of staff,  
17 could organize this hearing such that it could  
18 dovetail with your existing, with the hearing that you  
19 already have scheduled in the litigation expense  
20 docket. I'm not sure that it's an identity of panels,  
21 but it may be.

22 With respect to the litigation, I apologize for  
23 not having the docket number, you have hearings  
24 scheduled in Barefoot Bay and in North Ft. Myers on  
25 that thing. It seems to me like maybe you all could

1 dovetail that together. It would eliminate some of  
2 the rate case that Mr. Gatlin speaks of and so forth.

3 And with that, I would simply urge you to hold a  
4 hearing down in the hearing area. Nothing beats that  
5 from the perspective of customers having confidence  
6 in the process. Thanks.

7 CHAIRMAN JOHNSON: Public Counsel, let me ask a  
8 question. Ms. Walla is asking just that, for us to  
9 hold a hearing in the service area. Does she  
10 understand that to the extent that we hold a hearing  
11 the limitations that are being placed, or is she  
12 asking for this to be reopened? And I apologize, I  
13 don't have her filing here. I had it last night,  
14 but --

15 MR. McLEAN: Commissioner, to be absolutely frank  
16 about it, she understands that the issues will be  
17 limited to the numerator versus -- which numerator and  
18 which denominator and so forth. I think your staff  
19 says it's only the numerator. Yes, she understands  
20 that. But I have to tell you in all frankness that  
21 any time that you have a hearing in front of customers  
22 you are likely to hear from them on virtually -- on  
23 issues to deal with quality of service.

24 But I suggest to you that's always a live issue  
25 in every case that you have, and it has been two

1 years. The utility has plenty of opportunity to come  
2 forward and say that the quality of service is good.  
3 I'm not particularly anxious to see it go to a quality  
4 of service hearing and I don't think it will, but I do  
5 think that --

6 CHAIRMAN JOHNSON: And if it did we couldn't even  
7 factor that into this decision, though, could we?

8 MR. McLEAN: I have a broad point of view on that  
9 issue that quality of service is always something that  
10 the Commission should consider and should give full  
11 effect to. It arose in the Aloha case quite recently.  
12 And my recommendation there was that you have this  
13 information before you, now perhaps you should go back  
14 to Tallahassee and open a docket on it. But it is not  
15 for the purpose of bringing that kind of evidence in  
16 that Ms. Walla wants the hearing down there. I tell  
17 you in all candor that it is a risk that you incur  
18 when you go to Ft. Myers to have a hearing, of course.  
19 For that matter you face the same risk here. They may  
20 come up en masse and want to talk to you about quality  
21 of service.

22 But it is not the reason that Ms. Walla seeks a  
23 hearing in her service area. She seeks it there  
24 because it is a convenient forum and we support that  
25 particularly because for the last time a live

1 performance by the Commission is the best thing you  
2 can possibly do for the apparent integrity of the  
3 process.

4 CHAIRMAN JOHNSON: Thank you. Any questions,  
5 Commissioners? Is there a motion?

6 COMMISSIONER DEASON: No. I guess I have a  
7 question for staff. I'm having difficulty with the  
8 recommendation to reopen the record. And I need to  
9 know -- I hear Mr. Gatlin, I did not sit on the case,  
10 I find myself now in the position of being on this  
11 panel. But what I understand Mr. Gatlin to say is  
12 that there were issues at the case, evidence was  
13 taken, a decision was made, it was overturned by the  
14 court. Sometimes you win, sometimes you lose. Why do  
15 we need to reopen the record?

16 MR. JAEGER: Commissioners, it's my reading of  
17 the remand order on Pages 14 and 15 where the court  
18 thinks that we did blindsided the utility, that they  
19 did not know that we would be -- they looked at it as  
20 a change of policy. But on the top of Page 15, it  
21 says the PSC must on remand give a reasonable  
22 explanation, if it can, supported by record evidence  
23 which all parties must have an opportunity to address.  
24 It's my reading of that sentence right there that it's  
25 saying, okay, if you want to do what you want to do,

1           you have to have additional testimony or you have to  
2           have, you know, record evidence.

