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May 13, 1998

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HAND DELIVERY

Clerk
First District Court of Appeal
Courthouse
301 Martin L. King, Jr., Blvd.
Tallahassee, FL 32399-1850

950387-SU

RE: Florida Cities Water Company v. State of Florida, Florida
Public Service Commission

To the Clerk:

Enclosed on behalf of Florida Cities Water Company for
docketing with the Court are an original and three (3) copies of:

1. Petition for Review of Non-Final Agency Action and for
Interlocutory Order to Preserve Interests of Party
Pending Further Proceedings or Agency Action
2. Appendix (separately bound)
3. Petitioner's Request for Oral Argument.

Also enclosed is our firm's check in the amount of \$250.00 as
payment of the service charge for docketing this case.

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

- CAF _____
- CMU _____
- CTR _____
- EAG _____
- LEG _____
- LIN _____
- OPC _____
- RCH _____
- SEC /
- WAS _____
- OTH _____

Sincerely,
Wayne L. Schiefelbein
Wayne L. Schiefelbein

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Enclosures
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FPSC-RECORDS/REPORTING

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT
STATE OF FLORIDA

98 MAY 12 PM 3:30

FLORIDA CITIES WATER)
COMPANY,)
)
Petitioner,)
)
v.) CASE NO.:
)
STATE OF FLORIDA, FLORIDA)
PUBLIC SERVICE COMMISSION,)
)
Respondent.)
_____)

**PETITION FOR REVIEW OF NON-FINAL AGENCY ACTION AND FOR
INTERLOCUTORY ORDER TO PRESERVE INTERESTS OF PARTY
PENDING FURTHER PROCEEDINGS OR AGENCY ACTION**

COMES NOW the Petitioner, FLORIDA CITIES WATER COMPANY (Florida Cities), by and through its undersigned counsel, and hereby files this Petition for Review of Non-Final Agency Action and for Interlocutory Order to Preserve Interests of Party Pending Further Proceedings or Agency Action, pursuant to Section 120.68(1), Florida Statutes, Fla.R.App.P. 9.100(a), and Section 120.68(6)(b) Florida Statutes. As grounds therefor, Florida Cities would show the following:

Jurisdiction

1. This court has jurisdiction to hear this matter under Article V, Sec. 4(b)(2) of the Florida Constitution, which confers upon the district courts of appeal "the power of direct review of administrative action, as prescribed by general law."

2. Section 120.68(1), Florida Statutes, is a general law providing that judicial review of non-final agency action is to

be had in the district courts of appeal.

3. Section 120.68(6)(b), Florida Statutes, states that: "If the court sets aside agency action or remands the case to the agency for further proceedings, it may make such interlocutory order as the court finds necessary to preserve the interests of any party . . . pending further proceedings or agency action."

Purpose of Petition

4. This is the second appearance of the instant controversy before this Court. In January, 1998, this Court reversed the determination by the Florida Public Service Commission (PSC) of the used and useful portion of Florida Cities' wastewater plant. Florida Cities Water Company v. State, 705 So.2d 620 (Fla. 1st DCA 1998).¹ The Court reversed the PSC's determination of the capacity of the plant, which ruling the PSC has accepted. Finding that the PSC's use of annual average daily flows was a "considered break with agency policy"² (at 625), the Court further ruled as follows:

Because this policy shift was essentially unsupported "by expert testimony, documentary opinion, or other evidence appropriate to the nature of the

¹The Court's opinion, as most recently corrected and mailed by the Court on April 29, 1998, and its January 28, 1998 Mandate, are submitted as Appendix "A".

²This same "considered break with agency policy" is a subject of two other pending appeals before the Court. Palm Coast Utility Corporation v. State of Florida, Florida Public Service Commission, Case No. 97-1720; Southern States Utilities, Inc. v. Florida Public Service Commission, Case No. 96-4227.

issue involved," Manasota - 88, Inc. v. Gardinier, Inc., 481 So.2d 948, 950 (Fla. 1st DCA 1986), the PSC must, on remand, give a reasonable explanation, if it can, supported by record evidence (which all parties must have an opportunity to address) as to why average daily flow in the peak month was ignored. (emphasis added)

(at 626)

5. Characterizing the Court's remand as "an invitation" to reopen the record, the PSC has issued non-final orders reflecting its intention to reopen the record and scheduling a hearing to take testimony and evidence on the issue of what flows should be used in the numerator of the used-and-useful equation when the Department of Environmental Protection (DEP) permits a wastewater plant on the basis of annual average daily flows.³ Order No. PSC-98-0509-PCO-SU (April 14, 1998) at pp.4-5.⁴

6. By the instant Petition, Florida Cities seeks an Order from this Court reversing the decision by the PSC to reopen the record.

