



# Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA 32399-0850

## -M-E-M-O-R-A-N-D-U-M-

**DATE:** MARCH 4, 1999

**TO:** DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

**FROM:** DIVISION OF WATER AND WASTEWATER (AUSTIN, MCROY) *[Handwritten initials]*  
DIVISION OF LEGAL SERVICES (JAEGER) *[Handwritten initials]*

**RE:** DOCKET NO. 950387-SU - APPLICATION FOR A RATE INCREASE FOR NORTH FT. MYERS DIVISION IN LEE COUNTY BY FLORIDA CITIES WATER COMPANY - LEE COUNTY DIVISION.

**AGENDA:** March 16, 1999 - REGULAR AGENDA - POST HEARING DECISION ON FINAL RATES - PARTICIPATION LIMITED TO COMMISSIONERS AND STAFF EXCEPT FOR ISSUES 3A, AND 10. PURSUANT TO RULE 25-22.0021, FLORIDA ADMINISTRATIVE CODE, ISSUES 3A AND 10 ARE NEW MATTERS RELATED TO BUT NOT ADDRESSED AT THE HEARING AND INTERESTED PERSONS MAY PARTICIPATE. ALSO, ISSUE 3A SHOULD BE ISSUED AS PROPOSED AGENCY ACTION.

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\WAW\WP\950387E.RCM

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CASE BACKGROUND

Florida Cities Water Company (FCWC or utility) is a Class A utility that has two wastewater service divisions in Ft. Myers, Florida: a northern division and a southern division. The North Ft. Myers wastewater system, the applicant in this proceeding, was serving about 2,559 customers at December 31, 1994. Because many multi-family units are master-metered, about 4,590 equivalent residential connections (ERCs) were actually being served. The utility serves an area that has been designated by the South Florida Water Management District (SFWMD) as a critical use area. Wastewater treatment is provided by a 1.0 MGD (million gallons per day) advanced wastewater treatment (AWT) facility, presently being expanded to 1.25 MGD. Effluent is disposed of by discharge to the Caloosahatchee River, and will soon be provided to a golf course in the service area.

On May 2, 1995, the utility filed an application for increased rates pursuant to Section 367.081, Florida Statutes. The petition did not satisfy the minimum filing requirements (MFRs) and submission of additional data was necessary. The missing information was received on May 19, 1995, which date was declared the official date of filing pursuant to Section 367.083, Florida Statutes. The utility's last rate case was finalized on July 1, 1992, by Order No. PSC-92-0594-FOF-SU, Docket No. 910756-SU. In 1994, the utility's rates were increased due to an index proceeding. The utility has asked the Commission to process this application under the proposed agency action (PAA) procedures identified in Section 367.081(8), Florida Statutes.

The utility did not request interim rates. Schedules in the filing indicate receipt of a 6.71 percent return on average investment in 1994. The utility's last allowed overall rate of return was 9.14 percent. The utility reported that rate indexing procedures helped it maintain a satisfactory rate of return. However, the utility now maintains that rate increases are needed to reflect added investments and expenses, including an expenditure of approximately \$1,600,000 in 1995 to increase the capacity of its wastewater plant from 1 MGD to 1.25 MGD. This construction project was scheduled to be completed prior to the close of 1995. The utility believes the magnitude of this investment justifies an end-of-period rate base determination.

The test year for this proceeding is the twelve-month period ending December 31, 1995. This period is based upon actual costs for the historical base year ended December 31, 1994, with applicable adjustments. During the base year, the utility's wastewater revenues were \$2,085,157, with a corresponding net operating income of \$474,319. The utility's proposed rates are designed to generate \$2,591,990 in annual revenues, reflecting a

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\$480,078 (22.73 percent) overall increase. The requested net operating income amount of \$763,108 will yield a 9.08% return on the projected \$8,404,278 rate base balance.

On November 2, 1995, the Commission issued Proposed Agency Action Order No. PSC-95-1360-FOF-SU. However, this order was timely protested by twelve customers. On December 1, 1995, the utility filed its notice of intent to implement rates (the PAA rates) pursuant to Section 367.081 (8), Florida Statutes. By Order No. PSC-96-0038-FOF-SU, issued January 10, 1996, the Commission acknowledged the implementation of PAA rates on an interim basis subject to refund. The PAA rates were effective December 13, 1995. Also, by Order No. PSC-96-0356-PCO-SU, issued March 13, 1996, the Commission acknowledged the intervention of the Office of the Public Counsel (OPC or Citizens). Pursuant to the above-noted protests and intervention by OPC, an administrative hearing was held on April 24-25, 1996.

Subsequent to this hearing, the Commission issued its Final Order, PSC-96-1133-FOF-SU, on September 10, 1996. However, on October 7, 1996, the utility filed its notice of administrative appeal of that Order. Pursuant to this appeal, the First District Court of Appeal (Court or First District), among other things, reversed the Commission's use of annual average daily flow (AADF) in the numerator of the used and useful equation. The First District said this was a departure from Commission policy which was not supported by competent substantial evidence (unsupported 'by expert testimony, documentary opinion, or other evidence appropriate to the nature of the issue involved').

Although the Court reversed the Commission on this issue, it went on to say that the Commission "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."

Based on this language, the Commission issued Order No. PSC-98-0509-PCO-SU on April 14, 1998. That Order, in compliance with the First District's remand, set the capacity of the wastewater treatment plant at 1.25 mgd, reopened the record for a limited purpose, and granted in part and denied in part the utility's request for consideration of additional rate case expense. Specifically, the Commission decided to reopen the record to take evidence on what flows should be used in the numerator of the used and useful equation when the Department of Environmental Protection (DEP) permits the wastewater treatment plant based on AADF. In addition to this issue, the Commission decided to take evidence on the issue of additional rate case expense associated with reopening the record and the non-legal rate case expense associated with the utility's successful appeal of Order No. PSC-96-1133-FOF-SU. No

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other issues were identified by Order No. PSC-98-0509-PCO-SU. Additional testimony and evidence was taken on those issues identified in Order No. PSC-98-0509-PCO-SU, at a second administrative hearing held December 8 and 9, 1998. Briefs were filed on January 8, 1999. This recommendation addresses those issues. In addition, Issue 3A addresses the used and useful for the reuse system. Issue 10 addresses FCWC's motion to make rates permanent, which was filed on January 26, 1999.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission ignore average daily flow in the peak month in determining used and useful plant to be included in rate base?

RECOMMENDATION: No. However, where the utility's wastewater treatment plant is permitted by DEP in terms of average annual daily flow, it is appropriate to compute the used and useful percentage utilizing flows expressed in the same unit. (MCROY)

POSITION OF PARTIES

FCWC: No.

OPC: No. The Commission should not ignore any legitimate aspect of plant capacity. However, where, as here, the utility's wastewater treatment plant is permitted in terms of average annual daily flow, it is appropriate to compute the used and useful percentage utilizing flows expressed in the same unites [sic].

STAFF ANALYSIS: All parties seem to agree that flows experienced by the wastewater treatment plant should be considered when determining the plant's used and useful percentage. However, the parties' method for applying the annual average daily flows (AADF), maximum month average daily flow (MMADF), or Three-Month Maximum Average Daily Flow (3MMADF) to determine the appropriate used and useful on a wastewater treatment plant differ drastically.

The utility believes that peak flows experienced by the wastewater treatment plant should be used in determining the wastewater treatment plant's used and useful percentage. Witness Acosta testified that a determination of used and useful must be concerned with the maximum flows the treatment plant may experience in order to allow for such an event. This is the only way to ensure that safe, adequate service is continuously provided. (TR 879) Witness Acosta further testified that when flows on a monthly basis exceed AADF, sufficient plant must be in place and available to receive and treat those flows above AADF. Witness Accosta also believes that the Commission's calculation using AADF in the numerator and denominator does not recognize, for rate making purposes, that additional necessary plant. (TR 1311)

In its proposed findings of facts 1 through 5 (accepted in part and rejected in part), the utility states that the plant must

be able to treat maximum flows and that it must be able to treat those flows above AADF when they occur. It then argues that if MMADF is not used in the used and useful calculation then the plant required to treat the peak flows would not be recognized for ratemaking purposes. Both OPC and staff agree that the utility has to be able to treat peak flows. However, in permitting the plant based on AADF, FDEP takes into account that there may be peak days, peak months, or peak 3 months greater than the AADF. FDEP would not permit based on AADF if that was not appropriate (TR 1004). For a beach community that received a significant influx of seasonal residents AADF would not be appropriate (TR 1060). However, in the case at hand, FDEP approved the utility's request to use AADF.

OPC agrees with the utility that the maximum month average daily flows (MMADF) should not be ignored. Witness Bidy testified that MMADF flows should not be ignored. Witness Bidy further stated that peak capacities of the plant and those facilities within the plant that handle the peak flows are included in the plant design. Those dollars needed to construct the necessary plant capacity to handle the peak flows are in the cost of the plant and therefore, in rate base. (TR 1290) OPC contends that matching of the numerator and denominator in the used and useful calculation does not ignore the peak flows and also provides the appropriate used and useful percentage for the wastewater treatment plant.

Staff considered both parties' positions carefully on this issue. Staff understands the concern of the utility in regards to making sure plant constructed to handle peak flows is included in rate base. Staff believes this was accomplished during the plant design. Witness Cummings testified that the plant capacity is 1.25 MGD based upon the average annual daily flow and the waste concentration associated with this flow. (TR 934) Witness Cummings further testified that based on their analysis of historical data it was Black and Veatch's professional opinion that a 1.3 MGD plant was the appropriate and necessary and economically sized plant to treat the flows, including peak flows and to properly treat the pollutant loading associated with those flows. (TR 934) Witness Cummings clearly states that peak flows based on historical data are taken into consideration in the plant design.

Staff agrees with OPC that matching the numerator and denominator in the used and useful calculation does not ignore the peak flows. Witness Crouch described the process of determining used and useful. Used and useful is determined by dividing the flows during the test year by the capacity of the treatment plant. (TR 1140) Witness Bidy provided several examples of the importance of matching like units in the used and useful equation;



Example 1 Wastewater Plant A:  
Plant Design & Permit Capacity = 1.0 MGD on MMADF basis  
or 0.8 MGD on AADF basis

Plant AADF = 0.7 MGD during the test year

Plant MMADF = 0.9 MGD during the test year

Then, Used and Useful% =  $0.7 \text{ MGD} / 0.8 \text{ MGD} = 87.5\%$   
or  $0.9 \text{ MGD} / 1.0 \text{ MGD} = 90\%$

Example 2 Wastewater Plant A:  
Plant Design & Permit Capacity = 1.0 MGD on AADF basis

Plant MMADF = 0.9 MGD during the test year

Then, Used and Useful% =  $0.9 \text{ MGD} / 1.0 \text{ MGD} = 90\%$

In Example 1, the procedure for determining the used and useful percentage was properly applied. The flows in either MMADF and AADF were divided by the capacity in the respective category. However, in Example 2, the flows in MMADF were divided by the plant capacity in AADF to produce an inappropriate use and useful percentage. Witness Bidy stated, this method of computing the used and useful percentage artificially inflates the results by using the MMADF value in the numerator rather than the AADF value which would obviously be much lower. (TR 1283-1284) These examples exclude any adjustments for margin reserve, excess inflow and infiltration, etc. Witness Crouch further describes the importance of matching the numerator and denominator in the used and useful calculation. The matching comes into play in that it is important to express the numerator and denominator in like terms. For instance, if the numerator is expressed on the basis of maximum month flow, it is imperative that the denominator be expressed on the same basis. (TR 1140) Staff believes that since the design capacity is 1.25 MGD and is based upon the annual average daily flow, it would be appropriate to express plant flow data in terms of annual average daily flow in determining the used and useful percentage.

