

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Florida  
Cities Water Company for limited  
proceeding to recover  
environmental litigation costs  
for North and South Ft. Myers  
Divisions in Lee County and  
Barefoot Bay Division in Brevard  
County.

DOCKET NO. 971663-WS  
ORDER NO. PSC-98-1046-PHO-WS  
ISSUED: August 3, 1998

Pursuant to Notice, and in accordance with Rule 28-106.209, Florida Administrative Code, a Prehearing Conference was held on July 20, 1998, in Tallahassee, Florida, before Commissioner E. Leon Jacobs, as Prehearing Officer.

APPEARANCES:

B. KENNETH GATLIN, ESQUIRE, Gatlin, Schiefelbein & Cowdery, P.A., 3301 Thomasville Road, Suite 300, Tallahassee, Florida, 32312.  
On behalf of Florida Cities Water Company.

HAROLD MCLEAN, ESQUIRE, Associate Public Counsel, Office of Public Counsel, c/o The Florida Legislature, 111 W. Madison Street, Room 812, Tallahassee, Florida, 32399-1400.  
On behalf of the Citizens of the State of Florida.

ROSANNE GERVASI and TIM VACCARO, ESQUIRES, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida, 32399-0850  
On behalf of the Commission Staff.

**PREHEARING ORDER**

I. CONDUCT OF PROCEEDINGS

Pursuant to Rule 28-106.211, Florida Administrative Code, this Order is issued to prevent delay and to promote the just, speedy, and inexpensive determination of all aspects of the case.

DOCUMENT NUMBER-DATE

08112 AUG-38

483

FPSC-RECORDS/REPORTING

## II. CASE BACKGROUND

Florida Cities Water Company (FCWC or utility) is a Class A water and wastewater utility which operates under the Commission's jurisdiction in Lee and Brevard Counties. FCWC also operates as a water and wastewater utility in Collier, Sarasota, and Hillsborough Counties, which are not subject to the jurisdiction of this Commission.

On December 29, 1997, the utility filed a petition for limited proceeding pursuant to Section 367.0822, Florida Statutes, seeking approval to recover certain legal expenses incurred in its defense of a legal action brought by the United States relating to violations of the Clean Water Act (CWA). Recovery is sought through a monthly customer surcharge, applicable to the utility's water and wastewater customers in South Ft. Myers, North Ft. Myers (Lee County) and Barefoot Bay (Brevard County). The utility states that upon approval of a surcharge as sought in this proceeding, it will seek approval by Collier, Hillsborough, and Sarasota Counties of a surcharge to be applicable to its customers in those counties, as well. On March 20, 1998, the Office of Public Counsel (OPC) filed notice of its intervention in this proceeding. Its intervention was acknowledged by the Commission by Order No. PSC-98-0430-PCO-WS, issued March 26, 1998. This case is scheduled for an August 12-14, 1998, administrative hearing.

## III. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

A. Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending a formal ruling on such request by the Commission, or upon the return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been used in the proceeding, it shall be returned expeditiously to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of the proceeding, it shall be returned to the person providing the information within the time periods set forth in Section 367.156, Florida Statutes.

B. It is the policy of the Florida Public Service Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 367.156, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding.

In the event it becomes necessary to use confidential information during the hearing, the following procedures will be observed:

- 1) Any party wishing to use any proprietary confidential business information, as that term is defined in Section 367.156, Florida Statutes, shall notify the Prehearing Officer and all parties of record by the time of the Prehearing Conference, or if not known at that time, no later than seven (7) days prior to the beginning of the hearing. The notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute.
- 2) Failure of any party to comply with 1) above shall be grounds to deny the party the opportunity to present evidence which is proprietary confidential business information.
- 3) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the Court Reporter, in envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.
- 4) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information. Therefore, confidential information should be presented by written exhibit when reasonably possible to do so.

- 5) At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Division of Records and Reporting's confidential files.

#### IV. POST-HEARING PROCEDURES

Each party shall file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. If a party fails to file a post-hearing statement, that party shall have waived all issues and may be dismissed from the proceeding.

