

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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
ORDER NO. PSC-98-0762-PCO-SU
ISSUED: June 2, 1998

The following Commissioners participated in the disposition of
this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
JOE GARCIA

ORDER GRANTING FLORIDA CITIES WATER COMPANY'S
AMENDED MOTION FOR STAY OF ORDER NO. PSC-98-0509-PCO-SU
AND REQUIRING ADDITIONAL SECURITY

BY THE COMMISSION:

BACKGROUND

Florida Cities Water Company (Florida Cities or utility) is a Class A utility that provides water and wastewater service to two communities in Ft. Myers: a northern sector and a southern sector. The North Ft. Myers service area is the applicant in this proceeding, serving about 2559 customers at December 31, 1994. Many of the customers are master metered and the number of equivalent residential connections (ERCs) served is 4590. The utility serves an area that has been designated by the South Florida Water Management District (SFWMD) as a critical use area. Wastewater treatment is provided by a newly expanded advanced wastewater treatment (AWT) plant which the utility states has a capacity of 1.25 million gallons per day (mgd). Effluent is disposed into the Caloosahatchee River and to the Lochmoor golf course in the service area.

The utility's previous rate case was finalized July 1, 1992 by Order No. PSC-92-0594-FOF-SU in Docket No. 910756-SU. In 1994, the utility's rates were increased due to an index proceeding.

DOCUMENT NUMBER-DATE

05940 JUN-28 1351

FPSC-RECORDS/REPORTING

ORDER NO. PSC-98-0762-PCO-SU
DOCKET NO. 950387-SU
PAGE 2

We issued Proposed Agency Action (PAA) Order No. PSC-95-1360-FOF-SU on November 2, 1995. However, that PAA Order was protested on November 27, 1995, and the matter was set for hearing for April, 1996. After the protest of the PAA, the utility requested implementation of the rates approved in our PAA Order. This request was granted in Order No. PSC-96-0038-FOF-SU issued January 10, 1996, making the rates subject to refund, and providing security through a corporate undertaking. Those rates remain in effect today.

The utility expanded the capacity of its wastewater plant in 1995 at a cost of \$1.6 million, which included the installation of reclaimed water facilities and initiated provision of effluent to a lake on the Lochmoor golf course. We agreed that the magnitude of this investment justified an end-of-period rate base determination.

We rendered our post-hearing decision in Order No. PSC-96-1133-FOF-SU. That Order granted revenues of \$2,003,347, which was a decrease from test year revenues of \$588,643. The utility appealed our order to the First District Court of Appeal (First DCA or Court) on the issue of used-and-useful plant, and requested a stay pending judicial review. Additional security was required by Order No. PSC-96-1390-FOF-SU, issued November 20, 1996, to allow for the anticipated time for the appeal. The First DCA reversed our Order on the amount of plant capacity and the used-and-useful determinations, and remanded the case for us to give an explanation, if we could, supported by the record, for our used-and-useful calculations.

Subsequent to the remand, the utility filed its Petition to Allow Additional Rate Case Expenses on February 4, 1998. Also, on March 4, 1998, Ms. Cheryl Walla filed her petition requesting another hearing in the service area.

At the March 24 Agenda Conference, we considered: the remand by the First DCA; whether to reopen the record for further proceedings; the request of Ms. Walla for another hearing in the service area; the request of the utility for additional rate case expense; and the necessary amount of security to protect the rates subject to refund. Upon such consideration, we, among other things, voted (in a 2-1 vote) to reopen the record and schedule a hearing on what flows should be used in the numerator of the used-and-useful fraction when the Department of Environmental Protection (DEP) states the denominator, the permitted capacity of the

ORDER NO. PSC-98-0762-PCO-SU
DOCKET NO. 950387-SU
PAGE 3

wastewater treatment plant, based on annual average daily flows (AADF).