³The PSC also included consideration of Florida Cities' recovery of additional pre-appellate and post-remand rate case expense within the scope of the proceedings on remand. This Court granted Florida Cities' Motion for Attorney's Fees incurred in its first appeal. That matter is pending before the Division of Administrative Hearings, after an April 27, 1998 hearing, in Florida Cities Water Company v. State of Florida, Public Service Commission, DOAH Case No. 98-1347FC.

⁴This Order on Remand is submitted as Appendix "B". An Order Establishing Procedure and Issues is submitted as Appendix "C". An Order Revising Procedure is submitted as Appendix "D".

Summary of Argument

7. Florida Cities contends that this Court did not "invite" the PSC to reopen the record. Florida Cities believes that by its reversal and remand, the Court intended that the PSC provide a reasonable explanation why it ignored peak flows, "if it can," supported by record evidence from the original evidentiary proceeding before the PSC.

8. In the original evidentiary proceeding before the PSC held in April 1996, all parties were given adequate opportunity to address the issue of what flows should be applied to determine the extent to which the wastewater plant is used and useful in the public service. There is in fact adequate record evidence for the PSC to make this determination using the average daily flows in the maximum month, consistent with longstanding PSC policy. The PSC's decision to reopen the record is an improper attempt at a "second bite of the apple," which would unfairly subject Florida Cities to bear the hazards, harassment and expense of a second hearing, and is therefore a departure from the essential requirements of law.

Facts Which Warrant Immediate Judicial Review

9. This rate proceeding is now entering its fourth year before the PSC.

10. Florida Cities filed its petition for a wastewater rate increase on May 19, 1995 and requested that its petition be

processed using the PSC's proposed agency action procedure.

11. The PSC issued a Notice of Proposed Agency Action Order Granting Final Rates and Charges. 95 F.P.S.C. 11:151 (November 2, 1995). The PSC thereby found that the wastewater plant was "essentially 100% used and useful," using a longstanding PSC policy of considering peak flows, and determined that a 17.89% rate increase was appropriate. 95 F.P.S.C. 11:153-154, 162. The PAA Order was challenged by individual customers, who requested a formal proceeding, and the Office of the Public Counsel (OPC) intervened.

12. The PSC issued an Order Establishing Procedure. 96 F.P.S.C. 1:169 (January 9, 1996).⁵ The PSC thereby declared that: "The scope of this proceeding shall be based upon the issues raised by the parties and Commission staff (staff) up to and during the prehearing conference, unless modified by the Commission." 96 F.P.S.C. 1:169. The Order established a filing schedule for all parties' prefiled testimony and exhibits, and a prehearing statement by which each party was required to identify each question of fact, law, and policy which it considered at issue and its position on each such issue. 96 F.P.S.C. 1:171-172. The Order further provided that failure to raise an issue prior to the issuance of the prehearing order constituted a waiver of the issue by that party, except for good cause shown.

⁵This Order is submitted as Appendix "E".

96 F.P.S.C. 1:171-172.

13. Florida Cities, OPC, Customer-Intervenor Walla and PSC Staff all submitted prefiled testimony and exhibits and prehearing statements.

14. After an April 4, 1996 prehearing conference, at which all parties participated, the PSC issued a Prehearing Order. 96 F.P.S.C. 4:318 (April 17, 1996).⁶ The Prehearing Order memorialized the 34 issues identified by the parties, and the parties' positions thereon, including the following:

Issue 4: What capacity of the wastewater plant and what flows should be used to calculate used and useful?

Utility: The WWTP capacity is 1.25 MGD based on annual average daily flows. The flows that should be used in calculating used and useful are as shown in the MFR Schedule F-6.⁷ (Young, Cummings, Karleskint)

OPC: If the Commission uses the peak month flow to calculate used and useful, then the peak month capacity of the plant should likewise be used. However, if the Commission uses the average annual daily flow capacity to calculate used and useful, then the average annual daily flow of the system should be used. (Dismukes)

Walla: Whether you use annual average daily flows or

⁶The text of the Prehearing Order is submitted as Appendix "F". The full text is not printed in the F.P.S.C. Reporter.

