FLORIDA 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

April 30, 1998

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF WATER & WASTEWATER (WALDEN, MONIZ, GALLOWAY)
DIVISION OF LEGAL SERVICES (JAEGER, JABER)

RE: DOCKET NO. 950387-SU - FLORIDA CITIES WATER COMPANY, NORTH FT. MYERS DIVISION - APPLICATION FOR A RATE INCREASE IN WASTEWATER RATES

AGENDA: MAY 12, 1998 - REGULAR AGENDA - DECISION AFTER REMAND - PARTICIPATION IS DEPENDENT UPON VOTE IN ISSUE NO. 1

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\950387D.RCM

CASE BACKGROUND

Florida Cities Water Company (FCWC or utility) is a Class A utility that provides water and wastewater service to two communities in Ft. Myers: a northern sector and a southern sector. The North Ft. Myers service area is the applicant in this proceeding, serving about 2559 customers at December 31, 1994. Many of the customers are master metered and therefore the number of equivalent residential connections (ERCs) served is 4590. 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 newly expanded advanced wastewater treatment (AWT) plant which the utility states has a capacity of 1.25 million gallons per day (mgd). Effluent is disposed into the Caloosahatchee River and to the Lochmoor golf course in the service area.

The utility's previous rate case was finalized July 1, 1992 by Order No. PSC-92-0594-FOF-SU in Docket No. 910756-SU. In 1994, the utility's rates were increased due to an index proceeding.

The Commission issued PAA Order No. PSC-95-1360-FOF-SU on November 2, 1995. The PAA Order was protested on November 27, 1995 and the matter was set for hearing for April, 1996. After the protest of the PAA, the utility requested implementation of the rates approved in the Commission's PAA Order. This request was granted in Order No. PSC-96-0038-FOF-SU issued January 10, 1996, making the rates subject to refund, and providing security through a corporate undertaking. Those rates remain in effect today.

The utility expanded the capacity of its wastewater plant in 1995 at a cost of $1.6 million, which included the installation of reclaimed water facilities and initiated provision of effluent to a lake on the Lochmoor golf course. The Commission agreed with the utility that the magnitude of this investment justified an end-of-period rate base determination.

The Commission's post-hearing decision, rendered in Order No. PSC-96-1133-FOF-SU, granted revenues of $2,003,347, which was a decrease from test year revenues of $588,643. The utility appealed the Commission's order to the First District Court of Appeal (First DCA or Court) on the issue of used-and-useful plant, and requested a stay pending judicial review. Additional security was required by Order No. PSC-96-1390-FOF-SU, issued November 20, 1996, to allow for the anticipated time for the appeal. The First DCA reversed the Commission Order on the amount of plant capacity and the used-and-useful determinations, and remanded the case for the Commission to give an explanation, if it could, supported by the record, for its used-and-useful calculations.

Subsequent to the remand, the utility filed its Petition to Allow Additional Rate Case Expenses on February 4, 1998. Also, on March 4, 1998, Ms. Cheryl Walla filed her petition requesting another hearing in the service area.

At the March 24 Agenda Conference, the Commission considered: the remand by the First DCA; whether to reopen the record for further proceedings; the request of Ms. Walla for another hearing in the service area; the request of the utility for additional rate case expense; and, the necessary amount of security to protect the rates subject to refund. Upon such consideration, the Commission, among other things, voted (in a 2-1 vote) to reopen the record and schedule a hearing on what flows should be used in the numerator of the used-and-useful fraction when the Department of Environmental Protection (DEP) states the denominator, the permitted capacity of the wastewater treatment plant, based on annual average daily flows (AADF).

Accordingly, on April 3, 1998, the Prehearing Officer issued an Order Establishing Procedure and Issues -- Order No. PSC-98-0483-PCO-SU. That Order, recognizing that the Chairman had scheduled the hearing for July 16 and 17, 1998, required the utility to prefile its testimony on May 15, 1998. On April 10, 1998, the utility filed its Motion For Stay Pending Judicial Review of that Order or any other related Order. Subsequently, the Commission issued Order No. PSC-98-0509-PCO-SU, on April 13, 1998,

memorializing its vote at the March 24 Agenda Conference. The utility then, on April 14, 1998, filed its Amended Motion For Stay Pending Judicial Review And Request For Expedited Treatment. To provide sufficient time to allow the utility to prepare testimony in the event its motion for stay is denied, by Order No. PSC-98-0568-PCO-SU, issued April 23, 1998, the Prehearing Officer revised the Order on procedure to reflect new testimony dates.

This recommendation addresses that motion for stay.

ISSUE 1: Should parties be allowed to participate?