Staff also agrees with witness Bidy when he testifies that peak capacities of the plant and those facilities within the plant that handle the peak flows are included in the plant design. Those dollars needed to construct the necessary plant capacity to handle the peak flows are in the cost of the plant and therefore, in rate base. (TR 1290) Based on the above, the Commission should not ignore peak flows but where the utility's wastewater treatment plant is permitted in terms of average annual daily flow, it is

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appropriate to compute the used and useful percentage utilizing flows expressed in the same units.

ISSUE 2: Does a change in the wording of the DEP permit application so that the permit and application now indicate the time frame for design capacity, i.e. annual average daily flow, maximum monthly average daily flow or three month average daily flow correspond to a real change in operating capacity?

RECOMMENDATION: No. A change in the wording of the DEP permit application so that the permit and application now indicate the time frame for design capacity does not correspond to a real change in operating capacity. (MCROY)

POSITION OF PARTIES

FCWC: No.

OPC: No. A given wastewater treatment plant can be described and/or permitted utilizing several parameters; that is, with the actual capacity held constant, that capacity might be described in average terms, peak terms, or some variant of peak or average terms. The selection of one of these descriptors of capacity dictates that the same be used for comparison with the load in used and useful calculations.

STAFF ANALYSIS: All parties agree that the change in the wording on the DEP permit application to indicate the basis for design capacity does not reflect a change in the operating capacity of a wastewater treatment plant. Witness Addison stated that around 1994, the DEP instituted a new policy of showing the design capacity of a wastewater treatment plant as that provided by the applicant. (TR 1076) Simply showing the design capacity time frame as provided by the applicant on the permit does not affect the capacity of the treatment plant. Whether the applicant chooses to use annual average daily flow (AADF), maximum month average daily flow (MMADF), or three-month maximum average daily flow (3MMADF) as the basis for determining the Plant Capacity, the capacity of the plant does not change. DEP Witness Young cleared up any confusion by testifying that the capacity is the capacity. (TR 1004)

ISSUE 3: Where the DEP permits the wastewater treatment plant based on annual average daily flows, what flows should be used in the numerator of the used and useful equation to calculate used and useful plant?

RECOMMENDATION: The flows that should be used in the numerator of the used and useful equation for this utility should be expressed in annual average daily flow (AADF) as DEP has permitted. This corresponds with the design capacity as determined by the First DCA as being 1.25 MGD annual average flow (AADF). The resultant flow and design capacity as applied in the used and useful equation yields a 79 percent used and useful percentage for this utility. (MCROY)

POSITION OF PARTIES

FCWC: Consistent with past Commission policy, the average daily flow in the peak or maximum month should be used. Whatever method is used, all investment in used and useful plant, including investment necessary to treat peak flows, must be considered used and useful and included in rate base.

OPC: Because the permitted capacity issued for FCWC's wastewater treatment plant (WWTP) is expressed in terms of annual average daily flows, the load presented to the WWTP must also be expressed in terms of annual average daily flows. Where the utility offers a statement of capacity which fails to include a time dimension, the customers should be given the benefit of the doubt: maximum, instantaneous capacity should be used in the denominator.

STAFF ANALYSIS: In Commission Order Number PSC-96-1133-FOF-SU, dated September 10, 1996, the Commission found the following used and useful percentages. The wastewater treatment plant was 65.9 percent used and useful with a plant capacity of 1.5 million gallons per day (MGD). The disposal system was 76.0 percent used and useful. Finally, the collection system was determined to be 100% used and useful. The utility appealed to the First District Court of Appeal. The First District Court of Appeal found the plant capacity to be 1.25 MGD, annual average daily flow (AADF). The Court directed the PSC to reexamine the record to determine the correct flows which should be compared with the plant capacity to determine the correct used and useful percentage for the wastewater treatment plant.

In order to determine what flows should be used in the numerator and the denominator it is important to understand the role of used and useful analysis in the rate making process. The calculation of used and useful percentages is a rate setting concept. Rate setting encompasses all aspects of utility

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operations, financial as well as physical. Historically, the Commission has established expense levels, revenues and utility investment based on a 12 month test period. (TR 1140) Rates are established to achieve a revenue target based upon a 12-month period. This accounts for fluctuations, daily, weekly or monthly, including peaks and valleys, in expenses, revenues and necessary investment. Thus, on average, a reasonably accurate determination of the utility's needs over a test year is achieved. (TR 1140)

Pursuant to Section 367.081, Florida Statutes, the utility is entitled to a fair return on that part of utility property that is used and useful in the public service. The Commission makes used and useful determinations to balance the interests of current customers, future customers and the utility, i.e., the public interest. In layman's terms, used and useful analysis tells the Commission what percentage of the utility's investment is necessary to provide service to current customers and stand ready to serve some additional customers. The Commission does not wish for current customers to fund the utility's return on investment related to serving all future customers but it must recognize the utility's obligation of readiness to serve future customers in a finite short term period. In calculating used and useful in this case the Commission has applied a formula which employs the use of the capacity of the wastewater treatment plant taken from the permit issued by the DEP in the denominator and the actual (annual) average daily flows for the test year in the numerator. (TR 1144)

The utility contends, through witness Accosta, that the Commission has historically used the MMADF, for the test year in question, plus the margin reserve flow equivalent divided by the design plant capacity in determining the used and useful percentage of a wastewater treatment plant. The utility believes that peak flows experienced by the wastewater treatment plant should be used in determining the wastewater treatment plant's used and useful percentage. Witness Acosta testified that a determination of used and useful must be concerned with the maximum flows the treatment plant may experience in order to allow for such an event. This is the only way to ensure that safe, adequate service is continuously provided. (TR 879) Witness Acosta further testified that when flows on a monthly basis exceed AADF, sufficient plant must be in place and available to receive and treat those flows above AADF. Witness Accosta also believes that the Commission's calculation using AADF in the numerator and denominator does not recognize, for rate making purposes, that additional necessary plant. (TR 1311) The formula put forth by witness Accosta is as follows:  $U\&U \text{ Percentage} = \frac{MMADF + \text{Margin Reserve Flow}}{\text{Design Capacity}}$ . (TR 873) Witness Accosta further provided that the use of MMADF recognizes the inevitable peaks in treatment plant flows that the plant experiences and that must be treated to water quality standards established by the Florida Department of Environmental Protection

(FDEP). (TR 873) Further, witness Accosta believes that the MMADF should be used in the numerator to represent the actual flows going to the WWTP. And, the use of AADF in the numerator completely misses the seasonal population fluctuations, and does not recognize the sufficient capacity to accommodate the maximum month flows, and is not consistent with DEP Rule 62-600, Florida Administrative Code. (TR 879, 882-883)

OPC believes that the numbers used in the numerator and denominator of the used and useful equation should be of the same origin. That is, if the numerator is expressed in AADF then, the denominator should be expressed in AADF. If the numerator is expressed in MMADF then, the denominator should be expressed in MMADF. Consistency in units should be maintained throughout this equation. Witness Dismukes testified that in the most basic terms, used and useful is a comparison of the capacity of a plant to the load (or flows) it must treat. In order to reach a meaningful result, the capacity and the load must be expressed in the same units of measurement. In other words, the numerator and denominator of the used and useful calculation must both be expressed in the same units of measurement. (TR 1030) Witness Dismukes further testified that where the FDEP has permitted a wastewater treatment plant in terms of AADF, the load should be expressed in the same units. Expressing the load in terms of monthly peak flows, as argued by Florida Cities, where the same plant is rated in AADF will not only yield a meaningless result, but it will also overstate the used and useful percentage. (TR 1031) In addition, witness Bidy stated that if the plant capacity is permitted or designed on the basis of AADF, then the test year AADF should be used for the numerator. On the other hand, if the plant capacity is permitted on the basis of MMADF, then the test year maximum month average daily flow (MMADF) should be used. Generally, the designed capacity is the same as the FDEP permitted capacity. (TR 1282)

Witness Crouch, on behalf of the Commission, describes the used and useful calculation this way. Used and useful is determined by dividing the flows during the test year by the capacity of the treatment plant. (TR 1140) Witness Crouch states that for many years, the PSC staff has relied upon the permits issued by DEP to determine the permitted capacity of a wastewater treatment plant. That permitted capacity went in the denominator of the equation. Prior to 1992, the DEP issued permit did not indicate the basis which the utility specified. Since the basis was not shown on the permit, the PSC staff had no way of knowing what the basis was; consequently, staff selected the MMADF as the flow to be used in the numerator. (TR 1144) Inadvertently, Staff may have been mismatching the plant capacity and flow data in some of its cases when determining the used and useful percentages for wastewater treatment plants prior to 1992. This may have occurred

due to Staff having no knowledge of what the plant capacity on the DEP permit was based on and incorrectly applying the MMADF to the used and useful equation. Witness Crouch further states that starting approximately 1992, DEP began to show the basis for determining permitted flow (AADF, MMADF, 3MADF) which was selected by the utility in its permit application process and is based on the particular characteristic of the plant as determined by the plant designer. When DEP started listing flow basis in the permits (the denominator), there was no longer any doubt as to the basis and it became imperative that the same basis be used in the numerator flow data. (TR 1144) Witness Addison, employed by the DEP as a profession engineer in the Domestic Wastewater Section, testified that he agrees that whichever unit is used in the denominator should be used in the numerator. (TR 1070)

The utility also argues that capacity is capacity, and that despite their design engineer having chosen AADF as the basis for the permitted capacity, states that the Commission must continue to use MMADF as the measure of used and useful. Staff witness Addison testified that with the change in its rules, the time frame associated with permitted capacity must be specified in the permit. (TR 1060) In this case, the utility, in filling out Wastewater Form 2A (Exhibit 38), had the choice of MMADF, 3MADF, or AADF (or other). It chose AADF.

While it states capacity is capacity, the utility specifically recognizes that the plant actually has additional capacity to treat peak flow. Utility Witness Cummings testified that the plant has the hydraulic capacity to pass 2.5 mgd per day. (TR 955) Witness Cummings also stated that for peak design loading:

Computed as the maximum design loading times a peaking factor of 1.5 for carbonaceous load and 1.3 for nitrogenous load. This loading represents the peak day load to the biological system. (TR 939) (emphasis supplied by staff)

Therefore, we know both the daily hydraulic and biological peak loading factors. However, we do not know the MMADF capacity because the utility has not chosen to permit the plant that way. All we know in regards to long-term capacity is what the utility has chosen, i.e., AADF. Since the utility has stated that AADF is appropriate in the permitting phase, then it must be appropriate to use for determining used and useful. As stated by Staff Witness Addison, just because a utility exceeds its capacity in any one month, does not mean that it is out of compliance or will exceed its capacity for the year. You must look at the whole year to determine what percent of its capacity is being used.

Finally, utility argues that the Commission must use MMADF in the numerator because the utility must be able to treat flows in the maximum month. All parties agree that peaks must be accommodated. However, the issue is not whether peaks should be treated but how much of utility investment is, on average for the test year, used and useful. Utility witness Cummings, testified that the plant capacity is rated at 1.25 mgd and is designed to accommodate peaks. (TR 957-958) He further testified that the capacity rating of 1.25 mgd would be the same regardless of whether AADF, 3MADF or the MMADF the measure is used. (TR 950-951) In addition, OPC witness Bidy further stated that peak capacities of the plant and those facilities within the plant that handle the peak flows are included in the plant design. Those dollars needed to construct the necessary plant capacity to handle the peak flows are in the cost of the plant and therefore, in rate base. (TR 1290) Staff believes that if allowance for peaks is included at a utilization level equal to the plant's rated capacity, then it must be true at every other level of utilization. That is, the peaks are accounted for in plant design at all levels of utilization up to its rated capacity, regardless of the time frame for measurement. Therefore, the utility's argument is without merit.

