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ORIGINAL

IN REPLY REFER TO:

February 17, 1998

Tampa Office

VIA FEDERAL EXPRESS

Public Service Commission
Records and Reportings
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Application for rate increase in Brevard, etc.
PSC Docket No. 920199-WS
Order No. PSC-98-0143-FOF-WS

Gentlemen:

Enclosed please find the following for proper filing in the above-captioned case:

NOTICE OF APPEAL
(Original and one copy)

Would you please be so kind as to stamp the enclosed copy of this transmittal letter when received and return same to this office in the enclosed stamped self-addressed envelope. Thank you.

Sincerely,

Susan W. Fox

SWF/ce

Enclosures

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

SUGARMILL WOODS CIVIC ASSOCIATION, INC. f/k/a Cypress and Oaks Villages Association,

Appellant,

vs.

SOUTHERN STATES UTILITIES, INC., and THE FLORIDA PUBLIC SERVICE COMMISSION,

Appellees.

Appeal No.

PSC Docket No. 92-0199-WS

NOTICE OF APPEAL

Notice is given that SUGARMILL WOODS CIVIC ASSOCIATION, INC. f/k/a Cypress and Oaks Villages Association, Appellant, appeals to the District Court of Appeal, First District of Florida, the Final Order of the Public Service Commission dated January 26, 1998. Conformed copy of this order is attached hereto.

The nature of the order is a final order on remand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished via U.S. Mail, postage prepaid, this 17th day of February, 1998 to the following persons:

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for rate increase in Brevard, Charlotte/Lee, Citrus, Clay, Duval, Highlands, Lake, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, Volusia, and Washington Counties by SOUTHERN STATES UTILITIES, INC.; Collier County by MARCO SHORES UTILITIES (Deltona); Hernando County by SPRING HILL UTILITIES (Deltona); and Volusia County by DELTONA LAKES UTILITIES (Deltona).	DOCKET NO. 920199-WS ORDER NO. PSC-98-0143-FOF-WS ISSUED: January 26, 1998

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEACON
SUSAN F. CLARK
DIANE K. KIESLING
JOE GARCIA

ORDER DENYING MOTIONS FOR CONTINUANCE
AND
FINAL ORDER ON REMAND
REQUIRING REFUNDS TO SPRING HILL CUSTOMERS
AND REQUIRING NO REFUNDS AND NO SURCHARGES TO OTHER CUSTOMERS
ABSENT AN ALTERNATIVE SOURCE OF FUNDING

BY THE COMMISSION:

BACKGROUND

On May 11, 1992, Southern States Utilities, Inc., now known as Florida Water Services Corporation (Florida Water or utility), filed an application to increase the rates and charges for 127 of its water and wastewater service areas regulated by this Commission. By Order No. PSC-93-0423-FOF-WS, issued March 22,

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1993, the Commission approved an increase in the utility's final rates and charges, basing the rates on a uniform rate structure.

On April 6, 1995, Order No. PSC-93-0423-FOF-WS was reversed in part and affirmed in part by the First District Court of Appeal, which stated that the Commission failed to make the requisite finding that the utility's facilities and land were functionally related. Citrus County v. Southern States Utils., Inc., 656 So. 2d 1307, 1311 (Fla. 1st DCA 1995). On remand, we considered many issues, including whether the record in Docket No. 920199-WS should be reopened to take evidence on the issue of functional relatedness. As a matter of policy, we chose not to reopen the record to take evidence on the functional relatedness issue, but rather we reviewed the evidence already present in Docket No. 920199-WS and determined that the record supported the implementation of a modified stand-alone rate structure. Therefore, by Order No. PSC-95-1292-FOF-WS, issued October 19, 1995, we required Florida Water to implement a modified stand-alone rate structure. The implementation of the modified stand-alone rate structure resulted in a rate decrease for some customers. Accordingly, we required the utility to make refunds with interest within 90 days to those customers. We also noted that the modified stand-alone rate structure resulted in a rate increase for other customers. Relying on the case law related to retroactive ratemaking, we believed that the utility could not retroactively collect the difference in rates from the customers who underpaid.

The Florida Supreme Court's decision in GTE Florida, Inc. v. Clark, 668 So. 2d 971 (Fla. 1996), to allow GTE to surcharge its customers, resulted in our reconsideration of Order No. PSC-95-1292-FOF-WS in this docket. See Order No. PSC-96-0406-FOF-WS, issued March 21, 1996. In finding that a surcharge imposed as a result of an erroneous Commission order did not constitute retroactive ratemaking, the GTE Court stated that "utility ratemaking is a matter of fairness. Equity requires that both ratepayers and utilities be treated in a similar manner." GTE at 973. Upon reconsideration, we recognized the principles set forth in GTE, but found GTE to be inapplicable because we believed that there were crucial, dispositive differences between the GTE case and this one. Accordingly, we affirmed our earlier decision to require the utility to implement the modified stand-alone rate structure and to make refunds (within 90 days of the issuance of the order) without corresponding surcharges. Specifically, the utility was ordered to make refunds to its customers for the period between the implementation of final rates in September, 1993, and

the date that interim rates were placed into effect in Docket No. 950495-WS. See Order No. PSC-96-1046-FOF-WS, issued August 14, 1996.

Order No. PSC-96-1046-FOF-WS was appealed by Florida Water to the First District Court of Appeal, and on June 17, 1997, the First District Court of Appeal issued Southern States Utils., Inc. v. Florida Public Service Comm'n, 22 Fla. L. Weekly D1492 (Fla. 1st DCA 1997), stating that we erred in relying on the reasons enumerated in our order for finding GTE inapplicable. Therefore, the Court reversed and remanded our decision for reconsideration. The Court has stated that we violated the directive of treating the ratepayers and the utility in a similar manner by ordering SSU to provide refunds to customers who overpaid under the erroneous uniform rates without allowing SSU to surcharge customers who underpaid under these rates.

By Order No. PSC-97-1033-PCO-WS, issued August 27, 1997, we required Florida Water to provide an exact calculation by service area of the potential refund and surcharge amounts with and without interest as of June 30, 1997. By that Order, we also allowed all parties to file briefs on the appropriate action the Commission should take in light of the Southern States decision. We specifically requested that parties address the following preliminary options we identified as well as any other options they may identify: 1) require refunds with interest and allow surcharges with interest; 2) do not require refunds and do not allow surcharges because the rates have been changed prospectively; 3) order refunds without interest and allow surcharges without interest; 4) allow the utility to make refunds and collect surcharges over an extended period of time to mitigate financial impacts; and 5) allow the utility to make refunds and collect surcharges over different periods of time.

By Order No. PSC-97-1290-PCO-WS, issued October 17, 1997, we required Florida Water to provide notice by October 22, 1997 to all affected customers of the Southern States decision and its potential impact. The notice stated that affected customers could provide written comments and letters concerning their views on what action the Commission should take. Alternatively, the customers could call our Division of Consumer Affairs' toll free telephone number to provide comments. On November 5, 1997, the parties timely filed their briefs.

On November 21, 1997, Charlotte County filed a petition to intervene. On November 26, 1997, Charlotte County filed a Motion for Continuance or Request for Deferral. On December 5, 1997, Florida Water filed its Motion for Continuance or Request for Deferral.

On December 2, 1997, Best Western Deltona Inn, Florida United Methodist Children's Home, Inc., and Sugar Mill Association, Inc., filed petitions to intervene. On December 4, 1997, Sugar Mill Country Club, Inc., filed its petition to intervene.

This Order disposes of all pending motions and addresses the action we have found appropriate in light of the Southern States decision.

PETITIONS TO INTERVENE

By petition filed November 21, 1997, Charlotte County requested to intervene in this proceeding. In support thereof, it alleges that its substantial interests are affected in that it is a bulk water customer of Florida Water and that it received service from September 15, 1993 through January 23, 1996, for resale to its customers in Pirate Harbor. On December 2, 1997, Best Western Deltona Inn, Florida United Methodist Children's Home, Inc. and Sugar Mill Association, Inc. filed petitions to intervene wherein they allege that their substantial interests are affected because they are all utility customers. They have all received notices from the utility for the estimated potential surcharge amounts. According to the notice received by Sugar Mill Association, Inc., its average potential surcharge is $568. The potential surcharge amount for Best Western Deltona Inn is $35,100, and the potential surcharge amount for the Florida United Methodist Children's Home is $52,000. On December 4, 1997, Sugar Mill Country Club, Inc. filed its petition to intervene and in support thereof states that it is a utility customer with a potential surcharge amount between $15,000 and $20,000. No responses to the petitions to intervene were filed.

The First District Court of Appeal has directed this Commission to consider any petitions for intervention filed by groups subject to a potential surcharge in this case. Southern States Utils., Inc., 22 Fla. L. Weekly at D1493. We find that these petitioners are potential surcharge customers substantially affected by the outcome of this proceeding. Therefore, the petitions to intervene are granted. All parties should furnish

copies of future pleadings and other documents that are hereafter filed in this proceeding to John R. Marks, III, Knowles, Marks & Randolph, P.A., 215 South Monroe Street, Suite 130, Tallahassee, Florida, 32301 (representing Charlotte County) and Joseph McGlothlin, 117 South Gadsden Street, Tallahassee, Florida 32301 (representing Best Western Deltona Inn, Florida United Methodist Children's Home, Inc., Sugar Mill Association, Inc., and Sugar Mill Country Club, Inc.).