3           And so, if we want, you know, I think that was  
4           the invitation for us to reopen the record. That's  
5           really what I'm hanging my hat on is that they gave us  
6           this opportunity. They say if you want to do this, go  
7           ahead, but give everybody the opportunity to present  
8           evidence on it.

9           COMMISSIONER DEASON: Mr. Gatlin, what about that  
10          language in the order, is that an invitation to reopen  
11          the record?

12          MR. GATLIN: Well, I think the language is the  
13          PSC must on remand give a reasonable explanation, if  
14          it can, supported by record evidence which all parties  
15          must have an opportunity to address as to why average  
16          daily flow in the peak month was ignored.

17          Now, I don't think there is any indication -- it  
18          talks about reasonable explanation, if it can,  
19          supported by record evidence. I assume it's talking  
20          about record evidence in the docket that has been  
21          completed that is before you. They didn't say if you  
22          think you've got a weak case, you go back, Commission,  
23          and you get you some more evidence to support it and  
24          then come back. I don't think they meant that.

25          I mean, that would be wonderful if all the

1 parties that lose before the court in a Commission  
2 order could come back to you and say, well, we thought  
3 of something else. We want to put something else into  
4 the record we think we can really support. And that's  
5 just what the staff has said, is that you ought not to  
6 have a second bite at the apple. And I think -- but,  
7 you know, maybe staff is the one that wants the second  
8 bite.

9 I think OPC put on their record on this issue,  
10 their evidence, and we put on ours. And staff listed  
11 two witnesses from DEP as their witnesses in the case  
12 on these issues. You know, I don't know, I just don't  
13 see how we can go over and over it again. You know,  
14 what if we go over there and the court says, well, you  
15 know, we would like your matching principle, but you  
16 didn't give -- somebody lost, so you ought to give  
17 them another chance to put evidence on it. I mean, it  
18 just would never stop. I think the case is over, we  
19 ought to all declare victory and go home.

20 COMMISSIONER DEASON: Mr. McLean, how do you  
21 interpret that language?

22 MR. McLEAN: That none of us were victors, number  
23 one. We can't claim victory.

24 MR. GATLIN: Well, everybody got something.

25 CHAIRMAN JOHNSON: Could I see that?

1           MR. McLEAN: I don't believe that there has been  
2 a thorough airing of this issue before the Commission  
3 in any of the cases that I mentioned. Not Mr.  
4 Melson's; it hasn't happened yet.

5           COMMISSIONER GARCIA: Mr. McLean, address  
6 Commissioner Deason's question, which is on the  
7 language. What do you think that the court meant? Do  
8 you think the court meant for us to go back in?

9           MR. McLEAN: I think, given the context in which  
10 it arose was that lengthy appeal process in which the  
11 utility claimed surprise, they claimed that they were  
12 blindsided by a sudden change in commission policy  
13 without explanation. Reading the language in that  
14 context, I think the court wanted you to reopen the  
15 record and go back.

16           Let me rephrase that, because I don't want to  
17 overstate it. I think the Commission would be very  
18 happy if you went back and opened the record and aired  
19 that issue there instead of having to air it before  
20 the court. I think that the remand in this context  
21 says, look, this is an incomplete issue, it was not  
22 developed at the Commission. Go back down and develop  
23 there. I don't feel like -- personally, I don't feel  
24 like it was aired before the Commission. And even to  
25 some extent, even though it was our witness who

1 suggested it, I felt a little bit blindsided. I  
2 wished I could have developed a better record there,  
3 too.

4 But aside from all of that, I don't think this  
5 issue was developed before the Commission to the  
6 extent to which you can with confidence of accuracy  
7 resolve it. That's why I think you should -- that's  
8 why I think you should reopen the record. Were I  
9 sitting where you were, I would exercise my own  
10 discretion to see if I am comfortable with the record  
11 that was developed before the Commission, and if not,  
12 I would open the record and listen to more evidence on  
13 it. And that's what I suggest you do.

14 COMMISSIONER DEASON: What is the revenue impact  
15 of the issue on an annual basis?

16 MR. WALDEN: Commissioner Deason, going back to  
17 the staff recommendation which was addressed by the  
18 Commission in August of '96, I can give you -- let me  
19 try to answer your question this way. We had a  
20 primary and an alternate recommendation on that issue  
21 of used-and-useful, and the difference between those  
22 two recommendations was what is the plant capacity.  
23 Is the plant capacity 1.25 MGD, is the plant capacity  
24 1.5 MGD? And those were the denominators in both of  
25 those equations. In the numerator, we used the annual



1 average daily flow. And I can give you what the  
2 impact of the revenue requirement would be under that  
3 scenario.