Pursuant to Rule 28-106.215, Florida Administrative Code, a party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 40 pages, and shall be filed at the same time.

#### V. PREFILED TESTIMONY AND EXHIBITS; WITNESSES

Testimony of all witnesses to be sponsored by the parties and Staff has been prefiled. All testimony which has been prefiled in this case will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and associated exhibits. All testimony remains subject to appropriate objections. Each witness will have the opportunity to orally summarize his or her testimony at the time he or she takes the stand. Upon insertion of a witness' testimony, exhibits appended thereto may be marked for identification. After all parties and Staff have had the opportunity to object and cross-examine, the exhibit may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

Witnesses are reminded that, on cross-examination, responses to questions calling for a simple yes or no answer shall be so

answered first, after which the witness may explain his or her answer.

The Commission frequently administers the testimonial oath to more than one witness at a time. Therefore, when a witness takes the stand to testify, the attorney calling the witness is directed to ask the witness to affirm whether he or she has been sworn.

VI. ORDER OF WITNESSES

<u>Witness</u>	<u>Proffered By</u>	<u>Issues #</u>
<u>Direct</u>		
Gerald S. Allen, President	FCWC	3, 6, 13, 14
Gary H. Baise, Attorney	FCWC	3, 6, 13,
L. Gray Geddie, Jr., Attorney	FCWC	5
Michael Acosta, Vice President Engineering & Operations	FCWC	3
Michael E. Murphy, Vice President Chief Financial Officer	FCWC	3, 9, 13, 14
John D. McClellan, Consultant	FCWC	1, 2, 3, 9, 10, 14, 20, 21
*Dr. Abdul B. Ahmadi, DEP Program Administrator of Water Facilities	FCWC	
**Hugh Larkin, Jr.	OPC	1, 2, 12
Patricia W. Merchant	Staff	14, 16
***Sarah H. Moniz	Staff	14

- \* Dr. Ahmadi will be called at a time certain to be determined at a later date.
- \*\* Mr. Larkin will be called to testify at 1:00 p.m. on August 13, 1998.
- \*\*\* Cross-examination of this witness has been waived by the parties.

<u>Witness</u>	<u>Proffered By</u>	<u>Issues #</u>
<u>Rebuttal</u>		
Gerald S. Allen, President	FCWC	3, 6, 9, 13, 14
Gary H. Baise, Attorney	FCWC	3, 6, 13
Michael Acosta, Vice President Engineering & Operations	FCWC	3
John D. McClellan, Consultant	FCWC	1, 2, 3, 9, 10, 14, 20, 21
Michael E. Murphy, Vice President Chief Financial Officer	FCWC	3, 9, 13, 14

#### VII. BASIC POSITIONS

**FCWC:** FCWC properly and prudently defended the legal action brought by the United States Department of Justice, on behalf of the Environmental Protection Agency, and reasonably and prudently incurred litigation expenses. The amount of the litigation expenses sought to be recovered in this proceeding is reasonable. The proper method for recovery of these expenses is by a surcharge, as proposed by FCWC. The expenses incurred by FCWC, in presenting this case to the Commission, are fair and reasonable and should be recovered by FCWC as a part of the surcharge as proposed by FCWC.

**OPC:** FCWC's petition is fatally flawed because it seeks to recover in future rates expenses associated with prior consumption. In addition:

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 inquiry eventually 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.

**STAFF:** Staff's positions are preliminary and based on materials filed by the parties and on discovery. The preliminary positions are offered to assist the parties in preparing for the hearing. Staff's final positions will be based upon all the evidence in the record and may differ from the preliminary positions. Provided the utility's request does not constitute retroactive ratemaking, and if the utility can show that the legal fees incurred were prudent, sufficiently documented, and benefitted the customers by maintaining environmental compliance or minimized or avoided increased plant or operational costs, then a rate increase may be warranted.