Staff agrees with witness Crouch that matching is an important rate setting concept. (TR 1140) Staff also agrees with OPC witness Bidy, that matching flow measures in the numerator and denominator in accordance with the FDEP permitted capacity is appropriate. (TR 1282) The impact of using maximum month average daily flows to establish used and useful plant is to ignore the dampening effect of least month utilization. In so doing, it requires current customers to pay for investment in peak capacity, that on average for the test year, is not representative of current usage. Effectively, this approach causes current customers to move to the advantage of future customers and the utility. The Staff believes this result is inappropriate and inconsistent with long standing rate making principals which view the utility's expenses, revenues and investment over a 12-month test period.

Staff believes that for all of the reasons stated above, the flows that should be used in the numerator of the used and useful equation for this utility should be expressed in annual average daily flow (AADF) as DEP has permitted. This corresponds with the design capacity as determined by the First DCA as being 1.25 MGD annual average flow (AADF). The resultant flow and design capacity as applied in the used and useful equation yields a 79 percent used and useful percentage for this utility.



**ISSUE 3A:** In light of Southern States Utils., Inc. v. FPSC, 714 So. 2d 1046 (Fla. 1st DCA 1998), what action, if any, is necessary to correct the used-and-useful adjustments made to facilities designated as reuse? **(THIS ISSUE WAS NOT IDENTIFIED IN THE PREHEARING ORDER)**

**RECOMMENDATION:** Pursuant to the holding in Southern States Utils., Inc. v. FPSC, 714 So. 2d 1046 (Fla. 1st DCA 1998), no used and useful adjustment should be made to reuse facilities. This increases the revenue requirement by \$8,106. This issue should be proposed agency action. (JAEGER, MONIZ)

**STAFF ANALYSIS:** Starting in paragraph 2, page 21 of its brief, the utility argues that the Commission must apply the law as it exists at the time it makes its determination. Specifically, the utility states that no used and useful adjustment may be made to the prudently incurred costs for reuse facilities.

In Order No. PSC-96-1133-FOF-SU, issued September 10, 1996, in this case, the Commission found that the capacity of the wastewater treatment plant was 1.5 million gallons per day (mgd), and that annual average daily flows (AADF) should be used in the numerator of the used and useful equation. Based upon these findings (and an ultimate used and useful percentage of approximately 67%), the Commission made used and useful adjustments to improvements required by DEP and to all wastewater facilities as a whole, to include reuse facilities. As stated earlier, the utility appealed Order No. PSC-96-1133-FOF-SU.

The utility contested all of the above findings and the Court, in its January 12, 1998 opinion, Florida Cities Water Co. v. State, 705 So. 2d 620 (Fla. 1st DCA 1998), found all capital expenditures a utility makes in order to comply with governmental regulations, while prudent, need not be included in rate base, i.e., the Commission could make used and useful adjustments to the capital expenditures required by DEP. The Court further noted, in Footnote 4 of the Opinion, that,

Neither party has advocated on appeal for a discrete "used and useful" calculation for the reuse facility or contended that the reuse facility should be considered separately from the rest of the system. We do not, therefore, reach any question arising under Section 367.0817(3), Florida Statutes (1995).

Although the Court made the above-noted statement in footnote 4, the utility in both its initial appellate brief and its reply appellate brief did argue that Section 367.0817(3), Florida Statutes, required all prudent costs of a reuse project to be recovered in rates.

Upon remand, by Order No. PSC-98-0509-PCO-SU, issued April 14, 1998, the Commission reopened the record to specifically determine whether AADF or maximum month average daily flows (MMADF) should be used in the numerator of the used and useful equation. Subsequent to that order, on June 10, 1998, the First District Court of Appeal issued its opinion in the appeal of Order No. PSC-96-1320-FOF in Docket No. 950495-WS. Southern States Utils., Inc. V. FPSC, 714 So. 2d 1046 (Fla. 1st DCA 1998) [hereinafter Southern States] In that opinion, the Court overturned the Commission's decision to make used and useful adjustments to reuse facilities.

With the reopening of the record in this case, prehearing statements were filed on November 12, 1998, and a Prehearing Conference was held on November 18, 1998. At the Prehearing Conference, the issue of whether to use AADF or MMADF in the numerator was spread over three separate issues, along with two issues regarding additional rate case expense. Four fall-out issues were also identified. No issue concerning used-and-useful adjustments to reuse facilities was identified by any of the parties or staff. The hearing was held on December 8 and 9, 1998. The utility now argues that based on the holding of the Court in Southern States, it is improper to make a used and useful adjustment to reuse facilities, and that if the Commission does determine that used and useful is less than 100%, then the revenue requirement must reflect all reuse facilities at 100%.

As stated above, in its initial final order, the Commission did make a used and useful adjustment to reuse (as a part of the whole system), and the Court, in the initial appeal, did not specifically find that to be improper. However, it did not approve the adjustment either, it merely said, "We do not . . . reach any questions arising under Section 367.0817(3), Florida Statutes (1995)." The Court, however, had not yet decided Southern States.

Although the utility did raise the issue on appeal, neither the utility, the Office of the Public Counsel (OPC), nor staff raised the issue at the prehearing conference following the remand and reopening of the record. In his proffered prefiled testimony on remand, utility witness Acosta did offer testimony on the proper treatment of reuse facilities in regards to the used and useful adjustment. However, noting that this could be addressed in a

adjustment. However, noting that this could be addressed in a legal brief, the presiding officer granted staff's motion to strike that portion of witness Acosta's testimony as being irrelevant to any of the issues identified and outside the scope of issues for which the Commission reopened the record.

The Order Establishing Procedure (issued April 3, 1998) states that all parties (and staff) shall file a prehearing statement which statement shall set forth a statement of each question of law the party considers at issue and the party's position on each such issue. The Order goes on to say that any issues not raised by a party prior to the issuance of the prehearing order shall be waived by that party, except for good cause shown. Therefore, an argument could be made that the utility has waived this issue. Even though none of the parties or staff raised the issue, staff believes the Commission is bound by the Southern States decision, and must set rates on a going forward basis without making any used and useful adjustment to reuse facilities.

Although the final order was issued over two years ago, the Commission is still faced with the prospect of setting the appropriate final rates on remand. In Southern States, the First District Court of Appeal has clearly stated it is improper to make used and useful adjustments to reuse facilities. The Commission must recognize that Section 367.0817(3), Florida Statutes, has now been interpreted by the Courts and apply the law as it now exists consistent with this interpretation. See In re Forfeiture of Following Described Property, 1985 Mercedes, 596 So. 2d 1261 (Fla. 1st DCA 1992), where the Court held that a court must apply the law in effect at the time of the decision. See also, Cantor v. Davis, 489 So. 2d 18 (Fla. 1986); Florida Patient's Compensation Fund v. Von Stetina, 474 So. 2d 783 (Fla. 1985); Hendeles v. Sanford Auto Auction, Inc., 364 So. 2d 467 (Fla. 1978); Florida East Coast Railway v. Rouse, 194 So. 2d 260 (Fla. 1966); Junco v. State, 510 So. 2d 909 (Fla. 3d DCA 1987), which were cited by the Court in the Mercedes case.

In this case, staff believes that the utility has separated the costs associated purely with reuse, and those figures are available without the need or requirement for additional evidence. However, in Order No. PSC-96-1133-FOF-SU, despite the facilities being designated as reuse, and absent any determination that the costs were imprudently incurred, the Commission, through its used and useful adjustments, set rates such that a portion of these costs were not recovered in the utility's rates. Based on all the above, staff believes that the Commission must correct this

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apparent error, and set rates in this remand proceeding making no used and useful adjustment to those facilities classified as reuse.

Because the parties, prior to the holding in Southern States, did not specifically know that used and useful adjustments could not be made to reuse facilities, there is some question whether they had a fair opportunity to address whether the facilities were actually reuse and whether the costs incurred were prudent. Therefore, while staff believes that the Commission should correct the apparent error, this correction should be done as proposed agency action. Based on reuse facilities being considered 100% used and useful, the revenue requirement is increased by \$8,106.

**ISSUE 4:** What is the appropriate provision for rate case expense since the remand by the First District Court of Appeal?

**RECOMMENDATION:** The appropriate provision for rate case expense since the remand by the First District Court of Appeal is \$138,283. The total rate case expense that should be allowed is \$244,979. The \$244,979 is a summation of previously authorized rate case expense, of \$90,863, by Final Order No. PSC-96-1133-FOF-SU, rate case expense of \$138,283 since the remand, and appellate non-legal rate case expense (See Issue 5) of \$15,834. Amortized over four years, the resulting test year charge is \$61,246. This increases the total rate case expense since the appeal and remand by \$38,530. (AUSTIN)

**POSITION OF PARTIES**

**FCWC:** The total rate case expense that should be allowed is \$244,979.20. The separation of rate case expense before and after remand is shown on Exhibit 36.

**OPC:** No position pending further development of the record [sic].

**STAFF ANALYSIS:** At the hearing, utility witness Coel filed updated information showing the additional rate case expense requested due to the appeal and remand process since the issuance of Order No. PSC-96-1133-FOF-SU.

The utility has stated that it has incurred \$244,979.20 in rate case expense, not including appellate rate case expense for which it has been reimbursed by the Commission. Of this \$244,979.20, the Commission previously approved as prudently incurred, \$90,863.03, pursuant to Final Order No. PSC-96-1133-FOF-SU, issued September 10, 1996 in this docket. (FCWC BR p.17) The utility is seeking to recover an additional \$154,116 in rate case expense as result of the appeal and remand process. The \$154,116 is a summation of \$138,283 for the remand and \$15,834 for appellate non-legal rate case expense (See Issue 5 for appellate non-legal rate case expense).

The utility provided back-up documentation in support of the legal fees expense for the remand proceeding. The documentation shows detailed records for legal work performed by K. Gatlin, K. Cowdery, and W. Schiefelbein. (FCWC BR p. 18, EXH 36). In review of the documentation, it shows that the attorneys performed separate tasks during the rate case.

Based on staff's review of the supporting documentation, we believe that the utility's requested additional rate case expense for the appeal and remand is prudent and reasonable. Therefore, we recommend that the appropriate provision for rate case expense

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since the remand by the First District Court of Appeal is \$138,283. The remand rate case expense along with the appellate non-legal rate case expense (See Issue 5) of \$15,834, and the rate case expense of \$90,863, previously approved by Final Order No. PSC-96-1133-FOF-SU, results in total rate case expense of \$244,979, thus an annual expense of \$61,246. This increases the previously approved rate case expense provision in the above-mentioned Final Order by \$38,530.

**ISSUE 5:** What is the appropriate provision for appellate non-legal rate case expense?

**RECOMMENDATION:** The appropriate provision for appellate non-legal rate case expense is \$15,834. (AUSTIN)

**POSITION OF PARTIES**

**UTILITY:** The total rate case expense that should be allowed is \$244,979.20. The separation of rate case expense before and after remand is shown on Exhibit 36.

**OPC:** No position; however, the Citizens believe that the Commission should include adequate provision in its order to ensure that should there be any award of attorneys' fees by any appellate court, that FCWC does not recover rate case expense from the customers through rates for the same work done.

