FLORIDA PUBLIC SERVICE COMMISSION
Capital Circle Office Center • 2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

M E M O R A N D U M

March 12, 1998

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

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

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

AGENDA: MARCH 24, 1998 - REGULAR AGENDA - DECISION AFTER REMAND - PARTICIPATION IS DEPENDENT UPON VOTE IN ISSUE NO. 1

CRITICAL DATES: 8-MONTH EFFECTIVE DATE: JULY 27, 1996

SPECIAL INSTRUCTIONS: S:\PSC\WAW\WP\950387D.RCM

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CASE BACKGROUND

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

The utility's 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.

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

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

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

useful determinations, and remanded the case for the Commission to give an explanation, supported by the record, for its used-and-useful calculations.

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

This recommendation 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.

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ISSUE 1: Should parties be allowed to participate?

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

STAFF ANALYSIS: Typically, post-remand recommendations have been noticed as "Parties May Not Participate," with participation limited to Commissioners and staff. However, in this case, staff believes that the Commission will be considering new matters related to but not addressed at hearing.

The Commission has consistently allowed post-remand participation by the parties at the agenda conferences, stating that participation would aid the Commission in better understanding all of the complexities involved in this matter. In addition, given the nature of the allegations which have been raised, staff believes that participation by the parties would be helpful to the Commission. Therefore, staff recommends that participation at the agenda conference be allowed, but limited to five minutes for each party.

ISSUE 2: Should the petition filed by Ms. Cheryl Walla for another hearing in the service area be granted?

RECOMMENDATION: No, the petition should be denied. Based on staff's recommendations in Issues 3 and 4, the record should be reopened only for the limited issue of determining what flows should be used in the numerator of the used-and-useful equation. Therefore, a general hearing to include issues on quality of service is not contemplated, and a hearing in the service area is not required or recommended. (JAEGER)

STAFF ANALYSIS: 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 the Division of Records and Reporting on March 4, 1998. Staff provided copies of this request to the parties on March 9th.

As discussed in Issue 3, staff is recommending the record be reopened only 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. Staff believes that this is all the remand by the First DCA permits. Staff further believes that the First DCA has conclusively determined the plant capacity to be 1.25 mgd.

Generally, the customers provide testimony on the service rendered by the utility, which occurs at a service hearing, or during the evidentiary hearing conducted in or near the service area. Such testimony was taken at the hearing in this docket held on April 24 and 25, 1996, in Ft. Myers. Therefore no further customer testimony is required.

A prehearing conference and a hearing have been tentatively scheduled in Tallahassee for June 29 and July 17, 1998, respectively. Staff believes that, since the customer portion of the testimony has concluded, it is not necessary to conduct this limited hearing in the service area. Also, staff notes that in similar situations, the Commission has continued the technical portion of the hearing in Tallahassee. See, Docket No. 950615-SU. Based on past practice, staff recommends that any further proceedings be held in Tallahassee. However, staff believes that this is not required and the hearing could be held in Ft. Myers. Ms. Walla could be allowed to attend the Tallahassee hearing by teleconferencing.

Therefore, staff believes that another hearing should be held only as set forth in Issue 3, and that Ms. Walla's request for another hearing in the service area be denied.

ISSUE 3: In light of the decision and mandate of the First District Court of Appeal, what action should the Commission take regarding the Court's reversal of the Commission's calculation of used-and-useful percentage for the wastewater treatment plant using annual average daily flows in the numerator when the Department of Environmental Protection permits the wastewater plant based on annual average daily flows?

