

GATLIN, SCHIEFELBEIN & COWDERY, P.A.

Attorneys at Law

**3301 Thomasville Road, Suite 300
Tallahassee, Florida 32312**

B. KENNETH GATLIN
WAYNE L. SCHIEFELBEIN
KATHRYN G.W. COWDERY

TELEPHONE (850) 385-9996
TELECOPIER (850) 385-6755
E-MAIL: bkgatlin@nettally.com

OF COUNSEL
THOMAS F. WOODS

July 29, 1998

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

HAND DELIVERY

RECEIVED-FPSC
93 JUL 29 PM 12:37
RECORDS AND REPORTING

RE: Docket No. 971663-WS
Petition of Florida Cities Water Company for limited
proceeding to recover environmental litigation costs for North
and South Ft. Myers Division in Lee County and Barefoot Bay
Divisions in Brevard County.

Dear Ms. Bayo:

Please find enclosed, for filing in the above-referenced
docket, an original and fifteen (15) copies of Petitioner's
Response in Opposition to Citizens' Motion to Dismiss.

Also enclosed, for filing in the above-referenced docket, are
an original and fifteen (15) copies of a Request for Oral Argument.

Please acknowledge receipt of the foregoing by stamping the
enclosed extra copy of this letter and returning same to my
attention.

Thank you.

Very truly yours,

Kathryn G. Cowdery
Kathryn G.W. Cowdery

RECEIVED & FILED
Mon
FPSC-BUREAU OF RECORDS

KGWC/l dv
Enclosures

cc: Harold McLean, Esq.
Rosanne Gervasi, Esq.

DOCUMENT NUMBER-DATE
08000 JUL 29 98
FPSC-RECORDS/REPORTING

DOCUMENT NUMBER-DATE

08000 JUL 29 98

FPSC-RECORDS/REPORTING

JAW
FAA-1
-EG-2
1AT-5
iec-1

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of FLORIDA)
CITIES WATER COMPANY, seeking) Docket No. 971663-WS
recovery of environmental)
litigation costs in a Limited)
Proceeding for its NORTH and)
SOUTH FT. MYERS DIVISION in)
Lee County and BAREFOOT BAY)
DIVISION in Brevard County,)
Florida)

PETITIONER'S RESPONSE IN OPPOSITION TO
CITIZENS' MOTION TO DISMISS

Petitioner, Florida Cities Water Company (FCWC), pursuant to Fla. Admin. Code R. 28-106.204, hereby files its Response in Opposition to Citizens' Motion to Dismiss, filed by Intervenor Office of Public Counsel (OPC), and as grounds states:

1. FCWC filed its Petition for Limited Proceeding (Petition) in this docket on December 29, 1997. The purpose of the Petition is to seek Commission approval to recover a portion of FCWC's legal expenses incurred in its successful defense of a legal action brought by the United States relating to alleged violations of the Clean Water Act. A copy of FCWC's Petition is attached hereto and made a part hereof. The enforcement action commenced in 1992 and was not finished until after trial in March and April, 1996. The appeal of the Department of Justice and cross-appeal of FCWC was dismissed on agreement of the parties on August 6, 1997. It was not until the case was completed with the dismissal of the appeal that FCWC knew the complete litigation costs. Moreover, FCWC could not have known whether to file for recovery of legal expenses in a limited proceeding until the outcome of the case was known.

DOCUMENT NUMBER-DATE

08000 JUL 29 88

FPSC-RECORDS/REPORTING

Promptly, upon dismissal of the appeal in August, 1997, FCWC began preparing its petition and supporting testimony and evidence, all of which was filed with the Commission on December 29, 1997.

OPC's Motion to Dismiss should be denied or stricken because it was untimely filed

2. The OPC automatically gets a copy of each water and wastewater utility related petition or application filed with the Division of Records and Reporting at the Public Service Commission. The Division of Records and Reporting places a copy of each such petition filed in a special pick-up box, usually on the same day the petition is filed. The OPC has a runner who retrieves these documents for OPC on a daily basis. FCWC assumes this standard procedure was followed in this case.

