



JACK SHREVE
PUBLIC COUNSEL

STATE OF FLORIDA
OFFICE OF THE PUBLIC COUNSEL

c/o The Florida Legislature
111 West Madison Street
Room 812
Tallahassee, Florida 32399-1400
904-488-9330

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July 7, 1998

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

Re: Docket No. 971663-WS

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket are the original and 15 copies of Citizens' Prehearing Statement. A diskette in WordPerfect 6.1 is also submitted.

Please indicate the time and date of receipt on the enclosed duplicate of this letter and return it to our office.

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Sincerely,

[Signature]
Harold McLean
Associate Public Counsel

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Florida Public Service Commission

FCWC improvidently attracted the enforcement powers of the United States Environmental Protection agency and the enforcement powers of the United States Department of Justice, *was found to have committed more than 2300 violations of the Clean Water Act*, and in so doing, subjected the equity interests of its stockholders to possible forfeiture to the United States Government. Its resistance to the enforcement arm of the Government, whether a prudent measure to be taken on behalf of the owners of the utility (and irrespective of how successful) addressed no material interest of the rate paying customers of the utility. To quote one of the many descriptive expressions of the late Commissioner Gerald “Jerry” Gunter, the customers had “no dog in that hunt.”

While the entire burden of persuasion rests with the utility in this case, nonetheless, the Citizens’ evidence will show that FCWC’s expenses incurred in trimming the fine and violations to be assessed by a Federal District Court were incurred not in the provision of water and wastewater service, but in defense of its stockholders’ interests in the equity of FCWC. Moreover, the Citizens will show that the predicament in which FCWC found itself was one of its own making, was avoidable, foreseeable, and imprudent. The utility either neglected or chose not to directly challenge the denial of an NPDES permit; instead mounted a belated and collateral challenge of the permit denial by either intentionally or negligently discharging wastewater effluent without the permit. In taking this irresponsible and imprudent course of action, FCWC incurred the justifiable wrath of the federal enforcement authorities, years after it should have simply, and perhaps cheaply, challenged the permit denial. After all, it was a denial in which FCWC now says the EPA was improvident, if not reckless, and it is entirely reasonable for the Commission to infer that it would have been easily reversed.

When the federal enforcement authorities came, their curiosity included not only the offending Waterway estates site, but Barefoot Bay and Carrollwood as well. Whereas the customers were powerless to avoid this scenario, FCWC was not: it could have challenged the permit denial and very likely, if not certainly, avoided the enforcement aspects altogether.

Instead, FCWC slept on its remedies, discharged without a permit, and got caught.

The ratepayers ought not be saddled with any penalty which flowed from that behavior or in any part of the expense FCWC incurred in its narrow, self-induced brush with disaster.

ISSUES

Citizens' Issue 1: Does FCWC's petition seek to recover in future rates expenses incurred in past consumption?

Citizens' Position: Yes. Although the Citizens do not believe that the litigation expenses sought were incurred in the provision of water and/or wastewater service to the public, if such litigation expenses were so incurred, they were incurred for consumption delivered contemporaneously with the expenses, the last of which was booked by the utility, below the line, prior to 1997. This case is no different from any other in which a utility seeks to establish future rates designed to retroactively recover expenses or losses neglected or foregone from prior periods. The Commission has consistently ruled against retroactive ratemaking. (Larkin)

Citizens Issue 2: Should the expenses incurred by FCWC in its litigation with the United States Environmental Protection Agency (USEPA) and the United States Department of Justice (USDOJ) be recovered from FCWC's ratepayers in future rates?

Citizens' Position: No. The Commission has consistently held that fines and penalties are not recoverable from ratepayers. Upon identical rationale, the expenses associated with resisting fines and penalties should similarly be disallowed. The customers of this utility have absolutely no control over the management policies of the utility. When management runs afoul of enforcement authority and is found to have violated statutes such as the Clean Water Act on more than 2300 instances the stockholders of the company, not its captive customers, should be held responsible for all of the consequences thereof. (Larkin)

Citizens Issue 3: Did the Federal District Court for the Middle District of Florida find that FCWC violated the CWA on more than 2300 instances?