PARTICIPATION BY THE PARTIES

As we stated in Order No. PSC-97-1094-PCO-WS, issued September 22, 1997, we have interpreted the Southern States decision broadly to allow intervention and input by all substantially affected persons. Consequently, we find that participation by the parties and the customers during our consideration of this matter on remand is consistent with our broad interpretation of the Southern States decision. Accordingly, each party and each customer was allowed five minutes and two minutes, respectively, to address the Commission at the Special Agenda Conference regarding this matter on remand.

MOTIONS FOR CONTINUANCE

In its November 26, 1997 motion for continuance, Charlotte County requested that this proceeding be continued until it is provided the opportunity to review all the facts and ascertain all the positions in this case and until the Circuit Court resolves St. Jude's Catholic Church v. Florida Public Service Commission, a quo warranto action filed against the Commission. On December 5, 1997, Florida Water filed a motion for continuance wherein the utility adopts Charlotte County's motion and adds that the Commission should continue this matter to conduct an evidentiary hearing to allow all parties and customers an opportunity to identify and address all relevant issues in this proceeding. At the December 15, 1997 Special Agenda Conference to address the remand, Charlotte County and the utility further added that they would support a continuance to allow parties to work toward a legislative solution, an option suggested by two members of the Florida Legislature appearing before us at the Special Agenda Conference.

We have reviewed and heard argument related to the two motions for continuance. We find that the arguments in support of a continuance are not sufficient to warrant a delay of this decision. First, as a matter of jurisdiction, the St. Jude's Catholic Church

Circuit Court case does not affect nor will it supersede the mandate issued by the First District Court of Appeal with which we must comply. Second, we believe that all relevant issues in this proceeding have been identified and addressed by our decision herein. Third, we believe that our decision to go forward will not impede the possibility of a legislative solution. Accordingly, the motions for continuance filed by Charlotte County and Florida Water are denied.

DECISION ON REMAND

In considering the appropriate action we should take in this matter, we find that pursuant to GTE and Southern States, we have the following objectives: to ensure that neither the utility nor the ratepayers receive a windfall as a result of the erroneous Commission order; to treat the utility and ratepayers in a similar manner; and, to allow the utility the opportunity to earn a fair rate of return. In attempting to fulfill these objectives, we have relied upon the principles of fairness and equity espoused by the Courts in GTE and Southern States. As identified in greater detail later in this Order, these objectives are extremely difficult to reconcile in a fashion that is 100 percent equitable for all involved. Our decision herein evidences the extreme difficulty this Commission has had in trying to reconcile our interpretation of the Court's various decisions with the practical aspects of the implementation of a solution on remand. We have found that what may be legally correct by the letter of the law is completely impossible to implement in any reasonable and equitable manner.

We have reached this decision on remand after reviewing the Southern States and GTE decisions, Florida Water's refund/surcharge report, the briefs filed by all of the parties, the comments submitted by the customers affected by this decision, and the arguments and comments made by the parties and customers at the December 15, 1997, Special Agenda Conference. After considering the interests of the two customer groups and the utility in accordance with the decisions by the Courts, we find that our decision to not require refunds or surcharges is the only solution that will not create even greater inequities. Pursuant to our interpretation of equity, refunds cannot be made if the only source for the refund is a surcharge to other customers. In reaching this very difficult, complex decision, we have analyzed numerous options and each option is summarized below. Our analysis and decision follow.

Refund/Surcharge Report

By Order No. PSC-97-1078-PCO-WS, issued September 15, 1997, we required Florida Water to provide a revised refund/surcharge report. The report provided an exact calculation by service area of the potential refund and surcharge amounts with and without interest as of June 30, 1997. This calculation covers the period from September 15, 1993, when uniform rates were first implemented, to January 23, 1996, when modified stand-alone rates were implemented for all affected service areas, excluding Spring Hill. For the Spring Hill service area, a separate calculation was made for the period January 23, 1996 through June 14, 1997, the date new rates became effective in Hernando County. In its refund and surcharge report submitted September 17, 1997, Florida Water reports potential refunds of $11,059,486 (excluding the separate Spring Hill portion) and potential surcharges of $11,776,926. The separately calculated Spring Hill portion, amounts to $2,485,248. The difference results from the differences in customer base, consumption, and final rate structure. Therefore, the refund amount is not equal to the surcharge amount.

Customer Comments

In accordance with Order No. PSC-97-1290-PCO-WS, Florida Water provided notice to all of its customers who were affected by the Southern States decision. Customers did provide comments and input for our consideration. As of December 12, 1997, we received a total of 3,236 letters and facsimiles, 155 phone calls, and 3 e-mails. The totals indicated above include the comments we have received from the Hernando County customers. A summary of the customers' comments follows:

- 254 were in favor of refunds and surcharges with interest
- 672 were in favor of no refund and no surcharge
- 106 were in favor of refunds and surcharges without interest
- 20 were in favor of refunds and surcharges over an extended period of time
- 28 were in favor of refunds and surcharges over different periods of time
- 5 were in favor of requiring no refunds
- 1,883 were in favor of requiring refunds only
- 311 were in favor of no surcharges

Some customers did not specifically choose an option or make a comment that related to the notice from the utility. For that

reason, the tabulation by category does not equal the total number of responses received. Some of the customers expressed dissatisfaction with the Commission and its decisions, 15 customers commented that the utility's quality of service is poor, and 20 complained of high rates.

On November 5, 1997, the Hernando County edition of *The St. Petersburg Times* published an article that erroneously stated that customers had until the end of business that day to register with the Commission if they would like a refund. The article resulted in an overwhelming number of facsimiles and letters from customers in Hernando County stating their desire for a refund. A follow-up article published on November 6, 1997, explained the error and stated that customers were not required to notify the Commission if they want a refund.

As of December 2, 1997, we received approximately 1,721 responses from Hernando County customers alone. An overwhelming majority, 1,664, have stated that refunds should be made to the customers. A summary of these comments follows:

- 146 customers selected the refund/surcharge with interest option
- 38 selected the no refunds/no surcharges option
- 42 selected the refund/surcharge without interest option
- 7 selected the refunds/surcharges over an extended period option
- 8 selected the refunds/surcharges over different periods option
- 1,464 customers stated that they wanted refunds but did not state whether surcharges would be appropriate

In their responses, Hernando customers clearly indicated that they expected their refund in "one lump sum" rather than at a 10% discount over 20 years. The customers who made this statement were responding to a quote in the November 5, 1997, newspaper article in which customers were encouraged to tell us that they wanted the refund payment immediately and not spread over time.

On November 10, 1997, at the invitation of Representative Sindler, members of our staff participated in a town hall meeting for the customers of the Holiday Heights water system. Others in attendance were representatives from the utility, Orlando Utilities Commission, Orange County Utilities Department, and the Public

Counsel. Approximately 50 customers attended the meeting. The customers were opposed to an imposition of a surcharge.

Charlotte County, a utility customer, filed its comments stating that no refunds should be granted and no surcharges should be imposed. Charlotte County supports the prospective application of the current rate structure.

On November 26, 1997, the Sugar Mill Association, Inc. filed a petition and a position paper signed by approximately 470 residents. According to the position paper, the 638 customers within the Sugar Mill Community in Volusia County would be required to pay an average surcharge of $538. The customers assert that Sugar Mill residents pay among the highest rates for water and wastewater within Florida, that the facilities are in disrepair, and that the water quality is marginal. In the position paper, the customers provide four recommendations for our consideration: 1) the Commission should not require a refund; 2) the Commission should thoroughly evaluate a possible appeal of the Court's decision; 3) the Commission's decision on remand should be extended into 1998 because no hearings have been held; and 4) if a refund is required, the Commission should ensure that uncollectible surcharges are the utility's responsibility.

Briefs

Parties timely filed their briefs on November 5, 1997. A summary of the briefs follows.

Florida Water takes the position that the only way the Commission can avoid a repeat of this controversy and prevent further mistakes is to order, on remand, that Florida Water not provide refunds to customers who overpaid under the uniform rate structure nor surcharge customers who underpaid. Florida Water states that the number and complexity of issues entailed in attempting to pay refunds to and impose surcharges on Florida Water customers who received service from September 15, 1993 through June 14, 1997, make it almost impossible to fashion a truly equitable result.

Should the Commission choose to pursue refunds and surcharges, Florida Water states that the most equitable solution, given the magnitude of the refunds and surcharges, is to order the payment of refunds and the imposition of surcharges on all customers over a five-year period. In that event, Florida Water states that

customers who received service from September 15, 1993, through June 14, 1997, who are no longer customers of Florida Water should be excluded, and refunds and surcharges, determined on a service area basis, should be paid, without interest, by imposing a gallonage charge adjustment to each customer's bill based on each service area's net water and/or wastewater refund or surcharge. Each year's projected refunds and surcharges should be reconciled on an annual basis for the purposes of establishing refund and surcharge gallonage adjustments for the following year. Finally, Florida Water argues that in the event that surcharges are ordered, to keep Florida Water whole, the Commission must provide Florida Water additional revenue to reflect income tax liability associated with interest to be paid to Florida Water during the surcharge period.