#### 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

ORDER NO. PSC-98-1046-PHO-WS  
DOCKET NO. 971663-WS  
PAGE 9

neglected or foregone from prior periods. The Commission has consistently ruled against retroactive ratemaking. (Larkin)

**STAFF**: Yes.

**ISSUE 2**: Is there any requirement that this utility should have obtained an accounting order prior to filing this petition?

**POSITIONS**

**FCWC**: No. (McClellan)

**OPC**: Yes. (Larkin)

**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?

**POSITIONS**

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

**OPC**: 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)

**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.

ORDER NO. PSC-98-1046-PHO-WS  
DOCKET NO. 971663-WS  
PAGE 10

**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:** No position.

**STAFF:** No position pending further development of the record.

**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.

ORDER NO. PSC-98-1046-PHO-WS  
DOCKET NO. 971663-WS  
PAGE 11

**ISSUE 7:** Stricken.

**ISSUE 8:** Stricken.

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

ORDER NO. PSC-98-1046-PHO-WS  
DOCKET NO. 971663-WS  
PAGE 12

**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 a surcharge, and if so, how much?

**POSITIONS**

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

ORDER NO. PSC-98-1046-PHO-WS  
DOCKET NO. 971663-WS  
PAGE 13

**OPC:** 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)

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

**ISSUE 13:** Did 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, Murphy, McClellan)

**OPC:** 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.

**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,

ORDER NO. PSC-98-1046-PHO-WS  
DOCKET NO. 971663-WS  
PAGE 14

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:** 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.

**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 position.

**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)

ORDER NO. PSC-98-1046-PHO-WS  
DOCKET NO. 971663-WS  
PAGE 15

**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:** No surcharge should be approved.

**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:** 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.

**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**

<b><u>FCWC:</u></b>	<b><u>Meter Size</u></b>	<b><u>Monthly Surcharge Rate by Meter Size</u></b>
	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

ORDER NO. PSC-98-1046-PHO-WS  
DOCKET NO. 971663-WS  
PAGE 16

**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:** No position.

**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. The allowed rate of return on rate base is not an issue in this case. The allowed rate of return will be determined in a rate case. The legal expenses incurred by FCWC were expensed "below the line" meaning that the expenses were not included in operating income. Therefore, no matter what accounting treatment is allowed by the Commission, the recovery of the legal expense through the surcharge should not affect net operating income. It is requested that the total legal expenses to be recovered be recorded as a regulatory asset and included in rate base. This regulatory asset would then be amortized over a ten year period. As the surcharge is collected it would be recorded as revenue which would be offset by the amortization of the regulatory asset. Only the unamortized regulatory asset would remain in rate base and would allow for a rate of return in future rate case proceedings. (McClellan)

**OPC:** No. Since the Citizens oppose the recovery of any of the litigation expense as a legitimate expense chargeable to

ORDER NO. PSC-98-1046-PHO-WS  
DOCKET NO. 971663-WS  
PAGE 17

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. If the utility had wanted to recover a return on these litigation costs in this or in any future proceeding, it should have been requested in this case, and it was not. Before the Commission makes its decision in this docket, it should be aware of the total revenue impact associated with the recovery of the litigation costs.

#### LEGAL ISSUES

**ISSUE 22:** Proposed stipulation.

**ISSUE 23:** 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:** Staff has not had sufficient time to formulate a position on this issue. Staff will attempt to formulate a position prior to the issuance of the Prehearing Order.

IX. EXHIBIT LIST

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
<u>Direct</u>			
Gerald S. Allen	FCWC	(GSA-1)	Professional Resume: Gerald S. Allen
"	FCWC	(GSA-2)	Complaint: United States v. Florida Cities Water Company (FCWC), U.S. District Court, Middle District of Florida, C a s e N o . 93-281-CIV-FTM-21, 10/1/93.
"	FCWC	(GSA-3)	FCWC's Answer to Complaint: United States v. FCWC, U.S. District Court, Middle District of Florida, C a s e N o . 93-281-CIV-FTM-21, 11/22/93.
"	FCWC	(GSA-4)	Letter: Daniel S. Jacobs, Trial Attorney, U.S. Dept. of Justice (USDOJ), to Lee A. DeHihns, Esq., Alston & Bird, Counsel for FCWC, offering to settle litigation for \$5,000,000, 12/9/92.
"	FCWC	(GSA-5)	Memorandum: Gerald S. Allen to Files memorializing summary of meeting between FCWC and USDOJ/U.S. Environmental Protection Agency (USEPA), 12/11/92.