4 The calculations here show that the impact of the  
5 -- using the 1.25 MGD would raise the revenue  
6 requirement \$175,000. But I think your question also  
7 asked, or at least intimated, well, if we used a  
8 different flow criteria in the numerator, what would  
9 the impact be? I have not performed those  
10 calculations, but I think what it would do is it would  
11 take us back to the PAA order, and that would bring  
12 the -- and let me explain that a little bit. In the  
13 PAA order we used average daily flow maximum month,  
14 and that made the plant 100 percent used-and-useful.  
15 And in the PAA order, the revenue requirement that was  
16 approved by the Commission was 2,489,487. Let my back  
17 up and -- I told you there would be a \$175,000  
18 increase if we used 1.25 MGD, that total revenue  
19 requirement was 2,178,007.

20 COMMISSIONER DEASON: Well, I'm trying to  
21 understand what is at risk here in the sense of the  
22 Commission issued an order, that was a rate decrease  
23 in that case.

24 MR. WALDEN: Correct.

25 COMMISSIONER DEASON: A decision was made by the

1 court. What is the difference between what the court  
2 said and what the Commission's original order said in  
3 terms of revenue dollars? If we took the court's  
4 decision without reopening the record, what is the  
5 difference?

6 MR. WALDEN: If we, if the Commission decides to  
7 use the annual average daily flow and abide by the  
8 court's reversal, which made the plant capacity 1.25  
9 MGD, that would yield the revenue requirement of  
10 2,178,007 that I mentioned. That would be -- as Mr.  
11 McLean mentioned, that would be a small increase in  
12 rates over what the customers would have been paying  
13 under the Commission's decision, the final decision.

14 COMMISSIONER DEASON: What was the Commission's  
15 final decision?

16 MR. WALDEN: The Commission's final decision  
17 granted revenues of 2,003,347.

18 COMMISSIONER DEASON: So that's the difference of  
19 the 175 that you mentioned earlier.

20 MR. WALDEN: That's correct. Just to clarify  
21 that a little bit, the rates that are in effect today  
22 are the rates -- or it's the rates that were approved  
23 in the PAA recommendation.

24 COMMISSIONER DEASON: The 2.489 million?

25 MR. WALDEN: Yes, that's correct.

1           COMMISSIONER DEASON: Those rates still continue  
2 today?

3           MR. WALDEN: Yes, sir.

4           CHAIRMAN JOHNSON: Let me follow up on that to  
5 make sure I understand what would happen in this  
6 particular case. Because there was a remand we would  
7 have to go back to look at whatever evidence was  
8 presented in the record and come up with a  
9 methodology. And so are we stating that the  
10 methodology, the only methodology that is currently in  
11 the record is the annual average daily flow? And how  
12 are we getting --

13          MR. WALDEN: Let me let Mr. Jaeger address that.

14          CHAIRMAN JOHNSON: Yes. Because even if you look  
15 at this language, it says because -- they talk about  
16 what our shift in policy was. And it says because  
17 this shift in policy was essentially unsupported by  
18 expert testimony, documentary opinion, or other  
19 evidence appropriate to the nature of the issue  
20 involved, the PSC must on remand give a reasonable  
21 explanation, if it can, supported by record evidence  
22 -- or they say supported by evidence that's already in  
23 the record? We still have to come up with something.  
24 And I'm like, okay, what is in the record that we are  
25 going to up with as a reasonable explanation.

1           MR. JAEGER: The only thing that staff sees in  
2           the record for average daily flow that they changed  
3           the permit from, that DEP now does the permit on an  
4           all average daily flow. This was the first case. I  
5           want you to understand, this was really the first one  
6           where staff sort of realized DEP is permitting based  
7           on annual average daily flows now, and not just  
8           average daily flows max month or not saying in their  
9           permit what it's based on.