3. On February 12, 1998, the Commission issued Order No. PSC-98-0277-PCO-WS, the Order Establishing Procedure in this docket, which provides that the procedure in this docket is governed by Ch. 120, Fla. Stat., and the rules of the Commission. See Ch. 25-22, Part IV, Decisions Determining Substantial Interests, and Ch. 28-106, F.A.C.

4. OPC filed its Notice of Intervention on March 20, 1998. It was not until July 10, 1998, that OPC filed its motion to dismiss FCWC's Petition in this docket for failure to state a claim upon which relief can be granted.

5. Fla. Admin. Code Rule 28-106.204(2) (replacing Rule 25-22.037(2)), states:

Unless otherwise provided by law, motions to dismiss the petition shall be filed no later than 20 days after service of the petition on the party. (Emphasis supplied).

There is no other rule, statute, or law that would allow OPC to file a motion to dismiss for failure to state a cause of action nearly seven months after filing of the Petition, five months after issuance of the procedural order and four months after intervening in the docket.

6. OPC's delay in filing its motion to dismiss has prejudiced FCWC. Since filing its Petition, FCWC has incurred considerable expenses responding to numerous discovery requests, including depositions of five FCWC witnesses, one OPC witness, and one Commission Staff witness. Staff and OPC have prepared and filed testimony. FCWC has prepared and filed rebuttal testimony. There has been a pre-hearing conference along with the filing of pre-hearing statements. There have been two customer hearings. The twenty day limit for filing a motion to dismiss has an obvious purpose. Pursuant to the rules of the Commission, OPC's motion to dismiss should be denied or stricken as untimely.

7. The Commission requires parties to comply with the filing requirements of its rules. E.g. In re: Complaint of Tahitian Gardens Condominium Assoc., Inc., Against Aloha Utilities etc., Docket No. 97192-WS, "Order Granting, in part, Motion for Extension of Time," 97 FPSC 10:188 (requiring adherence to the 12 day time for filing a response to a motion to dismiss or strike pursuant to

Rules 25-22.037(2) and 25-22.028(4), F.A.C.); and In Re: Joint Petition of Citrus County et. al., Docket No. 930647-WS, "Order Dismissing Joint Petition," 93 FPSC 9:659 (Where the utility timely filed a motion to dismiss a petition, this Commission struck the petitioners' response to the motion to dismiss as untimely pursuant to Rule 25-22.037(2), F.A.C.). Likewise, OPC's motion to dismiss is subject to Rule 28-106.204, and must be denied or stricken as untimely.

8. The OPC's motion to dismiss must be stricken because OPC has failed to offer any proof of mistake, inadvertence, or excusable neglect on its part which could justify its failure to file its motion within 20 days of its receipt of the Petition. See Hamilton County Bd. of County Comm'rs v. State of Florida, Dept. of Env'tl. Regulation, 537 So. 2d 1378 (Fla. 1st DCA 1991).

OPC's motion should be denied because the grounds alleged do not support a motion to dismiss

9. OPC's motion to dismiss for failure to state a claim upon which relief can be granted has two grounds: 1) that FCWC's Petition fails to allege that any expenses FCWC has or is incurring places the utility's earnings outside the last authorized range of rate of return; and 2) that the Petition seeks retroactive ratemaking. Neither of these grounds supports a motion to dismiss for failure to state a cause of action, but rather, argue the merits of the case. Citizens' Motion to Dismiss should be denied.