⁷Schedule F-6, from Florida Cities' Minimum Filing Requirements, shows the wastewater plant's average annual flows and average daily flow in the peak (or "max") month. The schedule is submitted as the first page of Appendix "N".

peak flows, the flows shown by the utility include infiltration, and, therefore, used and useful is overstated. (Walla)

Staff: The capacity of the plant is as permitted by the DEP (1.3 mgd). Flow data to be used will be determined from the record. (Shoemaker, Barienbrock)⁸

15. The formal hearing was held in Fort Myers on April 24-25, 1996, before Commissioners Garcia, Johnson and Kiesling. All parties were given the opportunity to provide testimony and evidence on the issues previously identified.

16. Florida Cities, OPC and Ms. Walla submitted posthearing statements of issues and positions addressing the 34 issues.⁹ Their arguments on Issue 4 are submitted as Appendices "G", "H", and "I", respectively. Consistent with longstanding PSC policy, Florida Cities maintained that used and useful should be determined by comparing the average daily flows for the max month (plus a margin reserve) with the actual permitted capacity of the plant.¹⁰ OPC advocated "use of a flow that is consistent with the capacity of the plant."¹¹

17. The PSC Staff thereafter submitted a recommendation to calculate the used and useful portion of wastewater plant by

⁸Appendix "F", pp. 8-9.

⁹R. 649-750.

¹⁰R. 650; Florida Cities Post-Hearing Statement, at p. 7-11; Appendix "G".

¹¹R. 692, Citizens' Post-Hearing Statement, at p. 9; Appendix "H".

limiting recognition of wastewater flows to average annual daily flows, "as specified in the DEP permit." PSC Staff advocated that the PSC reject Florida Cities' request to use average flows from the peak month since "[t]hese flows do not match the plant design nor the permitting considerations in the DEP construction permit."¹² The pertinent excerpts from this Staff recommendation are submitted in Appendix "J".

18. The PSC approved the staff recommendation to use average annual daily flows, denied a rate increase, and ordered a rate decrease. 96 F.P.S.C. 9:139¹³ (September 10, 1996).

19. Florida Cities challenged the PSC's used and useful determination on appeal to this Court. This Court reversed the PSC's used and useful calculation. 705 So.2d 620 (1998) Noting that the PSC's use of annual average daily flows was "a considered break with agency policy" (at 625), the Court ruled as follows:

Because this policy shift was essentially unsupported "by expert testimony, documentary opinion, or other evidence appropriate to the nature of the issue involved," Manasota - 88, Inc. v. Gardinier, Inc., 481 So.2d 948, 950 (Fla. 1st DCA 1986), the PSC must, on remand, give a reasonable explanation, if it can, supported by record evidence (which all parties must have an opportunity to address) as to why average daily flow in the peak month was ignored. (at 626) (emphasis added)

¹²R. 754, Memorandum, p. 23.

¹³The Order is submitted as Appendix "K."

20. On March 12, 1998, PSC staff issued a Staff Recommendation for the purpose of implementing the Court's mandate on remand.¹⁴ PSC Staff informed the PSC that: "Other than the permit itself, there was no evidence as to what flows should be used in the numerator of the used-and-useful fraction when the permit was issued based on AADF [average annual daily flow]."¹⁵

21. The Staff recommendation advised the PSC of the judicial prohibition against "two bites at the apple," stating that: "The test appears to be 'did the parties have the opportunity to present the evidence at the first hearing'." Staff nonetheless indicated its belief that:

at the time of the hearing, none of the parties or staff realized the change in DEP's permitting practice and its significance and effect. Therefore, this was not made an issue and no party had the opportunity to put on evidence as to which flows should be used in the numerator.¹⁶

22. The Staff recommendation indicated there were three options available to the PSC. The first option was for the PSC to refuse to reopen the record and use ADFMM [average daily flow in the max month] in the numerator. This option, according to Staff,

¹⁴The full text of the March 12, 1998 Staff Recommendation is submitted as Appendix "L". This is properly considered by the Court under Citizens v. Beard, 613 So.2d 403 (Fla. 1992).

¹⁵Appendix "L", p. 8.

¹⁶Appendix "L", p. 11-12.

has the advantage that it would be quicker and would almost certainly be upheld by the First DCA. However, Staff believes that it is wrong to calculate used and useful with this mismatch. Also, staff is afraid that in subsequent rate cases, utilities may cite this case as precedent . . . even where evidence to the contrary was put on. Staff does not believe that the Commission should accept ADFMM in the numerator if it believes that another flow might be correct. Therefore, staff recommends against this option.¹⁷

23. The second option, according to Staff, was to refuse to reopen the record, have the parties brief, citing any record support, why it is correct or incorrect to use either AADF or ADFMM in the numerator, and make a decision based on the briefs and whatever record citation there is.

