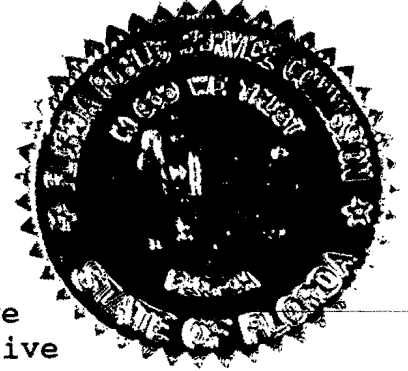


DIVISION OF ADMINISTRATIVE HEARINGS

ORIGINAL
FILE COPY

FLORIDA CITIES WATER :
 COMPANY, :
 :
 Petitioner, : DOAH CASE NO. 98-1347FC
 :
 vs. :
 :
 STATE OF FLORIDA, PUBLIC :
 SERVICE COMMISSION, :
 :
 Respondent. : FPSC DOCKET NO. 950387-SU
 :



PROCEEDINGS: HEARING

BEFORE: LARRY J. SARTIN
 Administrative Law Judge
 Division of Administrative
 Hearings

DATE: Monday, April 27, 1998

TIME: Commenced at 9:30 a.m.
 Concluded at 1:00 p.m.

PLACE: Division of Administrative
 Hearings
 1230 Apalachee Parkway
 The DeSoto Building
 Tallahassee, Florida

REPORTED BY: H. RUTHE POTAMI, CSR, RPR
 Official Commission Reporter

DOCUMENT NUMBER - DATE

05115 MAY-78

FPSC-RECORDS/REPORTING

1 **APPEARANCES:**

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4 Tallahassee, Florida 32312, appearing on behalf of
5 **Florida Cities Water Company.**

6 **DAVID E. SMITH**, Director, and **DIANA**
7 **CALDWELL**, Florida Public Service Commission, Division
8 of Appeals, 2540 Shumard Oak Boulevard, Tallahassee,
9 Florida 32399-0870, appearing on behalf of the
10 **Commission Staff.**

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1 be very informal as you would like it to be or as
2 formal as you would like it to be.

3 At any rate, I have had a chance to go
4 through the file. I've read your partial stipulation
5 on award of attorney's fees and, as I understand it,
6 and I guess that you all will explain this to me as we
7 go along, the issue that remains to be decided is the
8 extent to which the results of the appeal should be
9 taken into account in determining the amount of
10 attorney's fees.

11 As I understand it, you've stipulated to the
12 hourly rate, I guess, and the hours, and so we're only
13 here on the question of looking at the results
14 obtained; is that correct?

15 **MR. SCHIEFELBEIN:** Essentially, your Honor.
16 We also seek recovery of the attorney's fees and costs
17 that we show are proper in pursuit of our attorney's
18 fees that we're seeking today. So that's an
19 additional claim.

20 **THE COURT:** For this proceeding and the
21 proceedings leading up to this proceeding?

22 **MR. SCHIEFELBEIN:** The way it's structured
23 it would be attorney's fees and expert witness fees
24 incurred in this proceeding, yes, sir.

25 **THE COURT:** All right. Are there any

1 preliminary matters that we need to deal with before
2 we start this morning? Do either of you wish to
3 invoke the rule?

4 MS. CALDWELL: No.

5 MR. SCHIEFELBEIN: (Shaking head.)

6 THE COURT: Well, you're welcome to make
7 opening statements, if you'd like to. If you don't,
8 we can start with witnesses. Mr. Shiefelbein?

9 MR. SCHIEFELBEIN: Thank you, your Honor.
10 I'll try and be brief.

11 The 1st District Court of Appeals granted
12 Florida Cities' Motion for Attorney's Fees on a recent
13 appeal of the Commission's rate case decision. This
14 is a wastewater rate case.

15 Florida Cities moved for an award of
16 attorney's fees on the basis of the fact that the
17 Commission's disposition of the rate case represented
18 a gross abuse of agency discretion and that Motion for
19 Attorney's Fees was granted. And, as I assume you
20 know, the matter was remanded to the Public Service
21 Commission for a determination of those fees and, if
22 the parties were unable to agree, that the matter
23 would be referred to the Division. And that's how we
24 come to be here today.

25 Now, we will put on several witnesses, I

1 hope, briefly each of them; lot of witnesses with not
2 too much content that we feel necessary to express.
3 But we will first put on Mr. Frank Seidman, who I like
4 to kid. I call him Father Time. He's been involved
5 in regulation, PSC regulation, of utilities for well
6 over 30 years. We asked him to provide an independent
7 analysis and determination of the extent of our
8 success on the appeal, and he'll be rendering an
9 opinion on this.

10 Then, hopefully in short order, we have
11 Kenneth Gatlin and Kathryn Cowdery, who together with
12 me form Gatlin, Schiefelbein & Cowdery. Mr. Gatlin
13 was the lead attorney in the rate case, the
14 proceedings below, as it were, before the Commission.
15 He will give a little bit of background there; also
16 talk about his efforts in the case.

17 Ms. Cowdery was the lead counsel on appeal
18 before the 1st DCA, and she will explain her alternate
19 theories that she devised on the appeal.

20 Beyond that, we have Mr. Rick Melson, an
21 attorney with 18 years' experience before the Public
22 Service Commission as a private practitioner. He is
23 here to testify as to the reasonableness of my fees in
24 this collateral action. Basically that's the case
25 we're going to put on.

1 Our case is very simple, and that is, we
2 want it all. As a fallout or result of the court's
3 decision, we have successfully either been vindicated
4 on disallowed plant investment or have preserved
5 through possible further proceedings on remand the
6 opportunity to recover the balance of investment that
7 was disallowed by the Commission, and that was the
8 subject of the appeal.

9 Given that, we feel that the results
10 obtained on that appeal, to the extent they're
11 considered, would support an award of all of our
12 otherwise stipulated attorney's fees on this appeal.

13 That's it. That's our case, and I don't
14 think I need to belabor it further. You'll be hearing
15 from our witnesses as far as some of the details.

16 Thank you.

17 **THE COURT:** Thank you. Would you like to
18 make an opening statement?

19 **MS. CALDWELL:** Yes, please. Thank you. May
20 it please the Court, I'm Diana Caldwell. I've
21 introduced myself earlier.

22 The issue today is whether or not the
23 lodestar figure of the \$74,000 should be adjusted in
24 light of the results obtained by Florida Cities.

25 Today I will have one witness that will, I

1 hope, counter Mr. Seidman's argument to the
2 significance of the issue that was won on appeal by
3 the Commission.

4 That issue had to do with the Department of
5 Environmental Protection's requirement to enlarge the
6 plant, and Florida Cities had argued that they were in
7 a Catch 22, required to upgrade their plant by one
8 governmental agency upon penalty for noncompliance,
9 but unable to cover those costs for the upgrade from
10 customers because of the Commission's decision.

11 Florida Cities has argued that they were
12 unable to -- they should be able to recover all of
13 their costs.

14 I think that the case mostly is a legal
15 argument. I think there's very little factual issues
16 to come before the Court today, and I think that if we
17 have the opportunity to file our posthearing orders,
18 that we'll be able to fully flush out the legal
19 arguments at that time.

20 I do believe that this case is -- it's the
21 position of the Commission that this case is more an
22 issue where the Commission won the war and that
23 Florida Cities won the battle.

24 We hope to demonstrate today that the issue
25 raised by Florida Cities is separate and distinct,

1 that the issue had significantly greater consequences,
2 not only to Florida Cities, but the entire water and
3 wastewater utility industry, and that the remaining
4 issues on which they prevailed were, in fact, minor
5 and to some degree unresolved.

6 Florida Cities stated that the objective of
7 their case was obtained and, therefore, they should
8 recover all their attorney's fees. We disagree.

9 Florida Cities waged several campaigns in
10 their appeal. They laid it out issue by issue, but if
11 they won on the first issue, this is where they would
12 have won the war. But if the court had required the
13 Commission to include all costs required by DEP, the
14 issue of used and useful that they won on would never
15 have been addressed. And as it turned out, Florida
16 Cities achieved moderate success and brought them a
17 satisfactory result and a greater rate base with the
18 finding that the plant had the capacity of 1.25
19 million gallons per day. Therefore, the result is
20 still in question.

21 The second issue today is that they're also
22 claiming that they're entitled to a further award for
23 litigating the issue of attorney's fees. The argument
24 is predominantly a legal argument upon which the
25 Commission again should prevail, and we don't really

1 have anybody to testify as far as the reasonableness
2 of the fees; and we will argue that.

3 Finally, the lodestar figure should be
4 adjusted by the amount of cost charged by the
5 attorney's fees. We recognize that 120.595(5) allows
6 for the payment of costs, but it was not affirmatively
7 pled when they requested attorney's fees, nor was it
8 awarded by the courts. And that's what we hope are
9 going to be the arguments for today.

10 **THE COURT:** Can I ask, was there a written
11 decision of the Public Service Commission that was
12 then appealed?

13 **MS. CALDWELL:** Yes, there was a final order.

14 **THE COURT:** I was looking through my file.
15 I don't see that it's already been provided to me, so
16 I assume it will be during this proceeding.

17 **MS. CALDWELL:** We have, I think, agreed that
18 we will supply the Court with all of the briefs that
19 were filed, and I think a part of that will be a copy
20 of the order which is attached to the initial brief.

21 **THE COURT:** Okay. Would you prefer to go
22 ahead and deal with some of the exhibits you've agreed
23 to now and go ahead and get them accepted into
24 evidence, or would you rather go ahead and present
25 them as you call your witnesses? It's totally up to

1 Management & Regulatory Consultants, Inc., Post Office
2 Box 13427, Tallahassee, Florida.

3 Q Mr. Seidman, do you have before you a
4 document of some 14 -- well, apparently that's not a
5 good -- but do you have before you a document entitled
6 "Summary of Qualifications?"

7 A Yes, I do.

8 Q Did you prepare this document?

9 A Yes, I did. It has an attachment to it
10 called "Summary of Professional Expertise."

11 Q And does this focus on your expertise in any
12 particular area?

13 A In the field of public utility management
14 and regulatory issues.

15 Q And how many years of experience do you have
16 in the field of utility regulation?

17 A I've been in this field for some 35 years.

18 Q And in the last 10, 15 years or so, have you
19 focused in on any particular industry as far as your
20 consultancy?

21 A Basically since 1980 I've been doing
22 consulting primarily in the field of water and sewer
23 regulatory matters, also in the field of some electric
24 and telephone matters. In the most recent years,
25 probably the last 10 years, it's been primarily water

1 and sewer.

2 Q Would you summarize for us your experience
3 in the preparation of water and wastewater rate
4 applications?

5 A With regard to water and wastewater rate
6 applications, I have prepared rate case applications,
7 appeared as an expert witness in behalf of applicants.
8 In doing those preparations I've both supervised some
9 of it. I've prepared the applications in total in
10 some cases. I've prepared the applications in part in
11 some cases; some part the financial and rate portions,
12 sometimes the used and useful and engineering
13 portions, sometimes all of it.

14 Q And to the extent that detail might be
15 necessary regarding your background in preparing rate
16 case applications, that would be disclosed on this
17 summary of qualifications document?

18 A Yes. That pretty much -- I try to keep that
19 up to date. It covers just about all the cases I've
20 appeared at the Public Service Commission for, either
21 appearing in the cases or preparing the cases -- some
22 of them get settled, some of them don't go to
23 hearing -- for water and sewer and for electric and
24 telephone.

25 Q Do you also have experience, professional

1 experience, in the analysis of revenue requirements in
2 rate applications by utilities?

3 A Yes. In all of the cases I've prepared
4 revenue requirements, it's been -- determination of
5 revenue requirements has been part of the job.

6 Q Would that involve a determination of or
7 evaluation of rate base?

8 A Yes, it would be determining what the rate
9 base is on a per-books basis and then a used and used
10 and useful basis, also.

11 Q And would you describe your professional
12 experience or knowledge regarding a Public Service
13 Commission used and useful policy?

14 A With regard to used and useful policy, I
15 have been involved on behalf of the water and sewer
16 industry, I guess, since about 1991 with regard to
17 rulemaking proceedings and workshops regarding used
18 and useful.

19 Q And we'll explain some of that terminology.

20 THE COURT: I hope.

21 MR. SCHIEFELBEIN: Hopefully in a clear way.
22 Your Honor, I would offer this witness without further
23 to-do. We've got reams of documentation here.

24 MS. CALDWELL: We have no objection.

25 MR. SCHIEFELBEIN: But I would tender him as

1 an expert in the following fields: The preparation of
2 water and sewer rate applications, the analysis of
3 water and sewer revenue requirements and rate
4 applications, and Public Service Commission used and
5 useful policy.

6 THE COURT: Any objections?

7 MS. CALDWELL: No.

8 THE COURT: I'll accept him as proffered.

9 Q (By Mr. Schiefelbein) Mr. Seidman, I'd
10 like your help in speaking English to the judge as far
11 as what the heck it is that we do for a living.

12 Could you explain -- and if you feel it
13 would be helpful use the blackboard -- could you
14 explain how Florida Public Service Commission
15 regulated water and wastewater utilities, how their
16 rates are set in some simplified fashion? Can you do
17 that?

18 A I'll try. Whenever I'm asked what I do, I
19 have a hard time doing this. Basically under the
20 Public Service Commission if a utility comes in for a
21 rate case, or rates are reviewed by initiation of the
22 Commission or some other party requesting it, under
23 the statutes the Commission has to take into
24 consideration all of the operating expenses, taxes,
25 and depreciation expenses and the return on -- fair

1 return on the investment of the utility that's used in
2 serving the public.

3 So for purposes of putting together a rate
4 application, the basic components that you look for in
5 revenue requirement are quite simple as far as about
6 four categories.

7 Operating and maintenance expenses have to
8 be recovered; depreciation and amortization expenses
9 recovered; taxes are recovered; and return on -- a
10 fair return on the utility's investment in serving the
11 public are recovered.

12 All of those are subject, under the
13 Commission, to review for prudence and whether or not
14 all of those expenses and assets have been put in for
15 the public use as defined in the statute.

16 Q Can it be reduced to a formula as far as --
17 really, oversimplifying perhaps -- but as far as the
18 basic decisions that the Commission must make?

19 First of all, is there a concept called rate
20 base?

21 A Yes. I would do it this way: Revenue
22 requirement equals -- and you --

23 Q Revenue requirement -- that pen doesn't
24 work.

25 A Revenue requirements are the total dollars

1 that the utility is entitled to earn on an annual
2 basis; entitled to recover.

3 Q There will be no blackboard demonstration.

4 A Would you like me to repeat it again, then?

5 Q If you would. I'm sorry.

6 A Revenue requirements is the total dollars
7 the utility is entitled to recover on an annual basis,
8 and it consists of the operating and maintenance
9 expenses, plus depreciation and amortization expenses,
10 plus taxes, plus a fair return on the utility's
11 investment and assets serving the public. That's it.

12 Q And where does rate base as a term of art,
13 how does that fit in then?

14 A Rate base is the utility's assets invested
15 in serving the public. That is rate base, and if you
16 want, I can tell you the basic components of that.

17 Q If you would be brief, sure, it might be
18 helpful.

19 A Rate base is, really, if you will look at
20 the asset side of a balance sheet, it's the long-term
21 assets that the utility has an investment in; and it
22 basically consists of the investment -- the cost of
23 the plant itself, reduced by amount of accumulated
24 depreciation at that point in time, reduced again by
25 contributions in aid of construction, which are funds

1 that the utility receives from customers when they
2 hook up, and, therefore, it reduces their investment
3 in plant because they have no investment in those
4 contributions, plus some other factors that may fall
5 in as far as long-term investments; for instance, the
6 investment in working capital.

7 That's basically it. When you add those up,
8 you get the rate base, and when I talk about those
9 items, I'm talking about only that portion which is
10 used in serving the public. That's where used and
11 useful comes in.

12 Q Well, where does this term "used and useful"
13 come from?

14 A Well, used and useful is a term that's in
15 the statute. It's not defined in the statute.

16 Q By the statute, you mean?

17 A Chapter 367, Florida Statutes.

18 Q And the section is?

19 A 367.081.

20 Q (2)(a)?

21 A At least.

22 Q Go on.

23 A And although it's not defined, the
24 Commission has pretty much outlined what it means in
25 cases over the years, and it's been considered by the

1 Commission to be an engineering concept.

2 And when they look at it, there's about
3 three things that they consider. One is to determine
4 if the plant is really there represented by the
5 dollars; second, determine if it's being used to serve
6 the public; and, third, you determine is it sufficient
7 to take care of its other statutory requirements,
8 which is the ability to serve all of the customers
9 within its service area within a reasonable period of
10 time and to meet the regulatory requirements of other
11 agencies.

12 Q The description you just gave, that's not
13 something you made up yourself, is it?

14 A No. It comes from an order -- goes back, I
15 believe, to the 1970s.

16 Q Might that be the Deltona Utilities?

17 A There's a Deltona Utilities case, and I
18 don't have the reference.

19 Q And is that also consistent with your
20 understanding of the Digest of Regulatory
21 Philosophies?

22 A Yes, because that particular case is
23 referenced in the Digest amongst others.

24 Q So if investment is used and useful, it's
25 included in rate base. Was that your testimony?

1 A That's correct.

2 Q What if it's not used and useful?

3 A If it's not used and useful, it still
4 remains on the books of the company, but the company
5 isn't entitled to earn a return on it from the
6 customers through the rates.