10. This Commission recognizes that "[t]he function of a

motion to dismiss is to raise as a question of law the sufficiency of facts alleged to state a cause of action." Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). See also, Holland v. Anheuser Busch, Inc., 643 So. 2d 621 (Fla. 2nd DCA 1994) (stating that it is improper to consider information extrinsic of the complaint). When considering a motion to dismiss, it must be assumed that all allegations in the petition are true and all reasonable inferences must be drawn in favor of the petitioner. See Abruzzo v. Haller, 603 So. 2d 1338 (Fla 1st DCA 1992). The facts alleged by FCWC state a proper request for relief from the Commission pursuant to § 367.0822, Fla. Stat., the limited proceeding statute.

1. OPC's argument that FCWC has failed to allege underearnings is not a proper ground for a motion to dismiss, and is contrary to law.

11. OPC's argument that FCWC's Petition for Limited Proceeding should be dismissed for failure to state a cause of action because FCWC has not alleged earnings outside the last authorized range of rate of return, should be denied because such a showing is not required by the limited proceeding statute, § 367.0822, Fla. Stat., and defeats the plain intent of that statute. Section 367.0822(1) states, in part:

Upon petition. . . the commission may conduct limited proceedings to consider, and act upon, any matter within its jurisdiction, including any matter the resolution of which requires a utility to adjust its rates. . . . However, unless the issue of rate of return is specifically addressed in the limited proceeding, the

commission shall not adjust rates if the effect of the adjustment would be to change the last authorized rate of return.

FCWC's Petition is in compliance with § 367.0822. There is no requirement in § 367.0822 that FCWC must allege that the legal expenses FCWC has incurred which are at issue in this docket places its earnings outside the last authorized range of rate of return.

12. Commission orders support FCWC's position. In a pass-through petition filed with the Commission, In Re: Response to Commission order to show cause by Hudson Utilities, Inc. d/b/a Hudson Bay Company in Pasco County, Docket No. 961417-SU, Order No. PSC-97-0458-FOF-SU, the Commission stated:

We also believe that we may address such decreases in a limited proceeding pursuant to Section 367.0822(1), Florida Statutes. Section 367.0822(1), Florida Statutes, specifically allows the Commission on its own motion to require a rate adjustment if a matter is within its jurisdiction. . . . Furthermore, Section 367.0822, Florida Statutes, provides that if the issue of rate of return is not specifically addressed in the limited proceeding, we may adjust rates so long as the adjustment does not effect a change in the utility's last authorized rate of return. Pass-through increases and decreases have no effect on a utility's earnings because the change in revenue equals the change in expense. [Emphasis added].

97 FPSC 4:507. The same reasoning applies to FCWC's Petition for Limited Proceeding. FCWC proposes in this case that it be allowed a temporary surcharge to recover extraordinary non-recurring costs. FCWC does not propose to increase its rates. OPC contends that § 367.0822, Fla. Stat., prohibits an adjustment in rates if the

effect would be to change the last rate of return. FCWC is not proposing a change in rates that will effect its rate of return; a fact which must be taken as true for purposes of a motion to dismiss. It is proposing a separate distinct temporary charge, as allowed by § 367.081(1). OPC's analysis is not relevant to FCWC's proposal in this proceeding.

13. Furthermore, the acceptance of OPC's position by the Commission would place an impossible burden on FCWC. OPC's position would mean that during every year from 1992 through 1998 FCWC should have filed an underearning rate case to recover the DOJ related litigation expenses. This would be an absurd result and undoubtably the Commission would have required FCWC to defer the expenses until the court's decision on the merits was rendered and the actual amount of litigation expenses was known. It is a basic tenet of statutory construction that statutes will not be interpreted so as to yield an absurd result. Dorsey v. State, 402 So. 2d 1178 (Fla. 1981). FCWC had no way of predicting the amount of these litigation expenses. The fact is that the expenses were non-recurring extraordinary expenses and may not have been allowed as a basis for increasing rates in 1992-1998. For these reasons, FCWC has proposed that, now that the total amount of the expense is known, the recovery should be by temporary surcharge. With recovery by surcharge the question of under or over earnings remains separate. If FCWC is over-earning in one division, the

Commission might consider a reduction of rates. If a division is under-earning the FCWC might consider seeking approval to increase rates. In either event the surcharge would remain the same.