RECOMMENDATION: Yes. Participation should be limited to five minutes for each party. (JAEGER)

STAFF ANALYSIS: Typically, post-remand recommendations have been noticed as "Parties May Not Participate," with participation limited to Commissioners and staff. However, in this case, staff believes that the Commission will be considering new matters related to but not addressed at hearing. In addition, given the nature of the issues which have been raised, staff believes that participation by the parties would be helpful to the Commission. Therefore, staff recommends that participation at the agenda conference be allowed, but limited to five minutes for each party.

ISSUE 2: Should the Commission grant Florida Cities Water Company's Amended Motion for Stay Pending Judicial Review of Order No. PSC-98-0509-PCO-SU?

RECOMMENDATION: Yes. The Commission should grant Florida Cities' amended motion for stay filed on April 14, 1998. The utility's first motion for stay, filed on April 10, 1998, is moot. (JAEGER, JABER, WALDEN)

ANALYSIS: As stated in the case background, on April 10, 1998, Florida Cities filed its first Motion for Stay and on April 14, 1998, it filed its Amended Motion For Stay of Order No. PSC-98-0509-PCO-SU Pending Judicial Review And Request For Expedited Treatment. In the motions, the utility states that it will appeal Order No. PSC-98-0509-PCO-SU, which reopened the record and allowed for an additional hearing to be held on what flows should be used in the numerator of the used-and-useful fraction when the DEP permits the wastewater treatment plant based on AADF.

In its amended motion, Florida Cities states that it is likely to prevail on appeal as the First DCA did not authorize or "invite" the Commission to reopen the record. Further, Florida Cities argues that the Commission is improperly pursuing "a second bite of the apple" on an issue that all parties already had an opportunity to address in this proceeding.

Finally, Florida Cities states that it will suffer substantial harm if a stay is not granted, and argues that it, all parties, and the Commission should not have to bear both the expense of the appellate proceeding and the second hearing before the Commission. It then claims that such needless burden and expense is contrary to the public interest, and requests that all required filing and hearing dates established by Order No. PSC-98-0483-PCO-SU be canceled pending final review by the First DCA. Florida Cities also states that it believes the current security is sufficient, but requests the Commission to determine whether additional security will be required as a condition of the stay.

Pursuant to Rule 25-22.061(1)(a), Florida Administrative Code, the Commission is required to grant a motion for stay pending judicial review of an order involving the refund of moneys to customers or a decrease in rates charged to the customers. Order No. PSC-98-0509-FOF-WS does not involve either scenario. However, Rule 25-22.061(2), Florida Administrative Code, states that:

> Except as provided in subsection (1), a party seeking to stay a final or nonfinal order of the Commission pending judicial review shall file a motion with the Commission, which shall have authority to grant, modify, or deny such relief. A stay pending review may be conditioned upon the posting of a good and sufficient bond or corporate undertaking, other conditions, or both. In determining whether to grant a stay, the Commission may, among other things, consider:
>
> (a) Whether the petitioner is likely to prevail on appeal;
>
> (b) Whether the petitioner has determined that he is likely to suffer irreparable harm if the stay is not granted; and
>
> (c) Whether the delay will cause substantial harm or be contrary to the public interest.

a. Likelihood of Prevailing on Appeal

The utility's argument in this regard is only that it disputes that the Court authorized the Commission to reopen the record in this case to take additional evidence on the issue of what flows should be used in the numerator of the used-and-useful equation. The utility offers no new argument supporting why its appeal would be successful--in fact, the utility makes the same arguments it made at the March Agenda Conference. However, the resolution of whether the record should be reopened for the very limited purpose of taking evidence on what flows should be used in the numerator of the used-and-useful equation, when DEP permits the wastewater

treatment plant based on AADF, is one that hinges on the interpretation of the opinion issued by the First DCA in this case. In reaching its conclusion, the Commission stated:

> We find that the language of the First DCA, 'the PSC 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,' is an invitation to take additional testimony. Therefore, consistent with Tampa Electric, we believe that we have the discretion to receive additional evidence on what flows should be used in the numerator of the used-and-useful equation when the DEP permits the plant on the basis of annual average daily flows.
>
> We believe the First DCA distinguished between the issue on plant capacity and the issue of what flows should be used in the numerator. The issue on plant capacity was fully litigated, and the opinion of the First DCA left no room for further consideration on that issue. However, we believe that the First DCA specifically contemplated further action by us, if we wished, on the issue of what flows should be used in the numerator. It merely cautioned us that any change must be supported by record evidence, and that all parties must be given an opportunity to address this evidence. Since the Court had already stated there was no evidence in the record to support this policy change, the only interpretation that gives meaning to the above-noted language is that the Court was giving us the discretion to put any such evidence in the record. If it had not wanted us to have the discretion to reopen the record, it could have made its findings as conclusive as it did on the issue of wastewater treatment plant capacity. Order No. PSC-98-0509-PCO-SU at 5.