RECOMMENDATION: The Commission should reopen the record for the very limited purpose of taking evidence on what flows should be used in the numerator of the used-and-useful fraction when the Department of Environmental Protection, as of 1994, stated the denominator, the permitted capacity of this wastewater plant, on the basis of annual average daily flows. If the Commission does reopen the record to take evidence on this issue, staff believes that the additional issues of rate case expense for reopening the record and appellate rate case expense as discussed in Issue 5 below can be considered at that time. (JAEGER)

STAFF ANALYSIS: In its opinion, the First DCA reversed the portion of Order No. PSC-96-1133-FOF-SU, issued September 10, 1996, in this docket ("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 Department of Environmental Protection (DEP) changed its method of permitting. Originally, the DEP had permitted wastewater treatment plants without designating whether the capacity was based on AADF or ADFMM, or some other flow. Staff generally found that the DEP permit was based upon ADFMM, and used that flow criteria in the numerator.

However, the 1994 DEP permit issued for the wastewater plant stated the permitted capacity of the wastewater plant in terms of AADF. Based on this change, staff recommended, and the Commission approved the use of AADF in the numerator. Other than the permit itself, there was no evidence as to what flows should be used in the numerator of the used-and-useful fraction when the permit was issued based on AADF.

The First DCA saw 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 the Commission had departed "from the essential requirements of law", and that the Commission "must, on remand, give a reasonable explanation, if it can, supported by record evidence (which all parties must have an opportunity to address) as to why average daily flow in the peak month was ignored." 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 merely, "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."

Mandate

Although the mandate stated that the cause was remanded for further proceedings, if required, staff believes 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.

However, there is one case that attaches significance to the language of the mandate. In State, Dept. of Revenue v. Air Jamaica Limited, 522 So. 2d 446 (Fla. 1st DCA 1988), the Department of Revenue, after prevailing in an appeal of a tax issue, filed a motion in the trial court to enforce the Supreme Court's mandate and asked for statutory interest on the unpaid tax. On appeal by the state after the trial court denied its motion, the airlines argued that the Supreme Court's decision did not mention interest, nor did it remand the cause for consistent proceedings, so the trial court did not have jurisdiction to entertain the issue.

The First DCA disagreed, saying that the Supreme Court simply reversed a decision granting a tax exemption, and the mandate contained "standard language commanding 'that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.'" Id. at 448. That language gave the court sufficient discretion to consider the issue of statutory interest. The Air Jamaica case differs from the First DCA's opinion in this case in that the Supreme Court in the tax case did not find a lack of evidence to support a finding regarding interest. Moreover, the state had a separate, statutory right to interest. Therefore, staff believes the Commission should look to the language in the opinion, and not the mandate, to determine what actions it should take on remand.

Remand of the First DCA

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.

Since the specific issue of what flows should be used in the numerator was never considered and was not one that was specifically before the Commission, the Commission could take additional evidence and reconsider its decision in light of it. Staff believes that the language, "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.

The First DCA basically found that the "policy shift" was unsupported by evidence in the record. The First DCA specifically makes references to the need for additional justification for this apparent change in Commission policy and has not explicitly restricted this Commission from having an evidentiary proceeding on the Court's perceived deficiency.

Therefore, staff believes that the opinion of the First DCA allows for the reopening of the record. Even though this recommendation supports the notion that the record can be reopened for a very limited purpose, it is important to note here that the Commission also has the discretion to decide not to reopen the record even though the Commission recognizes its ability to do so.

Although staff believes that the Commission can and should reopen the record, staff believes that the Commission should be aware of the following case. In the case of Broward County v. Coe, 376 So. 2d 1222 (Fla. 4th DCA 1979), the Fourth DCA determined that the lower court had complied with a Fourth DCA remand "for further proceedings in accordance with this opinion," by declining to take further evidence on an issue involving good faith. On remand, the trial judge ordered a plan of rebate of certain taxes which the appellate court had determined were illegally collected. Id. at 1223.

The Fourth DCA found that the trial judge "correctly concluded that the [Fourth DCA's] prior opinion [and mandate] neither contemplated nor authorized a second evidentiary hearing." Id. Although in its prior decision the Fourth DCA found that there was no evidence on the "good faith" issue, the appellants had the opportunity to present evidence on that issue at the first evidentiary hearing. By requesting that the trial court take further evidence on the issue, the appellants effectively sought "two bites at the apple." Id. And "[s]omewhere the curtain must ring down on litigation." Id. Although it had remanded for further proceedings, the Fourth DCA evidently intended its remand to be for disposition consistent with its opinion.