The City of Keystone Heights and Marion Oaks Civic Association (Keystone/Marion) take the position that given the unique circumstances of this case, no refund should be made and no surcharge should be levied. Instead, the Commission should continue the current rate structure on a prospective basis. Charlotte County adopts and supports Keystone/Marion's brief.

Customers DeRouin, Heeschen, Riordan, Simpson, and Slezak (DeRouin, et al.) contend that the only action we can take under the current state of the case is to not require refunds and to not allow surcharges. DeRouin, et al. further state that any other action we take in regard to this matter would constitute appealable error because the Commission lacks statutory or administrative authority to impose surcharges.

Sugarmill Woods Civic Association, Inc. (Sugarmill Woods) contends that we have no alternative but to implement the refunds already ordered within 90 days and make the necessary surcharges to pay for them. Sugarmill Woods states that the First District Court of Appeal in no way criticized or even inferred that the portion of the Order requiring refunds was in any way incorrect, and that Florida Water has the ability to obtain financing to manage the refunds while collecting the surcharges over a more extended time period.

Senator Ginny Brown-Waite, Mr. Morty Miller, Spring Hill Civic Association, Inc., Sugarmill Manor, Inc., Cypress Village Property Owners Association, Inc., Harbor Woods Civic Association, Inc., Hidden Hills Country Club Homeowners Association, Inc., Citrus County, Amelia Island Community Association, Resident Condominium,

Residence Property Owners Association, Amelia Surf and Racquet Property Owners Association and Sandpiper Association (the Associations) state that the appellate decisions compel the payment of refunds to those customers overcharged by the erroneous order approving the uniform rate structure. Further, they state that Commission rule dictates that customer refunds be made with interest and prescribes the specific manner in which the interest is to be calculated. The Associations also offered another option, which is to require Florida Water to borrow the money necessary to make the immediate refunds. Surcharged customers should then be allowed to pay back the total of their individual unwarranted benefits over the course of 28 months, which is the same period over which they received them. The Associations further state that Florida Water's costs and interests associated with borrowing the initial refund monies should be recovered from the surcharged customers over the 28-month surcharge period.

The Office of Public Counsel's (OPC) brief is limited to the issue of whether Florida Water should be responsible for a refund to the Spring Hill customers for the period January 1996, through June 1997. Therefore, OPC's brief will be discussed in greater detail in the portion of our decision that specifically addresses the Spring Hill customers.

Summary of Options Considered

1. Require Refunds and Surcharges

We analyzed four basic methods (and variations thereof) for implementing refunds and surcharges: requiring refunds and allowing surcharges over an established period of time; requiring a refund within 90 days and establishing a regulatory asset to recover the surcharge amount; establishing a clause mechanism similar to the fuel adjustment clause to administer the surcharges; and using regulatory assessment fees to fund the refund. Before addressing each method, we have set forth below the arguments and analysis relevant to all four methods.

Florida Water argued that if we choose to order refunds and surcharges, both the payment of refunds and the imposition of surcharges on all customers should be done over a five-year period. Keystone/Marion argued that if we decide to impose a refund and surcharge, we must ensure that the surcharge is collected in a way which will have the least impact on customers, and that allowing an extended period of time for collection of the surcharge will

mitigate the impact for some customers. DeRouin et al. argued that we have no authority to impose a surcharge and the imposition of a surcharge would constitute retroactive ratemaking.

The Associations argued that there is no basis for altering our earlier requirement that refunds be made within 90 days of the entry of the Final Order. They further argued that the utility could finance an immediate refund by a loan with the costs associated with the loan being borne by the surcharged customers. According to the Associations, surcharged customers should be allowed to pay back their unwarranted benefits over the course of 28 months, which is the same period over which they received them. Alternatively, they stated that we could establish a longer period of surcharge repayment if we find that doing so will reduce the economic impact. Finally, they argued that under no circumstances should the lengthening of the time for surcharge payments be used as an excuse for extending the 90-day refund requirement. Likewise, Sugarmill Woods believes a 90-day refund period, consistent with Commission rule, is appropriate for refunds with an extended period for surcharges.

First, DeRouin et al. are correct that there is no specific statutory provision which provides the Commission with the authority to allow a utility to surcharge its customers who underpaid under an erroneously approved rate order. However, we find that we do have broad statutory and legal authority to prescribe fair and reasonable rates and charges, which may include the ability to order surcharges. See Sections 367.121 (1)(a) and (g), Florida Statutes, GTE v. Clark, and Southern States. Accordingly, we reject the argument that we lack authority to impose a surcharge. We note, however, that Florida Water could not surcharge new customers. See GTE at 973.

Second, we find that the issue of whether the imposition of surcharges would constitute retroactive ratemaking has been addressed in the GTE and Southern States decisions. In GTE, the Supreme Court rejected the contention that the imposition of a surcharge upon certain customers would constitute retroactive ratemaking where the utility is seeking to recover expenses and costs that should have been lawfully recoverable in the Commission's first order. Id. at 973. See also Southern States at D1492.

Third, our rules are silent on the procedures that the utility could use to surcharge customers who are no longer customers of the

utility. The GTE case provides us with some basic guidance in addressing this question. GTE states that the surcharge could be administered with the same standard of care afforded to refunds. Id. at 973. Pursuant to Rule 25-30.360(5), Florida Administrative Code, our rule regarding refunds to prior customers, we require utilities to mail a refund check to the last known billing address. Unclaimed refunds are treated as cash contributions-in-aid-of-construction pursuant to Rule 25-30.360(8), Florida Administrative Code. We are unable to find a similar solution for the collection of surcharges in order to keep the utility's revenue requirement unchanged that will not create newer, greater, inequities.

Fourth, we believe that the collection of the surcharge from all surcharge customers will be very difficult and practically impossible. Upon analyzing whether Florida Water would be able to discontinue service for nonpayment of the surcharge, we note that after providing written notice to the customer allowing reasonable time to comply, a utility may discontinue service pursuant to Rule 25-30.320(2)(g), Florida Administrative Code. Failure to pay a surcharge would constitute nonpayment of a utility bill, and therefore, Florida Water could legally refuse or discontinue service. From a practical standpoint however, customers no longer receiving service from Florida Water would have no incentive to pay the surcharge. Therefore, disconnection of service in that regard is a moot point. Florida Water's only recourse, at that point, might be a civil court action. For the customers who refuse to pay the surcharge and who remain on the system, discontinuance of service is certainly a legal remedy but it is fraught with problems such as further litigation and costs that are borne by all ratepayers. Additionally, if the utility cannot, from a practical standpoint, collect the entire surcharge amount, the fairness and equity principles espoused in the Southern States and GTE decisions have not been fulfilled.

a. Refund and Surcharge over an Established Period of Time

Pursuant to Rule 25-30.360(3), Florida Administrative Code, "[w]here the refund is the result of a specific rate change, including interim rate increases, and the refund can be computed on a per customer basis, that will be the basis of the refund . . . . Per customer refund refers to a refund to every customer receiving service during the refund period." Rule 25-30.360(5), Florida Administrative Code states that:

> For those customers still on the system, a credit shall be made on the bill . . . . For customers entitled to a refund but no longer on the system, the company shall mail a refund check to the last known billing address except that no refund for less than $1.00 will be made to these customers.

We believe that fairness and equity dictate that we consider the financial impact upon both customer groups as well as the utility. To make each individual affected customer whole on a purely monetary basis, customer-specific refunds and surcharges should be made. However, some of the potential surcharge amounts are very large. The higher surcharges range from a few hundred dollars up to tens of thousands of dollars. To treat both groups of customers in a "similar" manner rather than in a precise manner, we would have to order average surcharges and refunds by service area.

The utility's refund/surcharge report indicates that on a simple average basis, the surcharges would be more economically feasible. However, we believe that this method may create a "windfall" for some surcharge customers. As shown on Attachment A, the simple average approach causes many customers to pay far more or less than the subsidy they received. For example, in the Jungle Den service area, the highest surcharge is $2,720.83, while the lowest surcharge is 31¢. On a simple average basis, the average surcharge would be $931.28. It is not equitable for a customer whose obligation is 31¢ to pay close to $1,000, while a customer whose obligation is $2,721 pays less than half that amount. In the Burnt Store service area the highest surcharge is $74,861 while the lowest is 28¢. Using a simple average method, it is not equitable for either of these customers to pay $725.76.

b. <u>Refund Within 90 Days and Surcharge Using a Regulatory Asset</u>

A regulatory asset is an asset that results from rate actions of regulatory agencies. A regulatory asset arises from specific revenues, expenses, or losses that would have been included in the determination of net income in one period under the general requirements of the uniform system of accounts but for it being probable that such items will be included in a different period or periods for purposes of developing the rates the utility is authorized to charge for its services. A regulatory asset can also be created in reconciling differences between the requirements of generally accepted accounting principles, regulatory practice, and

tax laws. In determining whether the creation of a regulatory asset was a viable option, we considered the effect on revenue requirement, who would pay for the regulatory asset, and the amortization period.