**STAFF ANALYSIS:** The utility is seeking to recover \$15,834 in appellate non-legal rate case expense. The appellate non-legal rate case expenses were incurred primarily for the costs of maintaining duplicate billing registers, pursuant to Order No. PSC-96-0038-FOF-SU, issued January 10, 1996, in this docket. (FCWC BR p. 19) In Order No. PSC-96-1133-FOF-SU, the Commission authorized \$18,358 of rate case expense for Avatar Utilities Services Inc. (AUSI); \$6,144 of that cost related to maintaining a duplicate billing register for six months. (TR 986)

Based on staff's review of the supporting documentation, staff believes that the utility's requested additional appellate non-legal rate case expense for the services provided by AUSI are prudent and reasonable. The previous cost approved covered a smaller time frame whereas the requested cost covers a three year period. However, the cost on a per month basis is consistent with the cost previously approved by the Commission. Therefore, staff recommends that the Commission approve \$15,834 for appellate non-legal rate case expense.

ISSUE 6: What is the appropriate revenue requirement?

RECOMMENDATION: The following revenue requirement should be approved: (AUSTIN)

	<u>Total</u>	<u>Increase</u>	<u>% Change</u>
Wastewater Division	\$2,229,293	\$225,946	11.28%

POSITION OF PARTIES

FCWC: The revenue requirement is \$2,519,554 based on the test year ending December 31, 1995.

OPC: This is a fall-out number driven by Commission resolution of contested issues.

STAFF ANALYSIS: The revenue requirement is a fall-out number driven by the resolution of the contested issues. Based on its positions of the contested issues, FCWC is requesting approval of final rates that are designed to generate annual revenues of \$2,519,554. Those revenues exceed the revenues approved in Order No. PSC-96-1133-FOF-SU by \$516,207 or 25.77%. Based upon staff's recommendation concerning the contested issues, we recommend approval of rates that are designed to generate a revenue requirement of \$2,229,293. Staff's recommended revenue requirement is an increase of \$225,947 or 11.28% from those in the above-mentioned order. Further, staff's recommended revenue requirement includes the adjustment for the 1.25 mgd plant determination and also it reflects the recognition of the reuse plant as 100% used and useful.



**ISSUE 7:** What are the appropriate wastewater rates for Florida Cities Water Company - North Fort Myers Wastewater Division?

**RECOMMENDATION:** The recommended rates should be designed to allow the utility the opportunity to generate annual operating revenues in the amount of \$2,185,292 which excludes miscellaneous revenues, guaranteed revenues and reuse revenues. The approved rates should be effective for service rendered on or after the stamped approval date on the tariff sheets pursuant to Rule 25-30.475(1), Florida Administrative Code, provided the customers have received notice. The rates should not be implemented until proper notice has been received by the customers. The utility should provide proof to staff of the date notice was given within 10 days after the date of notice. (AUSTIN)

**POSITION OF PARTIES**

**FCWC:** The final rates are subject to the resolution of other issues.

**OPC:** No position.

**STAFF ANALYSIS:** Based on its positions and findings of fact and conclusions of law of the contested issues, the utility has requested permanent rates designed to produce revenues of \$2,519,554. (FCWC BR 21). Consistent with Issue 6, staff is recommending that the rates be designed to recover annual operating revenues of \$2,185,292 which excludes miscellaneous revenues, guaranteed revenues and reuse revenues. The rates were calculated using the same methodologies (i.e., allocation of revenue requirement, portion of revenues to be recovered through service rates and 20% differential between the residential and general service wastewater gallonage charges) as in Order No. PSC-96-1133-FOF-SU.

The utility should be required to file revised tariff sheets and proposed customer notice for staff's approval pursuant to Rule 25-22.0407(10), Florida Administrative Code. The approved rates should be effective for service rendered on or after the stamped approval date on the tariff sheets pursuant to Rule 25-30.475(1), Florida Administrative Code, provided the customers have received notice. The rates may not be implemented until proper notice has been received by the customers. The utility should provide proof of the date notice was given within 10 days after date of the notice.

A comparison of the utility's rates prior to filing, the implemented PAA rates, the requested final rates following the appeal and remand, and staff's recommended final rates is shown on Schedule No. 4.

**ISSUE 8:** What is the appropriate amount by which rates should be reduced four years after the established effective date to reflect the removal of the amortized rate case expense as required by Section 367.0816, Florida Statutes?

**RECOMMENDATION:** The wastewater rates should be reduced as shown on Schedule No. 5, to remove \$64,132 of rate case expense grossed-up for regulatory assessment fees which is being amortized over a four-year period. The decrease in rates should become effective immediately following the expiration of the four-year recovery period pursuant to Section 367.0816, Florida Statutes. The established effective date should be December 13, 1995. The utility should be required to file revised tariff sheets and a proposed customer notice setting forth the lower rates and the reason for the reduction not later than one month prior to the actual date of the required rate reduction. (AUSTIN)

**POSITION OF PARTIES**

**FCWC:** The appropriate amount by which rates should be reduced is \$38,529.04.

**OPC:** No position.

**STAFF ANALYSIS:** Staff is recommending, in issue 9, a refund by the utility of a portion of the revenue collected from the PAA rates (PSC-95-1360-FOF-SU) less the approved rate case expense in Order No. PSC-96-1133-FOF-SU, issued September 10, 1996, and staff's recommended rate case expense for the appeal and remand process. The PAA rates included a provision for rate case expense of \$30,240. Staff is recommending the utility retain an additional \$31,006 of revenues to represent the collection of staff's recommended rate case expense (See Issue 4) since the implementation of the PAA rates. Staff's recommended total rate case expense for this proceeding is \$61,246. The PAA rates were effective December 13, 1995. Thus, the effective date of the PAA rates establishes the start of the four-year recovery period for staff's recommended rate case expense of \$61,246.

Section 367.0816, Florida Statutes, requires that the rates be reduced immediately following the expiration of the four-year period by the amount of rate case expense previously authorized in the rates. The reduction will reflect the removal of revenues associated with the amortization of rate case expense and the gross-up for regulatory assessment fees which is \$64,132. The removal of rate case expense will reduce rates as recommended by staff on Schedule No. 5.

The utility should be required to file revised tariffs no later than one month prior to the actual date of the refund rate

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reduction. The utility also should be required to file a proposed customer notice setting forth the lower rates and reason for the reduction.

If the utility files this reduction in conjunction with a price index or pass-through rate adjustment, separate data shall be filed for the price index and/or pass-through increase or decrease, and for the reduction in the rates due to the removal of the amortized rate case expense.

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**ISSUE 9:** Should the utility be required to refund a portion of the revenues implemented pursuant to Order No. PSC-95-1360-FOF-SU, issued November 2, 1995?

**RECOMMENDATION:** Yes. The utility should be required to refund 10.92% of the revenues collected, from January 1, 1996 to December 31, 1996, through the implementation of rates established pursuant to Order No. PSC-95-1360-FOF-SU, issued November 2, 1995. From January 1, 1997, to the effective date of the final rates, FCWC should refund 10.50% of the revenues collected through the implementation of rates established in the abovementioned order. These refunds should be made with interest as required by Rule 25-30.360(4). The utility should be required to submit proper refund reports pursuant to Rule 25-30.360(7), Florida Administrative Code. The utility should treat any unclaimed refunds as CIAC pursuant to Rule 25-30.360(8), Florida Administrative Code. (AUSTIN)

**POSITION OF PARTIES**

**FCWC:** No.

**OPC:** This is a fall-out number driven by Commission resolution of contested issues.

**STAFF ANALYSIS:** The Commission approved PAA rates in Order No. PSC-95-1360-FOF-SU, issued November 2, 1995. Pursuant to Section 367.081(8), Florida Statutes, the utility implemented its PAA rates effective December 13, 1995, subject to refund. Staff is recommending a revenue requirement, in Issue 6, which is lower than the revenue requirement established in Order No. PSC-95-1360-FOF-WS. Therefore, a refund is appropriate.

As stated above, the utility implemented the PAA rates. Those rates included an annual provision for rate case expense of \$30,240, which included a provision to amortize prior rate case expense charges from Docket No. 910756-SU. The amortization period for the prior rate case expense expired in June of 1996. In Final Order No. PSC-96-1133-FOF-SU, issued September 10, 1996, the Commission approved a final rate case expense of \$90,863, amortized over four years, for an annual provision of \$20,716. That order also included a stipulation that instead of reducing rates on July 1, 1996, to reflect the complete amortization of rate case expense from the prior rate case, the customers would receive a credit on their bill until the final rates were approved and implemented in this docket. However, the utility appealed some issues in the final order; thus, the final rates were not implemented. As a result, the utility has continued to collect the PAA rates and has recovered approximately three years of the rate case expense authorized in the PAA rates. Also, pursuant to the final order,

the utility has issued customers credit on their bills to offset the amortized rate case expense in Docket No. 910756-SU.

As previously stated staff's recommended revenue requirement is lower than the revenue requirement established in PAA Order No. PSC-95-1360-FOF-SU. Therefore, a refund is appropriate. However, staff's recommended annual provision for rate case expense or \$61,246 in Issue 4, exceeds the annual provision for rate case expense of \$30,240 approved in the PAA rates. As a result, the utility is entitled to recover an additional \$31,006 of rate case expense. In order to provide the utility recovery of this amount, staff recommends that the calculated refund be reduced by this difference. The effect of reducing the refund by the difference in rate case expense is that it allows the utility to retain a portion of the revenue collected through the PAA rates to represent the additional rate case expense being in rates since the implementation of the PAA rates. Thus, the utility will have recovered the \$61,246 of rate case expense (\$30,240 + \$31,006) as recommended by staff in Issue 4, as of December 13, 1999. In addition, since the utility has issued customers credit on their bills to offset the amortized rate case expense for Docket No. 910756-SU, as required by the stipulation in Order No. PSC-96-1133-FOF-SU, staff recommends that the PAA revenues in the refund calculation be reduced by the amount of the credit. Staff has, therefore, calculated the refund by taking the difference between staff's recommended revenue requirement, with rate case expense, and the PAA revenue requirement, with rate case expense, excluding the \$21,001 credit for rate case expense which expired from Docket No. 910756-SU. We have also removed any miscellaneous revenues, guaranteed revenues, and reuse revenues.

Therefore, the utility should be required to refund 10.92% of the revenues collected, from January 1, 1996 to December 31, 1996, through the implementation of rates established pursuant to Order No. PSC-95-1360-FOF-SU, issued November 2, 1995. The calculation for this period takes into account that the utility started issuing credits in July of 1996. From January 1, 1997, to the effective date of the final rates, FCWC should refund 10.50% of the revenues collected through the implementation of rates established in the above-mentioned order. These refunds should be made with interest as required by Rule 25-30.360(4). The utility should be required to submit proper refund reports pursuant to Rule 25-30.360(7), Florida Administrative Code. The utility should treat any unclaimed refunds as CIAC pursuant to Rule 25-30.360(8), Florida Administrative Code.