7 Q Now, dealing strictly with wastewater, what
8 sort of plant facilities -- and, please, in a very
9 summary fashion -- are involved in a wastewater
10 system?

11 A In a wastewater system you have primarily a
12 wastewater treatment plant, including facilities to
13 dispose of the effluent, which would include the reuse
14 facilities, that is to take the effluent and dispose
15 of it by reusing it for environment purposes, like
16 spraying fields with it.

17 It also includes the collection lines and
18 any general plant and pumping plant required to meet
19 the needs of the utility in providing its service.

20 MR. SCHIEFELBEIN: Your Honor, if we could
21 have the summary of qualifications identified, as I
22 guess -- I don't know what your preference is as far
23 as numbering of exhibits.

24 THE COURT: I marked it as Petitioner's
25 Number 1. Do you wish to offer it now?

1 **MR. SCHIEFELBEIN:** Or I could do it at the
2 conclusion, if you have a preference.

3 **THE COURT:** No, it's up to you.

4 **MR. SCHIEFELBEIN:** All right. Hopefully,
5 that was somewhat enlightening as far as this area.

6 **Q** **(By Mr. Schiefelbein)** Now, as far as
7 before we get to the specifics of this case, how has
8 the PSC traditionally regulated wastewater treatment
9 and disposal facilities as far as their used and
10 useful nature?

11 **A** As far as determining used and useful,
12 there's no rules on how to specifically determine what
13 is used and useful in plant. There are minimum filing
14 requirements that the Commission has that you prepare
15 in a rate case. What they require -- or what they
16 define in those minimum filing requirements is minimal
17 information.

18 Out of the minimum filing requirements that
19 are referenced in the rules, there's only two pages
20 that really deal with wastewater treatment plant used
21 and useful. One is the Schedule F4 in which they
22 require you to provide the capacity of the plant, and
23 the other is the requirement to provide the average
24 daily flow in the maximum month of the year of -- of
25 the test year.

1 Another schedule, F6, is where used and
2 useful calculations are to be provided, and the
3 explanation for what you're supposed to provide is
4 quite basic; all of the calculations and analysis in
5 governmental requirements used to determine used and
6 useful percentages. And that's all there is as far as
7 what's in the rules.

8 With regard to what actually is done in
9 practice, I can tell you from putting cases together
10 that there's several things that you consider in
11 trying to make your case for what is used and useful.

12 One is trying to determine by relating the
13 demands on the plant the flows that have to go into
14 the plant from customer use against the capacity of
15 that plant, taking into consideration sufficient
16 capacity to meet growth under the requirements that
17 you have to have to be able to serve within a
18 reasonable period of time and to take care of
19 unforeseen circumstances, changes in demand. And
20 you're doing this based on numbers usually in the test
21 year.

22 The test year is a financial period that the
23 Commission looks at, so you have to have one place in
24 time you can look at everything. So basically on that
25 type of percentage calculation you'd be looking at the

1 demand on a system, plus reserves that are required,
2 divided by the capacity of facilities providing that
3 plant.

4 Other things you take into consideration
5 are -- might be economies of scale in providing the
6 service that would affect how much of the costs should
7 be included, whether there are requirements to
8 provide -- to include plant because one of the state
9 agencies or federal laws, whatever, would require you
10 to put in plant. And those are all matters that come
11 into play in determining used and useful for treatment
12 plants and related facilities.

13 Q I've distributed while you were speaking a
14 three-page package. Have you seen those documents
15 before?

16 A Yes, I have.

17 Q What are the first two pages, in short
18 order, of that --

19 A The first two pages, the ones I referred to
20 as schedule F4 and F6, are what is called the minimum
21 filing requirements, which is a set of documents, or
22 forms I should say, that the Commission requires you
23 to follow. And the third one is a -- okay. The first
24 two is all you asked me about.

25 Q So that's something, the first two pages are

1 something from what's --

2 **A** It's a book of at least 100 pages of forms.

3 **Q** Prescribed by the Public Service Commission?

4 **A** Yes, as prescribed by rule by the Public
5 Service Commission, and it includes forms in which are
6 shown details of the determination of the rate base,
7 details of the actual book numbers for plant in
8 service, adjustments to those numbers for used and
9 useful or any other reason, details of the operating
10 expenses, details of all the taxes, cost of capital of
11 the utility rate structure and rate determination, and
12 engineering related items.

13 **Q** And what's the third page of that package?

14 **A** The third page is a page from the standard
15 operating procedure of the water and wastewater
16 division of the Commission.

17 **Q** And what does this show the court?

18 **A** Well, it specifically it shows that the
19 engineering section of the water and wastewater
20 division when looking at determination of what's used
21 and useful in Item 4, shows that any facility required
22 to be installed by a regulatory agency, other than
23 lines required by real estate regulatory agent, should
24 be considered used and useful.

25 That's guidance to anyone filing a case that

1 plant that's required by regulatory agency is a
2 consideration in used and useful. Used and useful
3 embodied by its nature would be considered used and
4 useful plant.

5 MR. SCHIEFELBEIN: Your Honor, if I could
6 have that package identified as Petitioner's 2.

7 THE COURT: It's been so marked.

8 Q (By Mr. Schiefelbein) Have you been hired
9 by Florida Cities Water Company to appear today?

10 A Yes, I was.

11 Q And why is that?

12 A I was asked to do an independent analysis to
13 determine the degree of success that Florida Cities
14 may have enjoyed in its appeal to the court in
15 appealing its last rate case.

16 Q And to conduct that analysis, what sort of
17 documents did you look at?

18 A I looked at a -- several documents; some
19 just for background information and some for the
20 purpose of gleaning some information in which to make
21 an analysis. I, of course, looked at the court's
22 opinion. I looked at the briefs by all parties
23 leading up to that case.

24 I looked at the final order of the
25 Commission in this rate case. I looked at the prior

1 order of the Commission, which was a proposed agency
2 action, and that was the order that was protested and
3 caused this case to go to hearing.

4 I looked at the recommendations of the
5 Public Service Commission staff to the Commission with
6 regard to finalizing that case and to the work papers
7 that were provided in making their numerical
8 determinations.

9 I looked at the minimum filing requirements,
10 of course, that were filed by Florida Cities Water
11 Company in preparing its case. I looked also at the
12 order, the final order from the previous case, which
13 was back in 1993, I believe, just for comparison
14 purposes. And I looked at the Commission rules,
15 specifically anything that might deal with used and
16 useful itself, and standard operating procedures of
17 the Commission and staff.

18 Q Did you also review any work papers of the
19 Public Service Commission?

20 A Yes. I think I mentioned that I looked at
21 the work papers that the staff produced in making its
22 recommendation to the Commission and that resulted in
23 final order.

24 Q And I have before you a document. Have you
25 seen that document before? First of all, there's a

1 letter from me to the Commission.

2 A Yes, it's -- there's a cover letter with a
3 public records request for the staff's electronic
4 spreadsheets. And they were provided -- that was
5 provided along with the hard copy of what was on the
6 spreadsheet.

7 Q And those are the documents that you
8 reviewed when you referred to work papers?

9 A Yes, I did look at those.

10 MR. SCHIEFELBEIN: And if those could be
11 marked as Petitioner's 3, your Honor?

12 THE COURT: They've been so marked.

13 MR. SCHIEFELBEIN: Thank you.

14 Q (By Mr. Schiefelbein) I've shown you a
15 document entitled "Effects of Remand". Have you seen
16 this document before?

17 A Yes. I prepared it.

18 Q And what essentially is this document?

19 A These are my worksheets that I used to do my
20 analysis of the effects on the rate base of the
21 utility of the directions of the court in its opinion.

22 MR. SCHIEFELBEIN: If I might have that
23 marked as Petitioner's 4.

24 THE COURT: It's been so marked.

25 MR. SCHIEFELBEIN: Thank you.

1 Q (By Mr. Schiefelbein) Let's review some
2 of the facts of this case, Mr. Seidman. The
3 Commission initially issued a proposed agency action
4 order?

5 A That's correct.

6 Q Is that correct? And what did the
7 Commission propose to set the used and useful
8 percentage of the wastewater treatment plant and
9 disposal in this case?

10 A In the proposed agency action the Commission
11 assigned a 100% used and useful determination to the
12 water -- the wastewater treatment plant and effluent
13 disposal, reuse plant, all of the plant, as a matter
14 of fact, as 100% used and useful.

15 Q And how did that compare with the utility's
16 application for rate increase filed in this case?

17 A How did that compare with the application?

18 Q The application, yes, sir.

19 A The Commission gave the -- with regard to
20 determination of used and useful --

21 **MS. CALDWELL:** Your Honor, I object to this
22 line of questioning. It really doesn't go to -- it
23 kind of goes into the analysis that the court did, and
24 they've already made the decision that there was an
25 abuse of discretion. And so we don't need to get into

1 the PAA order that was the underlying order that was
2 challenged. We only go to the final order.

3 So I think any comparisons between the PAA
4 order and the final order are not necessary, to go
5 through it.

6 MR. SCHIEFELBEIN: Well, your Honor, I think
7 it's a pretty slim point, and we can actually not talk
8 about it, but if I might ask a couple more questions
9 before you make a determination that relates to the
10 significance of the PAA.

11 THE COURT: I'll give you some leeway.

12 Q (By Mr. Schiefelbein) Did Florida Cities
13 have rates implemented at this point in time? Do you
14 know whether they do or not?

15 A (Witness shaking head.)

16 Q You don't?

17 A No, I don't know.

18 Q You don't?

19 A I don't know.

20 Q Well --

21 A At what point in time --

22 Q Don't worry about it. It's not something we
23 had covered.

24 MR. SCHIEFELBEIN: Your Honor, I'll move on
25 and not proceed with the proposed agency action.

1 Q (By Mr. Schiefelbein) What did Florida
2 Cities ask for as far as the used and useful
3 percentage of its wastewater treatment plant?

4 A Something on the order of about 98 and a
5 half percent used and useful on its plants.

6 Q And there certainly was a proposed agency
7 action order issued in this case, was there not?

8 A Yes.

9 Q And what happened to that order. Did it
10 become final? Did it take effect?

11 A No. It was protested and went to hearing.

12 Q And that was protested by whom, sir, the
13 type of intervenor?

14 A Public Counsel. Public protested it.

15 Q And this matter went to hearing before the
16 Commission?

17 A Yes, went to a full hearing, evidentiary
18 hearing.

19 Q And was a final order issued by the
20 Commission after that hearing?

21 A Yes, it was.

22 Q Is that the document I put before you, to
23 the best of your knowledge; a copy of that final
24 order?

25 A Yes.

1 Q What is the order number there for the
2 record?

3 A The order number is PSC-96-1133-FOF-SU.

4 Q And that was issued on what date, sir?

5 A September 10th, 1996.

6 Q Do you have that document with you so that I
7 can keep that copy?

8 A I have portions of it with me.

9 Q What did the Commission determine by this
10 final order as far as the used and useful nature or
11 percentage or level of this treatment plant?

12 A They came out with a percentage used and
13 useful of 66% for treatment plant and some 76% for the
14 reuse facilities.

15 Q So they disallowed investment constituting
16 approximately how much of the plant investment?

17 A A third.

18 Q And how did they get there? What did they
19 use for their -- you talked about earlier the
20 relationship of demand to capacity. What did they use
21 to measure demand, customer demand?

22 A To measure customer demand they used the
23 average annual daily flows received at the plant,
24 which would be the -- basically the total of all flows
25 during the year divided by 365 days.

1 Q Had the Commission done that before?

2 A No.

3 Q To your knowledge?

4 A No, not to my knowledge, no.

5 Q They had traditionally used what?

6 A Traditionally the demands that are used to
7 determine used and useful are the average flows in the
8 maximum month during the test year; in other words,
9 the peak flows of the system.

10 Q What did the Commission use as far as the
11 measure of the capacity of the plant in determining
12 its used and useful nature?

13 A Basically they used the permitted capacity
14 of the plant.

15 Q In the final order?

16 A In the final order they used the -- I
17 believe it was the design capacity, I think. I'd have
18 to look.

19 Q And by use of that formula, the Commission
20 determined that this plant was what percentage used
21 and useful?

22 A 66%.

23 MR. SCHIEFELBEIN: Now, we have attached,
24 your Honor, as part of the partial stipulation -- and
25 maybe this would be as good a time as any to get that

1 marked. I don't know what your preference is.

2 THE COURT: If you want me to consider it as
3 part of the evidence, we probably should mark it and
4 make it clear of what the record consists of.

5 MR. SCHIEFELBEIN: I'm not aware of there
6 being any controversy as far as authenticity as far as
7 any of these documents.

8 Located under Exhibit A of the partial
9 stipulation, your Honor, is the actual court decision.

10 Q (By Mr. Schiefelbein) Have you read the
11 court decision the 1st District Court of Appeals'
12 decision?

13 A Yes, I have.

14 Q And did the court have anything to say about
15 the -- I don't want you to argue law here -- but did
16 the court have anything to say as far as the capacity
17 of the plant that the Commission used? I don't mean
18 for you to find the exact language.

19 A No. It basically said that the capacity
20 that the Commission used wasn't supported by evidence,
21 and they agreed with Florida Cities that the proper
22 capacity of the plant was 1,250,000 gallons a day
23 rather than the 1,500,000 gallons a day that the
24 Commission had used.

25 Q And what did the court have to say about the

1 level of customer demand or flows in the opinion;
2 again, in layman's terms, please?

3 A As I recall, basically it said that the
4 Commission shed no evidence to support changing its
5 policy with regard to what demanded use in determining
6 used and useful.

7 The Commission had as policy for many years
8 used the average flow in the maximum month as the
9 basis for demand. In this case it shifted without any
10 prior indication it was going to do that, without any
11 support for a policy shift, to annual average daily
12 flow.

13 Q So have you determined the dollar amounts,
14 the rate base amounts associated with the disallowed
15 part -- the disallowed investment in plant capacity
16 that the Commission's decision had rejected?

17 A Yes, I have. That was my analysis.

18 Q And just looking at the capacity piece, what
19 amount of rate base was, in effect, according to your
20 analysis, disallowed by virtue of the Commission's use
21 of the 1.5 instead of the 1.25 MGD capacity?

22 A With regard to just the determination of the
23 used and useful, it was some \$2.2 million that was
24 removed from rate base as a result of the used and
25 useful calculation.

1 Q The overall decision?

2 A The overall decision, well, the only basis I
3 had to compare it to what was in the PAA, because it
4 was in a 100% used and useful case. It was about 2 --
5 it was 2.25 was removed.

6 Q \$2.25 million?

7 A Right, \$2.25 million, and looked at what
8 that was composed of, and of that 2.25, 2.22 was
9 related to used and useful calculations. The other
10 had to do with other issues which weren't in
11 contention.

12 Q And how much of that \$2.2 million disallowed
13 by the Commission relates to the disallowed plant
14 capacity?

15 A To the plant capacity, \$879,000.

16 Q And did you perform an analysis of how much
17 of that \$2.2 million is related to the Commission's
18 use -- unexplained use of the average annual daily
19 flow?

20 A \$1.3 million.

21 Q So if you add those figures, 1.3 million and
22 the \$879,000, to the rate base that the Commission has
23 already allowed, where are we in terms of being used
24 and useful?

25 A You're about 98.6% used and useful, which is

1 what the company had asked for.

2 Q Everything they had asked for?

3 A Yes. With regard to rate base, yes.

4 Q Now, you're familiar that the court didn't
5 agree with all of Florida Cities' arguments on appeal;
6 is that correct?

7 A Yes, I'm aware of that.

8 Q If the court had agreed with all of Florida
9 Cities' various arguments, alternative theories on
10 appeal, how would that result compare with the result
11 that was obtained under strictly looking at the
12 capacity and flows as you've already testified?

13 A It wouldn't make any difference. Just
14 looking at the capacity and flows portion of
15 determination of used and useful, the company is in a
16 position to recover everything that it asked for,
17 nearly 100% of the plant.

18 The other issues dealing with whether the
19 plant -- that portion of the plant that was put in to
20 meet with governmental requirements as part of those
21 dollars that were recovered, you can't add them on top
22 of it. There's just only so much in -- it can take
23 the issue that they had with regard to failure to
24 recover all of the plant -- that was used and useful
25 in the previous case is included in that. Basically

1 everything was included, 98.6%. All of the company's
2 assets, for whatever purpose they were there, would be
3 recovered.

4 Q So can you have a plant that's 125% used and
5 useful?

6 A No. It's either 100% used and useful or
7 something less.

8 Q And under the court's decision as far as
9 capacity and flows, it's your understanding from your
10 analysis that that plant is properly considered what
11 percentage used and useful?

12 A 98.6%.

13 Q Do you have an opinion as far as the level
14 of success or the results obtained by Florida Cities
15 on its 1st District Court of Appeal as far as its
16 actual or potential impact on the company's rate base
17 in this rate case?

18 A It recovered everything that it felt it was
19 entitled to when it made its application; 100% of what
20 it asked for.

21 Q And in relation to the moneys that were
22 pursued on appeal, what were the results obtained?

23 A It would have to be the same, because
24 they -- you know, regardless of how the issues are set
25 out, the result was that when you do the recalculation

1 of used and useful, you're back to everything that the
2 company asked for in its filing.

3 Q Mr. Seidman, would you identify the document
4 that I just distributed?

5 A This is a copy of the Department of
6 Environmental Protection Rule 62-600.405, Planning for
7 Wastewater Facilities Expansion from the Florida
8 Administrative Code.