However, Staff "does not believe that additional argument alone would be sufficient to change the First DCA's opinion. . . ." This option was therefore, according to Staff, "not . . . a viable option."¹⁸

24. Staff therefore recommended a third option: to reopen the record and "have the parties put on testimony as to which flows should be used in the numerator." This would allow the PSC to "consider the evidence regarding the matching of flows in the used and useful fraction so as to correctly calculate the used and useful percentage," with a "far greater likelihood of being

¹⁷Appendix "L", p. 13.

¹⁸Appendix "L", pp. 13-14.

upheld on appeal. . . ."19

25. PSC Staff Counsel Jaeger confirmed the state of the established record at the PSC's March 24, 1998 Agenda Conference²⁰, as follows:

[Mr. Jaeger] So there is nothing really in the record to support annual average daily flows in the numerator except the gut feeling, mathematical, when you are getting an average percent to cancel out--if you have average daily flows in the denominator, to cancel out that average daily flows to get a percentage, you have to have annual daily flows in the numerator, that's a mathematical concept. But the court rejected that.

. . .

Commissioner
Deason: The number is in the record, but there is no justification when you have to have a matching.

Mr. Jaeger: There is no justification for matching.²¹

26. PSC Staff counsel characterized this Court's language regarding proceedings on remand as:

saying, okay, if you want to do what you want

¹⁹Appendix "L", pp. 13-14.

²⁰The full text of a transcript of the PSC's deliberations and vote at the March 24, 1998 Agenda Conference is submitted as Appendix "M". This is also properly considered by the Court under Citizens v. Beard, 613 So.2d 403 (Fla. 1992).

²¹Appendix "M", pp. 27-28.

to do,²² you have to have additional testimony or you have to have, you know, record evidence. And so, if we want, you know, I think that was an invitation for us to reopen the record. That's really what I'm hanging my hat on is that they gave us this opportunity.²³
(emphasis added)

27. Chairman Johnson agreed: "That seems to suggest that they are opening the door and they would allow us, in fact, they are almost inviting us to kind of justify what we did."²⁴

(emphasis added)

28. Counsel for Florida Cities informed the PSC that all parties had had ample opportunity to litigate the "flow issue" in the original evidentiary proceeding before the PSC, and that reopening the record would constitute an impermissible "second

²²Any doubt as to what the PSC "wants to do" can be dispelled by reference to the PSC's recent Notice of Rule Development, Vol. 24 Florida Administrative Weekly, No. 18 (May 1, 1998), p. 2273. The preliminary text of the proposed rule development is as follows:

25-30.432 Flow Data to be Used for Wastewater Treatment Plant Used and Useful Calculations. The used and useful percentage of wastewater treatment plant shall be calculated using a ratio of actual flows to the permitted plant capacity. The denominator shall be the plant capacity as stated on the permit issued by the Department of Environmental Protection (DEP) for the utility's treatment plant. The numerator shall be the flow data stated in the same period or basis as the denominator. If no basis or period is specified on the DEP permit, the maximum monthly average daily flow from the test year shall be used in the numerator.

²³Appendix "M", pp. 19-20.

²⁴Appendix "M", p. 37.

bite of the apple." Counsel for Florida Cities further noted that this Court "didn't say if you think you've got a weak case, you go back . . . and you get some more evidence to support it."²⁵

29. OPC also addressed the PSC, asserting: "This is a good time to begin to build a record upon which you can base your thoughts."²⁶ The flows issue, according to OPC, is "an incomplete issue . . . not developed at . . . [or] aired before the Commission," adding that "(a)nd even to some extent, even though it was our witness who suggested it, I felt a little bit blindsided. I wished I could have developed a better record there, too."²⁷

30. By a two-to-one vote (Commissioner Deason dissenting), a three-Commissioner panel ultimately decided to reopen the record and to schedule a hearing to receive additional testimony and evidence on the issue of what flows should be used in the numerator of the used and useful equation when DEP permits a wastewater treatment plant on the basis of average annual daily flows.²⁸

²⁵Appendix "M", pp. 5-12.

²⁶Appendix "M", p.13.