"	FCWC	(GSA-6)	Letter: Lee A. DeHihns, Esq., Alston & Bird, FCWC counsel, to Robert B. Gordon, Avatar Utilities Inc. outlining settlement issues, 12/18/92.
"	FCWC	(GSA-7)	Amended Complaint: United States v. FCWC & Avatar Holdings Inc., U.S. District Court, Case No. 93-2810-CIV-FTM-21, 3/30/95.
"	FCWC	(GSA-8)	Letter: FCWC (French) to Florida Department of Environmental Regulation (DeGrove) transmitting study report pertaining to discharges to Sweetwater Ck., 6/19/89.
"	FCWC	(GSA-9)	Agreement: Professional Engineering Services, FCWC & Dyer, Riddle, Mills & Precourt, Inc. for providing services in connection with the design of a new wastewater treatment plant (WWTP) at Carrollwood, 4/11/89.
"	FCWC	(GSA-10)	Administrative Order: USEPA No. 90-100(wKS) pertaining to WWTP at Carrollwood, 9/27/90.
"	FCWC	(GSA-11)	Consent Agreement and Order Assessing Administrative Penalties: USEPA Docket No. 90-542, pertaining

to WWTP at Carrollwood,  
4/19/91.

" FCWC (GSA-12) Agreement: Hillsborough  
County/FCWC providing  
for the connection of  
the Carrollwood  
wastewater system to the  
County system and  
wastewater treatment  
services, 6/5/91.

" FCWC (GSA-13) Orders: Florida Public  
Service Commission  
(Docket No. 951258-WS),  
Nos.:

" FCWC (GSA-13A) PSC-96-1147-FOF-WS  
issued 9/12/96;

" FCWC (GSA-13B) PSC-97-0223-FOF-WS  
issued 2/25/97;

" FCWC (GSA-13C) PSC-97-0516-FOF-WS  
issued 5/5/97.

" FCWC (GSA-14) Consent Order: FDEP and  
FCWC, OGC Case No.  
87-0153, pertaining to  
Barefoot Bay WWTP,  
10/13/88.

" FCWC (GSA-15) Letter: FDEP (Garfein)  
to FCWC (Overton)  
pertaining to the  
National Pollution  
Discharge Elimination  
System (NPDES) permit  
for Barefoot Bay,  
6/6/95.

" FCWC (GSA-16) Permit: Florida Domestic  
Wastewater Facility  
Permit for Barefoot Bay

WWTP (Facility I.D. No. FL0042293), 9/5/97.

" FCWC (GSA-17) Letter: USEPA (Childress) to FCWC (French) acknowledging receipt of NPDES renewal application for Barefoot Bay WWTP, 3/23/90.

" FCWC (GSA-18) Letter: FCWC (French) to USEPA transmitting application for renewal of NPDES Permit for Barefoot Bay WWTP, 6/8/90.

" FCWC (GSA-19) Administrative Order: USEPA No. 90-106 pertaining to Barefoot Bay WWTP, 9/26/90.

" FCWC (GSA-20) Memorandum: Gerald S. Allen to Files memorializing show cause hearing with USEPA pertaining to Barefoot Bay, 8/14/91.

" FCWC (GSA-21) Letter: FCWC (Bradtmiller) to USEPA (Herwig) pertaining to Barefoot Bay WWTP, 8/23/91.

" FCWC (GSA-22) Permit: USEPA NPDES Permit No. FL004293 for Barefoot WWTP, 9/16/91.