The utility's Commission-approved revenue requirement was upheld by the Court and therefore should not be changed by the outcome of this decision. From an accounting standpoint, we believe that this means that the utility's rate of return should not be changed and the utility should be kept whole. To keep the utility whole under the regulatory asset option, the utility's revenue requirement will have to be increased to achieve a neutral effect on the utility's overall rate of return. This is required to compensate the utility for not only the annual amortization of the asset but also a rate of return on the unamortized balance, the income tax effect generated by the rate of return, and regulatory assessment fees on the rate of return.

Normally, when a regulatory asset is created, it is included in rate base which results in the entire customer base paying both the return on the asset, as well as the annual amortization, income taxes and regulatory assessment fees associated with it. However, in this case we know that we cannot allow the costs to be spread over the entire customer base because of the two distinct customer groups. Therefore, the cost of the regulatory asset can only be paid by the surcharge customers, the group of customers in the service areas that received subsidies. To do otherwise and require the refund customers to pay a portion of the regulatory asset is not equitable. Further, according to GTE, no customer should be subjected to a surcharge unless that customer received service during the period of time in dispute. 668 So. 2d at 973. Choosing this option further limits the number of customers who are eligible to pay for the regulatory asset by eliminating the customers who were not utility customers during the period of time that the uniform rates were in effect.

To be completely equitable, the calculation of customers' refunds would have to be calculated in the same manner as the surcharge, even though they would not be done over the same period of time. This would assure that the two customer groups are treated in a similar manner. We are then left with a range of options depending on the breadth of this Commission's definition of "equity" and "fairness". The following options fall within that range, starting from the broadest to the narrowest:

1. Calculate two regulatory assets; one for water and one for wastewater. They should equal the total surcharge amount for each. Then collect an average or equal surcharge based on equivalent meter size from each water or wastewater surcharge customer over a set period of time.

2. Calculate individual regulatory assets for each of the 104 water and wastewater service areas equal to each service area's total surcharge. Then collect an average or equal surcharge based on equivalent meter size in each of the 104 service areas from the surcharge customers over a set period of time.

3. Calculate thousands of individual regulatory assets by customer, based on each individual water or wastewater customer's surcharge and collect each individual customer's surcharge over a set period of time.

Option 1 is not based on consumption or service area and it would result in many customers paying far more or less than the subsidy that they received. (See Attachment B, Schedule 1 of 3). It further allows subsidies to flow from one service area to another, and even though based on meter equivalents, it treats commercial and general service customers similar to residential customers, which in most cases would allow them to be subsidized and pay far less than they should actually pay. As uniform-based subsidies may not be appropriate, Option 1 may also be inconsistent with the Citrus County decision. These disadvantages make Option 1 very unacceptable.

Option 2 falls between the two extremes. (See Attachment B, Schedule 2 of 3) The advantages of this option are: 1) the surcharges are calculated by service area, which seems more equitable since the subsidies are contained in each service area based on each service area's revenue deficiency; 2) it is still easy to administer; and 3) the actual surcharge that most customers would pay would be much closer to the actual subsidy received, thus minimizing subsidies. The disadvantages to this option are: 1) it is still not based on consumption and some customers will pay more than the actual subsidy received; 2) since the surcharges are calculated based on service area, some surcharges will be much higher than in Option 1; and 3) even though the charge would be

equated to meter size, commercial and general service customers may ultimately pay less than they should.

Option 3 is the narrowest. (See Attachment B, Schedule 3 of 3) The advantages of this option are: 1) since it is based on the consumption of each individual customer, the calculation of the surcharge is the most accurate of the three options; and 2) because some customers' surcharge will be fairly small, they could pay the surcharge immediately. The disadvantages are: 1) it will be extremely difficult to administer; 2) a large number of the surcharges will be extremely high; and 3) as explained below, it would require an extremely large number of different amortization periods.

Under any of the regulatory asset options, we believe that the surcharge customers will ultimately pay more than the subsidies they received. This is a result of the rate of return, income taxes and regulatory fees that will have to be paid over the life of the regulatory asset. Additionally, the administrative cost to the utility of implementing any of the three options above has not been taken into account. The administrative cost of a regulatory asset option can be very material, especially with Option 3.

The amortization period of a regulatory asset would be a judgement call dependent upon the rates currently being charged for each service area. Because Florida Water's rates now vary greatly for different service areas under the cap band rate structure, using the regulatory asset option would result in groups of service areas under different amortization periods. The higher the number of service area groups, the more complicated administering the process becomes.

c. Refund and Surcharge via a Cost Recovery Mechanism

In the event we required refunds and surcharges, the utility suggested in its brief, that we allow it to administer the refunds and surcharges through a mechanism similar to the fuel cost recovery clause used in the electric industry. Under the utility's proposal, refunds and surcharges would be imposed on all existing Florida Water customers as they may change from month to month, based on adjustments to the gallonage charge on a service area basis. True-up accounts would need to be established so that Florida Water could true-up refunds and surcharges on an annual basis for the establishment of the applicable gallonage charge adjustments for the following year.

Before exploring the merits of this option, we examined whether we had the legal authority to implement a mechanism similar to that suggested by Florida Water for the purpose of administering a refund and surcharge. We reviewed the authority for the fuel adjustment clause, which is a mechanism that has been employed for many years in the electric industry pursuant to our general ratemaking authority for that industry. Sections 366.05 and 366.06, Florida Statutes, provide that the Commission has the authority to determine and fix fair, just, and reasonable rates. No specific statutory authority exists for the implementation of the clause. Therefore, by analogy, we find that we also have the authority to implement a similar procedure for the water and wastewater industry under our general ratemaking authority set forth in Sections 367.081(2) and 367.121, Florida Statutes. Given that a mechanism similar to the fuel adjustment clause is a legally valid option, we then examined the merits of this proposal. According to Florida Water, this mechanism would avoid extreme complications that would arise when Florida Water attempts to identify, contact, collect from or pay to former customers no longer served by the utility. To highlight this problem, Florida Water notes that there may be up to 30,000 former customers who have left its service areas which are affected by Southern States. This would mean that the net of the surcharges and refunds applicable to the anticipated 30,000 former customers would have to be recovered from the remaining surcharge customers.

We agree with Florida Water that a methodology requiring refunds and surcharges on a per customer basis and applicable only to those customers during the period the uniform rate was in effect would potentially create a heavy burden on the surcharge customers. Under a customer-specific methodology, the net of the surcharge amount applicable to former customers less the unrefundable amount would have to be borne by the remaining surcharge customers, because the utility's revenue requirement must not be changed. Although a mechanism as suggested by Florida Water would lessen the impact on the surcharge customers, we have concerns with certain aspects of the utility's proposal.

Our main concern with the mechanism proposed by the utility is that it would be applicable to all existing customers. As mentioned earlier, the GTE decision requires that no customer should be subjected to a surcharge unless that customer received service during the disputed period of time. To be consistent with GTE, the surcharge in this case should only be applicable to customers that received service during the period of time the

uniform rate was in effect, which was September 15, 1993, through January 23, 1996.

However, as noted above, if we follow this aspect of the GTE decision while not impacting the utility's revenue requirement, the remaining surcharge customers would be forced to absorb not only the surcharge amount applicable to them individually, but also any amount the utility cannot collect from former customers. The argument set forth that these customers should pay a surcharge at all is that they benefited from the uniform rate by paying less than they should have. In their brief, the Associations refer to these benefits as "undeserved economic windfalls". However, if these customers must absorb all of the uncollectible surcharge amounts, they would pay more through a surcharge (perhaps substantially more) than any benefit they may have received under the uniform rate. We believe this would not be fair or equitable to the surcharge customers, nor would it be treating them in a "similar" manner as the refund customers or the utility.

In that regard, we considered a methodology that requires refunds but employs a clause mechanism similar to the electric fuel adjustment clause for the surcharge. Under this methodology, refunds could be done either customer-specific or by service area as discussed previously. The clause would be applicable only to the surcharge customers.

The utility proposed that a clause remain in effect for a five-year period. We believe the length of time should depend on the amount of uncollectible surcharges, which cannot be estimated at this time. The clause could be administered similar to the fuel adjustment clause, in that a hearing would be held annually to determine the amount of the surcharge that should be recovered over the following year and the calculation of the surcharge based on projected consumption in the upcoming year. We agree with Florida Water that such a clause would require a true-up mechanism to address the accuracy of the projected consumption and any future unclaimed refunds and uncollectible surcharges.

The clause could be specific to each service area or apply to all affected service areas on a combined basis. This should depend on the feasibility of administering a separate clause for each of the 127 service areas involved in this docket. Without specific information from the utility on the cost of collecting the information and setting up a billing system to handle it, we are unable to determine whether a service area specific clause would be

feasible. However, as noted earlier, if it applies to all affected service areas, it may violate the Citrus County decision, which requires a finding by the Commission of functional-relatedness of a utility's facilities and land prior to the implementation of a uniform rate. Because no finding regarding the functional-relatedness of Florida Water's facilities and land has been made in this docket, a uniform clause may be illegal.

d. Customer Refunds from Regulatory Assessment Fees

Section 367.145, Florida Statutes, provides for the collection of regulatory assessment fees from each water and wastewater utility regulated by the Commission. More specifically, Section 367.145(3), Florida Statutes, provides that "[f]ees collected by the Commission pursuant to this section may only be used to cover the cost of regulating water and wastewater systems." In addition, Section 350.113(2), Florida Statutes, provides that all fees collected by the Commission are to be credited to the Florida Public Service Regulatory Trust Fund to be used in the operation of the Commission.