Citizens' Position: Yes. The court so found in Summary Judgment, issued November 22, 1995. (cross)

Citizens' Issue 4: Did the Federal District Court for the Middle District of Florida assess a fine of more than \$300,000.00 against FCWC?

Citizens' Position: Yes. The court so found in Final Judgment, issued August 20, 1996. (cross)

Citizens' Issue 5: Were both costs and Attorneys' fees denied by the Federal Court to FCWC?

Citizens' Position: Yes, both costs and fees were sought by FCWC and denied by the Federal court on the basis that FCWC was not a prevailing party and because the Government did not prosecute its case in bad faith. (cross)

Citizens' Issue 6: Would a penalty of more than \$50,000,000.00, had it been assessed against FCWC, have terminated or seriously affected the quality of service?

Citizens' Position: No. While bankruptcy is normally not a desirable course for any entity to take, the provision of water services and of wastewater disposal is an industry pervasively regulated by a host of governmental authorities. Even criminal exposure may be had for those who might illegally pollute, or provide unhealthy water. While FCWC urges calamitous failure of service in the event of a large fine, it is far more reasonable to assume that service would continue, much as before, under government stewardship, likely under the auspices of a federal bankruptcy court. A receiver or trustee in bankruptcy would be as accountable to regulatory authorities as FCWC is now.

As FCWC sees disaster in the bankruptcy scenario, it justifiably sees elimination of its shareholders' equity interest in the firm and a probable transfer to government or, eventually, other private interests. While a forced, wholesale change in ownership of this utility may be calamitous to FCWC and its developer parent, it may well be of no consequence to ratepayers. In fact, given the elimination of the obligation to service equity capital and the discharge or elimination of debt, the customers may have emerged with lower rates, in lieu of lesser services. (Larkin)

Citizens' Issue 7: Are the litigation expenses sought in this case reasonably characterized as normal, recurring costs of doing business?

Citizens' Position: No. The expenses in question occasioned a limited proceeding addressing millions of dollars. That matter alone suggests something atypical is going on. Violating the CWA and drawing the attention of the enforcement arm of the Federal EPA and DOJ is far from routine for any well-run utility. An occasional brush with the USEPA, (although certainly not the USDOJ) may well be routine, but this case is a far cry from the inevitable disagreement which crops up between a regulated entity and its regulator.

This case, according to FCWC itself, placed the current ownership of the utility at risk. The notion that it represents an episode of business as usual is quite fortunately false. (Larkin)

Citizens Issue 8: Should FCWC be allowed to include any unrecovered litigation expenses being amortized in its next rate case in order to earn a rate of return on the unrecovered balance?

Citizens Position: No. Since the Citizens oppose the recovery of any of the litigation expense as a legitimate expense chargeable to ratepayers, any return should also be denied. Additionally, should the Commission find some amount is recoverable from ratepayers only that amount should be recovered without return. (Larkin)

Legal Issues

Citizens' issue 9: Is the relief sought by FCWC barred by any doctrine against retroactive ratemaking?

Citizens' position: Yes. The relief sought by FCWC, i.e., future rates based upon past consumption has been historically denied by the commission with approval of the courts.

Citizens' issue 10: Is there any requirement that a utility seek any acknowledgment of the Commission prior to its reaching back in time to capture expenses not recovered in its then authorized rates?

Citizens' position: Yes.

Other Matters

The Citizens have no pending motions, and no issues have been stipulated at this time.

Respectfully Submitted:



Harold McLean
Associate Public Counsel

Office of Public Counsel
c/o The Florida Legislature
111 W. Madison Street
Room 812
Tallahassee, FL 32399-1400

(850) 488-9330

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Citizens' Prehearing Statement was served by United States Mail, or where the party is denoted by an asterisk (*) by hand delivery upon representatives of the following parties on this the 7th day of July, 1998.



Attorney

Gatlin Law Firm
Kenneth Gatlin, Esq.
3301 Thomasville Rd., #300
Tallahassee, FL 32312

Jerilyn Victor
1740 Dockway Dr.
N. Fort Myers, FL 33903

Cheryl Walla
1750 Dockway Dr.
N. Fort Myers, FL 33903

*Roseann Gervasi, Esq.
Division of Legal Services
Fla. Public Service Commission
2740 Shumard Oak Blvd.
Tallahassee, FL 32399-0863