Case law supports the proposition that an evidentiary hearing may be had after remand if that evidentiary hearing does not afford parties a "second bite of the apple." The test appears to be "did the parties have the opportunity to present the evidence at the first hearing?" See, Broward County v. Coe, supra. In Coe, the Court held that where tax officials **had the opportunity** to present evidence on the issue of good faith at the first evidentiary hearing, the trial court did not err by not authorizing a second evidentiary hearing on the issue of good faith. Id. at 1222. The "opportunity to present evidence" is the appropriate distinction here. Staff believes that at the time of the hearing, none of the parties or staff realized the change in DEP's permitting practice and its significance and effect. Therefore, this was not made an issue and no party had the opportunity to put on evidence as to

which flows should be used in the numerator. Absent this evidence, the First DCA found that it was improper to change from using ADFMM in the numerator without fully explaining and justifying such change. Having reviewed the language found in the First DCA's opinion, staff believes that an additional evidentiary proceeding on the very limited issue of what flows should be used in the numerator of the used-and-useful fraction would not be an impermissible "second bite at the apple".

Staff believes that the First DCA distinguished between the issue on plant capacity (fourth issue of this recommendation) and the issue on 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, staff believes that the First DCA specifically contemplated further action by the Commission, if the Commission wished, on the issue of what flows should be used in the numerator. It merely cautioned the Commission that any change must be supported by record evidence, and that all parties must be given an opportunity to address this evidence. Therefore, staff believes that the opinion of the First DCA gave the Commission the discretion to reopen the record on what flows should be used in the numerator.

Although staff believes that the First DCA invited the Commission to reopen the record, the language used by the Court is subject to other interpretations. Even though the opinion does not use the words "further proceedings" (the Mandate uses that language), Staff believes that the language quoted above from the opinion does, at the very least, imply further proceedings might be held. If further proceedings are warranted, a trial judge is vested with broad discretion in handling or directing the course of the case. Tampa Electric v. Crosby, 168 So. 2d 70 (Fla. 1964); Lucom v. Potter, 131 So. 2d 724 (Fla. 1961); Veiner v. Veiner, 459 So. 2d 381 (Fla. 3d DCA 1984), review denied, 469 So. 2d 750 (Fla. 1985); City of Pensacola v. Capital Realty Holding Co., 417 So. 2d 687 (Fla. 1st DCA 1982). Thus, if the Commission does not view the Court's language as a direct invitation to reopen the record, case law supports the view that in circumstances such as these, the Commission would have the discretion to decide whether or not to reopen the record.

In Smith v. Smith, 118 So. 2d 204, 205 (Fla. 1960), the Court held that:

> When a final decree in a chancery cause is

> reversed without specific directions to enter a particular decree or order, the effect of the reversal is to remand the cause to the lower court for the entry of a further decree consistent with the ruling of this Court. This is even more clearly the rule when, as in the instant case, our judgment reverses the final decree and specifically remands the cause 'for further proceedings consistent with' our opinion. In either event, the trial judge, upon the filing of our mandate, has the authority to take such further proceedings in the cause as may be appropriate in order to arrive at another decree which will accord with the mandate of this Court (emphasis added).

Options Available To The Commission

Staff believes that there are three options available to the Commission: (1) it may refuse to reopen the record and use ADFMM in the numerator; (2) it may refuse to reopen the record, have the parties brief, citing any record support, why it is correct or incorrect to use either AADF or ADFMM in the numerator, and make a decision based on the briefs and whatever record citation there is; or (3) it may reopen the record and have the parties put on testimony as to which flows should be used in the numerator.