We believe that the Legislature intended regulatory assessment fees to be used to fund the everyday operations of the Commission and not to remedy extraordinary circumstances such as those present in this case. Therefore, we do not believe that we can utilize funds generated by regulatory assessment fees to make the refunds to those Florida Water customers who overpaid under the uniform rate structure under current Florida law.

2. Customer Refunds From Commission's Regulatory Trust Fund

At the December 15, 1997, Special Agenda Conference, Senator Cowin and Representative Argenziano appeared before the Commission to suggest that the customer refund should come from the Commission regulatory trust fund. Further, Senator Cowin stated that Florida Water should "not be in charge of the refunds and surcharges under any circumstances." Senator Cowin and Representative Argenziano stated that they would sponsor legislation to take the money for the refunds from the Commission's regulatory trust fund.

We believe that our decision today does not preclude a legislative solution to this situation. As an arm of the Legislative Branch, this Commission will endeavor to comply with all legislation passed in this regard. However, at this moment, we

must comply with the July, 1997 mandate issued by the First District Court of Appeal.

3. Require No Refunds and No Surcharges

Florida Water's primary position is that we should decline to order refunds and surcharges. Florida Water states that this option is the only fair and equitable option because the customers who have "paid too much" under the uniform rate structure received a lower rate in January of 1996 and the Spring Hill customers have received a rate decrease pursuant to the settlement agreement reached with Hernando County. Under this option, the utility states that the potential surcharge customers could be relieved from the responsibility of paying more and the utility would remain whole consistent with Southern States. The utility states that the only logical and meaningful interpretation of Southern States is that the First District Court of Appeal intended to give potential surcharge customers an opportunity for meaningful, substantive participation on the issue of refunds and surcharges on remand. If the potential surcharge customers are precluded from opposing refunds on remand, Florida Water states that the court-mandated intervention is rendered meaningless and futile.

Keystone/Marion and DeRouin, et al. are in basic agreement with the utility that requiring no refunds and no surcharges is a valid option. They contend that on remand, we cannot simply begin at the point of treating a refund proposition as a given and add a surcharge. Instead, Keystone/Marion contend that we must conduct our analysis of the situation anew and factor into that analysis a full consideration of the impact of a surcharge upon customers exposed to that possibility. Keystone/Marion indicate that the surcharge amounts for certain customer groups is enormous and no one has had an opportunity to adjust consumption.

The Associations and Sugarmill Woods contend that the First District Court of Appeal has eliminated the no refund, no surcharge option for us. They argue that the First District Court of Appeal has affirmed our order requiring refunds. Therefore, citing to Hinnant, Inc. v. Spottswood, 481 So. 2d. 80, 82 (Fla. 1st DCA 1986), they state that the part of the order addressing refunds has become the law of the case. They state that the First District Court of Appeal only found error with regard to an application of a surcharge to the customers who underpaid under the erroneously approved uniform rate, and the First District Court of Appeal in no way criticized the refund portion of the order.

In attempting to comply with the Court's mandate, the question that we have considered is whether the Court has left the entire remand order open for reconsideration or only a portion of it. After much research, we are unable to find a case directly on point to definitively answer the question posed here. The cases regarding the law of the case are similar to Hinnant cited by Sugarmill Woods and the Associations. In the cases that we researched with arguably some similarities, the courts have stated that the law of the case precludes consideration of points of law which were, or should have been, adjudicated in a prior or former appeal of the same case. Valsecchi v. Proprietors Ins. Co., 502 So. 2d 1310, 1311 (Fla. 3d DCA 1987). We do not believe that these cases are applicable. The refund issue was a material issue before the First District Court of Appeal. Therefore, we believe that the First District Court of Appeal would not impliedly affirm by silence such a core issue. If the court intended to affirm the refund portion of the Commission's order, it could have expressly done so. Further, we note that courts do not always reach all issues presented to them, answering only those questions that need to be answered to dispose of a matter. Thus, we find that a good-faith argument has been made by the utility, Keystone/Marion, and DeRouin, et al., that we should review not only the issue of surcharge, but also the issue of refund.

Historically, we have made changes in rate structure in the water and wastewater industry without ordering refunds and surcharges. We review rate structure in every rate case, and changes are often made. Some of the common rate structure changes include a change from a flat to metered rate (water and wastewater), elimination of a minimum charge structure, and a change in the percentage revenue allocation between base facility and gallonage charges. All of these rate structure changes impact customers' bills to some degree. In other words, some customers will see an increase in their bills due to the rate structure change in addition to the revenue increase that was granted. We have consistently held in the past that a change in rate structure does not warrant a refund since ratemaking is prospective in nature. For example, this principle is applied in rate cases when determining the need for refunds for interim rates. As noted in Order No. PSC-96-1320-FOF-WS, issued in Florida Water's most recent rate case, Docket No. 950945-WS, even though individual final rates may be less than interim rates due to rate structure changes, no interim refund is warranted unless the newly authorized final rate of return is less than the rate of return authorized on an interim

basis. Our decision on interim refunds in this most recent rate case is on appeal at the First District Court of Appeal.

In addition, we have made rate structure changes in cases involving only a rate restructuring in the water and wastewater industry without ordering refunds to those customers that paid more under the old structure. We have never ordered surcharges in those instances where a change in rate structure has meant an increase in rates. See Orders Nos. PSC-94-1461-FOF-SU, issued November 29, 1994 in Docket No. 940950-SU, PSC-95-1228-FOF-WU, and PSC-96-0504-AS-WU, issued October 5, 1995 and April 12, 1996, respectively, in Docket No. 950232-WU. In both cases, we recognized that a change in rate structure meant a prospective lower rate for some customers and a higher rate for others.

Inherent in the decisions in all of the cases in which we changed rate structure is the notion that the previous rate structure was, for some reason, improper, or at some point, became improper. We would not change a utility's rate structure if we believed the current structure was appropriate and proper.

Rate structure changes are sometimes made to affect water conservation efforts. In its brief, Florida Water alludes to the fact that any decision in this case will affect current developing policy on conservation rates for water and wastewater utilities. Florida Water states that no utility will be willing to propose any deviation in rate structure, i.e., a conservation rate structure, if the risk is a refund/surcharge scenario in the event a court subsequently finds a fault. We share this concern that any decision made in this case could have a long lasting impact on future cases. Florida Water additionally states that our decision on remand in this proceeding potentially affects rate cases in every industry regulated by the Commission. We agree. By ordering refunds and surcharges, every rate case before the Commission presents the potential for a rate structure appeal and reversal, and the dilemma of refunds and surcharges.

<u>Conclusion on Option Chosen in Light of Southern States Decision</u>

In focusing on the principles of fairness and equity, it is important to remember that there were both winners and losers under the uniform rate structure; therefore, basing a decision on the impact of only a portion of the utility's customer base is improper. From a policy standpoint and now confirmed by law, the Commission must make its decisions after considering the impact on

all customers and the utility. See GTE Florida, Inc., 668 So. 2d at 972 and Southern States Utils., Inc., 22 Fla. L. Weekly at D1493. In our opinion, the GTE court defined equity very broadly: "Equity requires that both ratepayers and utilities be treated in a similar manner." (emphasis added). 668 So. 2d at 972.

We find that a number of problems and inequities arise in trying to make any type of refund. It is more inequitable to surcharge customers who had no ability to change consumption or choose to remain a utility customer. We cannot cure one inequity by creating a newer, greater inequity. We are guided by the mandates from the Southern States and GTE decisions and the overall issue of fairness in determining the appropriate methodology. The guidelines from the Court include that neither the utility nor the ratepayers should receive a windfall from an erroneous Commission order, new customers cannot be surcharged, and ratepayers and the utility should be treated similarly. We note that any methodology of refunds and surcharges other than customer-specific may be contrary to the First District Court of Appeal's decisions that no customer group should receive a windfall due to an erroneous order. However, even the customer-specific refund and surcharge methodology is fraught with inequities in reconciling the First District Court of Appeal's decision that the revenue requirement shall not be changed.

In balancing the interests of the two customer groups and the utility and taking into account the impact on the customers forced to pay the surcharge, the problems inherent in administering a refund and surcharge of this magnitude, and the impact on future decisions of this Commission, a strong argument has been made that the optimal and most equitable solution to this situation is no refunds and no surcharges.

We believe that the utility and the two groups of customers are treated in the most "similar" manner if we simply apply the rates prospectively. In terms of fairness and equity, the customers who paid "too much" have received a prospective rate reduction, customers who paid "too little" have received a prospective rate increase, and Florida Water maintains its revenue requirement.

With respect to affordability, Keystone/Marion state that the magnitude of the surcharge that the Commission would have to impose on certain customer groups is enormous. Asking customers to take on the burden of these huge surcharges at this late point in the

process would be grossly unfair and would impose a dramatic hardship on many. In determining the appropriate action and the appropriate timeframe under various options, we analyzed the customer-specific data provided by Florida Water. In the Burnt Store Service area, the surcharge exceeds $74,000 to Charlotte County School Board. Some surcharges exceed $40,000 per customer in service areas such as Beecher's Point and South Forty; several exceed $30,000 per customer in areas such as Deltona and Florida Central Commerce Park; while numerous surcharges exceed $20,000 in areas such as Park Manor, Sunshine Parkway, Grand Terrace, Marion Oaks and Marco Shores. We note that these larger surcharges apply to general service customers, including condominium associations. However, there are high residential surcharges ranging from a few hundred dollars to several thousand dollars, as shown on Attachment A.