**ISSUE 10:** Should the utility's Motion to Make Rates Permanent be granted? **(THIS ISSUE WAS NOT IDENTIFIED IN THE PREHEARING ORDER)**

**RECOMMENDATION:** The motion should be granted in part, and denied in part. Specifically, in the event the utility appeals the Commission's decision made at this agenda conference, the utility should be allowed to continue charging, subject to refund, the proposed agency action rates that it now has in effect. Further, the Commission should recognize that with the decision of the First District Court of Appeal and the issuance of Order No. PSC-98-0509-PCO-WS, the revenues associated with the plant capacity being 1.25 million gallons per day, as opposed to 1.5 million gallons per day, are no longer in dispute, and should not be a part of the revenues held subject to refund. Also, the Commission should recognize that the revenues associated with the use of annual average daily flows in the numerator is a minimum figure. Therefore, in the event of an appeal, the amount of annual revenues subject to refund is only \$300,539. The utility's current corporate undertaking in the amount of \$1,267,590.20 is sufficient security to protect revenues subject to refund up through June 15, 1999. Also, as was done in Order No. PSC-98-0762-PCO-SU, the utility, in the event of an appeal, should be required, without additional action by this Commission, to automatically increase its corporate undertaking starting on June 15, 1999, so as to protect the amount subject to refund for the next six months as shown on Schedule No. 6. Further, pursuant to Rule 25-30.360(6), Florida Administrative Code, the utility should continue to provide a report by the twentieth of each month indicating the monthly and total revenue collected subject to refund. Finally, the corporate undertaking should state that it will remain in effect during the pendency of any appeal as stated in the utility's motions and will be released or terminated upon subsequent order of the Commission addressing the potential refund. (JAEGER, MONIZ, AUSTIN)

**STAFF ANALYSIS:** In Proposed Agency Action (PAA) Order No. PSC-95-1360-FOF-SU, issued November 2, 1995, the Commission proposed to set rates so as to increase revenues by \$377,772 (total annual revenues of \$2,489,487). This Order was protested, and, on December 1, 1995, the utility filed its Notice of Intent to Implement Rates (the PAA rates) pursuant to Section 367.081(8), Florida Statutes, with an appropriate corporate undertaking in the amount of \$261,595. By Order No. PSC-96-0038-FOF-SU, issued January 10, 1996, the Commission acknowledged the implementation of PAA rates on an interim basis subject to refund and the sufficiency of the corporate undertaking.

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After a formal hearing, the Commission, on September 10, 1996, issued its Final Order No. PSC-96-1133-FOF-WS, wherein it found that the revenue requirement was only \$2,003,347. The amount of security was modified and increased in Order No. PSC-96-1390-FOF-SU, issued November 20, 1996, as a result of the utility's appeal and request for stay of the post-hearing decision. In determining the amount subject to refund, by Order No. PSC-96-1390-FOF-WS, the Commission took the difference between the revenue requirement, \$2,489,487, found in the PAA Order, and subtracted the revenue requirement (\$2,003,347) from the Final Order to determine that 19.88% of annual revenues collected should be held subject to refund. The utility posted a corporate undertaking in the amount of \$940,755, pursuant to that Order.

As a result of the utility's Motion for Stay Pending Judicial Review, filed April 10, 1998, and its Amended Motion for Stay, filed April 14, 1998, additional security was required. By Order No. PSC-98-0762-PCO-SU, issued June 6, 1998, the Commission implemented a system whereby the utility would automatically increase its corporate undertaking every six months to cover the amount subject to refund that was accruing. As of November 12, 1998, the utility had submitted a corporate undertaking in the amount of \$1,056,683.46. This amount was calculated to be good through May 12, 1998. However, the corporate undertaking has been calculated based on the difference in revenues from the PAA Order and the revenues from the Final Order being subject to refund.

On January 26, 1999, Florida Cities filed its Motion to Make Rates Permanent. On February 5, 1999, the OPC filed its response to that motion.

In its motion, the utility specifically requests the Commission to:

- a. Make permanent the allowed revenue and the rates approved by the Commission at its agenda conference for the consideration of this Docket now scheduled for March 2, 1999 [agenda was canceled and this item was placed on the March 16, 1999 agenda]; and
- b. Allow FCWC to continue to collect on an interim basis, subject to refund, the revenue not allowed by the Commission at its agenda conference now scheduled for March 2, 1999.

In its response, the OPC states in pertinent part:

2. Collection of this revenue subject to refund provides the Commission with jurisdiction over its eventual disposition; without this proviso, the Commission could be subject to a claim of retroactive ratemaking;
3. This case is still pending; Commission jurisdiction over regulated utilities such as FCWC is plenary and should not be lessened by Commission in the absence of showing that such action is necessary to avoid prejudice to a party;
4. FCWC alleges no prejudice in the situation which now prevails.

The request to make permanent the allowed revenue and the rates approved at the agenda conference appears to be a case of first impression for this industry in that staff is not aware of any other water or wastewater utility having ever requested that the allowed revenue be made permanent prior to the time for filing of an appeal having run. In the case at hand there appears to be only three issues remaining that would affect the revenue requirement, i.e., the appellate non-legal rate case expense, the additional rate case expense for reopening the record, and the difference in the revenue requirement that would result from using either AADF or MMADF in the numerator of the used and useful equation.

Because staff, OPC, and the customers have all proposed that AADF be used in the numerator, the utility appears to believe that a minimum annual revenue requirement will be determined if the Commission does decide to use AADF. Staff believes that the utility is correct, and cannot envision any scenario where the used and useful percentage would be less. The denominator is set at 1.25 mgd, and the minimum numerator would appear to be the AADF figure. Therefore, prior to adding in any rate case expense items, staff believes that the minimum annual revenue figure would be calculated by using the AADF figure.

With the denominator set at 1.25 mgd, the utility argues that: "This change alone allows additional uncontroverted revenue above that allowed by the Final Order in the amount of \$174,661 on an annual basis." Although staff agrees that the amount actually subject to refund has been reduced, intervenors could still contest the amount of any additional rate case expense in an appeal. Also, staff is aware that someone could possibly appeal the use of the AADF figure. However, because this possibility is so remote, staff recommends that the Commission use the uncontroverted 1.25 mgd figure in the denominator and the minimal AADF figure in the



numerator to calculate a minimum revenue requirement of \$2,188,948. Taking the revenue requirement of \$2,489,487 found in the PAA Order, and subtracting the minimum revenue figure of \$2,188,948, staff calculates that \$300,539 of annual revenues, and \$25,044.92 of monthly revenues are subject to refund. Therefore, 12.072% of revenues should be continued to be collected subject to refund.

Pursuant to Sections 367.081 and 367.121, Florida Statutes, the Commission must set rates which are fair, just, reasonable, compensatory, and not unfairly discriminatory. The utility appears to believe that it is unreasonable to keep the full amount subject to refund, when in reality, only a portion of it is still subject to any appellate process. Staff believes that there is very little prejudice, if any, in keeping the difference from the PAA rates and the revenue from the first final order, Order No. PSC-96-1133-FOF-WS, subject to refund. However, staff does recognize that holding the higher amount subject to refund could affect the utility's ability to support other corporate undertakings for its other utility systems and that its financial statements would still have to show those revenues being subject to refund.

In consideration of all the above, staff believes it is fair, just and reasonable to show that only the revenues collected above this minimum revenue requirement should continue to be collected subject to refund. Therefore, staff recommends the Commission reduce the amount of revenues being collected subject to refund as set forth above, and correspondingly reduce the amount of required security. Therefore, staff believes that the motion to make rates permanent should be granted to the extent set forth above, and the security should be reduced accordingly.

The utility has also requested that it be allowed to continue collecting the PAA rates. Rule 25-22.061(2), Florida Administrative Code, states:

(1)(a) When the order being appealed involves the refund of moneys to customers or a decrease in rates charged to customers, the Commission shall, upon motion filed by the utility or company affected, grant a stay pending judicial proceedings. The stay shall be conditioned upon the posting of good and sufficient bond, or the posting of a corporation undertaking, and such other conditions as the Commission finds appropriate.

In this case, the utility anticipates that the Commission will continue to use AADF in the numerator, and, consequently, order a reduction in rates and a refund. The utility states that it will appeal this decision and be entitled to a stay. It has merely requested in advance that a stay be granted and that it be allowed to continue charging the PAA rates. Staff believes that this is a reasonable request and, if the Commission approves the continuing incremental security as set forth above, the appropriate security has already been provided and will continue to be provided.

In the event the utility appeals the Commission's decision made at this agenda conference, the utility should be allowed to continue charging, subject to refund, the PAA rates that it now has in effect. Further, the Commission should recognize that with the decision of the First District Court of Appeal and the issuance of Order No. PSC-98-0509-PCO-WS, the revenues associated with the plant capacity being 1.25 million gallons per day, as opposed to 1.5 million gallons per day, are no longer in dispute, and should not be a part of the revenues held subject to refund. Therefore, in the event of an appeal, the utility's current corporate undertaking in the amount of \$1,267,590.20 is sufficient security to protect revenues subject to refund through June 15, 1999. Also, as was done in Order No. PSC-98-0762-PCO-SU, the utility, in the event of an appeal, should be required, without additional action by this Commission, to automatically increase its corporate undertaking starting on December 15, 1999, and every six months thereafter, so as to protect the amount subject to refund for the next six months as shown on Schedule No. 6. Further, pursuant to Rule 25-30.360(6), Florida Administrative Code, the utility should continue to provide a report by the twentieth of each month indicating the monthly and total revenue collected subject to refund. Finally, the corporate undertaking should state that it will remain in effect during the pendency of any appeal as stated in the utility's motions and will be released or terminated upon subsequent order of the Commission addressing the potential refund.

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**ISSUE 11:** Should the Commission approve staff's specific recommendations on Florida Cities' proposed findings of fact and conclusions of law?

**RECOMMENDATION:** Yes. The Commission should approve staff's specific recommendations on Florida Cities' proposed findings of fact and conclusions of law. (Jaeger, Austin, Moniz, McRoy)

**STAFF ANALYSIS:** The recommendations on the proposed findings of fact and conclusions of law may be found in Attachment A.

ATTACHMENT A

PROPOSED FINDINGS OF FACT

**ISSUE 1**

1. All parties agree that the Commission should not ignore average daily flow in the peak month in determining used and useful plant to be included in rate base. Prehearing Order, Order No. PSC-98-1577-PHO-SU (Prehearing Order), p. 8; Direct Testimony M. Acosta, pp. 5-7, T. 876-878; K. Dismukes, T. 1036; R. Crouch, T. 1190; T. Bidy, T. 1290.

**RECOMMENDATION:** Accept.

2. Mr. Harley Young, P.E., a DEP Section Manager, in the Ft. Myers office of the South Florida Division, supervising, among other things, the permitting of domestic wastewater systems, testified with regard to DEP permitting and with regard to the Waterway Estates AWTP permitting in particular. Florida Cities was required to provide, and did so provide, reasonable assurances that the peak and maximum flows to be received by the AWTP will be treated to meet the DEP water based effluent limitation requirements. Direct Testimony H. Young, pp. 2-4, T. 1001-1003. Mr. Crouch and Mr. Bidy gave consistent testimony. T. 1192-1193, 1199, 1292.

**RECOMMENDATION:** Accept.

3. A determination of used and useful must be concerned with the maximum flows the treatment plant may experience in order to allow for such an event. This is the only way to ensure that safe, adequate service is continuously provided. Direct Testimony M. Acosta, p. 8. T. 879.

**RECOMMENDATION:** Accept first sentence, reject second sentence as argumentative and conclusory.

4. When customer flows on a monthly basis exceed AADF, sufficient plant must be in place and available to receive and treat those flows above AADF. If MMADF is not considered in the used and useful calculation, it would create a situation in which the utility would be required to have plant available to treat the peak flows yet the plant investment required to treat those peak flows would not be recognized for ratemaking purposes. Rebuttal Testimony M. Acosta, p. 2, 12; T. 1301, 1311.

**RECOMMENDATION:** Accept first sentence. Reject second sentence as argumentative and unsupported by the record.

5. Section 367.081(2)(a), Fla. Stat.(1997), requires that the commission set just and reasonable rates. In doing so the PSC is required to consider "the investment of the utility in land acquired or facilities constructed in the public interest," as well as "operating expenses incurred in the operation of all property used and useful in the public service; and a fair return on the investment of the utility in property used and useful in the public service."

**RECOMMENDATION:** Reject because it does not constitute a finding of fact.

6. In expanding the AWTP, Florida Cities was required to and did invest in plant necessary to treat the maximum and peak flows in constructing the AWTP. T. 978, 1190.

