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CITIZENS' POSITIONS ON NEWLY ORDERED ISSUES

Issue 3:

Citizens' Position: The Citizens have no position as to whether FCWC defended itself in a reasonable and prudent manner from the charges levied by the Federal environmental authorities. However, the Citizens urge that FCWC acted unreasonably and imprudently by violating the Clean Water Act more than 2300 times and acted unreasonably and imprudently by incurring the enforcement action of the federal authorities. (Larkin, cross)

Issue 5:

Citizens' Position: No Position

Issue 7:

Citizens' Position: Yes. Economic benefit to the polluter is of paramount interest in the enforcement of the CWA. Early in the litigation, the Government was assured by FCWC that it had no present plan to seek reimbursement from the rate payers of the utility. (Larkin)

Issue 8:

Citizens' Position: No. The overzeal, if any, of the government enforcement action goes to the issue of whether FCWC reasonably and prudently defended itself from federal enforcement, with which no party takes issue in this docket. What is at issue is who is to pay the litigation expenses: whether the federal authorities were zealous, correct, or lax provides no answer.

07681-98

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET
NO. 971663-WS EXHIBIT NO. 1
COMPANY/
WITNESS: Public Counsel
DATE: 7-20-98

Issue 12:

Citizens' Position: None. *The petition is a plain attempt to gain a surcharge by means of retroactive ratemaking. Moreover, 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, 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)*

Issue 14:

Citizens' Position: No position as to any allocation issue. No recovery of the expenses which were incurred several years ago, and for purposes which don't serve the ratepayers should be permitted. (Larkin)

Issue 15:

Citizens' Position: No recovery of rate case expense is appropriate irrespective of whether FCWC recovers anything on its petition. Recovery of rate case expense (like the litigation expense) has not been shown to yield earnings outside the range of the last authorized rate of return, and for all the Commission knows, may cause the utility to overearn.

Issue 16:

Citizens' Position: No position.

Issue 17.

Citizens' Position: No surcharge should be approved.

Issue 18:

Citizens' Position: The Citizens oppose any surcharge. However, if a surcharge is approved, it should be sized so as to be recovered over a period of ten years.

Issue 20:

Citizens' Position: No position.

Issue 22:

Citizens' Position: Yes. While the Citizens oppose any recovery of litigation expenses, and oppose any recovery of any expense incurred by FCWC in recovering litigations expenses, the Citizens - who are the apparent beneficiaries of the referenced statute - urge that while the Commission may not waive the application of a statute, the Commission certainly has authority to find that the statute does not apply.

Issue 23:

Citizens' Position: Yes, although it is atypical, the USEPA and the FDEP may have to abandon their focus on results and order a particularly recalcitrant utility to take specified measures. However, the Citizens believe that it is far more typical for the environmental authorities to leave details, although not results, to the discretion of utilities such as FCWC.

VIII. ISSUES AND POSITIONS

ISSUE 1: Does the proposed recovery by FCWC of the litigation expenses constitute retroactive ratemaking?

POSITIONS

FCWC: No. (McClellan)

OPC: 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)

STAFF: Yes.

ISSUE 2: Is an accounting order a condition precedent to the recovery of the litigation expenses as proposed by FCWC?

Alternative Issue 2: Is there any requirement that a utility obtain an accounting order prior to reaching back in time to capture expenses not recovered in its then authorized rates?

POSITIONS

FCWC: No. (McClellan)

OPC: Yes.

STAFF: Although it is advisable to obtain such an accounting order, it is not required by statute or rule.

ISSUE 3: Did FCWC act prudently and reasonably in defending the legal action brought by the United States Department of Justice on behalf of the Environmental Protection Agency?

07681-98

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET
NO. 971663-45 EXHIBIT NO. 2
COMPANY/
WITNESS: FCWC.
DATE: 7-20-98

POSITIONS

FCWC: Yes. (Allen, Baise, Acosta, Murphy and McClellan)

OPC:

STAFF: At the point in time at which FCWC finally took action, the utility acted prudently and reasonably in defending the interests of the shareholders.

ISSUE 4: Was FCWC's failure to challenge the EPA's 1986 NPDES permit denial a prudent decision?

POSITIONS

FCWC: Yes. There is no way to determine the amount of FCWC's litigation expenses if the EPA action had been challenged.

OPC: Agree with staff.

STAFF: No. In 1986, FCWC had substantial evidence in its possession that refuted the EPA's basis for its decision to deny the permit. FCWC should have challenged the EPA's 1986 tentative denial of Waterway Estates' (Waterway) NPDES permit renewal, pursuant to Title 40, Section 124.13, Code of Federal Regulations. FCWC should also have challenged the EPA's 1986 final denial of Waterway's NPDES permit renewal, pursuant to Title 40, Section 124.74, Code of Federal Regulations.

ISSUE 5: Is the amount of litigation expenses incurred by FCWC in defending the complaint of DOJ fair and reasonable?

POSITIONS

FCWC: Yes. (Geddie)

OPC:

STAFF: Staff does not take issue with the amount of litigation expenses.

ISSUE 6: Does the potential recovery of litigation costs by FCWC provide a disincentive to comply with the Clean Water Act?

POSITIONS

FCWC: No. (Allen, Baise)

OPC: Yes.

STAFF: No position.

ISSUE 7: Was it relevant in the litigation for the Court to know that FCWC might recover its litigation expenses through rates?

POSITIONS

FCWC: No, and neither was this information concealed from the Court. (Baise, Allen)

OPC:

STAFF: No position. This issue is irrelevant to this proceeding and should be stricken.