Numerous potential surcharge customers have submitted comments indicating that they cannot afford to pay surcharges and they have indicated that they will not pay them. As discussed earlier, the utility may legally discontinue service to customers who refuse to pay the surcharge. However, if the majority of customers either refuse or are unable to pay the surcharge, it may be impractical for Florida Water to disconnect service. This raises other issues, such as bad debt. If there is a large amount of bad debt due to non-collection of the surcharge, this will impair the utility's opportunity to earn the authorized revenue requirement. The utility should be able to recover the amount associated with the bad debt since its revenue requirement cannot be affected.

In determining that the no refund and no surcharge option is the optimal and most equitable solution, we have recognized that this was strictly a rate structure change; the affected customers who may be subject to a surcharge have not had the ability to adjust consumption; the timing problem of customers leaving the system would be eliminated; and the utility's revenue requirement will remain unchanged. As has been pointed out, under this scenario all customers are treated similarly in that those customers who paid too much under the uniform rate are now billed under a lower rate, those customers who paid too little under the uniform rate have received a higher rate, and the utility's opportunity to earn its authorized rate of return is maintained.

In an earlier portion of this Order, we recognized that members of the legislature have sponsored legislation to make refunds from the Commission's regulatory trust fund. In light of

the possible legislative solution, Florida Water shall retain all of the refund/surcharge records intact, enabling it to make a refund if an alternative funding source is found.

REFUND REQUIRED TO SPRINGHILL CUSTOMERS

Florida Water's Spring Hill service area in Hernando County is a facility affected by the uniform rate structure. See Order No. PSC-93-0423-FOF-WS. On April 5, 1994, Hernando County rescinded Commission jurisdiction pursuant to Section 367.171, Florida Statutes. However, pursuant to Section 367.171(5), Florida Statutes, we retained jurisdiction over the Spring Hill service area because this docket was still pending.

At issue is whether Florida Water should have implemented modified stand-alone rates at its Spring Hill facility on January 23, 1996 and whether a refund is required to Spring Hill customers based upon the difference between the uniform rate and stand-alone rate from January 23, 1996, through June 14, 1997. For the facilities that were part of the most recent rate proceeding, Docket No. 950495-WS, the modified stand-alone rates were implemented on January 23, 1996, when the interim rates in that docket were approved. The Spring Hill facility was excluded from Docket No. 950495-WS. See Order No. PSC-95-1385-FOF-WS, issued November 7, 1995. The Spring Hill customers remained on the uniform rate structure until a June 14, 1997, rate change that resulted from a settlement agreement between Hernando County and the utility.

As stated earlier, by Order No. PSC-96-1046-FOF-WS, we affirmed an earlier decision to require the utility to implement the modified stand-alone rate structure and to refund accordingly. Order No. PSC-96-1046-FOF-WS was appealed by several parties including Florida Water and the City of Keystone Heights. Prior to the City of Keystone Heights' notice of appeal, Florida Water filed a motion for stay which we granted by Order No. PSC-96-1311-FOF-WS, issued October 28, 1997.

Subsequently, by Order No. PSC-97-0175-FOF-WS, issued February 14, 1997, we granted OPC's request to modify Order No. PSC-96-1311-FOF-WS to reflect that only Florida Water's refund obligation was stayed pending appeal, and that Florida Water was required to implement the modified stand-alone rate structure for the Spring Hill customers consistent with Orders Nos. PSC-95-1292-FOF-WS and PSC-96-1046-FOF-WS. On February 28, 1997, Florida Water filed a

motion for reconsideration and motion for stay of Order No. PSC-97-0175-FOF-WS. By Order No. PSC-97-0552-FOF-WS, issued May 14, 1997, we denied the petition for reconsideration and again affirmed that modified stand-alone rates were to be implemented for the Spring Hill customers.

In its brief, Florida Water argues that the automatic stay triggered by the City of Keystone Heights' September 12, 1996 notice of appeal of Order No. PSC-96-1046-FOF-WS barred Florida Water's implementation of the modified stand-alone rate structure for all 127 service areas, including Spring Hill and no party moved to modify or vacate the automatic stay. Citing Straube v. Bowling Green Gas Co., 227 S.W.2d 666 (Mo. 1950), Florida Water states that it had no choice but to charge Spring Hill customers the approved, tariffed uniform rates while Order No. PSC-96-1046-FOF-WS was on appeal.

Florida Water also states that effective September 1, 1997, it reduced its stand-alone rates for the Spring Hill customers in an amount which totals a $1.6 million revenue requirement decrease which is below the cost of service. Florida Water asserts that this decision constitutes a material reparation for any alleged overpayments based on modified stand-alone rates dating back to 1993. Therefore, Florida Water argues that refunds for the stay period would be duplicative. Additionally, Florida Water contends that confiscation of the revenues collected during the stay pursuant to legally established rates would violate its rights to due process. Citing GTE and Southern States, Florida Water believes that the principles of equity and fairness eliminate the option of requiring Florida Water to bear the financial burden of any refunds to the Spring Hill customers for the stay period. Finally, Florida Water argues that if we order a refund to the Spring Hill customers, then the surcharges necessary to recover the cost of such refunds should be borne by all of Florida Water's customers in the remaining 125 service areas in this docket.

In its brief, OPC states that while Order No. PSC-95-1292-FOF-WS never became final, it was the intent of the Commission as affirmed in Order No. PSC-97-0175-FOF-WS that all systems included in Docket No. 920199-WS implement modified stand-alone rates. Once Florida Water implemented the interim rate increase in Docket No. 950495-WS based on modified stand-alone rates, there was no longer any reason for Spring Hill's customers to continue paying uniform rates. The interim rates provided the full revenue requirement for the service areas included in that docket without requiring a

subsidy from Spring Hill. OPC asserts that after the modified stand-alone rates went into effect on January 23, 1996, Florida Water received a windfall equal to the difference between uniform rates and the modified stand-alone rates. OPC believes that in accordance with the equity principles set forth in GTE and Southern States, Florida Water should refund the over-collections for this time period.

Pursuant to Rule 25-22.061(3), Florida Administrative Code, an appeal of a Commission order by a public body creates an automatic stay. However, in this case, we also granted Florida Water's request for a stay. OPC then filed a motion for reconsideration or in the alternative motion to modify the stay. Having found that Rule 9.310(a), Florida Rules of Appellate Procedure, provided us with continuing jurisdiction, in our discretion, to grant, modify, or deny such relief, we granted OPC's alternative motion to modify the stay to reflect that only Florida Water's obligation to provide refunds was stayed pending appeal. Subsequently, Florida Water's emergency motion to review this decision by the Commission was denied by the First District Court of Appeal.

We recognize that our decisions to grant and then modify the stay requested by the utility transpired after the automatic stay was created by the City of Keystone Heights' notice of appeal. However, we believe the practical effect of our modification of the stay requested by Florida Water was to eliminate or vacate that portion of any and all stays pertaining to the utility's obligation to implement the modified stand-alone rate structure for Spring Hill, which included the City of Keystone Height's automatic stay. Therefore, we believe that when we granted OPC's motion to modify Florida Water's stay, the City's automatic stay was modified as well. Florida Water's argument would in essence amount to the existence of two separate stays of the same order with only one of those stays being modified.

Further, we find that the utility incorrectly relies on the Straube case. Florida Water asserts that the facts in Straube are parallel to the facts in this docket. In reviewing the case, we find that Straube did not involve a Commission order directing the utility to provide a refund for funds collected under an erroneous Commission order and Straube did not involve rates that were found to be invalid as in this docket. See Citrus County. Moreover, the "windfall" reaped by the utility in Straube was in a "non-ratemaking setting". Reinhold v. Fee Fee Trunk Sewer, 664 S.W.2d 599, 603 (Mo. Ct. App. 1984). Furthermore, the Straube case dealt

with the legal theory of unjust enrichment, not the state and federal constitutional rights of a utility as argued by Florida Water.

We agree with OPC that there was no rationale for Spring Hill to remain on its uniform rate after modified stand-alone rates were implemented for all other service areas. It was the uniform rate structure that created the so-called "winners/losers" scenario to meet the utility's total revenue requirement, and subsidies were an inherent part of the uniform rate structure. The interim modified stand-alone rates implemented on January 23, 1996, were based upon a new revenue requirement that made the utility whole for all service areas, excluding Spring Hill. Therefore, after January 23, 1996, a subsidy from Spring Hill was not needed to compensate for under-recovery from any of the other service areas. Maintaining the uniform rate for this period resulted in excess revenues being collected and retained by Florida Water from the Spring Hill customers and "[a]s the supreme court explained in <u>Clark</u>, '[i]t would clearly be inequitable for either the utilities or ratepayers to benefit, thereby receiving a windfall, from an erroneous PSC order." 22 Fla. L. Weekly at D1493.