**RECOMMENDATION:** Accept.

## ISSUE 2

1. All parties agree that the change in the wording of the DEP permit application so that the permit and application now indicate the basis for design capacity does not correspond to a real change in operating capacity. Prehearing Order, p. 8; Direct Testimony of M. Acosta, pp. 4-5, T. 875-876; T. 921-922; T. Cummings, T. 950-951, 979; H.

Young, T. 1008, 1019; K. Dismukes, T. 1036; T. Bidy, T. 1291.

**RECOMMENDATION:** Accept.

**ISSUE 3**

1. In determining the used and useful calculation for the Waterway Estates WWTP, MMADF should be used in the numerator to represent the actual flows going to the WWTP. Use of AADF in the numerator completely misses the seasonal population fluctuations, and does not recognize sufficient capacity to accommodate the maximum month flows, and is not consistent with DEP Rule 62-600, Fla. Admin. Code. Direct Testimony M. Acosta, pp. 8, 11-12, T. 879, 882-883.

**RECOMMENDATION:** Reject as unsupported by the record, and argumentative.

2. The use of AADF in the numerator of the WWTP used and useful calculation vastly understates the used and usefulness of the AWTP, decreasing it from 100% to 80%. Direct Testimony M. Acosta, p. 10, T. 881; Rebuttal Testimony M. Acosta, pp. 8-9, T. 1307-1308.

**RECOMMENDATION:** Reject as argumentative and unsupported by the record.

3. A used and useful calculation using AADF in the numerator and denominator does not recognize, for ratemaking purposes, that additional plant necessary to treat maximum flows. T. 898-899, 901. If MMADF is not considered and used in the numerator of the used and useful calculation, it would create a situation in which the utility would be required to have plant available to treat the peak flows yet the plant investment required to treat those peak flows would not be recognized for ratemaking purposes. Rebuttal Testimony M. Acosta, p. 2, 12; T. 1301, 1308.

**RECOMMENDATION:** Reject as unsupported by the record, and argumentative.

4. There is no competent substantial evidence to support Mr. Crouch's testimony that MMADF must be ignored in determining used and useful because the time frame associated with the design capacity of the AWTP was AADF. Mr. Crouch argues that the mathematical principle of "dimensional consistency" is violated if the basis of design associated with the plant design capacity (denominator) and average daily flow, that is, the total volume of wastewater flowing into a plant (numerator) do not match. Mr. Crouch incorrectly applies dimensional consistency by referring to AADF and MMADF as "units," which they are not. His argument is absolutely wrong.

**RECOMMENDATION:** Reject as argumentative and unsupported by the record.

5. The principle of dimensional consistency is properly observed in dividing MMADF by AADF in calculating used and useful percentage. Dimensional consistency requires "units" to match. The units which are used in measuring flows are "millions of gallons per day" or "mgd." The terms "AADF," "MMADF," and "3MADF," are not units, but are the time periods during which the flows, measured in units of mgd, are measured. M. Acosta, T. 910-912; T. Cummings, T. 971-972. This finding is supported by the physics text relied upon by Mr. Crouch (Exhibit 41, tab 16), by the definitions contained in the DEP rules governing permitting of wastewater treatment plants (Exhibit 41, tab 19), and by the only competent engineering testimony of record. Rebuttal Testimony M. Acosta, pp.6, T. 1305; M. Acosta, T. 910-912; T. Cummings, T. 971-972.

**RECOMMENDATION:** Reject as argumentative and unsupported by the record.

6. If Mr. Crouch's interpretation of dimensional consistency were correct, and it is mathematically unethical not to match the time frames (which he incorrectly labels "units") in the numerator and denominator of the used and useful equation, then the DEP's capacity

analysis rule would violate the principle of dimensional consistency, and all those who use that formula would likewise be labeled as "unethical." DEP Capacity Analysis Report Rule 62-600.405, F.A.C. (Exhibit 34), determines what percentage of a WWTP's facilities are being used by dividing the most recent consecutive three months average daily flows (3MADF) in the numerator by the permitted plant capacity (denominator). In dividing by the permitted plant capacity, there is no consideration made as to the time frame associated with the plant's design capacity. In other words, there is absolutely no consideration of "matching" of time frames in the numerator or denominator. Furthermore, if time frames were units, which they are not, it would be mathematically impossible to determine percentages of other events occurring within a specific time period, which it is not. For instance, calculating the percentage of annual rainfall occurring in June requires dividing one month's rainfall into the 12-month annual average rainfall. Under Mr. Crouch's argument, this calculation is mathematically impossible.

**RECOMMENDATION:** Reject as unsupported by the record, argumentative, conclusory and for sentences one and two, a legal conclusion as to the provisions of DEP's rules.

7. Mr. Crouch's understanding of dimensional consistency is wrong. Both the DEP capacity analysis rule and use of MMADF in the numerator and AADF in the denominator of the used and useful calculation are proper mathematical equations where units (mgd) are dimensionally consistent. Apparently, Mr. Crouch's current understanding of "dimensional consistency" occurred subsequent to the First District Court's entry of its opinion on January 12, 1998, in the Florida Cities' case (705 So. 2d 620). On November 19, 1996, he made a presentation to the re-use coordinating committee indicating the Commission policy was to use ADFMM in the numerator when determining used and useful (Ex. 41, tab 5). He confirmed this fact in testimony



in Docket No. 960258-WS on December 10, 1996 (Ex. 41, tab 12 and 14). Then, on December 9, 1997, after the Florida Cities' case had been argued but before the District Court had rendered its opinion, Mr. Crouch, in direct testimony before DOAH, testified that the ADFMM was used in the numerator. Only later, under cross-examination by an attorney from the firm who had represented FCWC in this case, did Mr. Crouch admit that the Commission had started using other than ADFMM (Ex. 41, tab 14).

**RECOMMENDATION:** Reject first three sentences as either argumentative, conclusory, or unsupported by the record. Accept remainder of paragraph.

8. The parties agree that the permitted capacity of a plant is the capacity of that plant, no matter what the basis of design associated with the capacity. The permitted and actual capacity of the Waterway Estates AWTP are one and the same: 1.25 mgd. Rebuttal Testimony of M. Acosta, p. 2, 9; T. 1301, 1308. Witness Harley Young, P.E., testified as follows:

Q. If a plant is permitted based on maximum month average daily flow, would it be permitted at a greater capacity than if it was permitted based on average annual daily flow?

A. No. The capacity is the capacity. The basis of design simply tells you that it's designed based on a peak seasonal flow.

Direct Testimony H. Young, pp. 4, 5; T. Cummings, T. 951; H. Young, T. 1008-1009; T. Bidy, 1291-1292. In other words, the time frame associated with the design capacity of a plant does not result in any "hidden" or extra capacity over and above the AWTP's 1.25 mgd capacity. Thus, the AADF time frame associated with the 1.25 mgd permitted capacity of the AWTP does not have any bearing whatsoever on the volume of wastewater flows which should be used in the numerator of the used and useful calculation, and certainly does not dictate a "matching" of time frames in the numerator and denominator.

**RECOMMENDATION:** Accept first three sentences with caveat that permitted capacity of plant is 1.25 mgd based on AADF. Remainder of paragraph

rejected as argumentative or unsupported by the record.

9. Mr. Crouch testified that the surge tank is the equipment necessary to "handle peak flows," and the investment in the surge tank "would be considered in the used and useful equation." T. 1185, 1191. However, the undisputed testimony is that a surge tank "equalizes" flows occurring for period of hours only. The fact that the Waterway Estates AWTP has a surge tank (flow equalization tank) does not give any valid reason for ignoring MMADF in the numerator of the used and useful calculation. A surge tank does not increase capacity above permitted capacity. All plants, no matter what the time frame associated with their design bases, may have, but are not necessarily required to have, a surge tank. Use of a surge tank is an economical manner in which to allow other components of a plant to be sized smaller. Rebuttal Testimony M. Acosta, pp. 10-11. T. 912-914; T. Cummings, T. 967.

**RECOMMENDATION:** Accept first two sentences. Reject third sentence as being argumentative. Accept remainder of the paragraph.

10. No benefit of any sort would accrue to Florida Cities if the PSC were to "match" the AADF time frame associated with the AWTP's design (denominator) with an AADF time frame for measuring the total volume of wastewater flowing into the AWTP (numerator). The staffing requirements of DEP Rule 62-699.310-311, F.A.C., are not in any manner dependent upon average daily flow ("ADF") time periods or design capacity time frames. Rebuttal Testimony M. Acosta, p. 11-13; T. 1310-1312; T. 908-909.

**RECOMMENDATION:** Reject first sentence as argumentative, conclusory, irrelevant, and unsupported by the record. Reject second sentence as being a legal conclusion.

11. Neither the margin reserve calculation nor AFPI allow any recognition into rate base of facilities required to accommodate maximum flows

experienced in connection with current customers.  
Direct Testimony M. Acosta, p. 9, T. 880.

**RECOMMENDATION:** Accept.

12. Ms. Dismukes is not an engineer, and did not purport to offer testimony for the purpose of addressing the engineering aspects of this case. She intended to address the policy and regulatory aspects of "the annual average daily flow versus peak month flow issues." Direct Testimony K. Dismukes, p. 1; T. 1027. Although Ms. Dismukes advocated "matching" similar time frames in the numerator and denominator in this case ("apples to apples" at T. 1031), she gave no policy or regulatory reasons for doing so, but relied mainly upon the testimonies of Mr. Bidy and Mr. Crouch to support such "matching". For instance, Ms. Dismukes could not answer on cross examination whether the investment to treat peak flow is not used and useful, deferring to Mr. Bidy. T. 1041.

**RECOMMENDATION:** Accept first two sentences. Reject third sentence as argumentative and unsupported by the record. Accept last sentence.

#### ISSUE 4

1. Florida Cities has incurred \$244,979.20 in rate case expense, not including appellate rate case expense for which it has been reimbursed by the Florida Public Service Commission. Direct Testimony L. Coel, pp. 1-4; T. 983-986; Exhibit 36 (LC-1, LC-1a, LC-1b); T. 991.

**RECOMMENDATION:** Accept.

2. Of this \$244,979.20, the PSC has previously approved as prudently incurred, \$90,863.03, pursuant to Final Order No. PSC-96-1133-FOF-SU. Direct Testimony L. Coel, p. 1, T. 983; Exhibit 36 (LC-1, LC-1a, LC-1b); T. 992.

**RECOMMENDATION:** Accept.

3. Since the time of the issuance of the First District Court of Appeals decision remanding the case for further proceedings, Florida Cities has incurred a total actual and estimated rate case expense amount of \$154,116.16. This amount of rate case expense is fully supported by back-up documentation in Exhibit 36 (LC-1, LC-1a, LC-1b). Direct Testimony L. Coel, pp. 2; T. 984.

**RECOMMENDATION:** Accept.

4. The back-up documentation to the legal fees expense for the remand proceeding shows detailed records for legal work performed by K. Gatlin, K. Cowdery, and W. Schiefelbein. The documents show these attorneys performing separate tasks during the rate case. Exhibit 36; T. 995-996. There was no testimony which attempted to dispute the reasonableness of the attorneys fees and no evidence of duplication of effort. There is no evidence that paralegals should have been used instead of attorneys for any of the attorney's work performed.

**RECOMMENDATION:** Accept first sentence. Reject second sentence as unsupported by the record. Accept remainder of paragraph.

#### ISSUE 5

1. Since January, 1996, during pendency of the appeal, rate case expenses identified on Exhibit 36 (LC-1b) as \$15,833.60 were incurred primarily for the costs of maintaining duplicate billing registers, pursuant to PSC Order No. PSC-96-0038-FOF-SU, issued Jan. 10, 1996.