9 Q I don't on direct want to drag you too
10 deeply into this rule, but can you provide a layman's
11 summary of what this DEP rule is?

12 A This is a rule in which all utilities, not
13 just those regulated by the Public Service Commission,
14 but all wastewater utilities, are required to provide
15 an analysis of their plant capacities and their needs
16 for expansion.

17 It sets out the criteria for when you
18 initiate the first analysis, what you take into
19 consideration in that analysis, and then there are
20 benchmarks in there for things to happen when you
21 prepare that analysis as far as when you start
22 designing the plant for an expansion, when you ask for
23 the permits, when you start construction, things of
24 that nature.

25 Q In making that determination, does DEP --

1 what capacity does DEP look at?

2 A DEP, for purposes of this rule, looks at the
3 three-month average daily flows of the plant compared
4 to its permitted capacity.

5 Q To its permitted capacity?

6 A Yes.

7 Q Okay. And this is a DEP requirement?

8 A Yes.

9 Q And what is the relationship of this DEP
10 requirement to any analysis of demand and capacity of
11 a plant? I mean do they have any relation to one
12 another?

13 A I think they do. I think it means to me
14 that you at least have to look at the minimum for
15 flows for determination of what plant is required, the
16 three-month average daily flows. Anything less than
17 that, you're going to be caught short with regard to
18 your ability to meet with the DEP's rules.

19 MR. SCHIEFELBEIN: And, your Honor, in my
20 daydream over here, did we mark that rule as
21 Petitioner's 6? If not, could we?

22 THE COURT: I wasn't sure if you wanted the
23 DCA opinion marked.

24 MR. SCHIEFELBEIN: I apologize. I thought
25 perhaps we might do -- since I don't expect any

1 questions as far as authenticity as far as the partial
2 stipulation, that we would --

3 THE COURT: The entire thing?

4 MR. SCHIEFELBEIN: That we would do it that
5 way; that's fine.

6 THE COURT: That would be Petitioner's 6,
7 and the DEP -- DER rule would be Petitioner's 7.

8 MR. SCHIEFELBEIN: And what would 5 be,
9 then?

10 THE COURT: That was the final order of the
11 Public Service Commission.

12 MR. SCHIEFELBEIN: Okay. I'm sorry.

13 THE COURT: That's all right.

14 MR. SCHIEFELBEIN: Your Honor, I would
15 tender the witness for cross at this time.

16 THE COURT: Ms. Caldwell?

17 MS. CALDWELL: I don't have many questions.

18 CROSS EXAMINATION

19 BY MS. CALDWELL:

20 Q Mr. Seidman, you testified that the changes
21 or the effect of the decision on the issues of plant
22 capacity and the average annual daily flow
23 determinations would bring the plant up to 98%; is
24 that correct?

25 A Yes, 98.6.

1 Q And you testified to the effects of the
2 first issue, which was if the DEP requirement --

3 A Correct.

4 Q That you would have essentially the same
5 result; is that correct?

6 A Oh, the issue within the --

7 Q The issue of since DEP required you, Florida
8 Cities, to improve their plant, that --

9 A The result would be the same?

10 Q Right. Is that correct?

11 A No. I said that the portion of the plant
12 that was required by government requirements was only
13 a part of all of the plant that was disallowed by the
14 Commission. It was subsumed in all of that used and
15 useful consideration.

16 By looking at the effect on the results of
17 changing the capacity in determining used and useful
18 and the flows in determining used and useful, all of
19 the plant -- the 98.6 of the plant became used and
20 useful, including the portion of the plant that was
21 required by governmental agency.

22 Q If the court had not ruled on the second two
23 issues but ruled on the first issue only, being if DEP
24 required Florida Cities to improve their plant to a
25 certain capacity, and that Florida Cities -- and in

1 this instance, incurred expenses to bring their
2 facilities up to the requirements of DEP and the court
3 required all of those costs to go into the
4 calculation, or it would require all those costs to be
5 included into rate base, would you get into the used
6 and useful calculation?

7 **A** To make that determination?

8 **Q** Right.

9 **A** Well, I guess in my opinion you don't have
10 to get into that determination to determine if
11 governmentally approved or required facilities are to
12 be included, but that in itself isn't enough to make a
13 determination of what's used and useful. You have
14 other things to consider beside that.

15 **Q** Okay. Let me maybe ask it another way.
16 Would it make any difference if the court had required
17 recovery of all of the DEP requirements?

18 **MR. SCHIEFELBEIN:** Any difference to what?
19 Excuse me, your Honor.

20 **WITNESS SEIDMAN:** If they made only that
21 determination, or --

22 **Q** (By Ms. Caldwell) Would it have made any
23 difference to the amount of plant going into rate base
24 if the court had only required the DEP -- the cost
25 required by DEP to go into rate base?

1 A Okay. I'm not sure I understand. Let me
2 see if I can rephrase it to what I think is -- if the
3 only thing the court said was include plant that's
4 required by regulatory agency, and didn't address the
5 issues of demand and capacity, it would not bring you
6 up to what the company got as a result of that,
7 because all that was involved and identified as being
8 required by the governmental agency was about
9 \$1.7 million.

10 There was \$2.9 million of plant that was
11 added since the last rate case or -- so there's other
12 plant to be considered as well as the used and
13 usefulness of the plant that was already there. So
14 you have to basically look at all of it in order to
15 get a result.

16 Q All right. You had talked earlier about "in
17 the public interest," or "used in serving the public."
18 Could you just clarify that a little bit?

19 A What does that mean?

20 Q Yes.

21 A To me, plant that's used in the public
22 service is everything that's required to meet the
23 statutory requirements of 367.

24 Q Would the public be all of the customers
25 that are in the service area, or is it the entire

1 public? Who is the public?

2 A It is the public within the service area of
3 the Utility.

4 Q Would it be the ratepayers, or would there
5 be a distribution between the current ratepayers and
6 possibly potential ratepayers coming on?

7 A In my opinion, there is no distinction. The
8 Commission only deals with current ratepayers when it
9 sets rates. I mean, those are the only people it can
10 apply it to.

11 Q Do you know whether the Commission has
12 scheduled a hearing on remand for the issue of the
13 average annual daily flow determination?

14 A Yes, I'm aware that the Commission has, I
15 believe, issued an order already on that as well as an
16 order on -- I think on rulemaking with regard to the
17 same issue.

18 MS. CALDWELL: I have no further questions.

19 THE COURT: Any redirect?

20 MR. SCHIEFELBEIN: No, your Honor. Thank
21 you. At this time we would move into evidence
22 Petitioner's Exhibits 1 through 7.

23 THE COURT: Do you want to go through them
24 one at a time?

25 MS. CALDWELL: I have no objections.

1 **THE COURT:** All right. I'll accept
2 Petitioner's Exhibits 1 through 7 into evidence.

3 **MR. SCHIEFELBEIN:** Thank you, your Honor.

4 (Petitioner's Exhibits 1-7 received into
5 evidence.)

6 (Witness Seidman excused.)

7 - - - - -

8 **THE COURT:** Do you all need a break?

9 **MR. SCHIEFELBEIN:** Whatever is your
10 pleasure.

11 **THE COURT:** I'm democratic about that kind
12 of thing. We can go ahead and take the next one, I
13 guess.

14 **MR. SCHIEFELBEIN:** Florida Cities Water
15 Company would call B. Kenneth Gatlin to the stand.

16 - - - - -

17 **B. KENNETH GATLIN**

18 was called as a witness on behalf of Florida Cities
19 Water Company and, having been duly sworn, testified
20 as follows:

21 **DIRECT EXAMINATION**

22 **BY MR. SCHIEFELBEIN:**

23 **Q** Good morning, Mr. Gatlin. I've waited for
24 this moment for many years. (Laughter)

25 **A** Take a shot.

1 Q Mr. Gatlin, are you a member of the Florida
2 Bar?

3 A Yes, I am.

4 Q And have you been a member since what year?

5 A 1959.

6 Q So you've been a member for 39 years. Of
7 those 39 years, how many of them have been devoted to
8 the practice of law either on behalf of or before the
9 Florida Public Service Commission?

10 A About 30; around 30.

11 Q And over that 30-year period in private
12 practice, over what period of time have you been
13 counsel, utility counsel, for Florida Cities Water
14 Company?

15 A About that amount of time. So that means my
16 first answer was wrong. It was 30 for that, and then
17 add six years for the Public Service Commission. So
18 that's the total amount.

19 Q Were you lead counsel in the Florida Cities
20 North Fort Myers -- prior to the current case, their
21 last wastewater rate case?

22 A Yes, I was.

23 Q Would you identify the document that I've
24 just distributed?

25 A This is an order of the Public Service

1 Commission in Docket 910756-SU. The order number is
2 PSC-92-0594-FOF-SU issued 7/1/92.

3 Q And in 10 words or less, what is this order?

4 A This is an order which approved rate
5 increase for Florida Cities Water Company.

6 Q North Fort Myers?

7 A North Fort Myers Water Company -- North Fort
8 Myers division.

9 Q And wastewater?

10 A Wastewater, yes.

11 Q And were you lead counsel for the company in
12 that case?

13 A Yes, I was.

14 Q The order, of course, speaks for itself.

15 But do you recall what the level of used and useful of
16 the wastewater plant, what was that determined by the
17 Commission to be?

18 A 100%.

19 Q And you were here when Mr. Seidman
20 testified?

21 A Yes, I was.

22 Q And he identified and briefly discussed a
23 DEP Rule 62-600.405?

24 A Yes, he did.

25 Q Do you know when that rule became effective?

1 A In relation to --

2 Q An approximate time is fine.

3 A I could look at a copy of the rule and I
4 think I could tell you.

5 THE COURT: (Handing document to witness.)

6 MR. SCHIEFELBEIN: Thank you, your Honor.

7 WITNESS GATLIN: 1991.

8 Q (By Mr. Schiefelbein) Now, what was your
9 function in the current North Fort Myers wastewater
10 rate case as far as the proceedings before the Public
11 Service Commission?

12 A Well, I represented the company. We
13 prepared the case, and I presented the case to the
14 Commission as the attorney for Florida Cities Water
15 Company.

16 Q And do you recall whether the application
17 and the MFRs, the minimum filing requirements, were
18 filed in this case, whether they were at all affected,
19 whether the company's case was at all affected by that
20 DEP rule that I previously mentioned?

21 A I don't recall offhand.

22 Q Okay. Now, this case was filed, the current
23 rate case, was filed approximately when? Do you
24 recall?

25 A May of '95.

1 Q So we're starting off our fourth year on
2 this rate case?

3 A Yes.

4 Q Any end in sight?

5 A Well, I hope so. I think so. If we prevail
6 before the court in our interlocutory appeal, I think
7 it would, but if the court decides otherwise, I guess
8 we're off and running again on another year or two.

9 Q Now, did this case -- and I know that this
10 may be drawing an objection, but I think it's helpful
11 to the court -- when this case was filed in May of
12 1995, did the company ask for any particular handling
13 of this rate case?

14 A No. We took the last rate case, the one
15 that we referred to, the order of 1992, and simply
16 brought forward everything in that case.

17 In our filing we made the determination of
18 used and useful, just as was done in this case and all
19 other cases that we have filed with the Public Service
20 Commission in the last 30 years, and we assumed that
21 we had filed it pursuant to Commission rule and past
22 Commission policy. Filed Schedule F4 and Schedule F6
23 just like we had filed it in other cases, and we
24 thought it was routine, a no-brainer.

25 Q Did you request that any particular

1 procedure be followed as far as -- did you request a
2 hearing on filing application?

3 A On the current application? No. We filed
4 it and asked for a proposed's agency action proceeding
5 thinking that this was an uncontroverted case that was
6 filed pursuant to Commission rules and Commission
7 policy and there would be no problem with it.

8 Q Several months after filing the application
9 did the Commission render a proposed agency order?

10 A The Commission did and granted it consistent
11 with previous orders from Florida Cities Water
12 Company, and we were perfectly satisfied with it. It
13 was the expected result.

14 Q And that translated, if you recall, as to
15 what sort of a wastewater rate increase? What was
16 contemplated by that order?

17 A 17, 18% as I recall.

18 Q And that proposed order, what happened to
19 it?

20 A A group of customers in the service area
21 filed a protest, and then Office of Public Counsel
22 filed a protest, which meant of course it had to go to
23 hearing and put it on a different kind of proceeding
24 than we had anticipated.

25 Q Okay. At the risk of unduly leading, to try

1 to cut out some of the cumulative nature of all this,
2 the Commission did hold a hearing and rendered a final
3 order in this case?

4 A That's true. That's correct.

5 Q And can you describe what the -- in short
6 shrift, what the outcome of that final order was?

7 A Well, it was disaster for Florida Cities
8 Water Company. Florida Cities Water Company had
9 conscientiously pursuant to law made the plant
10 addition and anticipated that the Commission would
11 follow its policy of determining used and useful, but
12 all of a sudden, for reason we did not know, the
13 Commission -- I mean, the company lost at least
14 \$2.4 million of plant. In fact, the used and useful
15 without the plant addition was \$800,000 less than it
16 had been in the earlier case.

17 Q The 1982 rate case?

18 A Yes. So the company had added customers,
19 had more flows, more customers, and the Commission
20 said that it was less used and useful than the last
21 case.

22 Q Were you involved in the determination to
23 file or pursue an appeal of that final order?

24 A Yes; yes, I was.

25 Q And are you privy to what the company's --

1 what they were trying to accomplish by that appeal?

2 A Yeah. Well, the company was pretty much in
3 a state of shock having lost this investment and
4 reluctantly determined that we had to take some
5 action, the company had to take some action, to try to
6 get some kind of relief. And it was finally
7 determined that it should be appealed, to try to get
8 this property that it had invested in, back into the
9 rate base, or into the rate base.

10 Q What sort of rate increase did the
11 Commission grant in that final order?

12 A It was a rate reduction.

13 Q They reduced the rates?

14 A Rate reduction, after finding that there was
15 less used and useful, contrary to their policy. Then
16 they came out with -- I forgot what the percentage
17 was. It wasn't a great percentage, but it was some
18 percentage of a rate reduction over the rates that had
19 been approved by the Commission in 1992, although
20 there was more plant, more customers.

21 Q Were you lead counsel on the appeal to the
22 1st District Court of Appeal?

23 A No. Kathryn Cowdery was the lead counsel.
24 I did do some work on the appeal. I didn't do -- I
25 think maybe I did 15, 20% of the billable hours, and

1 Kathryn Cowdery did the rest of it.

2 Q Attached to the partial stipulation on award
3 of attorney's fees as Exhibit E, what do you find?

4 A The invoice is from our firm to Florida
5 Cities Water Company for the work done on the appeal.

6 Q So you're BKG?

7 A Absolutely.

8 Q And who is KWC?

9 A Kathryn Cowdery.

10 Q And who is WLS?

11 A Wayne Shiefelbein.

12 Q Those are the initials. Now, what sort of
13 work, I mean in general, did you do on the appeal,
14 Mr. Gatlin?

15 A Well, I guess what I did, the big thrust of
16 my work was early on trying to determine with our
17 witnesses in the case what approach we could take or
18 what issues we thought were ones which we ought to
19 bring and how we should bring them; and once that was
20 determined with the company -- and Ms. Cowdery was
21 working along with us on that -- but once that was
22 determined, then Ms. Cowdery took the case and became
23 the lead counsel and prepared the brief, which turned
24 out to be a good one.

25 Q Now, you've taken a look at those invoices?

1 A Sure.

2 Q Have you fairly recently?

3 A Yes.

4 Q How does the level of detail as far as the
5 various attorneys' activities, how does that compare
6 with -- well, I need to back up.

7 When a rate case is done before the Public
8 Service Commission, there are litigation costs, are
9 there not?

10 A That's right.

11 Q And what's the term of art that's used for
12 proceedings before the Commission?

13 A Rate case expense.

14 Q And that consists of what big items
15 typically?

16 A Attorney's fees, expert witness fees, costs
17 of mailings; oh, a lot of other things, but
18 principally the witness and attorney's fees in the
19 case.

20 Q And does your firm seek recovery of those,
21 that rate case expense, before the Commission in rate
22 cases?

23 A Yes, we do.

24 Q And how do you do that? What sort of
25 documentation do you typically submit to the

1 Commission?

2 A Well, just like these documents that are
3 Appendix A to the stipulation, that's what we submit.
4 We have to submit enough detail for the staff and the
5 Commission to look at the time spent and on what it
6 was spent on, and then they have to make a
7 determination as to whether the Commission thinks it's
8 fair and reasonable; and then the Commission allows
9 that as a recovery, as an expense to be recovered, in
10 the final order and in the setting of the rates.

11 Q Was that done in the current rate case?

12 A Yes, it was.

13 Q What were attorney's fees in the proceedings
14 below before the Commission, if you recall?

15 A \$45,000.

16 Q And comparable invoices and so forth were
17 submitted?

18 A Yes. We, as a matter of course, prepare the
19 same kind of documents.

20 Q And of that \$45,000 of attorney's fees, how
21 much did the Commission allow?

22 A All of it.

23 Q Is that unusual in your experience as far as
24 your legal activities before the Commission?

25 A No. I think our experience has been

1 reasonably successful that the Commission has allowed,
2 based on what we file, most of the attorney's fees.

3 Q I notice in looking over the bills that you
4 don't seem to have it allocated or tied to different
5 arguments or theories argued on appeal. Just speaking
6 on behalf of your own -- you said 15 or 20% of the
7 time is yours. Why is that? Why didn't you keep a
8 diary of working on which issues or arguments?