Florida Water argues that in 1996, even though the Spring Hill rate contained a subsidy, it did not overearn and if a refund is ordered, corresponding surcharges must be collected from other customers. Rates are established to allow the utility the opportunity to earn its authorized rate of return. The actual return to be earned is not guaranteed. Circumstances may occur after the rates are set that may affect the achieved rate of return. These factors may include turnover of customers, usage, and an increase or decrease in expenses. Therefore, whether or not Florida Water overearned or underearned during this time is of no consequence. Pursuant to <u>Citrus County</u>, uniform rates were invalid which thereby negates any argument based on the utility's earnings level. The fact remains that Spring Hill customers were required to continue paying the uniform rate long after all other customers had been changed to the modified stand-alone rate.

Even assuming arguendo that the automatic stay resulting from the City of Keystone Heights' notice of appeal prevented Florida Water from implementing the modified stand-alone rate, the utility remains legally obligated to refund the difference in revenues collected. The law in Florida is very clear regarding the effects of a stay. In Florida, the term supersedeas means stay. A supersedeas or stay is preventive in nature and maintains the

status quo pending appellate proceedings. In re: Purifiner Distribution Corp., 188 B.R. 1007, 1009 (Bankr. M.D. Fla. 1995); Hudson v. Keene Corporation, 445 So. 2d 1151 (Fla. 1st DCA 1984), rehearing denied 472 So. 2d 1142 (Fla. 1985) (Opinion would not affect interests of parties against whom case had been stayed); Green v. Green, 254 So. 2d 802 (Fla. 3rd DCA 1971) (A party in whose favor judgment was rendered shall not suffer by stay of which was entered); Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co. v. Barrett, 174 So. 2d 417, 418 (Fla. 3rd DCA 1965) (The supersedeas, being preventive in nature, does not set aside what the trial court has adjudicated, but stays further proceedings in relation to the judgment until the appellate court acts thereon).

An automatic stay does not undo or set aside what the trial court has adjudicated; it merely suspends the order. City of Plant City v. Mann, 400 So. 2d 952 (Fla. 1981), citing Henry v. Whitehurst, 66 Fla. 567, 64 So. 2d 233 (1914) and El Prado Restaurant, Inc. v. Weaver, 259 So. 2d 524 (Fla. 3d DCA 1972). Indeed, an automatic stay during the initial appeal ends when the district court of appeal issues its mandate. City of Miami v. Arostegui, 616 So. 2d 1117, 1120 (Fla. 1st DCA 1993).

In the Plant City case, the Supreme Court affirmed a Commission order directing the utility to refund excess franchise fees collected from customers during the pendency of an appeal while an automatic stay was in effect. 400 So. 2d at 953. In support of its decision, the Supreme Court stated that "a supersedeas on appeal from a final judgment stays the execution but does not undo the performance of the judgement". Id.

Thus, even assuming the automatic stay which resulted from the City of Keystone Heights' notice of appeal was not modified in any sense, the stay does not release Florida Water from its obligation to provide refunds to customers in the Spring Hill area because the stay did not set aside or undo the performance of Order No. PSC-95-1292-FOF-WS, but merely stayed the execution of the order until the appeal was decided. Accordingly, Florida Water shall refund to its Spring Hill service area the difference between revenues collected through the uniform rate and modified stand-alone rate for the period January 23, 1996 through June 14, 1997. The refunds shall be made in accordance with Rule 25-30.360, Florida Administrative Code.

CLOSING DOCKET

This docket shall be administratively closed upon our staff's verification that the utility has completed the required refunds for the Spring Hill customers and upon expiration of the period for appeal. The utility's bond can be released upon our staff's verification that the refunds have been completed.

Based on the foregoing, it is therefore,

ORDERED by the Florida Public Service Commission that the petitions to intervene filed by Charlotte County, Best Western Deltona Inn, Florida United Methodist Children's Home, Inc., Sugarmill Association, Inc., and Sugarmill County Club, Inc., are granted. It is further

ORDERED that the motions for continuance filed by Charlotte County and Florida Water Services Corporation are denied. It is further

ORDERED that Florida Water Services Corporation shall not make refunds or impose surcharges for the reasons set forth in the body of this Order. It is further

ORDERED that Florida Water Services Corporation shall retain all of the refund/surcharge information to enable it to provide a refund if an alternative source of funding can be found. It is further

ORDERED that Florida Water Services Corporation shall refund to its Spring Hill service area the difference between revenues collected through the uniform rate and modified stand-alone rate for the period January 23, 1996 through June 14, 1997. It is further

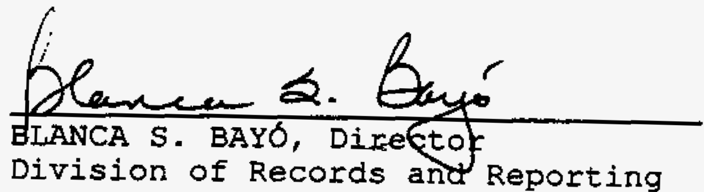
ORDERED that the Spring Hill refunds shall be made in accordance with Rule 25-30.360, Florida Administrative Code. It is further

ORDERED that the schedules attached hereto are incorporated by reference. It is further

ORDERED that this docket shall be closed upon Staff's verification that Florida Water Services Corporation has completed the required refunds for its Spring Hill facilities and upon expiration of the period for appeal. It is further

ORDERED that Florida Water Services Corporation's bond can be released upon our Staff's verification that the refunds have been completed.

By ORDER of the Florida Public Service Commission this 26th day of January, 1998.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

LAJ

DISSENTS

Chairman Julia L. Johnson dissented without opinion on the majority's decision to deny the motions for continuance and to not require refunds and surcharges.

Commissioner Joe Garcia dissented without opinion on the majority's decision to deny the motions for continuance.

Commissioner Diane K. Kiesling dissented with the following opinion:

I respectfully dissent. The mandate from the First District Court of Appeal (DCA) clearly directed this Commission to craft a fair resolution of the problems created by the reversal of the uniform rate structure. The DCA relied on the Supreme Court's opinion in GTE Florida, Inc. v. Clark, 668 So. 2d 971 (Fla. 1996), to reach its decision, as had Commissioner Clark and I in our dissents in Order No. PSC-96-1046-FOF-WS. GTE specifically holds: "It would clearly be inequitable for either utilities or ratepayers to benefit, thereby receiving a windfall, from an erroneous PSC

order." Id. at 973. Thus, GTE dictates that we must order refunds, and the DCA mandate requires surcharges where there are refunds. To order neither refunds nor surcharges creates a windfall to some customers and a loss to others, and totally violates the principles set forth in GTE and the dictates of the DCA mandate.

Further, while I agree with that portion of staff's analysis in the staff recommendation which states that refunds with surcharges should be ordered, I do not believe that a hearing on the mechanics of those refunds and surcharges is necessary. The best way to accomplish the refunds and surcharges is for this Commission to craft the most "equitable" refund and surcharge methodology, consistent with our rules for refunds and the facts and circumstances of this case. If there is some imbalance of funds after the refunds and surcharges are completed, the utility can apply to this Commission for a remedy. If the customers believe some error has occurred in the distribution amounts or methodology, they too can petition this Commission. I also believe that it is wholly inappropriate and irresponsible to leave it to the Legislature to "do equity" in this case.

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 the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) 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 and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