²⁷Appendix "M", pp. 22-23.

²⁸On May 12, 1998, the PSC granted Florida Cities' Motion to Stay the PSC's scheduled post-remand proceedings pending judicial review of the PSC Order on Remand.

31. In the past, the PSC has consistently limited its decisions following appellate remand to the established record. See the Order Implementing Remand in GTE Florida Incorporated, where the PSC referred to its "general practice" of not conducting further evidentiary proceedings on remand "unless the record is insufficient or incomplete. . . ." 95 F.P.S.C. 4:397, 398 (April 26, 1995). (emphasis added) See also the Order Complying with DCA Mandate in Sunshine Utilities of Central Florida, Inc., 94 F.P.S.C. 6:227 (June 15, 1994). Similarly, the PSC declined to reopen the record in an Order Complying with Mandate "as a matter of policy," finding that a rate structure other than that struck down by the Court was "supported by the evidence in the record." Southern States Utilities, Inc., 95 F.P.S.C. 10:371, 373 (October 19, 1995).

32. There is sufficient record evidence from the April 1996 evidentiary hearing to enable the PSC to calculate used and useful wastewater plant so as to recognize average daily flow in the peak month, consistent with longstanding PSC policy. Included as Appendix "N" is an excerpt (Schedule F-6) from Florida Cities' Minimum Filing Requirements, showing the wastewater treatment plant's "average annual flows" and "average daily flow in max month," together with excerpts from the testimony of Florida Cities' witnesses Young and Cummings. (Exh. 1, p. 152; T. 272 & 273; 576-577)

33. A lower court's role, upon receipt of a mandate from an appellate court, is purely ministerial, and its function is limited to obeying the appellate court's order or decree. Torres v. Jones, 652 So.2d 893, 894 (Fla. 3d DCA 1995). The lower court must follow the "dictate of the mandate and should not stray from it." Florida Power & Light v. Flichtbeil, 513 So.2d 1078, 1080 (Fla. 5th DCA 1987), review denied, 520 So.2d 585 (Fla. 1988).

34. The Court's Mandate commanded that "further proceedings, if required, be had in accordance with said opinion, the rules of Court, and the laws of the State of Florida."²⁹ The Florida courts have noted that this quoted language is standard in mandates, and allow the lower courts broad discretion in directing the cause of action thereafter. Department of Revenue v. Air Jamaica Ltd., 522 So.2d 446, 448 (Fla. 1st DCA 1988); Tampa Elec. Co. v. Crosby, 168 So.2d 70, 73 (Fla. 1964). It should be noted, however, that not all mandates that call for further proceedings on remand require, or even allow, additional evidentiary hearings and the re-opening of the record. See generally Department of Health & Rehabilitative Serv. v. Davenport, 609 So.2d 137, 138 (Fla. 4th DCA 1992) (holding that the lower court exceeded its authority by conducting a hearing where the case was remanded for the limited purpose of allowing the lower court to set forth its findings as to the hourly rate

²⁹Appendix "A", p. 1.

of attorney's fees, the reasonable hours expended by the attorney, and appropriate enhancement factors, which instead should have been determined on the established record).

35. As evidenced by the PSC's April 17, 1996 Prehearing Order³⁰, and the parties' posthearing statements,³¹ all parties were given ample opportunity to present testimony, evidence and argument on the appropriate wastewater flows to be recognized in calculating the plant used and useful in the public service, at the original evidentiary hearing. Florida Cities believes that this Court's January 1998 reversal and remand neither contemplated nor authorized a second evidentiary hearing that would provide a "second bite of the apple" to the PSC, its Staff, OPC and the other intervenors opposing Florida Cities' application for a rate increase, to attempt to justify a policy which ignores peak flows.

36. This Court has consistently refused to allow party litigants the proverbial "second bite of the apple." In an interlocutory appeal, this Court reversed a trial judge's post-remand decision to allow plaintiffs to file an amended complaint setting up a different theory or cause of action, declaring that: "A second bite at the apple may not be granted simply because the plaintiffs have failed to meet their burden of proof." St. Joe

³⁰Appendix "F," pp. 8-9.

³¹Appendices "G", "H", and "I".