14. Additionally, the Commission is aware that, like other utilities, FCWC files an annual report which shows its rate base and rate of return. FCWC's experience is that if the Commission believes that over-earning has occurred, the Commission promptly enters an order subjecting such over-earnings to refund. It must be remembered that there has been no determination by the Commission that the litigation expenses in this docket have been or should have been included as expenses to be recovered in FCWC's rates.

15. The cases cited by OPC in its motion to dismiss do not support the conclusion that proof of a utility's earning outside its last authorized rate of return is a condition precedent to seeking a surcharge pursuant to § 367.0822, Florida Statutes. None of the commission orders or court cases cited address § 367.0822, and there is no broad and sweeping language which would support OPC's contention.

2. OPC's argument that granting the relief requested in FCWC's Petition would result in retroactive ratemaking is not a proper ground for a motion to dismiss, and is contrary to law.

16. OPC's motion to dismiss for failure to state a cause of action on the ground that FCWC's request would result in retroactive ratemaking should be denied for several reasons.

Whether or not a charge would constitute retroactive ratemaking again goes to the merits of the case. It has been raised by OPC as an issue in the prehearing order, and has been addressed by the parties' testimony. FCWC has offered testimony supporting its position. OPC has offered contradicting testimony. The Commission will decide this issue based on the hearing record. It is not an issue to be decided as a matter of law. As an issue in this case, retroactive ratemaking cannot properly be framed as a reason to dismiss based on failure to state a cause of action.

17. OPC contends that the extraordinary non-recurring legal expenses may have already been recovered through existing rates and that the allowance of the surcharge would result in double recovery. This is not a proper ground for a motion to dismiss, but goes to the merits of the case. OPC in moving to dismiss FCWC's petition is deemed to necessarily admit the truth of all facts alleged in the petition as well as all reasonable inferences and conclusions arising from such facts which are favorable to FCWC. Weaver v. Leon County Classroom Teachers Assn., 680 So. 2d 478 (Fla. 1st DCA 1996); Kest v. Nathanson, 216 So.2d 233 (Fla. 4th DCA 1968) (question of sufficiency of evidence which petition will be likely to produce on merits is wholly irrelevant and immaterial to motion to dismiss). OPC therefore, for purposes of its motion to dismiss, must be deemed to admit FCWC's contention that it has not previously collected the legal expenses at issue.

18. OPC argues: "that a utility may not recover in new rates expenses for past consumption." (Emphasis supplied). FCWC's proposal for the recovery of extraordinary non-recurring expenses is not based on consumption. FCWC has offered testimony that the threatened civil penalty of \$104,000,000, affected the whole of FCWC and its customers. Consumption was not a factor. These facts must be taken as true for the purposes of a motion to dismiss.

19. The Florida Supreme Court has already held that a surcharge for recovery of costs expended is not retroactive ratemaking; that such a case is not one where a new rate is requested and then applied retroactively. GTE Florida Inc. v. Clark, 668 So. 2d 971, 973 (Fla. 1996). Likewise, in this proceeding, FCWC has not had the opportunity to recover the expenses that are included in FCWC's proposed surcharge. The GTE Court clearly approved the use of a surcharge as a method to recover expenses. When the Commission implemented the Court's GTE mandate, the Commission approved a surcharge for recovery of the expenses without reference to the affect that the recovered revenue would have on GTE's rate of return during the period of recovery. Order No. PSC-96-0667-FOF-TL and Order No. PSC-96-1266-FOF-TL. FCWC is requesting that it be allowed to offer proof to the Commission that the expenses it seeks to recover were prudently incurred, reasonable, and should be recovered through a temporary surcharge as it proposes. FCWC will offer this evidence and

testimony at hearing.