FLORIDA WATER SERVICE CORPORATION

Attachment A

Service Area	REFUND				SURCHARGE			
	HIGHEST	LOWEST	CUSTOMERS	CUSTOMER AVERAGE	HIGHEST	LOWEST	CUSTOMERS	CUSTOMER AVERAGE
AMELIA ISLAND	$107,600.72	$0.06	2,186	$314.53				
APACHE SHORES					$1,836.30	$3.15	225	$411.85
APPLE VALLEY	$1,124.10	$0.15	1,242	$119.29				
BAY LAKE ESTATES					$1,122.65	$7.21	89	$397.88
BEACON HILLS	$13,430.19	$0.01	4,631	$253.45	$53.96	$0.01		
BEECHER'S POINT					$46,136.29	$15.49	56	$1,819.88
BURNT STORE					$74,861.38	$0.28	941	$725.76
CARLTON VILLAGE					$651.56	$0.02	227	$68.94
CHULUOTA					$18,205.47	$0.35	940	$522.78
CITRUS PARK					$3,814.62	$0.01	629	$406.84
CITRUS SPRINGS					$5,084.54	$0.09	2,415	$206.00
CRYSTAL RIVER HIGHLANDS					$3,182:44	$3.30	123	$455.39
DAETWYLER SHORES					$1,211.68	$1.90	162	$141.97
DELTONA					$31,510.08	$0.02	32,927	$11.09
DOL RAY MANOR					$9,441.52	$5.99	82	$366.30
DRUID HILLS					$796.79	$2.67	290	$118.45
EAST LAKE HARRIS EST.					$591.50	$0.83	210	$158.40
FERN PARK					$845.30	$0.41	250	$107.49
FERN TERRACE					$71.68	$0.04	160	$11.22
FISHERMAN'S HAVEN					$425.06	$0.05	269	$90.50
FLA CNTRL COMM PARK					$31,233.14	$0.07	47	$3,108.86
FOUNTAINS					$2,989.86	$9.25	70	$832.22
FOX RUN					$2,829.55	$7.99	148	$1,131.86
FRIENDLY CENTER					$2,118.92	$16.89	30	$383.81
GOLDEN TERRACE					$2,971.55	$5.11	135	$282.04
GOSPEL ISLAND ESTATES					$2,201.02	$515.94	9	$1,087.06
GRAND TERRACE					$2,383.99	$2.66	127	$656.30
HARMONY HOMES					$759.79	$2.30	81	$246.66
HERMITS COVE					$2,562.19	$5.60	212	$356.88
HOBBY HILLS					$939.32	$0.48	144	$208.33
HOLIDAY HAVEN					$6,185.98	$4.37	133	$678.04
HOLIDAY HEIGHTS					$56.65	$4.78	70	$313.38
IMPERIAL MOBILE TERRACE					$455.27	$1.92	295	$84.49
INTERCESSION CITY					$5,072.04	$0.66	397	$500.23
INTERLACHEN LK ESTATES					$793.54	$0.76	301	$213.99
JUNGLE DEN					$2,720.83	$0.31	149	$931.28
KEYSTONE HEIGHTS					$11,107.46	$0.02	1,308	$127.12
KINGSWOOD					$979.78	$3.37	97	$255.27
LAKE AJAY ESTATES					$3,301.28	$10.84	129	$1,104.39
LAKE BRANTLEY					$558.85	$0.44	87	$192.90
LAKE CONWAY PARK					$1,115.41	$0.97	108	$230.35
LAKE HARRIET ESTATES					$81.20	$0.01	372	$7.96
LAKEVIEW VILLAS					$1,496.90	$14.62	17	$614.06
LEILANI HEIGHTS					$2,975.70	$0.16	504	$96.16
LEISURE LAKES	$1,435.80	$0.50			$498.17	$0.02	38,930	$44.76
MARCO SHORES					$21,536.16	$1.40	503	$726.58
MARION OAKS					$21,536.16	$0.04	3,984	$562.81
MEREDITH MANOR	$51.75	$0.01			$1,850.21	$0.01	958	$29.67
MORNING VIEW					$3,026.35	$430.70	40	$1,439.33
OAK FOREST					$867.44	$0.54	173	$162.15
OAKWOOD					$856.47	$1.03	295	$207.53
PALISADES COUNTRY CLUB					$11,283.91	$9.36	121	$1,097.52
PALM PORT					$936.48	$4.21	120	$435.67
PALM TERRACE					$1,814.57	$0.67	1,462	$433.32
PALMS MOBILE HOME PK					$624.80	$9.44	82	$162.96
PARK MANOR					$20,414.40	$12.14	50	$1,121.90
PICCIOLA ISLAND					$214.82	$0.12	165	$52.73
PINE RIDGE					$1,106.09	$0.02	1,114	$168.23
PINE RIDGE ESTATES					$1,476.39	$0.56	352	$325.90
PINEY WOODS					$474.47	$0.31	220	$122.06
POINT O'WOODS					$1,662.38	$0.02	432	$440.91
POMONA PARK					$3,728.15	$1.71	224	$183.92

FLORIDA WATER SERVICE CORPORATION

Attachment A

Service Area	REFUND HIGHEST	REFUND LOWEST	REFUND CUSTOMERS	REFUND CUSTOMER AVERAGE	SURCHARGE HIGHEST	SURCHARGE LOWEST	SURCHARGE CUSTOMERS	SURCHARGE CUSTOMER AVERAGE
POSTMASTER VILLAGE					$695.94	$19.02	208	$335.55
QUAIL RIDGE					$4,620.95	$43.77	37	$585.65
RIVER GROVE					$1,604.02	$3.29	130	$487.31
RIVER PARK					$1,133.88	$0.47	437	$212.65
ROLLING GREEN					$2,090.26	$3.04	94	$903.35
ROSEMONT					$1,657.70	$3.56	60	$547.47
SALT SPRINGS					$29,682.20	$9.73	149	$2,549.74
SAMIRA VILLAS					$9,846.78	$3,234.30	2	$4,923.39
SARATOGA HARBOUR					$1,098.27	$26.74	57	$409.72
SILVER LAKE ESTATES	$9,950.15	$0.17	1,292	$340.05	$0.40	$0.40		
SILVER LAKE OAKS					$2,895.42	$3.12	84	$554.24
SKYCREST					$528.25	$0.15	162	$135.12
SOUTH FORTY					$43,383.78	$19.02	47	$1,788.68
SPRING HILL	$47,811.00	$0.04	33,329	$151.72				
STONE MOUNTAIN					$2,711.65	$1,298.24	7	$1,733.64
ST. JOHNS HIGHLANDS					$1,037.91	$5.07	102	$278.48
SUGAR MILL					$8,374.02	$0.35	754	$426.59
SUGARMILL WOODS	$8,200.84	$0.19	3,327	$543.85	$116.79	$0.03		
SUNNY HILLS					$2,350.59	$3.01	530	$701.34
SUNSHINE PARKWAY					$24,223.86	$114.47	25	$2,459.57
TROPICAL PARK					$2,295.67	$0.04	789	$156.91
UNIVERSITY SHORES	$29,436.09	$0.03	5,253	$109.02	$9.94	$0.41		
VENETIAN VILLAGE					$1,312.40	$0.42	164	$544.11
WELAKA					$1,218.04	$5.04	135	$368.61
WESTERN SHORES	$833.21	$0.50	393	$138.04				
WESTMONT					$534.29	$0.05	204	$108.81
WINDSONG					$1,072.27	$1.13	147	$383.55
WOODMERE	$388.10	$0.02	1,586	$8.30	$4,974.35	$0.01		
WOOTENS					$1,646.24	$16.10	25	$516.04
ZEPHYR SHORES	$17,232.91	$0.11	597	$60.88				

Footnotes

Data unaudited; supplied by FWSC.

Zero (.00) surcharges and refunds ommitted.

Individual customer specific amounts are net of refund/surcharge.

Customer average is simple average net of refunds an surcharges and water and wastewater.

Attachment B
Schedule 1 of 3

Regulatory Asset - Option 1				
Years (a)	$416.71 Surcharge (416.71(a)*12) (b)	Monthly Payment for Regulatory Asset (c)	Total Surcharge (d)	Total Regulatory Asset Paid (e)
1	34.73	37.13	416.71	445.61
2	17.36	19.73	416.71	473.42
3	11.58	13.95	416.71	502.32
4	8.68	11.09	416.71	532.29
5	6.95	9.39	416.71	563.32
6	5.79	8.27	416.71	595.40
7	4.96	7.48	416.71	628.52
8	4.34	6.90	416.71	662.64
9	3.86	6.46	416.71	697.75
10	3.47	6.12	416.71	733.83
15	2.32	5.15	416.71	927.61
20	1.74	4.75	416.71	1,140.77

Notes:

1. Assumes $14,168,000 in surcharges reported by utility is correct.
2. Assumes 40,000 surcharge customers.
3. Assumes 6,000 surcharge customers have left utility.
4. Option A surcharge would be $416.71 using the above assumptions.
5. Assumes that all customers are equal meter equivalents.

Attachment B
Schedule 2 of 3

Regulatory Asset - Option 2				
Years (a)	Morningview Average Surcharge $1,439.33 (1,439.33/(a)*12) (b)	Monthly Payment for Regulatory Asset (c)	Total Surcharge (d)	Total Regulatory Asset Paid (e)
1	119.94	128.26	1,439.33	1,539.15
2	59.97	68.13	1,439.33	1,635.22
3	39.98	48.20	1,439.33	1,735.02
4	29.99	38.30	1,439.33	1,838.54
5	23.99	32.43	1,439.33	1,945.73
6	19.99	28.56	1,439.33	2,056.54
7	17.13	25.84	1,439.33	2,170.92
8	14.99	23.84	1,439.33	2,288.79
9	13.33	22.32	1,439.33	2,410.06
10	11.99	21.12	1,439.33	2,534.66
15	8.00	17.80	1,439.33	3,204.01
20	6.00	16.42	1,439.33	3,940.27

Notes:

1. Assumes $57,573 in surcharges reported by utility is correct for Morningview.
2. Uses 40 surcharge customers reported by utility.
3. Assumes all customers are equal meter equivalents.

Attachment B
Schedule 3 of 3

Regulatory Asset - Option 3				
Years (a)	Morningview Customer #1017 Surcharge $3026.35 (3,026.35/(a)*12) (b)	Monthly Payment for Regulatory Asset (c)	Total Surcharge (d)	Total Regulatory Asset Paid (e)
1	252.20	269.69	3,026.35	3,236.24
2	126.10	143.26	3,026.35	3,438.22
3	84.07	101.34	3,026.35	3,648.07
4	63.05	80.54	3,026.35	3,865.73
5	50.44	68.19	3,026.35	4,091.11
6	42.03	60.06	3,026.35	4,324.11
7	36.03	54.34	3,026.35	4,564.60
8	31.52	50.13	3,026.35	4,812.42
9	28.02	46.92	3,026.35	5,067.42
10	25.22	44.41	3,026.35	5,329.41
15	16.81	37.43	3,026.35	6,736.78
20	12.61	34.52	3,026.35	8,284.85

Notes:

1. Assumes highest surcharge in Morningview service area is correct as reported by utility.