BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

| | |
|---|---|
| In re: Application for a rate increase for North Ft. Myers Division in Lee County by Florida Cities Water Company - Lee County Division. | DOCKET NO. 950387-SU<br>ORDER NO. PSC-98-0509-PCO-SU<br>ISSUED: April 14, 1998 |

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
JOE GARCIA

ORDER ON REMAND SETTING CAPACITY OF WASTEWATER TREATMENT PLANT, REOPENING RECORD FOR LIMITED PURPOSE, GRANTING IN PART AND DENYING IN PART REQUEST FOR HEARING, GRANTING IN PART AND DENYING IN PART REQUEST FOR CONSIDERATION OF ADDITIONAL RATE CASE EXPENSE, AND MAINTAINING SECURITY

BY THE COMMISSION:

## BACKGROUND

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

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

In this rate proceeding, we issued PAA Order No. PSC-95-1360-FOF-SU on November 2, 1995. The PAA Order was protested on November 27, 1995, and the matter was set for hearing in April, 1996. After the protest of the PAA, the utility requested implementation of the rates approved in our PAA Order. This request was granted by Order No. PSC-96-0038-FOF-SU, issued January 10, 1996, which made the rates subject to refund, and provided security through a corporate undertaking. Those rates remain in effect today.

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

After hearing, we issued Order No. PSC-96-1133-FOF-SU (Final Order) on September 10, 1996. Through that Order, we granted revenues of $2,003,347, which was a decrease from test-year revenues of $588,643. The utility appealed this Order to the First District Court of Appeal (First DCA or Court) on several issues including the issue of used-and-useful plant, and requested a stay pending judicial review. Additional security was required by Order No. PSC-96-1390-FOF-SU, issued November 20, 1996, to allow for the anticipated time for the appeal.

By Opinion filed January 12, 1998, the First DCA remanded the case for us to give a reasonable explanation, if we could, supported by record evidence, as to why average daily flow in the peak month was ignored. The First DCA also reversed our finding that the capacity of the wastewater treatment plant was 1.5 mgd.

Subsequent to the remand, the utility filed its Petition to Allow Additional Rate Case Expenses on February 4, 1998. Also, on March 4, 1998, Ms. Cheryl Walla, an intervenor in this case, filed her petition requesting another hearing in the service area. A copy of this petition was provided to the parties on March 9, 1998.

This Order addresses the remand by the First DCA; whether to reopen the record for further proceedings; the request of Ms. Walla for another hearing in the service area; the request of the utility for additional rate case expense; and, the necessary amount of security to protect the rates subject to refund. At the Agenda

Conference held on March 24, 1998, all parties were given the opportunity to address the Commission on the above-noted issues.

CAPACITY OF WASTEWATER TREATMENT PLANT

The First DCA determined that the witness with actual knowledge of the capacity of the plant as built, testified that the treatment capacity of the plant was, as an average on an annual basis, 1.25 mgd. Testimony of Mr. Cummings, the professional engineer who oversaw construction when the plant was enlarged, explained that the capacity of the plant as actually constructed varied from what the Department of Environmental Protection (DEP) originally permitted. The First DCA also recognized that Mr. Cummings testified that to increase the plant capacity to 1.5 mgd, the utility would have to make three different improvements which would cost in the hundreds of thousands of dollars. The Court concluded that the correct capacity was 1.25 mgd, and no competent evidence supported our conclusion that the plant capacity was 1.5 mgd.

We believe that the decision of the First DCA is conclusive on this issue. Therefore, in light of the direction of the Court, we recognize the capacity of the advanced wastewater treatment plant to be 1.25 mgd. This change in the plant capacity alters our conclusion on the used-and-useful percentage reached in Order No. PSC-96-1133-FOF-SU. However, the final used-and-useful percentage will be dependent on what flows should be used in the numerator of the used-and-useful equation.

FLOWS TO BE USED IN THE NUMERATOR OF THE USED-AND-USEFUL EQUATION AND REOPENING THE RECORD

In its opinion, the First DCA also reversed the portion of our Final Order, which calculated the used-and-useful percentage using annual average daily flows (AADF) in the numerator, citing the lack of competent substantial evidence. The use of AADF, as opposed to average daily flows for the maximum month (ADFMM), was precipitated because the DEP changed its method of permitting. Originally, in most cases and in this case in particular, the DEP had permitted the wastewater treatment plant without designating whether the capacity was based on AADF or ADFMM, or some other flow.