Option 1 has the advantage that it would be quicker and would almost certainly be upheld by the First DCA. However, staff believes that it is wrong to calculate used and useful with this mismatch. Also, staff is afraid that in subsequent rate cases, utilities may cite this case as precedent that the correct flows to use in the numerator would be ADFMM even where evidence to the contrary was put on. Staff does not believe that the Commission should accept ADFMM in the numerator if it believes that another flow might be correct. Therefore, staff recommends that the Commission reject this option.

Option 2 has the advantage of not having to reopen the record and go back to hearing. However, after reviewing the First DCA's opinion, and also listening to the latest oral arguments before the First DCA in Dockets Nos. 950495-WS and 951056-WS, held on February 10 and 11, 1998, respectively, staff does not believe that additional argument alone would be sufficient to change the First

DCA's opinion that this was a policy shift unsupported by the record, i.e., the law of the case is that the record, as it now stands, does not support this change. In the case of Basic Energy Corporation v. Hamilton County, 667 So. 2d 249, 250 (Fla. 1st DCA 1995), the First DCA, quoting appellant, stated in pertinent part as follows:

> As appellant points out, "[a] trial court's role upon the issuance of a mandate from an appellate court becomes purely ministerial and its function is limited to obeying the appellate court's order or decree. . . . A trial court does not have discretionary power to alter or modify the mandate of an appellate court in any way, shape or form," and may not "change the law of the case as determined by the highest court hearing the case." . . .
>
> However, further inquiry may be necessary to determine what is required in order to comply with the mandate. "A remand phrased in language which limits the issues for determination will preclude consideration of new matters affecting the cause. . . . Concomitantly, '[i]t is well settled that, upon reversal and remand with general directions for further proceedings, a trial judge is vested with broad discretion in handling or directing the course of the cause thereafter.'"

Therefore, staff believes that there is a high probability that the Commission would again be overturned on appeal if it merely allowed the parties to brief the issue, and does not believe that this option is a viable option.

Finally, staff believes that option 3 is the best option. It has the disadvantage of having to reopen the record and conduct a further evidentiary proceeding. However, it has the advantage of allowing the Commission to consider the evidence regarding the matching of flows in the used-and-useful fraction so as to correctly calculate the used-and-useful percentage. Also, if an appeal is again taken, staff believes that this option has a far greater likelihood of being upheld on appeal than option 2 above.

Therefore, staff recommends that the Commission reopen the record for the very limited purpose of taking testimony on what flows should be used in the numerator of the used-and-useful

fraction when the DEP, as of 1994, stated the denominator, the permitted capacity of this wastewater plant, based on annual average daily flows. If the Commission does reopen the record to take evidence on this issue, staff believes that the additional issues of rate case expense for reopening the record and appellate rate case expense as discussed in Issue 5 below can be considered at that time.

ISSUE 4: Should the Commission adjust the wastewater plant capacity to 1.25 mgd in accordance with the First District Court of Appeal's remand?

RECOMMENDATION: Yes. (WALDEN, JAEGER)

STAFF ANALYSIS: 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 also testified that to increase the plant capacity to 1.5 mgd, the utility would have to make three different improvements which would cost over $100,000 each (see footnote 7 of the Opinion). The Court concluded that no competent evidence supported the Commission's conclusion that the plant capacity was 1.5 mgd, instead of the correct capacity of 1.25 mgd. (Opinion at pp. 17, 18, 20)

Based on the argument set forth in Issue 3 above, staff believes that the decision of the First DCA is conclusive and that it would be improper to attempt to reopen the record on the issue of plant capacity. Therefore, in light of the direction of the Court, staff recommends the Commission recognize the capacity of the wastewater plant to be 1.25 mgd. This change in the plant capacity alters the used-and-useful conclusion reached in Commission 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. This question is discussed in Issue 3.

ISSUE 5: Should the utility's Petition to Allow Additional Rate Case Expenses be granted?