" FCWC (GSA-23) Letter, Administrative Complaint & Consent Agreement & Order Assessing Administrative Penalties: USEPA (Cunningham) to FCWC

ORDER NO. PSC-98-1046-PHO-WS  
DOCKET NO. 971663-WS  
PAGE 22

(Bradt Miller) pertaining  
to Barefoot Bay WWTP,  
D o c k e t N o .  
CWA-IV-91-538, 9/25/91.

"	FCWC	(GSA-24)	Judgement & Memorandum Order: U.S. District Court, Middle District of Florida, Case No. 93-281-CIV-FTM-21, 8/20/96.
Gary H. Baise	FCWC	(GHB-1)	Player's List.
"	FCWC	(GHB-2)	TIME LINE, U.S. v. Florida Cities Water Company.
"	FCWC	(GHB-3)	Resume of Gary H. Baise
"	FCWC	(GHB-4)	List of Gary H. Baise's reported cases.
"	FCWC	(GHB-5)	Court's Standard Interrogatories.
"	FCWC	(GHB-6)	United States' Answer to Court's Standard Interrogatories.
"	FCWC	(GHB-7)	Defendant Florida Cities Water Company's Answers to Court's Standard Interrogatories.
"	FCWC	(GHB-8)	Motion for Extension of Time in Which to File Motion to Strike Affirmative Defenses.
"	FCWC	(GHB-9)	United States' Motion to Strike Affirmative Defenses.

"	FCWC	(GHB-10)	Memorandum in Support of United States' Motion to Strike Affirmative Defenses.
"	FCWC	(GHB-11)	United States' First Request for Production of Documents.
"	FCWC	(GHB-12)	Deposition digest of Julie Karleskint Deposition.
"	FCWC	(GHB-13)	Defendant's Motion for Protective Order.
"	FCWC	(GHB-14)	Order re: Florida Cities Water Company's Motion for Protective Order (dated April 18, 1994).
"	FCWC	(GHB-15)	Letter to Mr. Jacobs from Mr. Scroggin (dated April 19, 1994).
"	FCWC	(GHB-16)	Letter to Mr. Scroggin from Mr. Jacobs (dated April 20, 1994).
"	FCWC	(GHB-17)	Memorandum in Support of United States' Motion for an Order Allowing Ex-Parte Contacts with Former Employees.
"	FCWC	(GHB-18)	Memorandum in Opposition to Plaintiff's Motion for an Order Allowing Ex-Parte Contacts with Former Employees.
"	FCWC	(GHB-19)	Motion and Memorandum for Permission to File Reply Memorandum in Support of United

States' Motion for an Order Allowing Ex-Parte Contacts with Former Employees.

" FCWC (GHB-20) Order re: Defendant's Emergency Motion for Temporary Protective Order (dated Feb. 13, 1995).

" FCWC (GHB-21) Order re: Plaintiff's Motion for an order allowing ex-parte contacts (dated March 16, 1995).

" FCWC (GHB-22) Deposition digest of John Marlar deposition.

" FCWC (GHB-23) Deposition digest of Peter McGary deposition.

" FCWC (GHB-24) Defendant's Motion to Disqualify Counsel

" FCWC (GHB-25) Transcript of February 15, 1995 hearing before U.S. District Judge Swartz.

" FCWC (GHB-26) Order re: Motion to Allow Ex-Parte Contacts and Motion to Disqualify Counsel.

" FCWC (GHB-27) United States' Second Request for Production of Documents.

" FCWC (GHB-28) Deposition digest of Connie Kagey deposition.