**RECOMMENDATION:** Accept.

2. The duplicate billing register is the only record of each customer's bill calculated at the previously authorized, non-interim, rate structure. The register is used to determine revenues generated using the prior rates which are included in the FCWC North Ft. Myers Division's monthly reports to the PSC required by Order No. PSC-96-0038-FOF-SU. The reports are

required to show the amount of revenue billed each month and inception-to-date using interim rates, prior rates, and the difference. Direct Testimony L. Coel, p. 3; T. 990-994.

**RECOMMENDATION:** Reject the first sentence as unsupported by the record. Accept the remainder of the paragraph.

3. The PSC has previously allowed Florida Cities to recover duplicate billing register costs as rate case expense. Direct Testimony L. Coel, pp. 3-4; T. 985-986.

**RECOMMENDATION:** Accept.

4. Approximately \$1000 of the total amount is for Florida Cities' in-house rate department time. These expenses are fully supported by undisputed evidence. Exhibit 36 (LC-1, LC-1a, LC-1b); Direct Testimony L. Coel, pp. 2-3, T. 984-985.

**RECOMMENDATION:** Accept.

#### ISSUE 6

1. The revenue requirement in the PAA Order No. PSC-95-1360-FOF-SU, is \$2,489,487 based on the test year ending December 31, 1995. The appropriate revenue requirement in this proceeding must adjust the PAA revenue requirement by \$20,854 annually due to the rate reduction credit, discussed in the procedural background section of this brief, and by \$50,921 annually due to the additional rate case expense, as discussed in Issues 4 and 5 of this brief. See Attachment "D" hereto.

**RECOMMENDATION:** Accept first sentence and first half of second sentence. Reject second half of second sentence as unsupported by the record and conclusory.

2. FCWC has consistently maintained that its investment is 100% used and useful thereby

resulting in the revenue requirement of \$2,519,554 without the necessity of considering the application of Sec. 367.0817, Fla. Stat. However, Florida Cities appealed the issue of the PSC's failure to include the entire cost of its effluent reuse project in rate base as a violation of the requirements of Sec. 367.0817, Fla. Stat., on its appeal from Order No. PSC-96-1133-FOF-SU. Amended Brief of Appellant, Florida Cities Water Company, pp. 20-21, 45. The Court did not reach this issue on appeal.

**RECOMMENDATION:** Accept.

3. The choice of effluent reuse site was found to be a prudent decision. Order No. PSC-96-1133-FOF-SU, p. 39. None of the effluent reuse project facilities were found to be unreasonably or imprudently built.

**RECOMMENDATION:** Accept.

#### ISSUE 7

1. The PAA rates which are currently in effect are based upon a finding of the Waterway Estates AWTP facilities, including reuse, being 100% used and useful. The PAA rates are based upon the rate case MFR revenue requirement as adjusted by Staff. Other than the issues appealed to the First District Court of Appeal, Florida Cities did not contest the Staff adjustments to the revenue requirement.

**RECOMMENDATION:** Accept.

2. Since the entry of the PAA Order, Florida Cities has prudently incurred an additional \$154,116.16 of rate case expense (not including appellate rate case expenses reimbursed by the PSC pursuant to Court and DOAH Orders). Issues 4 and 5 herein.

**RECOMMENDATION:** Accept.

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3. The rate reduction credit which has been effective since June 30, 1996, has resulted in an annual revenue reduction of \$20,854, which must be properly accounted for in the final rates.

**RECOMMENDATION:** Accept.

**ISSUE 8**

1. Based on the additional rate case expense of \$154,116.16, revenue should be reduced at the end of four years by \$38,529.04. See Findings of Fact in Issues 4 and 5, above; Sec. 367.0816, Florida Statutes.

**RECOMMENDATION:** Reject as unsupported by the record.

**ISSUE 9**

1. Based upon the findings of fact and conclusions of law in Issues 1-8 above, the final rates will be greater than the PAA rates currently in effect.

**RECOMMENDATION:** Reject as unsupported by the record.

CONCLUSIONS OF LAW

**ISSUE 1**

Sec. 367.081(2), Fla. Stat. (1997), requires the PSC in ratemaking to consider the investment of the utility in land acquired or facilities constructed in the public interest which includes plant investment necessary to treat average daily flow in the peak month, that is, MMADF. For this reason, the Commission may not ignore average daily flow in the peak or maximum month in determining used and useful plant. Failure to use the MMADF in the numerator ignores average daily flow in the peak month.

**RECOMMENDATION:** Reject because the proposed conclusion does not constitute a conclusion of law.

**ISSUE 2**

The fact that since 1991 the Department of Environmental Protection has been using different language on its permit application and permits does not justify "matching" Florida Cities' Waterway Estates WWTP AADF design basis (denominator) with use of AADF flows (numerator), because the undisputed evidence in this case is that the change in wording did not correspond to any change in operating capacity. See So. States Util. v. Fla. Pub. Serv. Com'n, 714 So. 2d 1046, 1054-56 (Fla. 1st DCA 1998).

**RECOMMENDATION:** Reject because the proposed conclusion does not constitute a conclusion of law.

**ISSUE 3**

1. The proposed "matching" of AADF in the numerator with the design basis of Florida Cities' 1.25 AWTP AADF, ignores average daily flow in the peak month (MMADF) in calculating used and useful plant to be included in rate base, and therefore would violate Sec. 367.081(2), Fla. Stat. (1997).

**RECOMMENDATION:** Reject because the proposed conclusion does not constitute a conclusion of law.



2. The "matching" principle argued by witnesses Crouch, Biddy, and Dismukes is unsupported by any competent substantial evidence, and is unsupported by any scientific principle.

**RECOMMENDATION:** Reject because the proposed conclusion does not constitute a conclusion of law.

3. The "matching" principle argued by witnesses Crouch, Biddy, and Dismukes is inconsistent with and contrary to the rules of the DEP concerning the design and permitting of wastewater treatment plants, and concerning staffing requirements.

**RECOMMENDATION:** Reject because the proposed conclusion does not constitute a conclusion of law.

4. If the PSC is going to use a formula for calculating the used and useful percentage for Florida Cities' AWTP, or for any other wastewater treatment plant, it must consider and allow into rate base the investment in plant needed to provide service to the public. This must include the investment for plant required to treat all wastewater flows coming to the plant, including maximum or peak month flows. Therefore, the PSC must use MMADF in the numerator of the equation calculating the AWTP's used and useful percentage in this case.

**RECOMMENDATION:** Reject because the proposed conclusion does not constitute a conclusion of law.

#### **ISSUE 4**

1. A public utility is entitled to recover in rates those expenses reasonably necessary to provide service to its customers. Such operating expenses include prudently-incurred rate case expense. West Ohio Gas Company v. Public Utility Commission of Ohio, 294 U.S. 63 (1935); Driscoll v. Edison Light and Power Company, 307 U.S. 104 (1939).

**RECOMMENDATION:** Accept.

2. The undisputed evidence is that Florida Cities' rate case expense was reasonable and prudently incurred. Additional rate case expense in the amount of \$154,116.16 should therefore be allowed.

**RECOMMENDATION:** Accept.

**ISSUE 5**

1. For the same reasons set forth in Issue 4 above, the \$15,833.60 of costs for maintaining duplicate billing registers and for Florida Cities' in-house rate costs (which are included in the \$154,116.16 discussed in Issue 4, above) should be allowed.

**RECOMMENDATION:** Accept.

**ISSUE 6**

1. Based upon the findings of fact and conclusions of law in Issues 1 - 5 above, the appropriate revenue requirement in this docket, based upon a finding of 100% used and useful, is \$2,519,554 based on the test year ending December 31, 1995.

**RECOMMENDATION:** Reject because the proposed conclusion does not constitute a conclusion of law.

2. In addition, the PSC must apply the law as it exists at the time it makes its determination. See Hillhaven v. Dept. of Health & Rehab. Serv., 625 So. 2d 1299, 1302 (Fla. 1993), rev. denied 634 So. 2d 623 (Fla. 1994); In re Forfeiture of 1985 Mercedes, 596 So. 2d 1261 (Fla. 1st DCA 1992).

**RECOMMENDATION:** Accept.

3. In the Final Order, the effluent reuse project investment was inappropriately reduced using a used and useful formula, rather than allowing all investment as prudently constructed. The reuse facilities' used and useful determination should be determined separately from the rest of the facilities, pursuant to the Court's interpretation of Sec. 367.0817, Fla. Stat., in So. States Util. v. Fla. Pub. Serv. Com'n., 714 So. 2d 1046, 1058 (Fla. 1st DCA 1998).

**RECOMMENDATION:** Accept.

4. The reuse facilities and disposal site must be considered 100% used and useful pursuant to Sec. 367.0817, Fla. Stat., because they were prudently constructed in the public interest.

**RECOMMENDATION:** Accept.

5. However, because all investment in plant, including the reuse facilities, should be considered 100% used and useful pursuant to the PSC's used and useful formula calculation, application of the Court's interpretation of Sec. 367.0817, Fla. Stat., in So. States Util. v. Florida Public Service Com'n., supra., to the facts of this case, does not affect the final used and useful percentage of 100%.

**RECOMMENDATION:** Reject because the proposed conclusion does not constitute a conclusion of law.

#### **ISSUE 7**

1. The appropriate wastewater rates in this case are those as shown in Attachment "E" hereto, which are the PAA rates currently in effect, adjusted for the rate case expense amortization credit, also currently in effect, and as adjusted by allowance of the additional rate case expense incurred subsequent to the PAA order.

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**RECOMMENDATION:** Reject because the proposed conclusion does not constitute a conclusion of law.

**ISSUE 8**

1. The appropriate amount by which rates should be reduced four years after the established effective date to reflect the removal of the amortized rate case expense as required by Sec. 367.0816, Florida Statutes, is \$38,529.04.

**RECOMMENDATION:** Reject because the proposed conclusion does not constitute a conclusion of law.

**ISSUE 9**

1. Since the final rates will be greater than the rates currently in effect, no refund will be required.

**RECOMMENDATION:** Reject because the proposed conclusion does not constitute a conclusion of law.

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DATE: MARCH 16, 1999

**ISSUE 12:** Should this docket be closed?

**RECOMMENDATION:** No. Upon expiration of the protest period for Issue 3A, and the appeals period for the rest of the order, this docket should remain open pending staff's verification of refunds. Staff should be given administrative authority to close the docket upon verification that the refunds have been completed, and there are no unclaimed refunds. (JAEGER)

**STAFF ANALYSIS:** Upon expiration of the protest period for Issue 3A, and the appeals period for the rest of the order, if a timely protest is not received from a substantially affected person and an appeal is not filed, this docket should remain open pending completion and verification of the refunds. Staff recommends that administrative authority be granted to staff to close the docket upon verification that the refunds have been made, and there are no unclaimed refunds.