9 A Well, I don't think that would really be
10 possible under the situation. You're working on a
11 brief, you're working on the case, and you go from one
12 issue to another and back and combine them and take
13 them apart and put them back together, all that you do
14 in preparing a brief.

15 And to do what you're suggesting, I guess
16 you'd have to sit there with a stopwatch and, you
17 know, work five minutes on that one and click it and
18 go 30 minutes on another, which would just not be
19 practical at all to -- I don't think you could do
20 that. I don't think anybody would expect that to be
21 done.

22 Q Can you explain your understanding of the
23 interrelationship or lack of interrelationship between
24 the various arguments that Florida Cities maintained
25 on appeal?

1 A All our arguments -- we had one claim we
2 made to the court, and that was that the Commission
3 had denied our claim that we had, in effect, 100% used
4 and useful property, and that was the one claim we
5 had; and we had basically a couple of theories that we
6 used to show the court and to support that claim.

7 The claims are interrelated. I don't think
8 we would have gone to court without all of them. So
9 that's the way we constructed our brief and we
10 constructed our argument to the court was that all of
11 these theories, we were after one thing, and that was
12 to get that plant 100% used and useful, which we did.

13 Q Now, it's been intimated so far -- of
14 course, we have to go first -- but it's been intimated
15 by various comments and objections that, "Well, this
16 thing ain't over." That is correct, isn't it?

17 A I think that was the intimation from a
18 question from Ms. Caldwell, yes.

19 Q And the Commission has recently in response
20 to the remand rendered an order which does what, in
21 effect?

22 A The Commission said that they believed that
23 the final order of the court was an invitation for
24 them to reopen the record and take additional evidence
25 and testimony to support the Commission's position in

1 the final order.

2 We don't believe that's what the court
3 ordered and we have filed an appeal or will file one
4 to ask the court simply -- if that's what they meant,
5 that's what they meant. If not, don't waste
6 everybody's time and money in having another series of
7 hearings.

8 The Commission has gone so far as to
9 schedule hearings and the filing of testimony and the
10 usual procedure that they do in a rate case as though
11 we're starting all over on this particular issue.

12 We have filed a motion to stay the
13 proceedings which, as I understand it, will be on the
14 Commission agenda on the next agenda which is, oh,
15 first week or so in May.

16 I don't know what the staff is recommending
17 on it, but in any event the Commission will vote to
18 stay it or not; and if the Commission in its wisdom
19 decides not to grant the stay, we'll appeal that to
20 the District Court. But the Commission has also
21 postponed some filing dates that it had tentatively
22 set, that it set earlier for the hearing in case there
23 is a stay by either the Commission or the court.

24 Q How would you characterize the posture of
25 this case as far as the plant capacity to be used in

1 doing the used and useful determination? Is that a
2 live issue any longer?

3 A No. No. The court laid that to rest
4 finally and forever, I think.

5 Q The Commission used a 1.5 MGD in the
6 capacity?

7 A That's right. That was off of a
8 construction permit, yes.

9 Q And that's been laid to rest?

10 A Yes.

11 Q And what is the posture of this case as far
12 as the measurement of customer demand?

13 A Well, if I read what the Commission has been
14 saying in its orders, in its order that reopened the
15 case and the staff recommendation, they've decided
16 that they want to adopt a policy of using an average
17 day instead of max day in determining used and useful,
18 and they want to have a hearing to have some testimony
19 to support that position, which they didn't put the
20 testimony in the first hearing. And that's the
21 posture, is that they want to try to support what they
22 wanted to do in this case.

23 MR. SCHIEFELBEIN: If I might have that
24 marked with the next available number, your Honor.

25 THE COURT: Let me be sure of something.

1 You gave me a document that's an affidavit.

2 MR. SCHIEFELBEIN: We actually haven't
3 gotten to that. I'm sorry.

4 THE COURT: I won't mark that one yet. I'll
5 save that and just pick up the numbering with the 1992
6 final order. So I'll mark this as Petitioner's
7 Number -- Petitioner's No. 8 was the Public Service
8 Commission's final order in the 1992 rate proceeding.

9 MR. SCHIEFELBEIN: And then 9 would be
10 the --

11 THE COURT: The affidavit, I'll wait until
12 you actually start talking about it.

13 MR. SCHIEFELBEIN: The one that I just -- I
14 apologize, your Honor.

15 THE COURT: Oh, I'm sorry. That's 9, yes,
16 the one you just gave me.

17 MS. CALDWELL: What was the purpose of this?

18 MR. SCHIEFELBEIN: I'm getting to it. Which
19 one?

20 MS. CALDWELL: That was the '92 order?

21 MR. SCHIEFELBEIN: That was the last rate
22 case.

23 Q (By Mr. Schiefelbein) The document that's
24 been identified as Exhibit 9, would you confirm what
25 that order is?

1 A Order PSC-980509-PCO-SU issued April 14th,
2 1998, in Docket No. 950387-SU.

3 Q And is that the Commission's order on
4 remand?

5 A Yes.

6 Q Is that --

7 A Kind of a long title, but that's in the
8 title.

9 Q Is that the order that an appeal will now be
10 taken of?

11 A Yes.

12 Q Do you have before you an affidavit --

13 A Yes.

14 Q -- of Wayne L Shiefelbein?

15 A Yes.

16 Q If you would take a moment to look at that.

17 A (Witness complies.)

18 Q Have you seen that affidavit and the
19 documents attached to it before?

20 A Sure. Yes.

21 Q Let's start with the attachments to it.
22 Could you explain briefly what those documents are?

23 A This is a -- our bill rendered, or to be
24 rendered -- in some cases already rendered -- to our
25 client, Florida Cities Water Company, for a legal

1 effort put in for the purpose of collecting attorney's
2 fees. This is attorney's fees for collecting
3 attorney's fees.

4 Q Has Florida Cities Water Company, have they
5 paid the firm's bills for the appeal?

6 A Oh, yes. Yes.

7 Q Paid in full?

8 A Paid in full, absolutely.

9 Q And the attorney's fees activity there, do
10 you know what --

11 A Well, there's a January bill that's been
12 paid, and I believe that the March bill has been paid.
13 I'm not sure about the April bill.

14 Q This firm closes its bills as of what day of
15 the month?

16 A 25th day of the month.

17 Q Which would have been Saturday?

18 A Right.

19 Q Do you know whether Florida Cities has
20 become obligated -- has to pay Mr. Seidman a fee for
21 his activities in this case?

22 A Yes, they have.

23 MR. SCHIEFELBEIN: Your Honor, I would
24 tender the witness for cross. I appreciate your
25 indulgence.

1 **THE COURT:** Ms. Caldwell?

2 **CROSS EXAMINATION**

3 **BY MS. CALDWELL:**

4 Q Mr. Gatlin, in your resume you have a
5 long-time practice before the Commission, correct?

6 A Yes.

7 Q And have you represented other utilities or
8 wastewater utilities besides Florida Cities?

9 A Yes, I have.

10 Q And you've also represented Florida Cities
11 for their other wastewater plants. They have more
12 than one in the North Fort Myers --

13 A Yes, that's correct.

14 Q Have you ever raised the issue of requiring
15 all of the costs of the requirements of DEP into the
16 rate base? Have you ever raised that issue before in
17 any of those cases?

18 A Yes.

19 Q I'd like to move along to the exhibit which
20 is the stipulation, and if you would turn to your
21 Motion for Attorney's Fees, which is Exhibit B.

22 A "D"?

23 Q "B" as in boy. Did you author the Motion
24 for Attorney's Fees, which can be found as Exhibit B
25 in the stipulation?

1 A No.

2 MR. SCHIEFELBEIN: If I might --

3 MS. CALDWELL: I'm sorry. Kathryn Cowdery
4 did. I'll save those questions for her. That's all
5 the questions that I have.

6 THE COURT: Redirect?

7 MR. SCHIEFELBEIN: No, sir, but thank you.
8 We would ask that Exhibits 8, 9 and 10 be received
9 into evidence at this time, Petitioner's 8, 9 and 10.

10 THE COURT: Objections?

11 MR. SCHIEFELBEIN: Number 8 was --

12 MS. CALDWELL: Number 8 I had a question on.
13 I don't understand why it was being offered.

14 MR. SCHIEFELBEIN: Well, simply put, your
15 Honor, I mean, it's not an integral document. It's
16 basically a paper trail, which the various witnesses,
17 including Mr. Seidman, have taken a look at in
18 reaching their opinions as to what the level of our
19 success was.

20 In and of itself it's not an integral
21 document. I suspect that it's something you could
22 take notice of. Certainly in our last DOAH action
23 with the Commission, they were -- all parties made
24 very liberal use of the notice sections of the
25 evidence code and having the ALJ take notice of them.

1 So I don't know if that's responsive.

2 THE COURT: Is your question one of
3 relevancy?

4 MS. CALDWELL: Oh, right. It was more of a
5 question. I have no objections.

6 THE COURT: To any of them?

7 MS. CALDWELL: To any of them.

8 THE COURT: I'll accept Petitioner's
9 Exhibits 8, 9 and 10 into evidence.

10 (Petitioner's Exhibit 8, 9, 10 received into
11 evidence.)

12 THE COURT: Why don't we take about a
13 two-minute break?

14 MR. SCHIEFELBEIN: Thank you.

15 WITNESS GATLIN: Judge, could I be excused?

16 THE COURT: Certainly.

17 (Witness Gatlin excused.)

18 - - - - -

19 MR. SCHIEFELBEIN: Your Honor, as we
20 proceed, my first obvious error has come to my
21 attention. It didn't take long.

22 Mr. Seidman; I failed to ask Mr. Seidman
23 about his charges in the case. This is not a bill. I
24 don't mean to testify, and I'm certainly not. This is
25 an itemization of what he's done on the case. It's

1 too soon for him to have rendered a bill. I can put
2 Mr. Seidman on the stand, back on the stand, very
3 briefly to authenticate this and to be subject to
4 cross if necessary.

5 **MS. CALDWELL:** I have no objections for the
6 number of hours or the amount he's charging.

7 **THE COURT:** Do you want to examine him at
8 all? Mr. Seidman is here. He's still under oath.
9 Would you like to ask him -- I'm going to mark this as
10 Petitioner's Exhibit 11.

11 **MR. SCHIEFELBEIN:** If I could, your Honor,
12 could I put Mr. Seidman back on very briefly?

13 **THE COURT:** Sure.

14 **MS. CALDWELL:** Your Honor, I have no
15 objections to the number of hours, and I really don't
16 have any questions. I think that the core issue is
17 whether or not they're entitled to recover any fees
18 and things like that.

19 So I think as to the accuracy of this, I
20 don't have any problems with it, but I think it still
21 goes back to the core issue of whether, in fact, they
22 are entitled to recover.

23 **THE COURT:** I understand. With that
24 stipulation, why don't I go head ahead and accept
25 Petitioner's Exhibit 11 into evidence, and I

1 understand that ultimately the question is whether
2 there's any entitlement at all legally, and if there
3 is, then this would be part of the award.

4 (Petitioner's Exhibit 11 received into
5 evidence.)

6 **MR. SCHIEFELBEIN:** Thank you, your Honor.
7 May I proceed to my next witness?

8 **THE COURT:** Yes, please.

9 **MR. SCHIEFELBEIN:** Florida Cities Water
10 Company would call Kathryn Cowdery to the stand.

11 - - - - -

12 **KATHRYN COWDERY**

13 was called as a witness on behalf of Florida Cities
14 Water Company and, having been duly sworn, testified
15 as follows:

16 **DIRECT EXAMINATION**

17 **BY MR. SCHIEFELBEIN:**

18 **Q** Good morning, Ms. Cowdery.

19 **A** Good morning.

20 **Q** Ms. Cowdery, what was your function on the
21 rate case appeal for Florida Cities, North Fort Myers
22 Division?

23 **A** I was lead counsel.

24 **Q** And have you looked at the various bills
25 rendered prior to this hearing for that appeal?

1 A I have.

2 Q And can you give the court -- you're KWC, as
3 far as the charges on the bills?

4 A I believe so.

5 Q And we can all, of course, go through this
6 with calculators, but can you give us a ballpark as
7 far as what percentage of the attorney's fees incurred
8 on the appeal were for your efforts?

9 A I have not calculated it myself, but I am
10 told that it's somewhere around 80%.

11 Q And do you have before you two documents?

12 A I do.

13 Q What is the thicker of the two documents?

14 A It is entitled "Amended Brief of Appellant
15 Florida Cities Water Company," and it is the
16 appellant's brief for the 1st DCA appeal in this case.

17 **MR. SCHIEFELBEIN:** Why don't we go ahead and
18 have that assigned an exhibit number.

19 **THE COURT:** Mark it as Petitioner's No. 12.

20 **MR. SCHIEFELBEIN:** Thank you.

21 Q **(By Mr. Schiefelbein)** Were you the
22 primary author of that brief, Ms. Cowdery?

23 A I believe so.

24 Q And what is the second slimmer document that
25 I've put before you? Have you seen that before?

1 A Yes. That's the appellant's reply brief in
2 that same case number.

3 MR. SCHIEFELBEIN: If that could be assigned
4 Petitioner's 13.

5 THE COURT: It's been so marked.

6 MR. SCHIEFELBEIN: Thank you.

7 Q (By Mr. Schiefelbein) And are you the
8 primary author of that document?

9 A Yes.

10 Q Would you explain to this court how you
11 approached this appeal?

12 A Okay. To begin with, I think what
13 Mr. Gatlin testified to is correct. The first thing
14 that happened is that there were meetings with the
15 client and our firm -- I believe it was Mr. Gatlin
16 down at the utility's office -- to determine and to
17 discuss the issues that would be appealed.

18 Essentially, again what Mr. Gatlin testified
19 to was correct. We had approximately \$2.4 million of
20 investment that was not included in rate base, and it
21 needed to -- we were appealing that, that that
22 investment should be in rate base. And, of course,
23 the important thing is that when you have it in rate
24 base, your rates are set on that so you get enough
25 revenue.

1 Now, my approach was to look at the ways in
2 which we could bring that issue to the appellate
3 court, and I settled on two main approaches; a
4 statutory argument which went to the authority of the
5 Commission under 367, and the language of 367, the
6 broader argument.

7 And then the second theory was the specific
8 formula that was used by the Commission in coming up
9 with that used and useful formula. They were two
10 means to the same end.

11 And a main reason for taking that approach
12 is that, in my opinion, you ought to listen to the
13 United States Supreme Court, and I tried to do that.
14 There's a case called Federal Power Commission versus
15 Hope Natural Gas, and in my mind that case says some
16 important things, one of which is the end result
17 doctrine; and that is when you are appealing a rate
18 order from a Public Service Commission, it is the end
19 result which counts and not necessarily the
20 methodology they used to get there.

21 So in my mind if you go to court simply
22 arguing an incorrect use of methodology, wrong numbers
23 plugged in, if you just argue that, that is a
24 dangerous thing to do. It would be -- it could be
25 insufficient, an insufficient argument.

1 So in light of that, you know, you look at
2 the two arguments; the main statutory authority. You
3 start out with what is the statutory language under
4 367 under which the Commission operates and under the
5 used and useful language and why under 367 should this
6 investment have been included in rate base.

7 And we broke it down into different reasons,
8 and one of which was the government required
9 investment, which keeps coming up here today. That
10 was part of the whole argument. That was only
11 \$1.6 million, only. You know, you have to put all of
12 the statutory argument together. And combined in that
13 argument were arguments relating to the competent,
14 substantial evidence that the utility company had
15 supported all this investment with competent,
16 substantial evidence that was not disputed by anyone.

17 Okay. In our brief we state in Issue 4,
18 which is the formula argument, that, you know, your
19 Honor, you can make your decision based on the other
20 counts in this complaint; now let's talk about the
21 formula. You know, they were alternative theories.
22 It all goes to used and useful. And maybe I went
23 beyond what the question was.

24 Q I think we saved a lot of questions.

25 A But that's where we went up -- just to make

1 a point on that. If you only were arguing that
2 government investment statute and rule, that only got
3 you partway, and we did not only want to be partway.
4 We wanted to be -- the entire investment.

5 Q You prepared the Motion for Attorney's Fees?

6 A I did.

7 Q Of course that document is attached to the
8 partial stipulation?

9 A Okay.

10 Q And what was the basis or legal theory for
11 your Motion for Attorney's Fees?

12 A I felt that the Commission had, in issuing
13 its order, grossly abused its discretion, and under
14 120.595(5), under those circumstances you are entitled
15 to an award of attorney's fees.

16 I would note that I don't believe anyone in
17 our firm had ever asked for attorney's fees on appeal
18 before, although we have done appeals. You know, we
19 do them on a fairly regular basis. This particular
20 case just struck us as being unconscionable, and for
21 that reason I filed the motion.

22 MR. SCHIEFELBEIN: Your witness.

23 THE COURT: Excuse me. I probably missed
24 it, but did you ask her her name for the record?

25 MR. SCHIEFELBEIN: I'm very sorry.

1 **THE COURT:** We probably should establish
2 that formality. I was marking some exhibits and I was
3 afraid maybe I had missed it, but I didn't recall it.

4 **WITNESS COWDERY:** My name is Kathryn Gail
5 Winter Cowdery. I'm a partner in Gatlin, Schiefelbein
6 & Cowdery, 3301 Thomasville Road, attorney for Florida
7 Cities Water Company.

8 **MR. SCHIEFELBEIN:** Thank you.

9 **THE COURT:** Sure.