20. OPC's reliance upon In Re: Application for a rate increase in Duval County by Ortega Utility, Docket No. 940847-WS, 95 FPSC 11:247, has no application in this proceeding. First, FCWC is not basing its proposed surcharge on consumption. Second, neither are the expenses FCWC seeks to recover related to consumption. Third, Ortega was seeking recovery for ordinary measurable period expenses that caused losses in those periods. A "loss" differs from an expense in that losses relate to earnings levels rather than explicit costs. FCWC is seeking recovery of extraordinary costs imposed in earlier periods; costs that were neither predictable nor subject to estimation at the time incurred. It is clear that under the conditions confronting FCWC, the costs could not have been determined, much less recovered in rates during the periods in which the expenditures were made. Delayed recovery is the only mechanism by which FCWC may be made whole for the litigation costs. Finally, even though paid in earlier periods, the benefits of the litigation costs are not applicable solely, or even primarily, to the periods in which the expenditures were made. Those benefits will continue over a long period of time. These contentions must be taken as true for purposes of OPC's motion to dismiss.

21. Although the merits of the case should not be addressed in a motion to dismiss, FCWC notes that the Commission has

traditionally approved the recovery of legal expenses incurred in defense of litigation. E.g., In re: Application for a Rate Increase in Lee County by Lehigh Utilities, Inc., Docket No. 911188-WS, Order No. PSC-93-0301-FOF-WS, 93 F.P.S.C. 2:775 (legal expenses incurred for defending fines from DEP and EPA are allowable expenses); In re: Application for Rate Increase in Duval, Nassau, and St. Johns Counties by United Water of Florida, Inc., Docket No. 960451-WS; Order No. PSC-97-0618-FOF-WS, 97 F.P.S.C. 5:641 (legal expenses incurred for defense of DEP and EPA fines are allowable expenses); and In re: Petition of Florida Power Corporation etc., Docket No. 74061-EU, Order No. 6094 (Legal fees incurred by Florida Power Corp. in connection with antitrust litigation were normalized over a four-year period, where such expenses were incurred during the period 1970-1973 and were nonrecurring extraordinary expenses).

22. OPC argues that FCWC's Petition should be dismissed, including the rate case expense portion. Even were the Commission to dismiss FCWC's Petition, FCWC would be entitled to rate case expenses because the filing of FCWC's Petition for Limited Proceeding is prudent and reasonable.

23. Even if the Commission was inclined to grant OPC's motion, Fla. Admin. Code R. 28-106.201(4), requires that dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect,


unless it conclusively appears from the face of the petition that the defect cannot be cured. Fla. Admin. Code R. 28-106.201(5), requires the agency to state a deadline for filing an amended petition.

Wherefore, Florida Cities Water Company hereby requests that the Commission:

1. Strike Citizens' Motion to Dismiss as untimely, or alternatively;
2. Deny Citizens' Motion to Dismiss as without merit; or
3. Any other relief the Commission may deem appropriate.

Dated this 29th day of July, 1998.

Respectfully submitted,

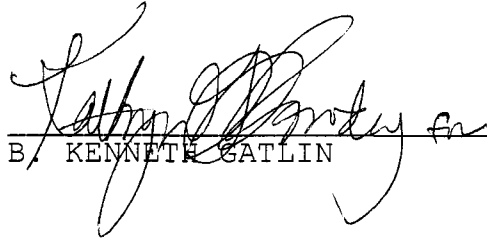


KATHRYN G.W. COWDERY
Fla. Bar #0363995
B. KENNETH GATLIN
Fla. Bar #0027966
Gatlin, Schiefelbein & Cowdery
3301 Thomasville Road, Suite 300
Tallahassee, Florida 32312
(850) 385-9996

Attorneys for
FLORIDA CITIES WATER COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Rosanne Gervasi, Division of Legal Services, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850 and to Harold McLean, Esq., Office of Public Counsel, c/o The Florida Legislature, 111 W. Madison Street, Room 812, Tallahassee, FL 32399-1400, on this 29th day of July, 1998.


B. KENNETH GATLIN