FLORIDA CITIES WATER CO.-NORTH FT. MYERS DIVISION  
 SCHEDULE OF WASTEWATER RATE BASE  
 TEST YEAR ENDED 12/31/95 (REMAND)

SCHEDULE NO. 1-A  
 DOCKET NO. 950387-SU

COMPONENT	TEST YEAR PER ORDER NO PSC-96-1133-POF-SU	STAFF ADJUSTMENTS	STAFF ADJUSTED TEST YEAR
UTILITY PLANT IN SERVICE	\$13,120,329	\$0	\$13,120,329
LAND	5,000	0	5,000
PROPERTY HELD FOR FUTURE USE	(2,425,823)	962,899	(1,462,924)
CONSTRUCTION WORK IN PROGRESS	0	0	0
ACCUMULATED DEPRECIATION	(3,092,676)	0	(3,092,676)
CIAC	(3,453,343)	(43,821)	(3,497,164)
AMORTIZATION OF CIAC	1,347,639	2,823	1,350,462
UNFUNDED FASB 106 OBLIGATION	(81,855)	0	(81,855)
OTHER: ALLOC. OF GENERAL OFFICE	27,799	0	27,799
WORKING CAPITAL ALLOWANCE	<u>78,845</u>	<u>0</u>	<u>78,845</u>
<b>RATE BASE</b>	<b><u>\$5,525,915</u></b>	<b><u>\$921,900</u></b>	<b><u>\$6,447,815</u></b>

FLORIDA CITIES WATER CO.-NORTH FT. MYERS DIVISION  
 ADJUSTMENTS TO RATE BASE  
 TEST YEAR ENDED 12/31/95

SCHEDULE NO. 1-B  
 DOCKET NO. 950387-SU

EXPLANATION	WASTEWATER
<b>PROPERTY HELD FOR FUTURE USE</b>	
a) Used and Useful Adjustment After Remand- Treatment Plant	\$912,587
b) To Remove Used & Useful Adjustment for Reuse Facilities	50,312
	<u>\$962,899</u>
<b>CIAC</b>	
To Adjust for imputation of CIAC on Margin Reserve	<u>(\$43,821)</u>
<b>ACCUMULATED AMORTIZATION</b>	
To reflect adjustment to impute CIAC on Margin Reserve	<u>\$2,823</u>

FLORIDA CITIES WATER CO.-NORTH FT. MYERS DIVISION  
 CAPITAL STRUCTURE  
 TEST YEAR ENDED 12/31/95 (REMAND)

SCHEDULE NO. 2  
 DOCKET NO. 950387-SU

DESCRIPTION	TOTAL CAPITAL	SPECIFIC ADJUSTMENTS (EXPLAIN)	PRO RATA ADJUSTMENTS	CAPITAL RECONCILED TO RATE BASE	RATIO	COST RATE	WEIGHTED COST
<b>PER UTILITY</b>							
1 LONG TERM DEBT	36,660,000	0	(32,600,479) \$	4,059,521	48.30%	9.53%	4.60%
2 SHORT-TERM DEBT	0	0	0	0	0.00%	0.00%	0.00%
3 PREFERRED STOCK	9,000,000	0	(8,003,391)	996,609	11.86%	9.00%	1.07%
4 COMMON EQUITY	20,782,539	0	(18,481,198)	2,301,341	27.38%	11.34%	3.11%
5 CUSTOMER DEPOSITS	1,013,037	0	(900,859)	112,178	1.33%	6.00%	0.08%
6 DEFERRED ITC'S-ZERO COST	0	0	0	0	0.00%	0.00%	0.00%
7 DEFERRED ITC'S-WTD COST	1,678,281	0	(1,492,438)	185,843	2.21%	9.96%	0.22%
8 DEFERRED INCOME TAXES	6,762,006	0	(6,013,220)	748,786	8.91%	0.00%	0.00%
9 TOTAL CAPITAL	<u>75,895,863</u>	0	<u>(67,491,585) \$</u>	<u>8,404,278</u>	<u>100.00%</u>		<u>9.08%</u>
<b>PER STAFF</b>							
10 LONG TERM DEBT	34,820,000	0	(31,868,052) \$	2,951,948	45.78%	8.30%	3.80%
11 SHORT-TERM DEBT	0	0	0	0	0.00%	0.00%	0.00%
12 PREFERRED STOCK	9,000,000	0	(8,237,004)	762,996	11.83%	9.00%	1.07%
13 COMMON EQUITY	22,782,539	0	(20,851,096)	1,931,443	29.96%	11.88%	3.56%
14 CUSTOMER DEPOSITS	1,013,037	0	(927,154)	85,883	1.33%	6.00%	0.08%
15 DEFERRED ITC'S-ZERO COST	0	0	0	0	0.00%	0.00%	0.00%
15 DEFERRED ITC'S-WTD COST	1,678,281	0	(1,536,001)	142,280	2.21%	9.62%	0.21%
16 DEFERRED INCOME TAXES	6,762,006	0	(6,188,741)	573,265	8.89%	0.00%	0.00%
17 TOTAL CAPITAL	<u>76,055,863</u>	0	<u>(69,608,048) \$</u>	<u>6,447,815</u>	<u>100.00%</u>		<u>8.72%</u>
<b>RANGE OF REASONABLENESS</b>					<b>LOW</b>	<b>HIGH</b>	
RETURN ON EQUITY					<u>10.88%</u>	<u>12.88%</u>	
OVERALL RATE OF RETURN					<u>8.42%</u>	<u>9.02%</u>	

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FLORIDA CITIES WATER CO.-NORTH FT. MYERS DIVISION  
 STATEMENT OF WASTEWATER OPERATIONS  
 TEST YEAR ENDED 12/31/95 (REMAND)

SCHEDULE NO. 3-A  
 DOCKET NO. 950387-SU

DESCRIPTION	TEST YEAR PER ORDER NO PSC-96-1133-FOF-SU	STAFF ADJUSTMENTS	STAFF ADJUSTED TEST YEAR	REVENUE INCREASE	REVENUE REQUIREMENT
OPERATING REVENUES	<u>\$2,003,347</u>	<u>\$0</u>	<u>\$2,003,347</u>	<u>\$225,946</u>	<u>\$2,229,293</u>
OPERATING EXPENSES				11.28%	
OPERATION AND MAINTENANCE	944,199	38,530	982,729		982,729
DEPRECIATION	279,337	58,182	337,519		337,519
AMORTIZATION	949	0	949		949
TAXES OTHER THAN INCOME	191,202	10,015	201,217	10,168	211,385
INCOME TAXES	106,035	(52,497)	53,538	81,197	134,735
TOTAL OPERATING EXPENSES	<u>\$1,521,721</u>	<u>\$54,230</u>	<u>\$1,575,952</u>	<u>\$91,365</u>	<u>\$1,667,317</u>
OPERATING INCOME	<u>481,626</u>	<u>(54,230)</u>	<u>427,395</u>	<u>134,581</u>	<u>561,976</u>
RATE BASE	<u>5,525,915</u>		<u>6,447,815</u>		<u>6,447,815</u>
RATE OF RETURN	<u>8.72%</u>		<u>6.63%</u>		<u>8.72%</u>

FLORIDA CITIES WATER CO.-NORTH FT. MYERS DIVISION  
 ADJUSTMENTS TO OPERATING STATEMENTS  
 TEST YEAR ENDED 12/31/95 (REMAND)

SCHEDULE NO. 3-B  
 DOCKET NO. 950387-SU

EXPLANATION	WASTEWATER
<b>OPERATION &amp; MAINTENANCE EXPENSES</b>	
a) Adjustment to reflect provision for non-legal appellate rate case expense	\$3,959
b) Adjustment to reflect provision for rate case expense since remand from courts	34,571
	<u>\$38,530</u>
<b>DEPRECIATION EXPENSE</b>	
a) To reflect adjustment to impute additional CIAC on margin reserve	(\$2,823)
b) To reflect used and useful adjustment	61,005
	<u>\$58,182</u>
<b>TAXES OTHER THAN INCOME TAXES</b>	
a) To reflect used and useful adjustment to property taxes	<u>\$10,015</u>
<b>INCOME TAXES</b>	
Income taxes associated with staff's adjustments	<u>(\$52,497)</u>
<b>OPERATING REVENUES</b>	
Adjustment to reflect recommended revenue requirement	<u>\$225,946</u>
<b>TAXES OTHER THAN INCOME TAXES</b>	
Regulatory assessment taxes on additional revenues	<u>\$10,168</u>
<b>INCOME TAXES</b>	
Income taxes related to recommended income amount	<u>\$81,197</u>

**RATE SCHEDULE**

**Wastewater**

**Monthly Rates**

	<b>Tariffed Rates Prior to Filing</b>	<b>Implemented PAA Rates</b>	<b>Utility Requested Final Rates</b>	<b>Staff Recommended Final Rates</b>
<b><u>Residential</u></b>				
Base Facility Charge (meter size) All Meter Sizes .	\$24.37	\$28.56	\$29.51	\$26.29
Gallonge Charge, per 1,000 gallons (Maximum 6,000 gallons)	\$4.62	\$5.15	\$5.32	\$4.49
<b><u>General Service and all other classes</u></b>				
Base Facility Charge (meter size):				
5/8" x 3/4"	\$24.37	\$28.56	\$29.51	\$26.29
1"	\$60.94	\$71.41	\$73.76	\$65.73
1 1/2"	\$121.87	\$142.80	\$147.53	\$131.47
2"	\$194.99	\$228.52	\$236.04	\$210.35
3"	\$389.98	\$457.03	\$472.09	\$420.70
4"	\$609.35	\$714.11	\$737.63	\$657.34
6"	\$1,218.69	\$1,428.23	\$1,475.27	\$1,314.68
Gallonge Charge, per 1,000 gallons (No Maximum)	\$5.55	\$6.18	\$6.38	\$5.38
<b><u>Typical Monthly Bill Comparisons</u></b>				
Residential Usage (gallons)				
3000	\$38.23	\$44.01	\$45.47	\$39.76
5000	\$47.47	\$54.31	\$56.11	\$48.74
10000	\$52.09	\$59.46	\$61.43	\$53.23

**RATE SCHEDULE**

**Schedule of Rate Decrease After Expiration of  
 Amortization Period for Rate Case Expense**

**Wastewater**

**Monthly Rates**

	<b><u>Staff Recommended Rates</u></b>	<b><u>Rate Decrease</u></b>
<b><u>Residential</u></b>		
Base Facility Charge (meter size) All Meter Sizes	\$26.29	\$0.77
Gallonge Charge, per 1,000 gallons (Maximum 6,000 gallons)	\$4.49	\$0.13
	<b><u>Staff Recommended Rates</u></b>	<b><u>Rate Decrease</u></b>
<b><u>General Service and all other classes</u></b>		
Base Facility Charge (meter size):		
5/8" x 3/4"	\$26.29	\$0.77
1"	\$65.73	\$1.93
1 1/2"	\$131.47	\$3.86
2"	\$210.35	\$6.17
3"	\$420.70	\$12.35
4"	\$657.34	\$19.29
6"	\$1,314.68	\$38.58
Gallonge Charge, per 1,000 gallons	\$5.38	\$0.16

**FLORIDA CITIES WATER CO.-NORTH FT. MYERS DIVISION  
 CALCULATION OF SECURED REVENUES  
 TEST YEAR ENDED 12/31/95**

**SCHEDULE NO. 6  
 DOCKET NO. 950387-SU**

	3 month appeal time	9 month appeal time	15 month appeal time
Revenue Requirement - Per Order NO. PSC 95-1360-FOF-SU	\$2,489,487	\$2,489,487	\$2,489,487
Minimum Revenue Req. Based on Court of Appeal Decision Using AADF & 1.25 MGD/capacity & Removal of all Rate Case Expense not approved in Order No. PSC-96-1133-FOF-SU	\$2,188,948	\$2,188,948	\$2,188,948
Revenue Difference:	\$300,539	\$300,539	\$300,539
Monthly revenue increase	<u>      / 12</u> \$25,045	<u>      / 12</u> \$25,045	<u>      / 12</u> \$25,045
Revenues subject to refund	\$300,539	\$300,539	\$300,539
Divide by number of months	12	12	12
Average monthly revenues	\$25,045	\$25,045	\$25,045
No. of months until refund:	42	48	54
Estimated date that refund is completed	June 15, 1999	Dec 15, 1999	June 15, 2000
	\$1,051,887	\$1,202,156	\$1,352,426
Annual interest rate:	5.59%	5.59%	5.59%
Interest rate for the period that revs are held subject to refund:	19.58%	22.37%	25.17%
	119.58%	122.37%	125.17%
<b>Amount to be secured:</b>	<b>\$1,257,799</b>	<b>\$1,471,102</b>	<b>\$1,692,811</b>