10 **CROSS EXAMINATION**

11 **BY MS. CALDWELL:**

12 **Q** Ms. Cowdery, I think that counsel is going
13 to grant me a little latitude.

14 **MS. CALDWELL:** What I'd also like to do is
15 incorporate into the record the rest of the briefs
16 that were filed in this case, and I would like to use
17 Ms. Cowdery to identify them.

18 **MR. SCHIEFELBEIN:** Sure.

19 **Q** **(By Ms. Caldwell)** The first one I will
20 give to you is the brief. Could you please identify
21 the first piece I handed you?

22 **A** This is identified as the "Answer Brief of
23 the Florida Public Service Commission" with
24 attachments.

25 **MS. CALDWELL:** We'd like to have this marked

1 for identification.

2 **THE COURT:** I'll mark this Respondent's
3 No. 1.

4 **Q** **(By Ms. Caldwell)** Could you identify the
5 second brief, please?

6 **A** This says "Brief of Amicus Curiae, Florida
7 Waterworks Association, Inc." Without checking
8 something, I can't say if there was ever an amended
9 brief filed. It would have been substantially the
10 same if it was. I don't know.

11 **MS. CALDWELL:** We'd like this identified.

12 **THE COURT:** I'll mark it as Respondent's
13 No. 2.

14 **WITNESS COWDERY:** And this document is the
15 "Answer Brief of Intervenors, the Citizens of the
16 State of Florida" in the same case, same appeal.

17 **MS. CALDWELL:** We'd like it marked for
18 identification.

19 **THE COURT:** I'll mark it as Respondent's
20 No. 3.

21 **Q** **(By Ms. Caldwell)** And to the best of your
22 knowledge, those are all the briefs that you've
23 identified that have been filed in this case?

24 **A** Yes. I have some recollection of an amended
25 brief because of a font, but those, to the best of my

1 knowledge, are the briefs.

2 Q Thank you. My next question is, there was
3 an amended brief, I think, filed.

4 A Okay.

5 Q Did you charge for the time spent in
6 amending the brief? Did you charge that again to
7 Florida Cities?

8 A Yes.

9 Q So that would be included in the bill?

10 A I believe so. Well, I say yes. I really
11 would have to -- I do not know. I would have to look
12 at the bills, because if it was purely a secretarial
13 changing, you know, you'd have to look at the bills to
14 see. It would be reflected in the bills.

15 Q I'd like to move on now to the joint
16 stipulation, Exhibit B, which I understand is the
17 Motion for Attorney's Fees, and I've just got an extra
18 copy. Do you have a copy of that petition?

19 A As I understand it, I do. (Pause) Yes.

20 Q And did you author the Motion for Attorney's
21 Fees?

22 A I did.

23 Q Do you agree that you requested attorney's
24 fees because the agency's final order which
25 precipitated this appeal was a gross abuse of

1 discretion?

2 A I do.

3 Q And as the authority, you cited Section
4 120.595(5) Florida Statutes?

5 A That's what it says, yes.

6 Q In paragraph 2 of your motion, didn't you
7 argue that it was an abuse of the Commission's
8 discretion to fail to acknowledge the facts that the
9 USEPA, the Florida DEP, the South Florida Water
10 Management District, and Lee County, all governmental
11 agencies, imposed requirements on Florida Cities to
12 expand its water, wastewater treatment plant?

13 A I did.

14 Q And didn't the court find in its opinion
15 that even when another governmental agency has
16 required a utility to make a capital expenditure, the
17 PSC must decide what portion of the expenditure, if
18 any, belongs to the utility's rate base?

19 A Words to that effect, if not those words.

20 Q It would be on Page 8 of the court's
21 opinion?

22 A Whatever the court stated, but it was
23 probably that.

24 Q In paragraph 3 on Page 2 of your motion, it
25 argues that the Commission deviated from past orders

1 in setting rate base -- in setting rates; is that
2 correct?

3 A That is correct.

4 Q And does this argument go to the court's
5 finding on the used and useful calculation?

6 A I believe it does. I'm just wanting to make
7 sure I don't misstate something, because this -- the
8 answer, I believe, is yes, having to do with the
9 maximum daily flow versus average annual daily flow.

10 Q And paragraph 4 on Page 3 again argues abuse
11 of discretion for failing to adhere to Florida
12 Statutes 367.0817(3) in particular.

13 A Correct.

14 Q Which places Florida Cities in an untenable
15 Catch 22 position, and you say that's correct?

16 A That's correct.

17 Q And does this argument relate back to the
18 first issue, which is the DEP requirements?

19 A It relates to the failure to adhere to the
20 enabling legislation .081(2), .0817(3), 367.112 in
21 refusing to allow recovery of governmentally required
22 construction costs.

23 Q And paragraph 5, weren't you arguing that
24 the Commission had allowed full recovery of DEP
25 requirements in 1992 and should, therefore, be allowed

1 full recovery in this case?

2 A Essentially, you know, whatever is stated in
3 there is what I argued; deviation being unexplained in
4 the final order.

5 Q And that again relates back to the first
6 issue of the DEP requirements and government agency
7 requirements?

8 A Well, it does, but it was a separate -- it
9 was a separate issue. This particular paragraph went
10 to the section of our brief which was talking about in
11 determining used and useful calculations, the past
12 agency practice, the practice of the agency was always
13 to take into consideration DEP-required facilities.
14 It did not specifically go to the statutory argument.
15 It was a separate argument. But yes.

16 Q Paragraph 6 beginning on Page 3, this
17 relates to the Commission's determination that the
18 capacity of a plant was 1.5 million gallons per day
19 when the court found it should be 1.25 million gallons
20 per day, correct?

21 A I'd have to read it, but I believe that is
22 correct. Without supportive, competent, substantial
23 evidence -- wait. It is not -- I think it's a little
24 broader than what you are stating, because I had two
25 separate competent, substantial evidence arguments,

1 and I think this goes to both of them.

2 I believe it was Count II of the brief which
3 discussed in general the lack of competent,
4 substantial evidence support regarding the plant
5 improvements in general, and I don't -- and I think
6 this goes to both of those. It's -- that last
7 sentence is an "and" sentence, not an "or" sentence.

8 Q Was this something the court reversed the
9 Commission on? Was this an issue the court reversed
10 the Commission on?

11 A The court reversed the issue -- reversed the
12 Commission as to the 1.5 versus 1.25 capacity.

13 Q And finally in paragraph 7 you analogized
14 the Commission's abuse of discretion for failing to
15 explain its policies and address countervailing
16 arguments for, and I quote, "the statutory and rule
17 requirements that facilities, reuse projects
18 specifically, constructed in the public interest be
19 allowed in rate base." Is this correct?

20 A That is a correct reading of the language
21 there, yes.

22 Q And, again, does that point relate back to
23 the first issue on DEP requirements?

24 A It relates to statutory and rule
25 requirements, the facility's reuse projects

1 specifically constructed in the public interest be
2 allowed in rate base. I don't recall which specific
3 count that was when you say Issue 1.

4 Q I think in your brief the first issue was
5 the broader --

6 A It was the broader.

7 Q "The Commission's final order disallowing
8 the 1.6 million of governmentally required plant
9 improvements from rate base is contrary to law and
10 should be reversed."

11 A I think that's correct. You know, in
12 summary, this motion went to every issue raised. When
13 I say "issue," every count raised. It addressed
14 everything I raised.

15 Q Ms. Cowdery, can you point out in this
16 Motion for Attorney's Fees where you requested
17 recovery of your costs?

18 A I don't know that I specifically did. I
19 think I just went pursuant to 120.595(5). That's the
20 authority.

21 Q Could you also turn to Exhibit D in that
22 stipulation, which is the court's award of attorney's
23 fees?

24 A Of course we always have to grant such
25 relief as the court may deem appropriate -- this is an

1 attachment to this document?

2 Q Right. It's one page, and I'd like to help
3 you out, but it's just buried without being numbered
4 sequentially.

5 A Okay. I think I've --

6 MR. SCHIEFELBEIN: Your Honor, if I might
7 interject here for a moment. Although the dollar
8 effect is sufficiently small to have me bite my tongue
9 for a while over here, you know, we entered into a
10 stipulation, which I understood the purpose of it was
11 to simplify the scope of the proceeding so we wouldn't
12 have to prove up every dollar; we wouldn't have to
13 prove up whether we did bill or didn't bill, or
14 whether it was reasonable to bill for filing an
15 amended brief, or whether we needed to seek recovery
16 through the court of costs.

17 I mean, we came up with a stipulation and
18 said this is reasonable; however, there's a legal
19 argument that needs to be considered according to the
20 Commission. And I think it's -- I don't know if it
21 rises to being objectionable, but I think it's a
22 little bit unseemly here to have my witnesses, who
23 have not been prepared to defend what are basically a
24 year's worth of bills and so forth, very, very minute
25 cross-examination when we have that stipulation. I

1 certainly could have come prepared to litigate every
2 dime and every detail.

3 **THE COURT:** Do you wish to respond?

4 **MS. CALDWELL:** Well, I think the information
5 that we stipulated to, or the points that we
6 stipulated to, were the amount, the dollar amount, of
7 the attorney's fees, being the hourly rate that they
8 were charging and the number of hours that they had
9 put into it; and that is the information that we had
10 stipulated to.

11 And certainly had we had time to come -- we
12 certainly could have done depositions and all sorts of
13 information to that effect, and I could have had more
14 witnesses prepared and be prepared to cross-examine
15 their witnesses. So I don't think that we're
16 nitpicking any more than the other side here on the
17 different issues.

18 It certainly wasn't a stipulation that they
19 would go after attorney's fees for attorney's fees.
20 It was something that we were discussing over the
21 telephone. So I think that we should be granted just
22 some latitude here. It's a matter of -- the issue is
23 how the figure of the \$74,000 should be adjusted, and
24 I think the fact that they did not request cost is
25 certainly an issue that should be addressed.

1 **THE COURT:** I'm just looking at the
2 stipulation again with this issue in mind. I guess in
3 paragraph 5 of your stipulation you do refer to the
4 total amount of attorney's fees and cost as 74,000.
5 Then when we get down to paragraph 7, I read that
6 paragraph as a stipulation that the \$74,648.14 is an
7 agreed upon figure and that's the point at which the
8 dispute begins.

9 **MS. CALDWELL:** Right.

10 **THE COURT:** And that from that point on,
11 we're determining -- well, really the only issue
12 that's stated here is the impact of, quote, "the
13 results obtained," closed quote, upon that \$74,000
14 amount.

15 I know that there is, then, also this issue
16 of dollar amounts that are incurred as a part of this
17 proceeding, but are your questions going to whether
18 the \$74,000 is a correct figure, 74,000 plus, or that
19 some amount should be taken out of that for costs that
20 were not sought?

21 **MS. CALDWELL:** That's correct; that the
22 \$74,000 includes the cost which they did not seek.

23 **MR. SCHIEFELBEIN:** Well, we thought we had
24 stipulated to it, your Honor.

25 **THE COURT:** I can read this to say that it

1 sounds like you did stipulate to that, and I'm not
2 going to -- if there's confusion about what the
3 parties intended, I'm not sure that the language is
4 strong enough to make a decision that you're bound by
5 this and that's it. But I've either got to make that
6 decision that, no, you're bound by this, or it seems
7 to me the other possibility is to say, okay, we're
8 going to have to give you some more time, both of you,
9 to come prepared to address this particular issue.

10 Let me just read it one more time. (Pause)
11 The way paragraph 7 is written it seems clear to me
12 that the only question is what adjustment, if any,
13 should be made to the \$74,648.14 based upon, quote,
14 "the results obtained." I mean that's what it says.

15 So it's not at all clear -- I think it's
16 clearer that the question of cost was an agreed upon
17 issue. So I don't believe that that is an issue that
18 is left to be litigated in this proceeding, not based
19 upon what you have in paragraph 7.

20 Is there something else in the prehearing
21 stipulation that I'm overlooking where you left that
22 issue open to be decided?

23 **MS. CALDWELL:** It actually wasn't an issue
24 that we had recognized until later on in looking
25 through the case law, which I had --

1 **THE COURT:** Well, that was the second part
2 of my question. My familiarity with lodestar and the
3 impact of the results obtained on that figure is
4 probably not as good as it's going to become. So I
5 was going to ask you to be sure whether the results
6 obtained -- my understanding is that that does not
7 include a determination of whether cost is
8 appropriate. That -- except I guess to the extent
9 that a cost may relate to an issue that the party
10 that's being awarded the fees didn't win. I guess to
11 that extent we would look at those costs and try to
12 separate them out.

13 **MS. CALDWELL:** I think it's a legal issue
14 that we can brief and address.

15 **THE COURT:** Okay. All right.

16 **Q** **(By Ms. Caldwell)** Ms. Cowdery, I have
17 just really one further question. In your job as an
18 attorney for Florida Cities, are you also familiar
19 with other types of, let's say, legislation or other
20 decisions, such as Commission rules, legislation,
21 statutes that affect your company, and do you keep up
22 with that?

23 **A** I would say certainly. I have not been -- I
24 was not involved in the rule challenge which our firm
25 was recently involved with, but that certainly keeps

1 me up to speed on what's going on with regard to
2 Commission rules.

3 You know, I am familiar with pending
4 legislative matters that our firm is involved with,
5 although I had no involvement with that, in that. And
6 I want to make it absolutely clear to you that when I
7 worked on this appeal that my client is Florida Cities
8 Water Company, and the arguments I make here --

9 **MS. CALDWELL:** Your Honor, I think she's
10 going beyond my question.

11 **WITNESS COWDERY:** I found it --

12 **THE COURT:** I think maybe you're
13 anticipating the purpose of the question.

14 **WITNESS COWDERY:** Right. Okay. As long as
15 we understand each other.

16 **Q** **(By Ms. Caldwell)** So you do follow both
17 legislative matters that are going on as well as other
18 proceedings before the Commission?

19 **A** Right. I certainly try to keep up.

20 **Q** Are you familiar with Senate Bill 1034?

21 **A** Not by name I don't know what it is.

22 **MR. SCHIEFELBEIN:** Objection as to
23 relevance. We're dealing here with a 1995 rate case.

24 **MS. CALDWELL:** Your Honor, this goes to the
25 significance of our case in that the first issue that

1 was raised by Ms. Cowdery is a very significant issue
2 that has an impact not only on Florida Cities Water
3 Company, the North Fort Myers case.

4 Mr. Gatlin testified that he has raised this
5 type of issue in not only his other Florida Cities
6 water cases, but he's also raised it for other
7 utilities that he represents. And I think my question
8 simply is to ask Ms. Cowdery if she's familiar with a
9 particular provision within a Senate bill that
10 overturns the ruling by the 1st DCA.

11 **MR. SCHIEFELBEIN:** Simply not relevant to
12 what we're here about today.

13 **MS. CALDWELL:** It's relevant to the extent
14 that it is a very significant issue -- the Commission
15 believes it's a very significant issue, and it should
16 be significant -- it apparently is significant to the
17 Legislature if they want to overturn the 1st DCA's
18 opinion.

19 **THE COURT:** I think I understand that this
20 is part of your argument that you mentioned in your
21 opening statement as the petitioners have won this
22 battle, but they have not won the war and, in fact,
23 they lost the war.

24 At this point I'm not prepared to say that
25 this is ultimately going to be relevant. I need to do

1 a lot of reading and to come to a greater
2 understanding than I have at this point in this
3 proceeding.

4 So I'm going to allow this line of inquiry.
5 I understand that ultimately that this is an issue
6 that I'll have to look at very closely. As you say,
7 this is something that apparently is being considered
8 currently in the Legislature, and to what extent it's
9 something that is currently going on in the
10 Legislature relevant to a decision that was made a
11 number of years ago does raise a red flag about
12 relevancy, but I need to get up to speed a lot better
13 than I am today. So I'm going to give you some leeway
14 to explore this.

15 Q (By Ms. Caldwell) Do you recognize this
16 as any type of legislation?

17 A I recognize it as a kind of legislation,
18 having seen legislative format before. I do not
19 recognize that legislation. I do not recognize that
20 document.

21 Q So you have not seen this --

22 A I have not seen that document.

23 MS. CALDWELL: I think what I'll do is wait
24 until I have my witness up and ask him. Those are all
25 the questions I have.

1 THE COURT: Redirect?

2 MR. SCHIEFELBEIN: Yes, please.

3 REDIRECT EXAMINATION

4 BY MR. SCHIEFELBEIN:

5 Q Ms. Cowdery, when you recorded your time for
6 your Motion for Attorney's Fees and for your briefs
7 and so forth, did you divvy that up according to the
8 time spent paragraph by paragraph or theory by theory
9 when you accounted for your time?

10 A No.

11 Q Why not?

12 A It wasn't something I needed to do. I
13 identified my work by what I was doing, which was
14 either research or preparing a brief, you know. It
15 was one claim.

16 If I had tried to break it down by counts,
17 it wouldn't have done much good, because for instance,
18 Counts II and IV were very difficult to tease out, and
19 they -- arguments from one went into the other and
20 back and forth and, you know, it wasn't something that
21 needed to be done as part of the case.

22 Q Is it practical, in your view, to have done
23 that?

24 A It wouldn't have been practical, no, but,
25 you know, going into an appeal you have two completely

1 separate claims. You know in advance that you need to
2 identify those separately. This was not a case like
3 that. This was -- we're trying to get one thing
4 accomplished.