However, the DEP permit issued in 1994 for this wastewater plant stated the permitted capacity in terms of AADF. Based on this change, our staff recommended, and we approved, the use of

AADF in the numerator. Other than the permit itself, there was no evidence justifying the use of AADF in the numerator of the used-and-useful fraction when the permit was issued based on AADF.

The First DCA viewed this as a Commission policy shift which "was essentially unsupported 'by expert testimony, documentary opinion, or other evidence appropriate to the nature of the issue involved'". The First DCA, citing Section 120.68(7), Florida Statutes, then concluded that we had departed "from the essential requirements of law", and that we "must, on remand, give a reasonable explanation, if [we] can, supported by record evidence (which all parties must have an opportunity to address) as to why average daily flow in the peak month was ignored." Section 120.68(7), Florida Statutes, provides in pertinent part:

> (7) The court shall remand a case to the agency for further proceedings consistent with the court's decision or set aside agency action, as appropriate, when it finds that:
> . . .
> (e) The agency's exercise of discretion was:
> . . .
> 3. Inconsistent with officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the Agency . . .

Other than the above directions, the First DCA's opinion stated, "Reversed and Remanded." Also, the Mandate, issued January 28, 1998, stated: "YOU ARE HEREBY COMMANDED that further proceedings, if required, be had in accordance with said opinion, the rules of Court, and the laws of the State of Florida."

Although the mandate stated that the cause was remanded for further proceedings, if required, we believe that the words of the mandate do not have separate significance apart from the opinion. This conclusion is supported by the number of cases that interpret the lower tribunal's authority on remand in light of the terms of remand used by the courts in their opinions and not the mandate.

Typically, in a case where the reviewing court intends for the lower court to take additional evidence, it will at least remand the cause for further proceedings and also instruct the lower tribunal to reconsider its decision or to make additional findings. In Tampa Electric Co. v. Crosby, 168 So. 2d 70 (Fla. 1964), the Court stated the general proposition that when a cause is remanded

with directions to make adequate findings, further hearing may or may not be had as the circumstances require. Id. at 73. The Court also stated that a reviewing court that remands for further consideration should announce any restrictions on further testimony and that without such a restriction, the trier of fact has the discretion to receive additional evidence.

We find that the language of the First DCA, "the PSC must, on remand, give a reasonable explanation, if it can, supported by record evidence (which all parties must have an opportunity to address) as to why average daily flow in the peak month was ignored", is an invitation to take additional testimony. Further, the First DCA did not impose any restrictions on further testimony. Therefore, consistent with Tampa Electric, we believe that we have the discretion to receive additional evidence on what flows should be used in the numerator of the used-and-useful equation when the DEP permits the plant on the basis of annual average daily flows.

We believe the First DCA distinguished between the issue on plant capacity and the issue of what flows should be used in the numerator. The issue on plant capacity was fully litigated, and the opinion of the First DCA left no room for further consideration on that issue. However, we believe that the First DCA specifically contemplated further action by us, if we wished, on the issue of what flows should be used in the numerator. It merely cautioned us that any change must be supported by record evidence, and that all parties must be given an opportunity to address this evidence. Since the Court had already stated there was no evidence in the record to support this policy change, the only interpretation that gives meaning to the above-noted language is that the Court was giving us the discretion to put any such evidence in the record. If it had not wanted us to have the discretion to reopen the record, it could have made its findings as conclusive as it did on the issue of wastewater treatment plant capacity. Therefore, we find that the opinion of the First DCA gave us the discretion and invited us to reopen the record on what flows should be used in the numerator.