Paper Co. v. Connell, 299 So.2d 92, 93 (Fla. 1st DCA 1974). This Court similarly quashed a nonfinal order allowing on remand additional evidence on the value of certain property, where the Court had on the preceding appeal excluded certain evidence on valuation of that same property, finding that the post-remand nonfinal order was a departure from the essential requirements of law. St. Joe Paper Co. v. Adkinson, 413 So.2d 107, 108 (Fla. 1st DCA 1982). See also Lawnwood Med. Ctr. v. Agency for Health Care Administration, 678 So.2d 421 (Fla. 1st DCA 1996); and Weaver v. School Bd. of Leon County, 624 So.2d 761 (Fla. 1st DCA 1993).

37. Other Florida district courts are in agreement with this fundamental legal principle. The Fourth District Court affirmed a trial judge's refusal following remand to allow a party to present evidence through a second evidentiary hearing on an issue litigated at the first evidentiary hearing. Broward County v. Coe, 376 So.2d 1222, 1223 (Fla. 4th DCA 1979). The Fifth District Court reversed a trial judge's order granting a new trial on damages, and found that the plaintiff, having failed to introduce competent, substantial evidence on an issue at the first trial, was not entitled to "a second bite at the apple." Van Der Noord v. Katz, 481 So.2d 1228, 1230 (Fla. 5th DCA 1986). The Second District Court has also adopted this view, reversing a trial judge's denial of a motion for attorney's fees, finding that the party opposing the motion "should not be given a second

bite at the apple to present evidence which it failed to produce at the scheduled evidentiary hearing." Carlough v. Nationwide Mutual Fire Ins. Co., 609 So.2d 770, 771-772 (Fla. 2d DCA 1992). Similarly, the Court reversed a trial judge's order granting rehearing on the issue of damages, as improperly allowing "a second bite at the apple" at establishing an element of proof that should have been proved at trial. St. Petersburg Housing Authority v. J. R. Development, 706 So.2d 1377, 1378 (Fla 2d DCA 1998).

38. Florida Cities submitted its application for a rate increase and supporting data and expert testimony in accordance with longstanding PSC policy, in support of a finding that its wastewater plant is fully used and useful in the public service. It violates the most basic notions of fundamental fairness for the PSC to seek to impose a radical policy change for the used and useful determination announced for the first time after the original evidentiary hearing, based on absolutely no record support, and, following this Court's reversal and remand, to then reopen the record and schedule a second evidentiary hearing on the matter. Such a course of action is a recipe for piecemeal litigation and endless appeals, inconsistent with the most basic tenets of minimum due process and Florida administrative law, one which this Court assuredly did not "invite" the PSC to pursue.

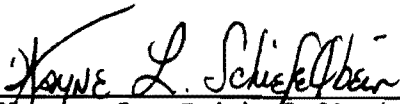
39. The PSC's action following reversal and remand

constitutes a flagrant and gross abuse of agency discretion. Pursuant to Fla.R.App.P. 9.400(b) and Sec. 120.595(5), Florida Statutes, Florida Cities therefore requests that the Court award attorney's fees incurred by Petitioner in seeking review of the PSC's Order on Remand, as well as attorney's fees and costs incurred in pursuing recovery of such attorney's fees, and remand this case to the Division of Administrative Hearings for an impartial determination thereof, subject only to review by the Court if either party is dissatisfied with the outcome.

Prayer for Relief

Based on the foregoing, Florida Cities Water Company asks the Court to find that the instant petition demonstrates a preliminary basis for relief, a departure from the essential requirements of law that will cause material injury for which there is no adequate remedy by appeal, or that review of final administrative action would not provide an adequate remedy; to therefore issue an order directing the Florida Public Service Commission to show cause, within the time set by the Court, why the Order on Remand should not be reversed; to retain jurisdiction to address Florida Cities' request for an award of attorney's fees incurred in its appeal of the Order on Remand; and to grant such other relief as the Court may deem appropriate.

Respectfully submitted,

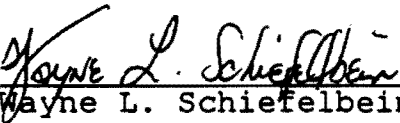


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ATTORNEYS FOR FLORIDA CITIES
WATER COMPANY

Certificate of Service

I hereby certify that true and correct copies of the foregoing Petition and the separately bound Appendix have been served by hand-delivery to Rob Vandiver, General Counsel, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850; Harold McLean, Associate Public Counsel, Claude Pepper Building, 111 W. Madison Street, Room 812, Tallahassee, Florida 32399-1400; and by U.S. Mail to Cheryl Walla, 1750 Dockway Drive, North Fort Myers, Florida 33903, this 13th day of May, 1998.


Wayne L. Schiefelbein

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