Staff believes that the Commission's interpretation of the First DCA opinion is legally sound. However, if the First DCA finds that the Commission misinterpreted the language of the opinion, the utility could prevail on appeal.

b. & c. Irreparable Harm, Substantial Harm or Contrary to the Public Interest

Florida Cities argues that it will suffer substantial harm if a stay is not granted, because absent a stay obtained from either the PSC or the Court, it will incur needless expense in pursuing the appeal and participating in proceedings before the PSC. The utility asserts that the duplication of proceedings will affect other parties and the PSC itself.

Staff believes that the utility has raised valid points here and compelling support for a stay pending judicial review. Going forward with a hearing in July on this matter will result in unnecessary expense in the event that the First DCA disagrees with the Commission's interpretation of the court opinion. At this point, waiting for a decision by the First DCA on the utility's appeal of Order No. PSC-98-0509-PCO-SU will not prejudice or harm any party or the PSC. On the contrary, waiting for an appellate decision could avoid the possibility of unnecessary expense and time associated with litigation.

Based on the foregoing, staff recommends that Florida Cities Water Company's Amended Motion For Stay Pending Judicial Review, filed on April 14, 1998, should be granted. The Motion for Stay, filed on April 10, 1998, is moot. If Staff's recommendation in this issue is approved, Staff will contact the Chairman's office regarding the cancellation of the prehearing and hearing dates pending resolution of the appeal by the First DCA.

ISSUE 3: What is the appropriate security to guarantee the revenue subject to refund collected as per Order No. PSC-96-0038-FOF-SU, issued January 10, 1996 given the utility's subsequent Motions for Stay filed on April 10, 1998 and April 14, 1998?

RECOMMENDATION: The utility should be required to file a corporate undertaking in the amount of $1,487,207. Pursuant to Rule 25-30.360(6), Florida Administrative Code, the utility should be required to provide a report by the 20th of each month indicating the monthly and total revenue collected subject to refund. Further, 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. (GALLOWAY)

STAFF ANALYSIS: Given the direction of this case, staff has calculated the security to include the estimated time for the possible appeal process along with the period of time between the implementation of PAA rates and this recommendation. As a result of the utility's Motion for Stay Pending Judicial Review, filed on April 10, 1998, and its Amended Motion for Stay, filed on April 16, 1998, staff believes that security in the amount of $1,487,201 should be posted.

The amount of security for this docket was originally ordered when the utility decided to implement PAA rates effective in December 1995. 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 of the post hearing decision. Once again, staff believes it is necessary to modify the amount of security due to the extended time frame resulting from recent decisions and filings.

The utility posted a corporate undertaking in the amount of $940,755, pursuant to Order No. PSC-96-1390-FOF-SU, issued November 20, 1996. However, to guarantee any potential refunds of revenues collected through the extended time frame (which should include a

potential appeal by the utility as stated in its recently filed motions), the security must be increased.

Pursuant to Rule 25-22.061(2), Florida Administrative Code, a stay pending review may be conditioned upon the posting of good and sufficient bond, or the posting of a corporate undertaking, and such other conditions as the Commission finds appropriate. Therefore, the corporate undertaking posted by the utility in the amount of $940,755 is no longer adequate. The appropriate amount of security should be increased to total $1,487,207.

In its Motion for Stay Pending Judicial Review, filed April 10, 1998, the utility states that it will appeal Order No. PSC-98-0483-PCO-SU and any related order, through a Petition for Review of Non-Final Agency Action, pursuant to Sections 120.68(1) and (6)(b), Florida Statutes. Also, in its Amended Motion for Stay Pending Judicial Review and Request for Expedited Treatment, filed on April 14, 1998, the utility states that it will appeal Order No. PSC-98-0509-SU, through a Petition for Review of Non-Final Agency Action, pursuant to Section 120.68(1) and (6)(b), Florida Statutes. In general, an appeal process is estimated to take up to 18 months. Staff has calculated the security to include the estimated appeal time along with the period of time between the implementation of rates and this recommendation.

Based on the foregoing, staff recommends that the utility be ordered to post a corporate undertaking in the amount of $1,487,207. Further, pursuant to Rule 25-30.360(6), Florida Administrative Code, the utility should be required to provide a report by the 20th 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.