ORDER NO. PSC-98-1046-PHO-WS  
DOCKET NO. 971663-WS  
PAGE 25

"	FCWC	(GHB-29)	Deposition digest of Bruce Barrett deposition.
"	FCWC	(GHB-30)	Defendant Florida Cities Water Company's Motion for Partial Summary Judgment and Request for Oral Argument.
"	FCWC	(GHB-31)	Deposition digest of Paul Bradtmiller deposition.
"	FCWC	(GHB-32)	Deposition digest of Johnnie Overton deposition.
"	FCWC	(GHB-33)	Deposition digest of Jack Tompkins deposition.
"	FCWC	(GHB-34)	Letter to Mr. Basie from Mr. Jacobs (dated Jan. 30, 1995)
"	FCWC	(GHB-35)	United States' Reply to Defendant's Emergency Motion for a Temporary Protective Order and Defendant's Request for Oral Argument in Connection with Defendant's Motion to Disqualify Counsel.
"	FCWC	(GHB-36)	United States v. Weitzenhoff, 35 F.3d 1275 (9th Cir. 1994).
"	FCWC	(GHB-37)	United States' First Set of Interrogatories to Defendant Florida Cities Water Company.

ORDER NO. PSC-98-1046-PHO-WS

DOCKET NO. 971663-WS

PAGE 26

"	FCWC	(GHB-38)	Defendant's Second Request for Production of Documents to Plaintiff United States of America.
"	FCWC	(GHB-39)	Defendant's Offer of Judgment.
"	FCWC	(GHB-40)	Defendant's Notice of Intention to Oppose Constructive Motion by United States for Leave to File Amended Complaint.
"	FCWC	(GHB-41)	Defendant's Memorandum in Partial Opposition to Plaintiff's Motion for Leave to Amend Complaint.
"	FCWC	(GHB-42)	Order re: United States' Revised Amended Complaint (dated April 26, 1995).
"	FCWC	(GHB-43)	Revised Amended Complaint.
"	FCWC	(GHB-44)	Defendant Florida Cities Water Company's Motion to Strike.
"	FCWC	(GHB-45)	United States' Motion for Reconsideration of Court's Order on Amendment of Complaint.
"	FCWC	(GHB-46)	Defendant Florida Cities Water Company's Answer to Revised Amended Complaint.

"	FCWC	(GHB-47)	United States' Opposition to Defendant Florida Cities Water Company's Motion to Strike.
"	FCWC	(GHB-48)	United States' Third Request for Production of Documents.
"	FCWC	(GHB-49)	Defendant's Motion for Partial Summary Judgment.
"	FCWC	(GHB-50)	United States' Opposition to Defendant Florida Cities Water Company's Motion for Partial Summary Judgment.
"	FCWC	(GHB-51)	Order Denying FCWC's Motion for Partial Summary Judgment.
"	FCWC	(GHB-52)	United States' Motion for Partial Summary Judgment (exhibits omitted).
"	FCWC	(GHB-53)	United States' Second Set of Interrogatories and First Request for Admissions.
"	FCWC	(GHB-54)	Research Memos.
"	FCWC	(GHB-55)	FCWC Motion for Partial Summary Judgment and Request for Oral Argument.
"	FCWC	(GHB-56)	Deposition Summaries.
"	FCWC	(GHB-57)	Deposition Summaries.

"	FCWC	(GHB-58)	FCWC's Fourth Request for Production of Documents and Third Request for Interrogatories.
"	FCWC	(GHB-59)	United States' Fifth Request for Production of Documents.
"	FCWC	(GHB-60)	FCWC's Notice of Dispositive Authority.
"	FCWC	(GHB-61)	Order re: Summary Judgment Motions.
"	FCWC	(GHB-62)	FCWC Exhibit List and Stipulations.
"	FCWC	(GHB-63)	DOJ Exhibits.
"	FCWC	(GHB-64)	Joint Pretrial Statements.
"	FCWC	(GHB-65)	United States' Motion for an Order Permitting Discovery of Defendant's Late-Named Witnesses.
"	FCWC	(GHB-66)	FCWC Memorandum in Opposition to Plaintiff's Motion for an Order Admitting Discovery of Defendant's Late-Named Witnesses and for Expedited Consideration.
"	FCWC	(GHB-67)	Order re: Discovery of Late-Named Witnesses.
"	FCWC	(GHB-68)	United States' Motion for Expedited Reconsideration of the Court's Ruling on Res

Judicata and in Reply to Avatar Holdings' Motion for Clarification of the Court's Order.