10           So there is nothing really in the record to  
11           support annual average daily flows in the numerator  
12           except the gut feeling, mathematical, when you are  
13           getting an average percent to cancel out -- if you  
14           have average daily flows in the denominator, to cancel  
15           out that average daily flows to get a percentage, you  
16           have to have average daily flows in the numerator,  
17           that's a mathematical concept. But the court rejected  
18           that.

19           And so what we are -- what staff is saying is  
20           that we think the record is incomplete as it now  
21           stands. And that's what Mr. McLean was saying, is if  
22           you are not comfortable with going forward, we have to  
23           do something to supplement the record or reopen the  
24           record. Otherwise, what the court has said in these  
25           cases after cases was we used average daily flows max

1 month, and that appeared to be our policy was to use  
2 average daily flows max month.

3 CHAIRMAN JOHNSON: But is there information in  
4 the record -- for us to reach that conclusion, can we  
5 go back to the record and say oh, yes, this is --

6 MR. JAEGER: That's my issue. Option 2, which I  
7 don't think is really viable, because I don't think  
8 anything got in the record to say we should use  
9 average annual daily flow in the numerator. I don't  
10 think there is -- the record is not sufficient.  
11 That's what the court has decided, and I don't think  
12 -- you know, we gave them what was in the record and  
13 the court rejected that. And they rejected our  
14 argument that this is a mathematical equation,  
15 mathematical figures that require matching.

16 COMMISSIONER DEASON: The number is in the  
17 record, but there is no justification why you have to  
18 have a matching.

19 MR. JAEGER: There is no justification for  
20 matching.

21 COMMISSIONER DEASON: And the court said that is  
22 a change in policy.

23 MR. JAEGER: That is a change in policy.

24 MR. GATLIN: Madam Chairman?

25 CHAIRMAN JOHNSON: Is there a justification in

1 the record for what the utility would like for us to  
2 do?

3 MR. JAEGER: He gave you that.

4 CHAIRMAN JOHNSON: The documents they provide is  
5 sufficient? And this is what Mr. Gatlin --

6 MR. JAEGER: I believe that what has happened,  
7 this is the first case where we realized this change  
8 and we did not develop the record, and this is enough  
9 that the court would support using max -- average  
10 daily flows max month. Obviously, I think if we used  
11 then there is no problem. I said this in Option 1.  
12 But it's whether you are comfortable with setting this  
13 precedent or whether you think it's right to use when  
14 the denominator is average daily flow, average annual  
15 daily flow, is it right to use max month average daily  
16 flow? And that's what the staff is saying. We don't  
17 think the record was complete. It was not fully  
18 litigated, and staff and the parties didn't realize  
19 the exact significance of what that change in the DEP  
20 permitting was.

21 MR. GATLIN: Madam Chairman.

22 CHAIRMAN JOHNSON: Yes, Mr. Gatlin.

23 MR. GATLIN: I thought the staff had told you,  
24 and I agree with it, that the test is not whethre it's  
25 in the record to support it. The test is whether the

1 parties had an opportunity to place it in the record  
2 to support their position. And the documents I gave  
3 clearly show that the issues -- each of us listed  
4 witnesses on the issues, and each of us presented what  
5 witnesses we wanted to present. The issue was what  
6 was the numerator, if you will, that should be used.  
7 And we said you should use max month. OPC said you  
8 should do that matching business. But each party had  
9 the full opportunity to present whatever it wanted to  
10 present. It sounds to me what the staff is saying,  
11 we've decided what it ought to be, we decided the  
12 numerator ought to be the annual average day, and now  
13 that we have decided that we want to go back and build  
14 the record to support that. And I don't think the  
15 court contemplated that. I don't think the court  
16 contemplated that the Commission decide what the  
17 results ought to be and the staff go back and now  
18 build a record to support that position.

19 CHAIRMAN JOHNSON: I'm sorry, Mr. Gatlin, explain  
20 to me again what you think the court is telling us we  
21 have -- what do we have to do? This case has been  
22 remanded, what must we do?

23 MR. GATLIN: Well, I think they said to tell  
24 them, if you can, presumably in an order, why you wish  
25 to ignore peak month in computing the used-and-useful

1 percentage.

2 CHAIRMAN JOHNSON: So to the extent that we could  
3 better explain based on the record, we could just send  
4 up an explanation?