Accordingly, on April 3, 1998, the Prehearing Officer issued an Order Establishing Procedure and Issues -- Order No. PSC-98-0483-PCO-SU. That Order, recognizing that the Chairman had scheduled the hearing for July 16 and 17, 1998, required the utility to prefile its testimony on May 15, 1998. On April 10, 1998, the utility filed its Motion For Stay Pending Judicial Review of that Order or any other related Order. Subsequently, we issued Order No. PSC-98-0509-PCO-SU, on April 14, 1998, memorializing our vote at the March 24 Agenda Conference. The utility then, on April 14, 1998, filed its Amended Motion For Stay Pending Judicial Review And Request For Expedited Treatment. To provide sufficient time to allow the utility to prepare testimony in the event its motion for stay was denied, the Prehearing Officer, by Order No. PSC-98-0568-PCO-SU, issued April 23, 1998, revised the Order on procedure to reflect new testimony dates. This Order addresses the amended motion for stay.

ORAL ARGUMENT

Typically, post-remand recommendations have been noticed as "Parties May Not Participate," with participation limited to Commissioners and staff. However, in this case, because we were considering new matters related to but not addressed at hearing, and given the nature of the issues which have been raised, we allowed each party five minutes for participation.

AMENDED MOTION FOR STAY

As stated above, on April 10, 1998, Florida Cities filed its first Motion for Stay. Then, on April 14, 1998, it filed its Amended Motion For Stay of Order No. PSC-98-0509-PCO-SU Pending Judicial Review And Request For Expedited Treatment. In the motions, the utility states that it will appeal Order No. PSC-98-0509-PCO-SU, which reopened the record and allowed for an additional hearing to be held on what flows should be used in the numerator of the used-and-useful fraction when the DEP permits the wastewater treatment plant based on AADF.

In its amended motion, Florida Cities states that it is likely to prevail on appeal as the First DCA did not authorize or "invite" the Commission to reopen the record. Further, Florida Cities argues that the Commission is improperly pursuing "a second bite of

the apple" on an issue that all parties already had an opportunity to address in this proceeding.

Finally, Florida Cities states that it will suffer substantial harm if a stay is not granted, and argues that it, all parties, and the Commission should not have to bear both the expense of the appellate proceeding and the second hearing before the Commission. It then claims that such needless burden and expense is contrary to the public interest, and requests that all required filing and hearing dates established by Order No. PSC-98-0483-PCO-SU be canceled pending final review by the First DCA. Florida Cities also states that it believes the current security is sufficient, but requests us to determine whether additional security will be required as a condition of the stay.

Pursuant to Rule 25-22.061(1)(a), Florida Administrative Code, we are required to grant a motion for stay pending judicial review of an order involving the refund of moneys to customers or a decrease in rates charged to the customers. Order No. PSC-98-0509-FOF-WS does not involve either scenario. However, Rule 25-22.061(2), Florida Administrative Code, states that:

Except as provided in subsection (1), a party seeking to stay a final or nonfinal order of the Commission pending judicial review shall file a motion with the Commission, which shall have authority to grant, modify, or deny such relief. A stay pending review may be conditioned upon the posting of a good and sufficient bond or corporate undertaking, other conditions, or both. In determining whether to grant a stay, the Commission may, among other things, consider:

- (a) Whether the petitioner is likely to prevail on appeal;
- (b) Whether the petitioner has demonstrated that he is likely to suffer irreparable harm if the stay is not granted; and
- (c) Whether the delay will cause substantial harm or be contrary to the public interest.

a. Likelihood of Prevailing on Appeal

The utility's argument in this regard is only that it disputes that the Court authorized us to reopen the record in this case to take additional evidence on the issue of what flows should be used in the numerator of the used-and-useful equation. The utility

offers no new argument supporting why its appeal would be successful and reiterates the points it made at the March Agenda Conference. However, the resolution of whether the record should be reopened for the very limited purpose of taking evidence on what flows should be used in the numerator of the used-and-useful equation, when DEP permits the wastewater treatment plant based on AADF, is one that hinges on the interpretation of the opinion issued by the First DCA in this case. We believe our interpretation of the First DCA opinion is legally sound and correct. However, if the First DCA finds that we misinterpreted the language of the opinion, the utility could prevail on appeal.

b. & c. Irreparable Harm, Substantial Harm or Contrary to the Public Interest

Florida Cities argues that it will suffer substantial harm if a stay is not granted, because absent a stay obtained from either us or the Court, it will incur needless expense in pursuing the appeal and participating in proceedings before us. The utility asserts that the duplication of proceedings will affect other parties and the Commission itself.