" FCWC (GHB-69) Order re: Motion for Reconsideration on Res Judicata and Motion for Clarification.

" FCWC (GHB-70) FCWC Proposed Findings of Fact and Conclusions of Law.

" FCWC (GHB-71) FCWC's Pretrial Brief.

" FCWC (GHB-72) Defendant's Joint Motion in Limine to Exclude the Testimony and Report of Eileen Zimmer

" FCWC (GHB-73) United States' Motion in Limine.

" FCWC (GHB-74) Defendant's Joint Motion in Limine to Exclude the Testimony and Report of Eileen Zimmer.

" FCWC (GHB-75) Berz Settlement Proposal.

" FCWC (GHB-76) Trail Transcript.

" FCWC (GHB-77) United States' Offer of Proof in Lieu of the Testimony of Witnesses who Plead the Fifth Amendment.

" FCWC (GHB-78) Defendants' Joint Memorandum of Law Addressing the Invocation of the Fifth Amendment.

"	FCWC	(GHB-79)	FCWC's Witness List.
"	FCWC	(GHB-80)	Plant Effluent Quality Report (Black & Veatch).
"	FCWC	(GHB-81)	FCWC Motion to Strike the Deposition Testimony of Jack Williams Tompkins.
"	FCWC	(GHB-82)	Parties' Proposals for Post-Trial Submissions.
"	FCWC	(GHB-83)	Order Regarding Fifth Amendment and Request Court Draw Inferences from Refusal to Testify.
"	FCWC	(GHB-84)	United States' Post-Trial Memorandum.
"	FCWC	(GHB-85)	United States' Post-Trial Proposed Findings of Fact and Conclusions of Law.
"	FCWC	(GHB-86)	FCWC Post-Trial Brief.
"	FCWC	(GHB-87)	FCWC Proposed Findings of Fact and Conclusions of Law.
"	FCWC	(GHB-88)	United States' Motion for Reconsideration on Adverse Inferences and Extension of Page Limits.
"	FCWC	(GHB-89)	FCWC Memorandum in Opposition to Motion for Reconsideration.
"	FCWC	(GHB-90)	Order Granting in Part and Denying in Part

M o t i o n        f o r  
Reconsideration.

"	FCWC	(GHB-91)	United States' Citation of Additional Authority.
"	FCWC	(GHB-92)	Defendants' Joint Response to Plaintiff's Citation of Additional Authority.
"	FCWC	(GHB-93)	Order Directing Parties to File Memorandums on Borough of Ridgeway.
"	FCWC	(GHB-94)	United States' Reply Memorandum in Support of Reinstatement of Res Judicata.
"	FCWC	(GHB-95)	Defendants' Joint Response to Memorandum Seeking Reinstatement of Res Judicata.
"	FCWC	(GHB-96)	Order Reaffirming Res Judicata Effects.
"	FCWC	(GHB-97)	Opinion.
"	FCWC	(GHB-98)	FCWC Verified Motion for Attorney Fees.
"	FCWC	(GHB-99)	FCWC Motion for Bill of Costs.
"	FCWC	(GHB-100)	United States' Memorandum in Opposition to Attorney Fees.
"	FCWC	(GHB-101)	Order Denying Attorney Fees.
"	FCWC	(GHB-102)	United States' Notice of Appeal.

"	FCWC	(GHB-103)	FCWC Notice of Cross Appeal.
"	FCWC	(GHB-104)	Order Granting Motion to Dismiss with Prejudice.
"	FCWC	(GHB-105)	Pleadings Table.
"	FCWC	(GHB-106)	Depositions Table.
"	FCWC	(GHB-107)	Correspondence re: Fees.
"	FCWC	(GHB-108)	Billing Chart.
"	FCWC	(GHB-109)	Cover Letter to Bills.
"	FCWC	(GHB-110)	Letter to Avatar on Fees.
L. Gray Geddie, Jr.	FCWC	(LGG-1)	FCWC Legal Fees and Services Paid to Law Firms.
Michael Acosta	FCWC	(MA-1)	NPDES Permit Renewal Application and Letter, 5/9/86.
"	FCWC	(MA-2)	Letter: EPA (Patrick) to FCWC (Reeves) tentative conclusion that NPDES permit should be denied, 7/22/86.
"	FCWC	(MA-3)	Permit: FDEP operating permit for WWE WWTP expiring 8/2/88, 8/2/83.
"	FCWC	(MA-4)	Letter: FDEP (Richardson) to EPA (Hyatt) regarding existence of wasteload allocation for WWE WWTP, 5/7/86.