5 MR. GATLIN: Well, I think so. Now, the court  
6 was, I think -- and, Mr. Jaeger, I agree with him -- I  
7 think the court implied pretty strongly that this  
8 record is not going to support that. But I don't  
9 think they said reopen the record and get you up some  
10 testimony and get you up some witnesses and bring them  
11 in here and support it. I don't think they meant  
12 that.

13 CHAIRMAN JOHNSON: You think they meant to limit  
14 us to the four corners of the record. And if we could  
15 find an explanation in the record, fine; but if we  
16 can't, then that ends it.

17 MR. GATLIN: The case is over.

18 CHAIRMAN JOHNSON: And then we have to go with  
19 what they view has been our long-standing policy.

20 MR. GATLIN: Right.

21 COMMISSIONER DEASON: I think the standard here  
22 is not whether we agree or disagree with the court.  
23 The question is the court has made a decision. I  
24 think it's very serious when you go back in and reopen  
25 a record. Very serious. I hesitate to do that. I



1 think it should be under the most extreme  
2 circumstances. I'm not sure it rises to the occasion  
3 here.

4 Let me ask Legal, and I may have to refer to Mr.  
5 Vandiver or Ms. Davis. In the GTE case, when the  
6 court overturned us on affiliate transactions and  
7 affiliated costs, and said that the standard should be  
8 what the market would -- if the prices were above the  
9 market. We didn't know that was going to be the new  
10 standard, we didn't have any evidence on that. I  
11 think we had evidence in the record concerning  
12 affiliate earnings or something, I'm not exactly sure.  
13 We didn't reopen the record then, did we? We didn't  
14 agree with the court's decision, either, did we? But  
15 we just accepted it and went on.

16 MS. JABER: I'm familiar a little bit with that  
17 because of the SSU reopening the record. In GTE you  
18 said as a matter of course, unless there were some  
19 sort of extreme circumstances, you weren't going to  
20 reopen the record. In SSU you had the similar issue,  
21 and as a matter of policy you chose not to reopen the  
22 record. Let me bring you back to what Mr. Jaeger  
23 is trying to say, though. It's not just looking at  
24 the reopening of the record cases. What he is saying  
25 is the very language of this opinion constitutes an

1 invitation.

2 MR. McLEAN: May I address that narrow issue?

3 COMMISSIONER CLARK: I think the question was,  
4 was it was a general remand or not from GTE and could  
5 we. And the debate was whether or not it let us open  
6 it or was it a direction that we just implement what  
7 they said.

8 COMMISSIONER DEASON: And we interpreted that we  
9 just implement what they said, is that right?

10 COMMISSIONER CLARK: Yes. I think we interpreted  
11 it that we didn't have a choice, and I think as a  
12 policy matter, too, we decided not to do it, frankly.

13 COMMISSIONER GARCIA: And you think there is much  
14 of a difference here?

15 MS. JABER: There was a difference in the GTE  
16 language and the SSU language in the opinion. I think  
17 one was like reversed for further direction, or  
18 reversed for further directions. SSU was further  
19 disposition consistent herewith. This one, as Mr.  
20 Jaeger says in his recommendation, you know, it goes  
21 back to the APA and the language right out of 120.  
22 Correct, Ralph?

23 MR. JAEGER: It quotes Section 120.68(7), the  
24 court does, and it says in .68(7), the court shall  
25 remand a case to the agency for further proceedings

1 consistent with the court's decision. That's another  
2 where I was reading trying to figure out what did they  
3 want us to do with this --

4 COMMISSIONER DEASON: Well, a further proceeding  
5 does not mean evidentiary hearing, right?

6 MR. JAEGER: That's right. That's what I'm  
7 saying, the Coe decision was a further proceeding, and  
8 it entered the decision without taking any further  
9 evidence.

10 CHAIRMAN JOHNSON: Could we have -- or can we ask  
11 for some clarification?

12 MS. JABER: And I think probably that time period  
13 has expired.

14 CHAIRMAN JOHNSON: Has come and gone?

15 MS. JABER: Probably, yes.

16 MR. WALDEN: That time period has passed.

17 MR. McLEAN: Madam Chairman, may I suggest that  
18 there is some clarification in the order itself.  
19 There is agreement among all hands that the difference  
20 between the 1.25 issue and the 1.5 issue, you got slam  
21 dunked on that. The court said essentially go back  
22 and get it right. You know, change it. Do it the  
23 correct way.