ISSUE 8: Is the quality and/or motive of the DOJ and/or EPA relevant to this case?

POSITIONS

FCWC: Yes. (Allen, McClellan and Baise)

OPC: No.

STAFF: No.

ISSUE 9: Would bankruptcy have seriously affected the quality of service provided to FCWC's customers?

POSITIONS

FCWC: Yes. (Murphy and McClellan)

OPC: 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)

STAFF: No.

ISSUE 10: Is the relative degree to which FCWC or its rate payers may have benefitted an issue in determining propriety of recovery of the litigation expenses?

Alternative Issue 10: Should recovery of litigation expenses from the ratepayers depend on whether the utility or the ratepayers benefitted from the litigation?

POSITIONS

FCWC: No. (McClellan)

OPC: Yes.

STAFF: Yes.

ISSUE 11: Are the litigation expenses sought in this case reasonably characterized as normal, recurring costs of doing business?

POSITIONS

FCWC: FCWC does not believe this to be an issue in this proceeding. FCWC has not alleged that this expense is recurring, although environmental litigation is normal. The expense in this case was prudently incurred and under the circumstances the amount is reasonable. The expense was a legitimate cost of doing business.

OPC: No. The expenses in question occasioned a limited proceeding addressing millions of dollars. That matter alone

suggests something atypical is going on. 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)

STAFF: No.

ISSUE 12: Should any portion of FCWC's litigation costs be recovered through rates, and if so, how much?

POSITIONS

FCWC: Yes. \$2,265,833 through a surcharge as set forth in FCWC's petition.

OPC: None. 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, 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)

STAFF: No, these costs are retroactive in nature and should therefore be disallowed.

ISSUE 13: Did the [proceeding which resulted in the] DOJ litigation involve all of FCWC's wastewater systems?

POSITIONS

FCWC: Yes. (Allen, Baise and Murphy)

OPC: No position.

STAFF: Yes, the DOJ litigation involved all of FCWC's wastewater systems, but not all to the same degree.

ISSUE 14: Should FCWC's request to allocate the costs among all of its customers be approved?

POSITIONS

FCWC: Yes. (Allen, ~~Baise~~ and Murphy)

OPC: No position.

STAFF: No. These legal fees are not a cost of providing water service, nor are they a cost of wastewater service to any of the other FCWC wastewater facilities which were not penalized. Any allowed costs should only be recovered from the North Ft. Myers, Barefoot Bay, and Carrollwood wastewater customers. However, the fees should only be allocated to these customers if the evidence in the record shows that the costs were prudently incurred to maintain compliance or minimize or avoid increased plant or operational costs. (MERCHANT, MONIZ)

ISSUE 15: What is the appropriate amount of rate case expense?

POSITIONS

FCWC: \$228,000.

OPC:

STAFF: If the Commission disallows recovery of litigation costs, then no rate case expense should be allowed. However, if the Commission allows recovery of some amount of litigation costs, only prudently incurred rate case expense should be allowed.

ISSUE 16: Should FCWC be required to pay regulatory assessment fees on any revenues that may be approved in this docket?

POSITIONS

FCWC: Yes, if required by the Commission.

OPC: No.

STAFF: Yes. Any amounts collected from the customers to reimburse the utility for litigation costs incurred should be considered utility operating revenues and as such regulatory assessment fees are required to be collected on those amounts. (MERCHANT)

ISSUE 17: What is the appropriate amount of revenue, if any, to be collected through the surcharge?

POSITIONS

FCWC: \$2,265,833 plus rate case expenses.

OPC: Agree with staff.

STAFF: The final amount is subject to the resolution of other issues.

ISSUE 18: Should FCWC's requested recovery period for litigation costs be approved?

POSITIONS

FCWC: Yes.

OPC:

STAFF: If the Commission finds that some amount of recovery for litigation costs should be allowed, then a ten year recovery period is reasonable.

ISSUE 19: What are the appropriate surcharges?

POSITIONS

FCWC: Meter Size Monthly Surcharge Rate by Meter Size

5/8"	\$ 0.42
1"	1.05
1-1/2"	2.10
2"	3.36
3"	6.72
4"	10.50
6"	21.00
8"	42.00

OPC: Zero.

STAFF: The final amounts are subject to the resolution of other issues.

ISSUE 20: If the Commission issues an order that provides for the recovery of litigation costs, what is the appropriate accounting treatment?

POSITIONS

FCWC: FCWC should be able to currently record those costs incurred in prior years. (McClellan)

OPC:

STAFF: The costs should be treated as a regulatory asset to be amortized over a period to be determined through later issues.

ISSUE 21: 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?

POSITIONS

FCWC: Yes. (McClellan)

OPC: 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)

STAFF: No. The recovery of a return on litigation costs should have been requested in this case, and it was not.

LEGAL ISSUES

ISSUE 22: Should FCWC's request to amortize rate case expense over ten years be approved?

POSITIONS

FCWC: Yes.

OPC:

STAFF: No. The Commission does not have the authority to waive a statute. FCWC must amortize any approved rate case expense over four years, pursuant to Section 367.0816, Florida Statutes, and Rule 25-30.470, Florida Administrative Code.

ISSUE 23: May the EPA and DEP make specific requirements of plant additions and improvements of a wastewater utility?

POSITIONS

FCWC: Yes. (Baise & Acosta)

OPC:

STAFF: No position. This issue is irrelevant to this proceeding and should be stricken.

ISSUE 24: Must FCWC allege and prove, as a prerequisite to the relief it seeks, that present rates cause it to earn below its last authorized rate of return?

POSITIONS

FCWC: No.

OPC: Yes.

STAFF: No position at this time.