Upon consideration of all the above, we find it appropriate to reopen the record to take evidence on what flows should be used in the numerator of the used-and-useful equation, when DEP permits the wastewater treatment plant based on AADF. In this way, we can make a fully informed decision and comply with the remand of the Court. Therefore, we shall reopen the record and schedule a hearing for the very limited purpose of hearing evidence on what flows should

be used in the numerator of the used-and-useful fraction when the DEP states the denominator, the permitted capacity of the wastewater plant, based on annual average daily flows. In addition to this issue, we shall also take evidence on the issue of additional rate case expense associated with reopening the record and non-legal appellate rate case expense as discussed below.

PETITION FOR ADDITIONAL RATE CASE EXPENSE

Pursuant to our Final Order issued in this docket, we found that the utility's revised request of $90,863 in rate case expense was appropriate. This amount included $55,547 in actual expenses and $35,316 in estimated expenses to complete the case through the Final Order.

On October 7, 1996, FCWC filed a Notice of Administrative Appeal of the Final Order. On January 12, 1998, the Court issued its opinion and remanded the case back to this Commission on two issues, none of which related to rate case expense. The Court also granted FCWC's motion to recover attorney's fees from the Commission related to the appeal.

Now, on February 4, 1998, the utility has filed its Petition to Allow Additional Rate Case Expenses (Petition). In the Petition, the utility requested recovery of an additional $32,653 in unrecovered rate case expense. The Petition included the utility's request to recover costs related to a true-up of pre-appeal expenses that were previously estimated from March through August 1996, costs for maintaining a duplicate register during the appeal for refund purposes, additional costs for legal services incurred prior to the appeal process and additional charges allocated to FCWC's rate department during the appeal. In its supporting documents, filed with the Petition, the utility provided a synopsis by category for all rate case expense incurred for each month beginning with January, 1995 and continuing through January, 1998. A total was provided for each category and then the amount allowed in the Final Order was removed, resulting in a $32,653 deficit.

Based on our analysis, it appears that the utility overestimated its costs up to the Final Order in a few instances; but in most cases the costs were underestimated. For example, engineering costs were $2,666 less than the amount allowed in the Final Order, but legal fees were $24,874 greater than was originally estimated in its requested rate case expense.

After analysis of all supporting documents filed with the Petition, it appears that most of these costs requested by the utility were the result of a true-up between the actual and estimated costs included in the Final Order. The utility has also requested an additional $13,034 in rate case costs for maintaining a duplicate register for refund purposes and $1,002 for in-house rate charges. Both of these costs, totaling $14,036, appear to be related to the appeal.

We have addressed additional rate case costs after an appeal in two prior cases. The first was in Docket No. 900386-WU, Sunshine Utilities of Central Florida, Inc. (Sunshine). In that case, the utility only requested additional costs associated with the appeal. Sunshine did not request a true-up of the actual expenses incurred as compared to the estimate allowed in the final order before appeal. In Order No. PSC-94-0738-FOF-WU, issued June 16, 1994, we fully analyzed the issue of recovery of appellate costs after an appeal in which the utility prevailed on some issues, and allowed Sunshine to recover a portion of its costs related to the appeal.

We addressed the issue of appellate costs again in Docket No. 950495-WS. In that docket, Southern States Utilities Inc. (now Florida Water Services Corporation) requested recovery of $459,231 in additional rate case costs incurred subsequent to the issuance of the final order in its previous rate case, Docket No. 920199-WS. The request for additional costs related to reconsideration of the final order, the appeal, the refund issue, and a true-up between actual and budgeted costs included in the final order in Docket No. 920199-WS. In Order No. PSC-96-1320-FOF-WS, issued on October 30, 1996, we allowed additional costs associated with the appeal. However, we found that the utility did not support its request to recover the true-up costs from the prior rate case. Because the utility had failed to provide supporting documentation or testimony as to why such costs should be allowed, we denied recovery of the true-up costs as unsupported by the record. Therefore, we did not address the merits of whether it would be appropriate to allow such a true-up.

Even though FCWC has filed documents in this case to support its request to true-up its estimated rate case expenses incurred prior to the appeal, we do not believe that such a true-up is appropriate. It is the utility's burden to justify its requested costs. Florida Power Corp. v. Cresse, 413 So. 2d 1187, 1191 (Fla. 1982). In each hearing, we give each utility the opportunity to

update its rate case expense to reflect the actual amounts incurred with an estimate to complete through the final order. It is the utility's burden to put forth its best estimate of the costs that will be incurred. That estimate is subject to cross examination and the overall issue may be briefed by the parties before we make our final decision.