RECOMMENDATION: The portion of FCWC's request to true-up $18,617 of its estimated rate case expenses incurred prior to the appeal is inappropriate and should be denied. Any future costs associated with reopening the record, as well as the requested non-legal appellate costs of $14,036 not included in rates, should be considered an issue that will be addressed at hearing. (MONIZ, JAEGER)

STAFF ANALYSIS: Pursuant to Order No. PSC-96-1133-FOF-SU (Final Order), issued September 10, 1996, in this docket, the Commission 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 with the First District Court of Appeal (Court). On January 12, 1998, the Court issued its opinion and remanded it back to the 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.

On February 4, 1998, the utility filed its Petition to Allow Additional Rate Case Expenses (Petition) with the Commission. 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 staff's 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 staff's analysis of all supporting documents filed with the Petition, it appears to staff 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.

Staff is aware of two prior cases where the Commission has addressed additional rate case costs after an appeal. 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, the Commission 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.

The Commission addressed the issue of appellate costs again in Docket No. 950495-WS. In that docket, Southern States Utilities Inc. (SSU) 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, the Commission allowed SSU additional costs associated with the appeal. However, the Commission found that SSU did not support its request to recover the true-up costs from the prior rate case. SSU failed to provide supporting documentation or testimony as to why such costs should be allowed. As such, the Commission denied recovery of the true-up costs as unsupported by the record, and did not address the merits of whether it would be appropriate to allow such a true-up.

Thus, the true-up issue was never at issue since SSU did not

first justify its costs. In Order No. PSC-96-1320-FOF-WS, issued October 30, 1996, the Commission denied the utility's request to true-up its estimated rate case expense because the record did not reflect why these costs are justified.

In this docket, FCWC has filed supporting documents for its request to true-up its estimated rate case expenses incurred prior to the appeal. Regardless, staff does 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). Prior to hearing, the Commission provides each utility with 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 the Commission makes its 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 the Commission does not go back and true-up any other estimated or projected expenses. Such true-up circumstances would be extraordinary. If the Commission were placed in a position of having to true-up estimated expenses, then rate cases would never end. Staff believes 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).

Regarding the appellate charges, staff believes that the Sunshine case addresses the circumstances that may warrant such consideration. Since the Court has awarded appellate legal fees to FCWC from the 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 staff believes that these costs should be considered. Since staff is recommending that the Commission open the record to consider additional testimony on used-and-useful (Issue 3), the issue of non-legal appellate rate case expense can also be incorporated.

Accordingly, staff recommends that the portion of FCWC's

request to true-up $18,617 of its estimated rate case expenses incurred prior to the appeal is inappropriate and should be denied. Further, any future costs associated with reopening the record, as well as the requested non-legal appellate costs of $14,036 not included in rates, should be considered an issue that will be addressed at hearing. If the Commission declines to re-open the record, then the additional appellate rate case costs can be considered as proposed agency action.

ISSUE 6: Should the amount of security that was previously deemed appropriate pursuant to Order No. PSC-96-1390-FOF-SU, issued November 20, 1996, be modified at this time?

RECOMMENDATION: No. Staff believes that the amount of security that was previously deemed appropriate pursuant to Order No. PSC-96-1390-FOF-SU, issued November 20, 1996, should not be modified at this time. (GALLOWAY)

STAFF ANALYSIS: Staff believes that the amount of security that was previously deemed appropriate pursuant to Order No. PSC-96-1390-FOF-SU, issued November 20, 1996 should not be modified at this time. Among other things, the final revenue requirement in this docket is dependent upon the disposition of Issue 3. The security amount is dependent upon the final revenue requirement and how it compares with the approved test year revenues. Therefore, since a final revenue requirement will be forthcoming, in an abundance of caution, staff believes that a determination regarding security should not be made until the appropriate final revenue requirement is calculated.

In accordance with Order No. PSC-96-1390-FOF-SU, issued November 20, 1996, Florida Cities posted a corporate undertaking in the amount of $940,755. Staff believes that under the circumstances, this amount should not be modified at this time.