We believe that the utility has raised valid points and that a stay pending judicial review is warranted. Going forward with a hearing in July on this matter will result in unnecessary expense in the event that the First DCA disagrees with our interpretation of its opinion. Also, delaying any action pending a decision by the First DCA on the utility's appeal of Order No. PSC-98-0509-PCO-SU will not prejudice or harm any party or the Commission. On the contrary, waiting for an appellate decision could avoid the possibility of unnecessary expense and time associated with litigation.

Based on the foregoing, Florida Cities Water Company's Amended Motion For Stay Pending Judicial Review, filed on April 14, 1998, is granted. The Motion for Stay, filed on April 10, 1998, is moot.

SECURITY FOR REFUND

As a result of the utility's Motion for Stay Pending Judicial Review, filed on April 10, 1998, and its Amended Motion for Stay, filed on April 14, 1998, additional security will be required. The amount of security for this docket was originally ordered when the utility decided to implement PAA rates effective in December 1995. The amount of security was modified and increased in Order No. PSC-

ORDER NO. PSC-98-0762-PCO-SU
DOCKET NO. 950387-SU
PAGE 6

96-1390-FOF-SU, issued November 20, 1996, as a result of the utility's appeal of the post-hearing decision. The utility posted a corporate undertaking in the amount of \$940,755, pursuant to that Order.

Pursuant to Rule 25-22.061(2), Florida Administrative Code, a stay pending review may be conditioned upon the posting of good and sufficient bond, or the posting of a corporate undertaking, and such other conditions as we find appropriate. Although appeals can typically take 18 months to complete, there is some question as to whether this appeal will take that long. Our calculations of the required security (in 6-month increments) for the next 18 months is set forth on Schedule 1 which is attached to and made a part of this Order. To cover through the next six months (through November 12, 1998), the utility shall post a corporate undertaking in the amount of \$1,056,683.46. If the appeal process has not been completed by that time, the utility shall, without additional action by this Commission, increase the corporate undertaking to \$1,267,590.20 to cover through the next six-month period. If the appeal process has not been completed by May 12, 1999, the utility shall, again without additional action by this Commission, increase the corporate undertaking to \$1,487,207.48 to cover through the next six-month period. Further, pursuant to Rule 25-30.360(6), Florida Administrative Code, the utility shall provide a report by the twentieth of each month indicating the monthly and total revenue collected subject to refund. Finally, the corporate undertaking shall state that it will remain in effect during the pendency of any appeal as stated in the utility's motions and will be released or terminated upon subsequent order of the Commission addressing the potential refund.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Cities Water Company's April 14, 1998 Amended Motion for Stay of Order No. PSC-98-0509-PCO-SU is granted. It is further

ORDERED that Florida Cities Water Company's April 10, 1998 Motion for Stay is Moot. It is further

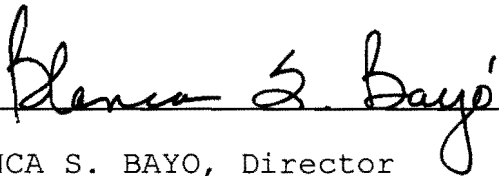
ORDERED that Florida Cities Water Company shall post corporate undertakings as stated above. It is further

ORDER NO. PSC-98-0762-PCO-SU
DOCKET NO. 950387-SU
PAGE 7

ORDERED that Florida Cities Water Company shall provide a report by the twentieth of each month indicating the monthly and total revenue collected subject to refund. It is further

ORDERED that the schedule attached to this Order is incorporated and made a part of this Order.

By ORDER of the Florida Public Service Commission this 2nd day of June, 1998.



BLANCA S. BAYO, Director
Division of Records and Reporting

(S E A L)

RAJ/LAJ

ORDER NO. PSC-98-0762-PCO-SU
DOCKET NO. 950387-SU
PAGE 8

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or 3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.