Since FCWC did not appeal the issue of rate case expense, that portion of the order has been litigated and is final. Rate case expense is no different from any other expense considered in a rate case, and we do not go back and true-up any other estimated or projected expenses. Such true-up circumstances would be extraordinary. If we were placed in a position of having to true-up estimated expenses, then rate cases would never end. Also, we believe that the doctrine of administrative finality is applicable in this situation, and that the end to litigation on rate case expense up to the appeal came with the filing of the appeal. See, Mann v. Department of Professional Regulation, Board of Dentistry, 585 So. 2d 1059 (Fla. 1st DCA 1991).

However, regarding the appellate charges, we believe that the Sunshine case addresses the circumstances that may warrant such consideration. Since the Court has awarded appellate legal fees to FCWC from this Commission, those costs will not be recovered through rates in this case. However, the costs of maintaining a duplicate register for refund purposes and in-house rate charges were incurred during the appeal process and we find that these costs should be considered. Since we are reopening the record to consider additional testimony on the flows to be used in the numerator of the used-and-useful equation, the issue of non-legal appellate rate case expense can be considered at that time.

Accordingly, FCWC's request to true-up $18,617 of its estimated rate case expenses incurred prior to the appeal is inappropriate and is denied. However, any future costs associated with reopening the record, as well as the requested non-legal appellate costs of $14,036 not included in rates, shall be considered at the upcoming hearing.

## REQUEST FOR HEARING

Ms. Cheryl Walla, an intervenor in this docket, filed a request stating that the customers would like another hearing in the North Ft. Myers service area. This request was received by our

Division of Records and Reporting on March 4, 1998, and mailed to the parties on March 9, 1998.

As discussed above, we have decided to reopen the record and schedule a hearing for the limited purpose of taking testimony on the correct flows to be included in the used-and-useful calculation of the wastewater treatment plant. Also, we have determined that we should also take evidence at that hearing on the costs for non-legal appellate rate case expense and the rate case expense that will be incurred for reopening the record. We believe that this is all the remand by the First DCA permits.

Upon consideration, we will grant Ms. Walla's request that the hearing be held in the service area. However, it will not be a hearing de novo, and the issues to be considered at this hearing will be limited as set forth in this Order.

SECURITY FOR RATES SUBJECT TO REFUND

In accordance with Order No. PSC-96-1390-FOF-SU, issued November 20, 1996, FCWC posted a corporate undertaking in the amount of $940,755 to protect rates subject to refund through conclusion of the appellate process. The security amount is dependent upon the final revenue requirement, which is dependent upon the disposition of the issue of what flows should be used in the numerator of the used-and-useful equation. Therefore, we shall not make any modifications to the security arrangement that is in place until the appropriate final revenue requirement is calculated, and FCWC shall maintain the above-noted security.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that, pursuant to the remand of the First District Court of Appeal, the capacity of the advanced wastewater treatment plant of Florida Cities Water Company, North Ft. Myers, shall be adjusted to be 1.25 million gallons per day. It is further

ORDERED that, pursuant to the remand of the First District Court of Appeal, we shall reopen the record and schedule a hearing to take testimony and evidence on what flows should be used in the numerator of the used-and-useful equation when the Department of Environmental Protection permits the plant on the basis of annual average daily flows. It is further

ORDERED that the Petition to Allow Additional Rate Case Expenses filed by Florida Cities Water Company shall be granted in part and denied in part as set forth in the body of this Order. It is further

ORDERED that the request for a hearing in the service area filed by Ms. Cheryl Walla, Intervenor, shall be granted for the limited issues set forth in the body of this Order. It is further

ORDERED that the security for rates subject to refund required by Order No. PSC-96-1390-FOF-SU shall not be modified and shall be maintained.

By ORDER of the Florida Public Service Commission this 14th day of April, 1998.

Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

( S E A L )

RRJ

DISSENT

Commissioner J. Terry Deason dissents on the issues of reopening the record and holding an additional hearing.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice

should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or 3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.