"	FCWC	(MA-5)	Memorandum: Lehman to Reeves regarding meeting of 8/2/86 with FDEP after tentative denial by EPA of NPDES permit renewal, 8/10/86.
"	FCWC	(MA-6)	Letter: EPA (Barrett) to FCWC (Reeves) notification of denial of NPDES permit renewal.
"	FCWC	(MA-7)	NPDES Certification worksheet: FDEP to EPA.
"	FCWC	(MA-8)	Letter: EPA (Marlar) to FCWC (Reeves) transmitting Section 309 Order, 5/11/87.
"	FCWC	(MA-9)	Permit: NPDES Permit No. FL0030325 for Waterway Estates, 9/29/89.
Michael E. Murphy	FCWC	(MM-1)	Professional Resume: Michael Murphy.
"	FCWC	(MM-2)	Legal Expenses Schedule.
"	FCWC	(MM-3)	Rate Case Expense Schedule.
"	FCWC	(MM-4)	Rate Schedule.
Dr. Abdul B. Ahmadi	FCWC	(ABA-1)	Deposition transcript.
"	FCWC	(ABA-2)	Trial testimony transcript.
Hugh Larkin	OPC		Appendix 1 to testimony

Parties and Staff reserve the right to identify additional exhibits for the purpose of cross-examination.

X. PROPOSED STIPULATIONS

1. If a surcharge is approved, FCWC shall reduce its rates to remove the litigation costs when the recovery is complete.

2. If a surcharge is approved, FCWC shall file an annual statement of total revenues recovered through the surcharge at the time that it files its annual report.

3. If a surcharge is approved, it shall be listed as a separate item on the customers' bill, and shall be identified as an environmental litigation surcharge.

4. Both costs and attorneys' fees were denied by the Federal Court to FCWC.

5. The amount of litigation expenses incurred by FCWC totals \$3,826,210. While OPC does not join in this proposed stipulation, it will not contest it.

6. FCWC shall amortize rate case expense over ten years.

XI. PENDING MOTIONS

1. The Citizen's Motion to Dismiss, filed July 10, 1998.

XII. RULINGS

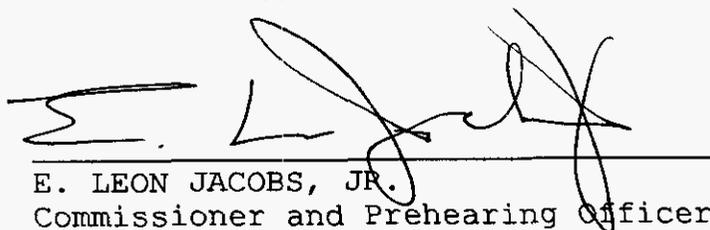
1. FCWC's Motion for Extension of Time to File Response to Citizen's Motion to Dismiss, filed July 17, 1998, is granted.

ORDER NO. PSC-98-1046-PHO-WS  
DOCKET NO. 971663-WS  
PAGE 35

It is therefore,

ORDERED by Commissioner E. Leon Jacobs, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

By ORDER of Commissioner E. Leon Jacobs, Jr. as Prehearing Officer, this 3rd day of August, 1998.



E. LEON JACOBS, JR.  
Commissioner and Prehearing Officer

( S E A L )

RG

ORDER NO. PSC-98-1046-PHO-WS  
DOCKET NO. 971663-WS  
PAGE 36

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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.