24 With respect to this issue, they remanded it with  
25 language that said one of two things; they said either

1           you may go back down and try to explain what you did  
2           on the existing record, or develop a new record. I  
3           think that option is clearly before you. I think that  
4           the court clearly leaves that open.

5           COMMISSIONER GARCIA: Mr. McLean, tell me where  
6           you find that part where it says go back.

7           MR. McLEAN: I'm talking the 1.25 versus the 1.5,  
8           the court -- that limited issue, nothing to do with  
9           this numerator or denominator business. We all seem  
10          to agree that there is nothing further to be done on  
11          that. That issue is lost or won depending on your  
12          point of view, and the court doesn't say anything to  
13          the Commission about going back and revisiting the  
14          issue in terms of record, in terms of explanation or  
15          anything like that.

16          However, with respect to this issue they say the  
17          words that Mr. Jaeger read to you. Must on remand  
18          give reasonable explanation, if it can, supported by  
19          record evidence which all parties have an opportunity  
20          to address. That to me gives you one of two options.  
21          You can either try to explain what you attempted to do  
22          on the existing record, which the court has already  
23          noted, and the court knows that it noted is somewhat  
24          inadequate, or you can develop the record a little bit  
25          further and then explain what it is you want to do.

1           In my view that issue is yours to decide. There  
2 is not language from the court that says you must take  
3 it one way or the other. And to bolster that point, I  
4 would point you to the 1.5 versus 1.25 where they  
5 didn't give you any latitude. I don't think that you  
6 can open the record with respect to that issue, you  
7 can't if you don't want to. If they didn't want you  
8 to open it here, they would have used a similar  
9 approach that they used in that other issue.

10           I think this order from the court gives you all  
11 the discretion to do what you want to with this issue.  
12 And if you want to open the record to base your  
13 explanation upon additional evidence, you have the  
14 right to do that. And if you want to explain what you  
15 did on the existing record, you could do that, too.  
16 We, of course, are urging you to open the record  
17 because we would like a full airing of that issue  
18 before the Commission.

19           CHAIRMAN JOHNSON: The one issue that you raised  
20 that as I read the order I did, I felt similar to what  
21 you just articulated, because they do seem to suggest  
22 that the record that was relied upon is not  
23 sufficient. But then they refer it back, and I'm  
24 like, well, if they have already answered the  
25 question, why are they referring it back? So that's

1           why I get hung up, Mr. Gatlin.

2           And I see the language the Commission must on  
3           remand give reasonable explanation, it also allows the  
4           parties an opportunity to address whatever evidence we  
5           have. That seems to suggest that they are opening the  
6           door and they would allow us -- in fact, they are  
7           almost inviting us to kind of justify what we did.  
8           Because they seem to suggest that what we did was not  
9           justified, but they're saying, okay, but if you can  
10          justify it --

11          MR. GATLIN: Madam Chairman, I think that has to  
12          be read in conjunction with the Coe case, which the  
13          staff says is the test. And that was whether parties  
14          had an opportunity to present evidence or testimony on  
15          these issues. And they clearly did. I mean,  
16          everybody listed witnesses, everybody produced  
17          witnesses. It was in the briefs, everybody briefed  
18          them on these issues as to which number should be the  
19          numerator and which should be the denominator. And  
20          so, I think everybody has had one shot at it. And I  
21          think what staff is recommending is that somebody  
22          ought to have another bite of the apple.

23          CHAIRMAN JOHNSON: Thank you, Mr. Gatlin.

24          MR. GATLIN: Thank you.

25          MR. McLEAN: If the court viewed things that way,

1           how easy it would have been for them to say,  
2           "Everybody has had an opportunity to address this  
3           issue. Commission, you are wrong, enter an  
4           appropriate order." They didn't say that. They said  
5           please explain what you did. We don't know whether  
6           they meant for you to do it on an existing record or  
7           an expanded record because they didn't say so.  
8           Because they didn't do it in the other case, it seems  
9           a very strong implication to me that they expected you  
10          to do it here, or at least would accord you the  
11          opportunity to do so if you wished to.