5 Q Did you discuss at all the interrelationship
6 of the issues in your briefs themselves?

7 A Without going through page by page, the only
8 place where I'm aware of that is in the reply brief.
9 In response to an Office of Public Counsel argument,
10 you know, I do specifically point out that the
11 \$1.6 million of governmentally required improvements
12 argument is -- and I don't remember my precise words,
13 except for inseparable from the three used and useful
14 issues which were identified in the prehearing order,
15 which included the flow issue. It was all -- to me it
16 was all used and useful. It's just how you approach
17 it.

18 Q Can you find that language in your brief?

19 A Page 3, paragraph 3.

20 Q This is of the reply brief?

21 A Of the reply brief. Whether facilities
22 required by the government should be recovered in
23 rates is inseparable from the main issues identified
24 in the prehearing order -- that's relating back to the
25 rate case -- regarding used and useful plant.

1 That's Issue 4, and if my recollection is
2 correct, Issue 4 was the flows, but I'd -- you know,
3 you'd have to check that. Rate base, Issue 11, which,
4 I believe, was the fallout rate base number, and the
5 reuse rate, which was Issue 23.

6 **THE COURT:** 27.

7 **WITNESS COWDERY:** 27. Thank you.

8 **MR. SCHIEFELBEIN:** Nothing further.

9 **THE COURT:** Any recross?

10 **MS. CALDWELL:** No.

11 **THE COURT:** Do you wish to offer these
12 exhibits into evidence now, the ones --

13 **MS. CALDWELL:** Yes. I think I had the three
14 briefs.

15 **THE COURT:** I've marked them as
16 Respondent's 1, 2 and 3. Any objections to those?

17 **MR. SCHIEFELBEIN:** No objections.

18 **THE COURT:** I'll accept them into evidence.

19 (Respondent's Exhibits 1, 2 and 3 received
20 into evidence.)

21 **THE COURT:** And also your Exhibits 12
22 and 13. That was your amended brief and the reply
23 brief.

24 (Petitioner's Exhibits 12 and 13 received
25 into evidence.)

1 **MR. SCHIEFELBEIN:** Thank you, your Honor.

2 **THE COURT:** Any objections to those?

3 **MS. CALDWELL:** No.

4 **THE COURT:** I'll accept them into evidence.

5 **MR. SCHIEFELBEIN:** Thank you. May I call my
6 next witness, your Honor?

7 **THE COURT:** Yes.

8 **MR. SCHIEFELBEIN:** Florida Cities Water
9 Company would call Rick Melson to the stand.

10 - - - - -

11 **RICK MELSON**

12 was called as a witness on behalf of Florida Cities
13 Water Company and, having been duly sworn, testified
14 as follows:

15 **DIRECT EXAMINATION**

16 **BY MR. SCHIEFELBEIN:**

17 **Q** Mr. Melson, for the record, who are you and
18 where do you work?

19 **A** I'm Richard Melson. I'm a partner in the
20 law firm of Hopping Green Sams & Smith, 123 South
21 Calhoun Street in Tallahassee.

22 **Q** Are you a member of the Florida Bar?

23 **A** Yes, since 1975.

24 **Q** And are you a Public Service Commission
25 practitioner?

1 A Most of my practice is before the Public
2 Service Commission, yes.

3 Q And how many years experience do you have in
4 that endeavor?

5 A I have practiced before the Commission since
6 1980.

7 Q And what sort of utilities do you represent
8 before the Commission?

9 A Water and wastewater, some electric,
10 telephone.

11 Q And have you represented water and
12 wastewater utilities in rate cases before the
13 Commission?

14 A Yes, I have.

15 Q And have you also represented customer
16 interests at rate cases before the Commission?

17 A Yes; I believe in a case in which I was on
18 the other side from you, Mr. Shiefelbein. (Laughter)

19 Q We won't get into that. Mr. Melson, did
20 you -- have you been engaged by Florida Cities Water
21 Company in this proceeding, this DOAH proceeding?

22 A Yes, through your firm.

23 Q And what is the scope of your retention?

24 A I was asked to look at the fees and costs
25 incurred in connection with seeking attorney's fees,

1 essentially the costs associated with this proceeding.

2 Q And what did you do to enable yourself to
3 reach a conclusion or render an opinion as to those
4 fees?

5 A I interviewed you. I reviewed your files on
6 the matter. I talked with a couple of other attorneys
7 in town to confirm my sense of what the going rate for
8 legal services in this area is, and I looked at some
9 prior attorney's fees cases that I was aware of to see
10 what sort of fees have been occurred in connection
11 with those.

12 Q I have before you a document that I think
13 has been previously marked and admitted as
14 Petitioner's 10, which is an affidavit of mine.

15 A Yes.

16 Q Attached to that affidavit are certain
17 documents. Have you seen those documents before?

18 A Yes, I've reviewed those. Those were
19 represented to me to be your bills and prebills in
20 connection with the attorney's fee matter.

21 Q The prebill relates to a bill yet to be
22 rendered?

23 A Correct.

24 Q And there's another document there that I've
25 placed in front of you which is entitled -- what is it

1 entitled? Well, would you read the title of that?

2 A It's titled "Attorney's Fees and Costs
3 Incurred in Pursuit of Recovery of Appellant
4 Attorney's Fees.

5 Q Have you seen that document before?

6 A Yes, I have.

7 Q And did you prepare it?

8 A No, I did not.

9 Q Did you have a hand in editing or revising
10 it?

11 A Yes. I suggested that on the bottom of the
12 first page that you summarize the hours for each
13 individual attorney, and you accommodated that
14 suggestion.

15 MR. SCHIEFELBEIN: Could I identify that as
16 an exhibit, I guess Petitioner's 14, if my numbers are
17 correct?

18 THE COURT: That's correct, and I've so
19 marked it.

20 MR. SCHIEFELBEIN: Thank you.

21 Q (By Mr. Schiefelbein) Is there any
22 independent evidentiary value to what's just been
23 marked as Petitioner's 14? What is that essentially,
24 as you understand it?

25 A My understanding, it's a summary prepared by

1 your firm that simply summarizes the hours and dollars
2 that are shown on the attachment to the affidavit.

3 Q That and various pages indicates that
4 certain, quote, "costs" should be excluded or are
5 excluded from the calculation. Do you have an insight
6 as to what that's about?

7 A Yes. In preparing your request for
8 attorney's fees in connection with the attorney fee
9 matter, it's my understanding you excluded some time
10 by other lawyers in your firm that was not clearly
11 identified as associated with the matter; that you
12 excluded all law clerk time and that you excluded all
13 costs other than Mr. Seidman's fee and my fee in
14 connection with testifying.

15 Q Included you and Mr. Seidman?

16 A You excluded everything except us.

17 Q Correct. Okay. So what -- from reviewing
18 those bills and prebill information and reviewing the
19 affidavit, do you have a number of hours that Wayne
20 Schiefelbein devoted to this instant action before
21 DOAH?

22 A I believe the three lawyers in your firm
23 combined have devoted or expect to devote about 66
24 hours.

25 Q That would include the projection?

1 A That includes the projection, yes. The
2 projection is 22 hours, so it would be roughly 44
3 hours incurred up through a day or two ago.

4 Q Are you satisfied that that information
5 excludes any of Mr. Gatlin or Ms. Cowdery's time as
6 far as preparing to and appearing today as a witness?

7 A That's correct; it includes none of their
8 time in connection with preparing to testify or
9 testifying.

10 Q And none of law clerk time?

11 A That's correct.

12 Q And no costs whatsoever other than the
13 expense of your services and Mr. Seidman's services?

14 A That's correct.

15 Q Prior to showing up at the hearing this
16 morning at the beginning, how many hours did you
17 devote to familiarizing yourself and preparing for
18 this hearing?

19 A I have 2.6 hours up until this morning.

20 Q And you've been here since the beginning of
21 the hearing?

22 A Yes, sir.

23 Q And what is your hourly rate?

24 A \$220 an hour.

25 Q Now, do you have an opinion, have you

1 developed an opinion as to the level of attorney's
2 fees, both incurred and projected, to complete as set
3 forth in those two exhibits that you have before you?

4 A Yes, I have.

5 Q And what is that opinion?

6 A My opinion is that represents a reasonable
7 hourly rate, perhaps on the low side of what I'm
8 familiar with in the community, and a reasonable
9 number of hours in connection with the pursuit of
10 attorney's fees.

11 Q When you say a low amount on the fees, what
12 is your -- do you have knowledge of the local
13 utilities bar that represents folks before the
14 Commission?

15 A I'd say I have anecdotal knowledge.

16 Q And what is that anecdotal knowledge as far
17 as what is the range of fees that are charged to
18 utilities before the Public Service Commission?

19 A I think it varies some based on the type of
20 utility. In my experience with water and wastewater
21 utilities, the range is probably from around \$150 an
22 hour to around \$215 an hour.

23 With respect to others utilities, the low
24 end of the range is closer to \$175, and the high end
25 of the range is probably \$225 to \$250.

1 Q In reviewing the documentation provided to
2 you in reviewing our files on this matter, is there
3 anything unusual or interesting particularly that
4 caught your eye as far as any novel strategy or
5 activity by the firm on this case?

6 A No, not in particular. I was for other
7 purposes interested in some of the research you've
8 done and copied down a citation or two.

9 Q Would the files indicate to you that there
10 had been a fair amount of legal research for this
11 proceeding?

12 A Yes, they did. You appeared to have
13 researched several distinct issues relating to the
14 attorney's fee award.

15 Q And could you -- if you can, what were the
16 issues that appeared to have been researched from the
17 files?

18 A You appeared to have researched the lodestar
19 rule, the results obtained rule. You researched the
20 recoverability of attorney's fees expended in
21 recovering attorney's fees. You researched the scope
22 of a DOAH proceeding given the type of remand order
23 that the court entered in this case, and you
24 researched some prior administrative law decisions
25 entered by this judge.

1 Q Thanks, Mr. Melson. I had forgotten that.

2 THE COURT: I hope it was some of my shorter
3 ones, which there aren't many of. (Laughter)

4 Q (By Mr. Schiefelbein) Is it difficult to
5 challenge the Florida Public Service Commission on
6 appeal, in your experience?

7 A It is more difficult to win than to
8 challenge. I've been involved in several appeals of
9 Public Service Commission orders, and the losses
10 outnumber the wins.

11 Q By quite a bit?

12 A Probably by about the normal percentage,
13 about 80% losses, 20% wins.

14 MR. SCHIEFELBEIN: I have nothing further.
15 Thank you.

16 THE COURT: Cross?

17 CROSS EXAMINATION

18 BY MS. CALDWELL:

19 Q Mr. Melson, I have just one question. Is
20 the \$220 an hour you're charging, is that your normal
21 fee?

22 A My normal rate moved up on January 1st from
23 \$220 to \$230. So 220 is a slight discount from my
24 current rate.

25 Q And what did you do in the eight hours that

1 you were charging? What was that time spent doing?

2 **A** The eight hours was Mr. Schiefelbein's
3 estimate of the time. In fact, I have spent 2.6 hours
4 prior to today and whatever time has been spent since
5 9:30 this morning, and that, I expect, will be the sum
6 total of my time. It will not reach the eight hours.

7 **Q** So it includes all the time that you have
8 spent here today?

9 **A** Yes.

10 **Q** From 9:30?

11 **A** Yes, ma'am.

12 **MS. CALDWELL:** That's all I have.

13 **THE COURT:** Any redirect?

14 **MR. SCHIEFELBEIN:** No. Thank you.

15 **THE COURT:** Thank you, sir.

16 (Witness Melson excused.)

17 - - - - -

18 **THE COURT:** Do you wish to offer
19 Petitioner's 14?

20 **MR. SCHIEFELBEIN:** Yes, your Honor, please.
21 I appreciate the help.

22 **THE COURT:** Objections? (No response.)

23 I'll accept it into evidence.

24 (Petitioner's Exhibit 14 received into
25 evidence.)

1 **THE COURT:** Does that complete petitioner's
2 case?

3 **MR. SCHIEFELBEIN:** Yes, it does, your Honor.
4 Thank you for your indulgences.

5 **THE COURT:** Would you like to take a short
6 break before you take your witness, or do you want to
7 press on?

8 **MS. CALDWELL:** I'd just as soon press on.
9 We call Marshall Willis.

10 - - - - -

11 **MARSHALL W. WILLIS**
12 was called as a witness on behalf of the Florida
13 Public Service Commission and, having been duly sworn,
14 testified as follows:

15 **DIRECT EXAMINATION**

16 **MS. CALDWELL:** Your Honor, we'd like to mark
17 for identification the resume of Mr. Marshall W.
18 Willis.

19 **THE COURT:** I'll mark it as Respondent's
20 No. 4.

21 **BY MS. CALDWELL:**

22 **Q** Mr. Willis, please state your name and
23 address.

24 **A** My name is Marshall W. Willis. My address
25 is 2540 Shumard Oak Boulevard, Tallahassee, Florida

1 32399.

2 Q Mr. Willis, what is your occupation?

3 A I'm a bureau chief. I'm chief over the
4 bureau of economic regulation in the Division of Water
5 and Wastewater.

6 Q And that's for the Public Service
7 Commission?

8 A Yes, it is, Public Service Commission.

9 Q And how long have you been a bureau chief?

10 A I've been a bureau chief since 1981, I'd
11 say.

12 Q And how long have you worked for the
13 Commission?

14 A It's almost 21 years as of this June.

15 Q What are your responsibilities as chief of
16 the bureau of economic regulation?

17 A I supervise three sections made up of three
18 supervisors. One section is over engineering; has a
19 professional engineer as a supervisor. I have an
20 economist over one section, and a CPA over the other.

21 Basically the responsibilities of all three
22 supervisors entail filings before the Commission, rate
23 cases, limited proceedings, soon to be certificate
24 cases, staff assisted cases, tariff filings, just
25 about anything filed before the Commission.

1 Q And approximately how many rate cases have
2 you either been involved in or supervised?

3 A I never thought of it that way. I'm sure
4 there's probably -- I'd have to say it's close to 100.

5 Q Okay. What is your educational background?

6 A I have a degree in accounting from the
7 University of West Florida, and I am a certified
8 public accountant.

9 Q And how long have you been a CPA?

10 A Since 1980.

11 Q Have you ever testified as an expert?

12 A Yes, I have.

13 Q And can you give me an idea of the number of
14 proceedings?

15 A Over 50 cases before the Commission and the
16 Department of Administrative Hearings.

17 Q Have you held any teaching or speaking
18 positions?

19 A I have been a member of the faculty of
20 the -- what's called the NARUC South Florida Utility
21 Conference. NARUC is the National Association of
22 Regulatory Utility Commissioners. I have taught as a
23 faculty member for several years on that.

24 I have been asked to speak on many
25 occasions, one before the District Court of Appeals'

1 seminar. At the time, the District Court of Appeals
2 was just taking over appeals in water and wastewater
3 cases. Prior to that all appeals went to the Supreme
4 Court of the State of Florida.

5 I also have been a speaker on many occasions
6 in the opening and closing sessions of the biannual
7 conference of the National Association of Water -- or
8 not Water -- the National Association of Regulatory
9 Utility Commissioners, their accounting conference,
10 which occurs twice a year.

11 Q And what is the purpose of your testimony
12 today?

13 A The purpose of my testimony is basically to
14 compare the policy and practice of the Commission
15 versus the outcome of the North Fort Myers appeal.

16 Q Have you reviewed the 1st District Court of
17 Appeals' opinion filed January 12th in Case
18 No. 96-3812, Florida Cities Waters Company versus
19 Florida Public Service Commission?

20 A Yes, I have.

21 Q And from your reading of the opinion, what
22 issues did the court rule on?

23 A Well, from my reading of it, the court
24 rendered an opinion on three basic issues. The first
25 issue dealt with the recovery of environmental costs

1 required by an environment -- well, a state agency.

2 The second issue dealt with -- and the third
3 issue basically -- dealt with the used and useful
4 calculation applied by the Commission.

5 The second issue covered -- and I may have
6 these out of order -- but the second issue covered
7 basically the capacity of plant. And in this case the
8 Commission had chosen a 1.5 MGD capacity, and the
9 court ruled that it was 1.25.

10 The third issue dealt with the numerator, or
11 the calculation of used and useful, and that was the
12 annual average daily flow versus the average daily
13 flow peak month.

14 Q What is the significance of the court's
15 holding related to the recovery of expenses incurred
16 in complying with environmental regulations?

17 A Well, the significance to me is that the
18 court upheld the Commission's practice. If the court
19 had overturned the Commission on that issue, that
20 would have ramifications well beyond this North Fort
21 Meyers rate case. It would go to any future case.

22 And if that happened, the Commission would
23 have to include at 100% any costs required by an
24 environmental agency, be it Environmental Protection
25 Agency, Department of Environmental Protection or the

1 Commission itself.

2 Q Could you give us an example as to the
3 consequence if we lost that issue, say, with just a
4 rate case? Just an example; a rate case or a
5 hypothetical.

6 A A hypothetical? Well, in the present case,
7 the North Fort Meyers case, we've already talked about
8 the monetary value involved here for the environmental
9 cost which was testified to earlier.

10 That would had to have been included at 100%
11 with no used and useful adjustment applied to it.
12 Every case that comes before the Commission nowadays
13 usually has environmental costs associated with it.

14 Florida Cities has many systems, and they've
15 come before us with environmental costs which has in
16 the past had used and useful adjustments made to
17 those. They would have to have been included at 100%
18 used and useful.

19 Some have a material impact. Some may not
20 have a material impact. It depends on how much of the
21 plant would be nonused and useful.