12                 MR. JAEGER: I think Mr. McLean said it more  
13                 articulately, that they did -- and I used that word  
14                 you used invitation. I think they gave us the  
15                 invitation and said, you know, what you've got now, if  
16                 it's good, you know, if you want to have that, you  
17                 have to do more, and it's up to your -- it's your  
18                 discretion to reopen the record, I think. And I think  
19                 they did give you the invitation.

20                 COMMISSIONER GARCIA: All right. Let me -- do  
21                 you have any more questions, Madam Chairman?

22                 CHAIRMAN JOHNSON: No.

23                 COMMISSIONER GARCIA: I'm going to go ahead and  
24                 -- first of all, I'm going to deny staff on Issue 2,  
25                 and I want to have the hearing down there. And then I

1 will move staff on the rest of the issues.

2 CHAIRMAN JOHNSON: There is a motion and a  
3 second. Or there is motion, excuse me.

4 COMMISSIONER DEASON: There is a motion. There  
5 is not going to be a second. So if you want to second  
6 it, you need to pass the gavel.

7 Is there a second to the motion?

8 CHAIRMAN JOHNSON: Second.

9 COMMISSIONER DEASON: Just to understand, it is  
10 to deny staff on Issue 2 and moving staff on all  
11 remaining issues.

12 COMMISSIONER GARCIA: Right. And then on --  
13 denying staff, I guess, would turn it into a yes, that  
14 we will have it down there. I would like to suggest  
15 to staff to listen to Mr. McLean's suggestions about  
16 when we schedule this hearing because of other things  
17 going down so we can get our costs down.

18 COMMISSIONER DEASON: Okay. We have a motion and  
19 a second. All in favor -- do we still have a second?

20 CHAIRMAN JOHNSON: Yes.

21 COMMISSIONER DEASON: We have a motion and a  
22 second. All in favor say aye.

23 CHAIRMAN JOHNSON: Aye.

24 COMMISSIONER GARCIA: Hang on one second. Did  
25 you have something to add?



1 CHAIRMAN JOHNSON: No, we were just talking about  
2 scheduling.

3 COMMISSIONER GARCIA: Okay. Commissioner Clark's  
4 long experience as an attorney before and on this  
5 Commission would have --

6 COMMISSIONER CLARK: This is a tough case, you  
7 guys.

8 COMMISSIONER GARCIA: Good. I'm glad, then. I'm  
9 heartened.

10 COMMISSIONER DEASON: I offered my spot to  
11 Commissioner Jacobs and to you. No takers? Okay. We  
12 have a motion and a second. All in favor say aye.

13 CHAIRMAN JOHNSON: Aye.

14 COMMISSIONER GARCIA: Aye.

15 COMMISSIONER DEASON: Opposed, nay. Nay.

16 MR. JAEGER: Commissioners, I'm sorry, I had a  
17 question that I just thought of. You know, we are  
18 going to have the hearing down there, but it's  
19 basically on these three issues that are the rest of  
20 the rec, and so it's -- you know, she requested a  
21 general hearing and that was what I was sort of  
22 denying and then the other part was she requested that  
23 it be down there.

24 CHAIRMAN JOHNSON: Well, this is limited.

25 COMMISSIONER GARCIA: This is a limited hearing.

1 All I'm doing is having it down there as per Mr.  
2 McLean's suggestion.

3 MR. JAEGER: Thank you.

4 COMMISSIONER GARCIA: I want to try to remember  
5 that phrase you kept using Mr. McLean.

6 MR. McLEAN: I don't recall it just now. Thank  
7 you, Commissioners.

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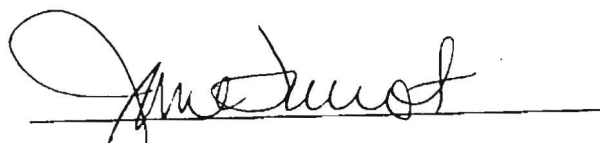
CERTIFICATE OF REPORTER

STATE OF FLORIDA )  
COUNTY OF LEON )

I, JANE FAUROT, RPR, do hereby certify that the foregoing proceeding was transcribed from cassette tape, and the foregoing pages number 1 through 40 are a true and correct record of the proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing action.

DATED THIS 29th day of March, 1998.



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