22 Q Let's say, for example, a wastewater
23 facility was not an advanced wastewater treatment
24 facility, and then DEP or another governmental agency
25 required them -- let's say before they were a large

1 plant but had a small serving capacity of, say, 50%.
2 What would be the consequences of a DEP requirement
3 that they upgrade their plant?

4 A Well, if the utility maintained the same
5 capacity when upgrading to advanced waste treatment,
6 and they were required to go to advanced waste
7 treatment, we would probably have to include 100%
8 regardless of used and useful, whereas before it would
9 have been 50% used and useful.

10 Q Would the Commission get to the issue of
11 used and useful if it had to include all the
12 governmental compliance costs?

13 A It would never get to the issue of used and
14 useful for those items that were required by a
15 government. For those that were not required, yes,
16 you would be doing the used and useful.

17 Q How does the holding directly affect Florida
18 Cities in a future rate case?

19 A The Commission will be applying used and
20 useful, if necessary, to costs included for
21 environmental requirements.

22 Q Would this holding affect the other
23 utilities as well?

24 A Yes, it will, in the same way.

25 Q You just testified to the effects of the

1 first issue. Could you give me a summary of the
2 effects of the second issue? I know Mr. Seidman had
3 testified to it, but could you sort of summarize that?

4 A Well, the second issue, as I said before,
5 dealt with the actual capacity of the plant, which in
6 our used and useful calculation goes in in the
7 denominator.

8 In this case the court overturned the
9 Commission, and basically the Commission has now
10 issued an order agreeing and -- with the court that
11 capacity is now 1.25 and will be adjusting the dollars
12 for that, and that coming -- when this case is
13 actually finalized.

14 Now, as far as how it might affect policy
15 and practice of the Commission, that basically is this
16 case only. It doesn't really affect any future case
17 of Florida Cities -- well, it may affect Florida
18 Cities in the future when its plant comes before us,
19 but has not had any future construction to expand its
20 capacity. But as far as any other case before the
21 Commission, it really has no ramifications.

22 The third issue?

23 Q Yes.

24 A The third issue itself has actually not been
25 resolved yet, as you've already heard the prior

1 witnesses. The Commission had set that issue for
2 hearing. There has been a request for stay. That's
3 up in the air.

4 It will be on the first agenda before the
5 Commission in May, and because of that, that really
6 has not been finalized. But if the final outcome is
7 with the utility, then that will have, definitely have
8 impact upon future cases before the Commission as to
9 what goes into the numerator of the calculation.

10 Q All right. And from a policy aspect, would
11 you say that the first issue was distinct from the
12 second two issues?

13 A I would. My opinion is they are distinct,
14 because if the utility had won on that first issue,
15 you would never go to calculation of used and useful
16 for any environmental costs. They would automatically
17 be 100% used and useful per court case.

18 MS. CALDWELL: I'd like to have this
19 identified -- I guess we would be on 5.

20 THE COURT: That is correct. That's marked
21 as Respondent's No. 5.

22 Q (By Ms. Caldwell) Mr. Willis, as bureau
23 chief, are you required to review legislation that may
24 affect either the Commission or the utilities you
25 regulate?

1 **A** Yes, I am.

2 **Q** And are you familiar with legislation that
3 has been filed this year before the Legislature?

4 **A** Yes, I am.

5 **Q** Would this --

6 **MR. SCHIEFELBEIN:** Objection, your Honor,
7 before we get too far into this. Again, I would
8 submit to you that the status of legislation that has
9 not passed the court -- it's not passed the
10 Legislature is not relevant to our inquiry today,
11 which is how did we do on appeal.

12 **THE COURT:** I'm going to reserve my ruling.
13 This goes back to the issue that came up previously
14 about the impact of the Senate bill, and I'm going to
15 give the respondent some opportunity to argue this
16 issue.

17 **MS. CALDWELL:** We understand that this bill
18 may not pass, and we recognize that and don't offer it
19 as being something that has passed the Legislature.

20 We simply offer it for the issue that it's
21 something that is -- it's an important issue that
22 sometimes needs to go before the Legislature rather
23 than have the Commission decide.

24 **THE COURT:** I'm anticipating your argument
25 is going to be that this supports the testimony that

1 the question of what should be done with expenditures
2 that are required by other agencies, that that issue
3 is a much broader issue that impacts not just this
4 case, but other cases and that's what this goes to.

5 MS. CALDWELL: That's correct.

6 THE COURT: I don't mean to suggest that I
7 agree with that or I believe that that is correct, but
8 because I anticipate that's what your argument is
9 going to be, the fact that there is a bill, the fact
10 that it came afterwards, none of those things are
11 relevant.

12 It really goes to what weight I should give
13 the testimony I think that this gentleman has given
14 about the importance of that particular issue.

15 MS. CALDWELL: That's correct.

16 MR. SCHIEFELBEIN: If I might, your Honor.

17 THE COURT: Sure. Go ahead.

18 MR. SCHIEFELBEIN: I certainly agree with
19 all that, and I guess I can cover this at length in my
20 proposed order. But there seems to be a case being
21 made here that this is really important to the
22 Commission, and I don't know if that's terribly
23 relevant to our inquiry here today. I think that's
24 the short version of what I'm trying to stifle here.

25 THE COURT: That is a part of what is going

1 on. I don't know that that's what the Public Service
2 Commission is relying upon.

3 I've heard in the testimony that there is an
4 impact to -- not necessarily on the Public Service
5 Commission, maybe, as there is an impact on a whole
6 lot of other utilities. And the fact that the Public
7 Service Commission, if they have won this issue, if
8 you will, is going to impact all those other
9 utilities, well, does that diminish from what this
10 petitioner was able to accomplish on appeal. I
11 understand that that's part of it.

12 I don't think that's what the Public Service
13 Commission is arguing and ultimately going to argue.
14 Maybe it is. I don't know, but that's something I'll
15 have to determine once I've read your briefs.

16 Q (By Ms. Caldwell) Mr. Willis, are you
17 familiar with Senate Bill 1034?

18 A Yes, I am.

19 Q And could you turn to Page 2, Line 22 and
20 read that paragraph?

21 A Do you want me to read it into the record or
22 just read it?

23 Q Well, yes. Just go ahead and read it into
24 the record.

25 A "Notwithstanding the provisions of this

1 paragraph, the Commission shall approve rates for
2 service that allow a utility to recover from customers
3 the full amount of environmental compliance costs.
4 Such rates shall not include charges for allowances
5 for funds prudently invested or similar charges. For
6 purposes of this requirement, the term 'environmental
7 compliance costs' includes all reasonable expenses and
8 fair return on any prudent investment incurred by a
9 utility in complying with the requirements or
10 conditions contained in any permitting, enforcement or
11 similar decisions of the United States Environmental
12 Protection Agency, the Department of Environmental
13 Protection, a water management district, or any other
14 governmental entity with similar regulatory
15 jurisdiction."

16 Q Thank you. Have you had cause to analyze
17 this legislation and come to an opinion as to what it
18 means?

19 A Yes, I have. I was asked to analyze this
20 particular bill for the Commission. This paragraph
21 means exactly what I was talking about earlier. It
22 goes directly to the very first issue where if this
23 bill were to pass, any expense, any capital
24 improvement made to fund environmental compliance
25 costs would be 100% included in rate base with no used

1 and useful adjustment. That's my reading of the bill.

2 Q And how did you relate it to the 1st DCA's
3 opinion on the first issue?

4 A 1st DCA agreed with the Commission, which is
5 in total reverse of what this paragraph says.

6 MS. CALDWELL: That's all I have. I tender
7 him for cross.

8 CROSS EXAMINATION

9 BY MR. SCHIEFELBEIN:

10 Q In fact, Senate Bill 1034 failed last year
11 as well, didn't it?

12 A Yes, it did.

13 Q Similar language in the bill?

14 A Similar language in the bill, yes.

15 Q That bill was filed and considered before
16 the Legislature well before any appellate opinion was
17 rendered in this case; is that correct?

18 A That's correct.

19 Q Mr. Willis, you're kind of in charge of the
20 rate case below, weren't you? The rate case that
21 we're here --

22 A The North Fort Myers rate case?

23 Q Yes.

24 A Yes.

25 Q You're, in fact, in charge of all water and

1 wastewater utility rate cases that come before the
2 Commission?

3 A That's correct.

4 Q And, in fact, you've rendered a number of
5 recommendations in this case, haven't you?

6 A My staff has, yes.

7 Q Okay. Well, did you concur with those
8 recommendations?

9 A Yes. I signed off on those recommendations.

10 Q So when the Commission staff recommended in
11 September of 1995 that Florida Cities' application for
12 a wastewater rate increase be granted with a 100% used
13 and useful rating, you concurred in that
14 recommendation?

15 A Yes, I did. That was the proposed agency
16 action recommendation. But that was based on the fact
17 that it was unknown to our engineer what the actual
18 permit was based on at that point, and, in fact, my
19 staff engineer did not make that determination and
20 find that out until the case had been protested.

21 Q Well, that's interesting. You also were
22 responsible for the August 1st, 1996, staff
23 recommendation that was posthearing in this case,
24 weren't you?

25 A That's correct.

1 Q And that differed quite a bit from the PAA
2 that disallowed about two-thirds of the company's
3 investment plant, didn't it?

4 A Yes, it did, and if --

5 Q Would it --

6 A With it it also had a primary and an
7 alternate in that recommendation, I believe.

8 Q And which did you support?

9 A (Pause)

10 Q If you don't recall, you don't recall.

11 MS. CALDWELL: Your Honor, I object. What's
12 the relevance of which side he supported?

13 MR. SCHIEFELBEIN: Bias.

14 THE COURT: I'll allow it.

15 WITNESS WILLIS: I don't know that I
16 supported either side. My function as a bureau chief
17 is basically to make sure that the Commission has all
18 the facts that it needs to make a determination in any
19 case.

20 I don't recall that I actually took a stand
21 either way on the primary or alternate. I believe
22 that both had to be before the Commission. Both were
23 necessary before the Commission for those
24 Commissioners to make a determination.

25 Q So your job is to make sure there's evidence

1 to support whatever decision that they need?

2 A That's correct.

3 Q What evidence was there in this proceeding
4 supporting a 1.5 MGD capacity that you signed off on?

5 MS. CALDWELL: I object, your Honor. It
6 goes to the question that was resolved by the court,
7 and I don't think we need to go over that today.

8 MR. SCHIEFELBEIN: Well, this witness, your
9 Honor, is expressing a whole bunch of opinions
10 interpreting a court's opinion that speaks very well
11 for itself, and coming up with some very -- to me,
12 very foreign sort of opinions here. And before I get
13 to the substance of those opinions, I'd like to
14 establish that this is not someone fresh to the case.
15 This is someone that has a vested interest
16 philosophically and employment-wise with that
17 decision.

18 THE COURT: I'm going to overrule it.

19 MR. SCHIEFELBEIN: I'm sorry?

20 THE COURT: I'll overrule it. You can
21 answer the question if you recall it.

22 WITNESS WILLIS: Could you ask the question
23 again?

24 THE COURT: I think the question was whether
25 there's any evidence to support the 1.5 million.

1 **WITNESS WILLIS:** As the court ruled, there
2 was none. I think the court made that finding.
3 Whether I believe there is or isn't, the court made
4 the ruling.

5 **Q** **(By Mr. Schiefelbein)** But you signed off
6 as the senior-most person on a recommendation that the
7 1.5 should be used?

8 **A** I signed off on a recommendation that said
9 that was one of the opinions of staff.

10 **Q** And did you, in fact, sign off on the
11 recommendation to reopen the record in this case?

12 **A** Yes, I did.

13 **Q** Because the court invited you all to? Isn't
14 that you all's position, the court invited you to --

15 **A** I believe that was the interpretation of our
16 attorneys as well as technical staff of the opinion --
17 majorly we were relying upon our attorneys -- is that
18 the court did allow that.

19 **Q** Let's see if I can understand your way of
20 characterizing this appeal on different issues, and I
21 think it's pretty fair overall. But, I mean, you say
22 that we said the government made us do it, give us
23 that in rate base, and Florida Cities did not succeed
24 on that argument, correct?

25 **A** That was the first issue.

1 Q How much money followed that argument? Do
2 you know?

3 A I think it was testified to earlier it
4 was --

5 Q Was it about 1.6 million?

6 A I believe that's correct.

7 Q I'm sorry?

8 A Actually, I'm not sure it was 1.6 million.

9 Q So you don't know how much money was
10 associated with the "environmental agency made me do
11 it" argument?

12 A Well, there's two costs basically associated
13 with it, and Mr. Seidman testified to that. I think
14 one of them was around 800,000, and the other
15 1.6 million.

16 Q Not to debate with you, but \$877,000 were
17 disallowed -- the rate base that resulted from the
18 September 1996 order this case was about \$877,000 less
19 than the rate base approved in the company's last rate
20 case; isn't that accurate?

21 A That's true. That is correct.

22 Q And there's about 1.6 million in DEP, EPA
23 and local government environmental agency required
24 investment?

25 A That's correct. It's the 1.69. I believe

1 it's 1.69 million.

2 Q And you said that the -- thank goodness for
3 the court, the court vindicated the Commission's
4 position on that sort of investment; isn't that right,
5 that they supported your practice in not allowing it?
6 Is that what you said?

7 A I don't think I characterized it that way.
8 I said they upheld the Commission's practice.

9 Q How long has that practice been going on?

10 A For quite a while, ever since I've been
11 there.

12 Q Really. Okay. I knew there was a reason
13 why I moved the proposed agency action order in this
14 case into evidence. I knew it would come to me. Now
15 if I could only find it.

16 I'm going to the July 1, 1992 order of the
17 Commission, and I guess that's Petitioner's Exhibit 8.
18 Take your time looking at it, but I'm looking to draw
19 your attention here to costs of advanced wastewater
20 treatment plant. And I'm at a loss without a copy.

21 A Page 6.

22 Q Have you had a chance to read that
23 paragraph, "Cost of Advanced Wastewater Treatment
24 Plant."

25 A Not completely.

1 Q All right.

2 A (Pause) I've read it.

3 Q On what basis did the Commission allow every
4 dime of investment in that advanced wastewater
5 treatment plant to be included in rate base in the
6 company's last rate case?

7 A It was 100% used and useful based upon
8 flows.

9 Q Gosh, I don't think you're in "Cost of
10 Advanced Wastewater Treatment Plant," the section
11 here.

12 Would you not agree that the Commission
13 ruled that the utility was required to expand its
14 wastewater treatment facilities by the EPA and the DEP
15 by various quoted orders?

16 A That's correct. They deemed that the costs
17 were prudent.

18 Q Is there anything imprudent about that plant
19 as it -- did the Commission find any imprudence in the
20 current rate case associated with that plant?

21 A With its current rate case?

22 Q Uh-huh.

23 A No.

24 Q And you don't dispute that expansion of the
25 plant was required by a DEP consent order in the

1 current case, do you?

2 A The 1.0?

3 Q The 1.25. It's never been disputed before.

4 Do you wish to dispute it now?

5 A But it was required by DEP? That's -- I'm
6 not sure whether it was required by DEP or not. I
7 know the reused portion was required by DEP. I'm not
8 sure if the additional 2.5 capacity was required or
9 the utility did it because they ran out of capacity.

10 Q Did the court in its opinion say that this
11 is the Commission's practice regarding environmental
12 requirements, cost of compliance with environmental
13 requirements, and we're sustaining the PSC's "get
14 tough" policy on those things?

15 A No. Actually they --

16 Q Did they talk about prior Commission
17 policy --

18 MS. CALDWELL: Let him -- I object. He
19 needs to answer the first question.

20 THE COURT: Go ahead.

21 WITNESS WILLIS: I was going to say no, they
22 didn't. The court referred to a prior rate case that
23 was actually heard by the Commission. I forget what
24 year. It was an old case. I believe it was Keystone.

25 Without the opinion in front of me, I'm not

1 sure, but I believe it was either Keystone Water
2 Company in which the Commission found that it was
3 required by a governmental agency, and they allowed
4 the entire amount in rate base, and the court also in
5 its opinion stated that Commission had veered from
6 that practice.

7 Q They actually said the Commission has itself
8 turned its back on its Kingsley Service Company
9 precedent.

10 A Kingsley --

11 MS. CALDWELL: Your Honor, is
12 Mr. Schiefelbein going to testify or --

13 MR. SCHIEFELBEIN: No. I'm leading the
14 witness. Would you like to see the court's opinion?

15 WITNESS WILLIS: No. I believe you've said
16 it correctly.

17 MS. CALDWELL: I think he's reading out of
18 an old opinion. That's the old language.

19 MR. SCHIEFELBEIN: You'll get a chance, I
20 guess, on redirect.

21 THE COURT: Well, the record will show -- I
22 don't remember exactly what was said, but they can
23 compare the transcript with what the evidence of the
24 actual opinion is.

25 Q (By Mr. Schiefelbein) So is it not fair

1 to say that the court saw the Commission's get tough
2 position on these environmentally required costs as
3 being a repudiation of its past policy?

4 A Well, I differ that it's a get tough policy.
5 I don't believe it's a get tough policy.

6 Q But there's been a change in the policy?

7 A There has been a change in policy, and the
8 court recognized that and they affirmed the
9 Commission's change in that policy; and that policy
10 has been going on for quite a while.

11 Q Are you familiar with the water and
12 wastewater division's standard operating procedures?

13 A Pretty much.

14 Q Is it not true that the current version of
15 those was approved actually by the executive director
16 of the Commission back in March of '91. Does that
17 sound right?

18 A You'll have to show it to me.

19 Q Have you ever seen this document before? I
20 apologize. It's an excerpt.

21 A Yes. It's one page out of many.

22 Q Okay.

23 A Out of 32, to be exact.

24 THE COURT: This is part of Petitioner's
25 Exhibit 2, I believe.

1 **MR. SCHIEFELBEIN:** I believe that's right,
2 your Honor. (Pause)

3 **Q** **(By Mr. Schiefelbein)** Here's the whole
4 one, so you can make sure we're not taking anything
5 out of context. Does this appear to be the father of
6 this?

7 **A** It appears to be, yes.

8 **Q** Could you turn to Page 23 of 32?

9 **A** I've got it.

10 **Q** And I'm trying to put this into context. Is
11 this essential issue the various things that the
12 Commission has indicated it will consider in making a
13 used and useful calculation for water and wastewater
14 plant?

15 **A** No, I don't believe this is what the
16 Commission will consider. This standard operating
17 procedure that you're looking at is a standard
18 operating procedure of my engineering section, and by
19 being such, it's what's required for our engineers to
20 look at.

21 When they do their field investigation, then
22 they look at the minimum filing requirements in the
23 books and records relating to plant. And specifically
24 when you go to the one page you included, which is
25 Page 23, you have to go back to Page 22, which you

1 didn't include, to get the actual meaning of Page 23.

2 And I'll read it. It's in consideration --

3 Q I think you're going far --

4 A I don't believe so. I don't believe I'm
5 going far at all. I mean, if you're referring to
6 Page 23 and whether I understand what it is, you have
7 to go back to Page 22 to the very beginning to --

8 Q All right. Please proceed.

9 A -- understand what it is.

10 Q Please proceed.

11 A This is part of a section called
12 "Considerations in Evaluating Plants and Systems."
13 And basically there's a short paragraph that basically
14 explains it, and that's "In preparing to apply the
15 aforementioned criteria and formula to a used and
16 useful condition will require a considerable amount of
17 technical judgment and appraisal. The following are
18 items to be considered during the engineers'
19 evaluation of data and utility systems."

20 And that's exactly what Page 23 is. It's
21 part of that list of things to be considered.

22 Q This is in addition to just some formula.
23 These are things that the staff should consider.

24 A That's correct.

25 Q And on Page 23 of 32, Item 4, what are one

1 of the things that staff should consider in making
2 that used and useful determination?

3 A Any facility required to be installed by a
4 regulatory agency other than lines required by real
5 estate regulatory agencies should be considered used
6 and useful.

7 Q So that determination of -- wouldn't you
8 agree that that determination of used and useful as
9 far as formulas, as far as government requirements,
10 prudence, all these things are somewhat intertwined to
11 get to the right result?

12 A Sure they are intertwined.

13 Q Okay. And you were here for Mr. Seidman's
14 testimony?

15 A Yes, I was.

16 Q Did he testify accurately as to as far as
17 the dollar significance of the various theories or
18 arguments in this case, to the best of your knowledge?

19 A To the best of my knowledge. I haven't had
20 time to go over his calculations, but they pretty much
21 agree with what my staff has calculated.

22 Q You've had ample opportunity to make a
23 presentation --

24 A I looked at the dollar --

25 Q -- if there wasn't, right? You do agree --

1 and I'm not trying to trick you -- but you do agree
2 that a good round number of dollars associated with
3 governmentally regulated required investment is about
4 \$1.6 million?

5 A Yeah, I would pretty much agree to that.

6 Q And you would agree, wouldn't you, that the
7 effect of using a 1.25 MGD instead of a 1.5 MGD plant
8 capacity represents about \$879,000 worth of
9 investment, give or take? I have no real reason at
10 this point to disagree with Mr. Seidman's figures.

11 And the debate over whether to use annual
12 average daily flows or whether to use the average
13 daily flows of the max month, do you have any reason
14 to disagree with Mr. Seidman's calculation that that's
15 about \$1.3 million in rate base that's being pursued
16 by that argument?

17 A No, I do not.

18 Q Now, if Florida Cities had prevailed on just
19 the DEP argument and the court hadn't reached -- or
20 disagreed with the capacity and the flows argument,
21 wouldn't you agree, then, that the company would have
22 been victorious in adding \$1.6 million to its rate
23 base than that which was allowed by the Commission
24 initially?

25 A Yes, they would have got 1.6 million.

1 Q And if Florida Cities had been vindicated on
2 every single argument, would it have done any better
3 as far as the potential recovery of rate base than it
4 did exactly under the case that is today?

5 A Yes.

6 Q And how is that?

7 A They would probably get close to or 100% of
8 rate base.

9 Q 100% of rate base?

10 A Very close to it, if not.

11 Q If they had won all of them?

12 A Yes.

13 Q And how much of rate base do they get by
14 virtue of prevailing only on the capacity and the
15 flows issues?

16 A I'd have to go back to my documents to get
17 those exact numbers.

18 Q Please do.

19 A (Pause) I don't know that they're going to
20 be exactly broken down in the terms that you're
21 looking at right there. There's going to have to be a
22 calculation.

23 MR. SCHIEFELBEIN: Would it make sense, your
24 Honor, just for everyone's convenience to take five
25 minutes and let him have a chance to calculate it?

1 THE COURT: That's fine.

2 WITNESS WILLIS: It's going to take longer
3 than five minutes.

4 MR. SCHIEFELBEIN: Well, how long will it
5 take?

6 MS. CALDWELL: Do you have everything you
7 need to do the calculation with? Do you have a
8 calculator?

9 WITNESS WILLIS: I'm not sure I have all the
10 documents to make a calculation. I may have to go
11 back to the office to do it.

12 MR. SCHIEFELBEIN: Then that's all right.

13 WITNESS WILLIS: I mean, without looking at
14 the order, Mr. Schiefelbein, I really can't tell you
15 if all the -- everything I need is right here and not
16 going back to files at the Commission to make these
17 calculations.

18 Q (By Mr. Schiefelbein) So isn't it a fact
19 that you don't know how much money is associated at
20 present with the victory for Florida Cities on the
21 capacity, the potential victory by Florida Cities on
22 the flows with the remand? You don't know how much
23 money is associated with that?

24 A I basically have a good idea of that. I
25 mean, I'm agreeing with Mr. Seidman, because my Staff

1 has gone back and calculated those very dollars. I
2 don't have those dollars with me.

3 Q But you generally agree with Mr. Seidman?

4 A Yes, I do. On those dollars, I do.

5 Q And you would agree that you can't win more
6 than 100%?

7 A That is correct.

8 Q And you can't win much more than 98.6%?

9 A And that's pretty close to 100%. Normally
10 when you get 98.6%, the Commission will give you 100%.

11 Q And, in fact, that's what the Commission did
12 on the PAA, isn't it?

13 A On the PAA the Commission gave the utility
14 100%, and I explained before why they did that.

15 Q Now, this DEP question, this environmental
16 regulated required issue, that's real important to the
17 Commission, isn't it?

18 A Yes, it is.

19 Q And this bill that Ms. Caldwell talked
20 about, did the Commission -- what was the position of
21 the Commission on that legislation?

22 A I think you'd have to talk to Mr. Williams
23 about that. He's our legislative liaison. I was just
24 asked to review the bill. I don't actually go over to
25 the Legislature and give viewpoints or anything like

1 that. I was asked to give my input and my opinion on
2 the bill.

3 Q But you've been present at the various
4 Internal Affairs talking about the Commission's
5 position on that bill; isn't that a fact?

6 A I've been there listening.

7 Q Isn't it a fact that the Commission did not
8 oppose that bill?

9 MS. CALDWELL: Your Honor, that goes beyond
10 the scope of this. I mean --

11 THE COURT: I'm going to give him some
12 leeway. I've given you --

13 MS. CALDWELL: I was going to say I'll
14 withdraw the objection.

15 THE COURT: I'm giving him the leeway to
16 bring out the --

17 MS. CALDWELL: I'll withdraw the objection.

18 WITNESS WILLIS: I don't believe the
19 Commission opposed the bill.

20 Q (By Mr. Schiefelbein) Do you know if that
21 bill -- what happened to it legislatively this
22 session? Do you know much about that?

23 A From my understanding, and most of it's
24 hearsay, I believe it passed the House, and in the
25 Senate it was actually changed in the regulatory

1 committee. I'm not sure if it was changed. There's a
2 lot of technicalities that go on there.

3 As it was explained to me, there was an
4 amendment tacked on to make it a study, but it
5 actually wasn't a substitute bill. So I have no real
6 idea what will happen to it when it reaches the floor.

7 Q Sure. That's fair.

8 A I'm not up on all the procedures and
9 practices of the Legislature by any means.

10 MR. SCHIEFELBEIN: Thank you very much.

11 THE COURT: Redirect?

12 **REDIRECT EXAMINATION**

13 **BY MS. CALDWELL:**

14 Q Mr. Willis, what happens when a PAA is
15 protested?

16 A The decision of the Commission in the PAA
17 order actually goes away as if it never happened, and
18 the Commission starts all over again. They actually
19 go through a hearing process and, in fact, our
20 internal statutory clock starts over.

21 Q So the PAA renders everything -- all the
22 information in the PAA is rendered moot?

23 A Yes, it is. We have to start completely
24 over again. We have to go through formal discovery to
25 obtain information to admit at trial and actually go

1 to a hearing process with a final recommendation
2 coming out of that.

3 Q Mr. Willis, since you've attended these
4 internal affairs, is it your understanding that the
5 Commission has taken no position on any bill in the
6 Legislature and it's simply here to --

7 MR. SCHIEFELBEIN: Boy, that's an awfully
8 leading objection.

9 Q (By Ms. Caldwell) What is your
10 understanding of the Commission's --

11 A Well, I can tell you -- I can just answer
12 just simply. My understanding from talking with
13 Mr. Williams is that the Commission has taken no
14 position on these bills, and I believe he told me that
15 two days ago when we were discussing this very bill
16 and the ramifications of it.

17 Q Are you aware whether the Commission has
18 taken any position on any of the bills this year?

19 A I'm not aware of positions taken on other
20 bills, but I know in a lot of the bills for water and
21 wastewater they haven't taken any position.

22 Q And when you do analysis, do you know what
23 the purpose of the analysis is when it's provided to
24 the Legislature?

25 A To inform the Legislature of what we believe

1 the bill will do.

2 Q The ramifications of the bill?

3 A The ramifications of the bill itself, yes.

4 MS. CALDWELL: I have no further redirect.

5 MR. SCHIEFELBEIN: If I might.

6 THE COURT: Yes.

7 RECROSS EXAMINATION

8 BY MR. SCHIEFELBEIN:

9 Q Either in your conversations with your
10 colleague, Mr. Williams, or before the Public Service
11 Commission's Internal Affairs, is it your
12 understanding that at least in relation to that bill,
13 that the Commission has affirmatively represented to
14 the legislators that they never disallow
15 environmentally required costs? Is that a refrain
16 that you have heard by the Commission before on
17 legislative matters?

18 A Mr. Schiefelbein, I don't know the answer to
19 that one.

20 MR. SCHIEFELBEIN: Thank you.

21 WITNESS WILLIS: I guess if I was closer to
22 the legislative process, I would.

23 THE COURT: Any further redirect?

24 MS. CALDWELL: No.

25 THE COURT: Thank you, sir.

1 (Witness Willis excused.)

2 - - - - -

3 THE COURT: Do you wish to offer 4 and 5?

4 MS. CALDWELL: Yes, I do, please.

5 THE COURT: Objections?

6 MR. SCHIEFELBEIN: None, sir.

7 THE COURT: I'll accept them both into
8 evidence.

9 (Respondent's Exhibits 4 and 5 received into
10 evidence.)

11 MR. SCHIEFELBEIN: On 5 I would, if I might,
12 your Honor, I would maintain our objection that it's
13 not relevant.

14 THE COURT: Sure.

15 MR. SCHIEFELBEIN: I don't need to repeat
16 it.

17 THE COURT: Actually, any exhibit, until I
18 read it off -- even if you've not objected to
19 relevancy, ultimately I, as I have to write my
20 decision, have to decide if it's relevant.

21 All right. Any additional evidence by the
22 respondent?

23 MS. CALDWELL: I have no further evidence.

24 THE COURT: Any rebuttal? (No response.)

25 MS. CALDWELL: Do you want us to do any kind

1 of closing argument or just do the --

2 **THE COURT:** We're going to talk about that.

3 I just want to see if there's any rebuttal.

4 **MR. SCHIEFELBEIN:** No, sir, no rebuttal.

5 Thank you.

6 **THE COURT:** In terms of procedures, this
7 case is a little different, I guess, in some ways to
8 what we normally do, because it is a determination of
9 fees on an appeal. Normally we make determinations of
10 awards of fees either under our own statutory
11 authority under -- I can't remember the name -- 56
12 whatever, where we have final authority, or we make
13 recommendation to the agency as to whether there's
14 been an improper purpose.

15 This is different in that there's already
16 been a decision that there should be an award, and I'm
17 not sure how to characterize what I'm about to do or
18 what I'm now required to do. I'm not sure if it's a
19 recommended order or a final order. I guess it is in
20 the nature of a -- well, I was going to say a final
21 order, but I'm not sure that that is correct.

22 At any rate, I'm going to write something,
23 and my decision will be in writing and it will set out
24 what I believe the evidence presented today has proved
25 with regard to the issues before us, before me, and it

1 will include a dollar amount.

2 It will either be in the nature of a final
3 order or a recommended order, or maybe I won't
4 characterize it as either and let the District Court
5 make that decision.

6 At any rate, before I do so, I think it
7 would be appropriate to give the parties an
8 opportunity to file written proposed orders, and as a
9 consequence, I don't think that closing argument would
10 be terribly helpful. I think you can make a much more
11 effective closing argument through your proposed
12 orders.

13 I assure you I will read them, and it will
14 make a more lasting impression on me probably than
15 closing argument will, and it also will give you an
16 opportunity to fully consider the evidence and to
17 organize your thought processes and set out the best
18 way you can your client's position.

19 Our normal rules require that proposed
20 orders be filed within 10 days of the filing of the
21 transcript, which is going to be the later event since
22 you already indicated you will order a transcript.

23 If you do file proposed orders within 10
24 days of when the transcript is filed, I'm required to
25 enter my order within 30 days of that date. If you

1 believe you need more than 10 days, I will consider
2 giving you more than 10 days, but I generally require
3 agreement of the parties.

4 I also will not waive my time requirement.
5 As far as I'm concerned, I have 20 days from when your
6 proposed orders come in, and that's when I generally
7 will start working on my order. So if you want it up
8 to 20, I would not extend my period of time, it would
9 be a total of 40 days before my order.

10 If you want more than 20, then that does
11 extend my time. I want at least as many days as you
12 all have. So what do you think? Is 10 days
13 sufficient, or do you want more time?

14 **MR. SCHIEFELBEIN:** Speaking on behalf of
15 Florida Cities, 10 days from date of the transcript is
16 fine.

17 **MS. CALDWELL:** And we agree.

18 **THE COURT:** That's fine with me, and I will
19 have my secretary notify both of you that the
20 transcript -- well, you'll probably know before I
21 will. I was going to say I'll have my secretary
22 notify you when it's filed, but I think that you both
23 know that anyway.

24 If anything happens, you get into a bind for
25 whatever reason and you can't meet the 10 days, and if

1 there's agreement among the parties that you need a
2 day extra -- I hate to even tell you this, because I
3 know how lawyers are, but if you have a legitimate
4 problem and you need an extra day or two, if you'll
5 just talk to each other and notify me, that's fine.

6 If you want to get into longer periods of
7 time, it's still going to require agreement, but I
8 will make a determination once I hear from you, but
9 otherwise I'll expect your proposed orders within 10
10 days.

11 Format that you use, I don't care. However
12 you can best represent your client's position is fine.
13 I'm going to write my order in the same way I write
14 most of them, hopefully a little shorter. I'll make
15 findings of fact, have a little preliminary statement,
16 and I'll make conclusions of law in that order; but if
17 you don't want to use that process or that format,
18 that's fine. You can use whichever process you want.

19 Any questions about the order?

20 **MR. SCHIEFELBEIN:** The only question I would
21 have is can we get any idea when there might be a
22 transcript?

23 **THE COURT:** Let's go off the record.

24 (Discussion off the record.)

25 **THE COURT:** Let's go back on the record.

1 Anything else before we close?

2 MR. SCHIEFELBEIN: No, sir. Thank you very

3 much.

4 (Thereupon, the hearing concluded at 1:00

5 p.m.)

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2 COUNTY OF LEON)

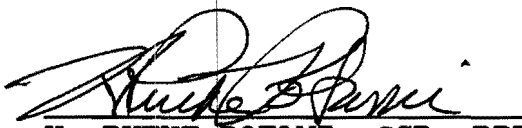
CERTIFICATE OF REPORTER

3
4 I, H. RUTHE POTAMI, CSR, RPR Commission
Reporter,

5 DO HEREBY CERTIFY that the Hearing in DOAH
6 Case No. 98-1347FC, FPSC Docket No. 950387-SU was
heard by the Division of Administrative Hearings at
7 the time and place herein stated; it is further

8 CERTIFIED that I stenographically reported
the said proceedings; that the same has been
9 transcribed under my direct supervision; and that this
transcript, consisting of 144 pages, constitutes a
10 true transcription of my notes of said proceedings.

11 DATED this 7th day of May, 1996.

12
13 
14 H. RUTHE POTAMI, CSR, RPR
Official Commission Reporter
(850) 413-6734

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