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April 13, 1998

Blanca S. Bayo, Director
Division of Records & Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

HAND DELIVERY

Re: Docket No. 950387-SU

Application for a rate increase for North Ft. Myers Division
in Lee County by Florida Cities Water Company - Lee County
Division.

Dear Ms. Bayo:

Enclosed on behalf of Florida Cities Water Company is an
original and 15 copies of a Notice of Filing Transcripts of Agenda
Conference and Internal Affairs Meeting.

ACK Please acknowledge receipt of the foregoing by stamping the
AFA 2 enclosed extra copy of this letter and returning same to my
APP _____ attention. Thank you for your assistance.
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CTR _____
EAG _____
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LIN 3
OPC _____ WLS/cas
RCH _____ Enclosures
SEC 1
WAS Willis
OTH _____

Sincerely,

Wayne L. Schiefelbein

Wayne L. Schiefelbein

DOCUMENT NUMBER-DATE

04231 APR 13 98

REC'D - RECORDS REPORTING

DOCUMENT NUMBER-DATE

04230 APR 13 98

REC'D - RECORDS REPORTING

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Notice
DOCUMENT NUMBER-DATE

04229 APR 13 98

REC'D - RECORDS REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION
TALLAHASSEE, FLORIDA

IN RE: Consider Whether to Concede Error in the Appeal of
Florida Water Services Corp. Concerning the Use of
Annual Average Daily Flow in Determining Used and
Useful. (1st DCA Case No. 96-04227) (Vandiver).

DOCKET NO. 950495-WS

BEFORE:



CHAIRMAN JULIA A. JOHNSON
COMMISSIONER J. TERRY DEASON
COMMISSIONER SUSAN F. CLARK
COMMISSIONER E. LEON JACOBS

PROCEEDING:

INTERNAL AFFAIRS

ITEM NUMBER:

2

DATE:

Tuesday, February 3, 1998

PLACE:

4075 Esplanade Way, Room 140
Tallahassee, Florida

JANE FAUROT, RPR
P.O. BOX 10751
TALLAHASSEE, FLORIDA 32302
(904) 379-8669

DOCUMENT NUMBER-DATE

04231 APR 13 88

FPSC-RECORDS/REPORTING

P R O C E E D I N G S

1
2 MS. HELTON: (proceedings in progress) -- what I
3 believe is the awkward position of having to discuss
4 legal strategy in the open because of the fact that we
5 are a state agency and its legal body is -- I don't
6 think we're left with any choice.

7 As you know, I have recommended that based on the
8 recent Florida Cities decision, we concede error in
9 the SSU/Florida Water rate case for the last appeal
10 based on that decision for the annual average daily
11 flow issue. The reason being that I believe the court
12 reversed us in Florida Cities because the court did
13 not believe that we had competent, substantial
14 evidence to base the used and useful finding for
15 wastewater treatment plant in that case on annual
16 average daily flow, and that we did not adequately
17 explain the decision to do that in the order. And I
18 believe that we're faced with a similar situation here
19 in the Florida Water case.

20 In the Florida Water case, the only evidence that
21 you relied on in your decision was the fact that there
22 were -- I think it boiled down to five permits that
23 had annual average daily flow listed as the plants'
24 capacity for those wastewater treatment plants.

25 There was no testimony in the record to support

1 making the used and useful calculation on annual
2 average daily flow. Nor was there any testimony in
3 the record saying why annual average daily flow should
4 be used over the annual average max month. That
5 situation, frankly, I don't believe is present in the
6 Palm Coast appeal, which the court is going to hear
7 the next day.

8 COMMISSIONER CLARK: So it's your -- only your
9 recommendation with respect to one of them.

10 MS. HELTON: Right. I did the table with the
11 three cases to try to show what we had in Florida
12 Cities, why I thought the situation was similar in the
13 Florida Water case, and why I think we're in much
14 better standing as far as the Palm Coast case goes.

15 In that case we had Karen Amaya, a staff
16 engineer, on the stand saying why -- that it should be
17 based on, you know, average daily flow and why. And
18 in the Commission order we have an explanation of not
19 only that it should be based on annual average daily
20 flow, but the why, and that is because it gives us a
21 skewed used and useful calculation. That's not
22 present, unfortunately, in the Florida Water decision,
23 in my opinion.

24 COMMISSIONER DEASON: What do we hope to gain by
25 admitting error? I'm not so sure that -- I'm just

1 trying to figure out -- try to improve our credibility
2 in the court? Attorneys' fees are not at issue here.

3 MS. HELTON: No. No one has asked for attorneys'
4 fees.

5 I believe that we've got a recent decision that's
6 come out, that the court was pretty clear that they
7 think we made the wrong decision with annual average
8 daily flow. And I think the same situation is here in
9 the Florida Water case. And I think that for me to go
10 over there and argue otherwise does damage our
11 credibility. And I'm not sure that's the position we
12 want to be in with this court.

13 COMMISSIONER JACOBS: Do you think that that was
14 on -- well, let me say this. My reading of the case
15 was that that factor played into the other issues in
16 the case and kind of built -- built up a momentum that
17 the court was on to see that we reached error in
18 that --

19 MS. HELTON: I'm not sure what case you're
20 talking about, the Florida Cities case?

21 COMMISSIONER JACOBS: Yes, the Florida Cities
22 case. In other words, I don't know that that issue
23 standing alone -- and maybe I'm wrong, tell me.

24 MS. HELTON: Well, it's simply the fact that we
25 don't have a very good record over there with Florida

1 Water decisions.

2 COMMISSIONER JACOBS: Here's my point. If there
3 were other factors, other issues in that -- in that
4 decision that contributed to the court's conclusion,
5 can we come away from that decision saying that that
6 issue alone we want --

7 MR. SMITH: Let me interrupt you a second. There
8 may have been other issues; there always are in court
9 decisions, because they're looking at the fairness and
10 the result and -- but you don't see that in the order.
11 And what they reversed you on is basically a policy
12 change without a sufficient explication and lack of
13 competent substantial evidence. I think that is the
14 only question that you should consider in making this
15 decision. And, you know, it may be that, you know,
16 the factors or the consequences of this particular
17 decision in this case is not nearly as significant as
18 it was in that one. But that's not what the case is
19 about legally.

20 COMMISSIONER JACOBS: Help me understand this
21 policy change. It is my understanding that in terms
22 of the actual annuals, was this -- did we change how
23 we calculate this?

24 COMMISSIONER CLARK: That was my question, too.
25 Because it seems to me that we were relying on

1 permitted capacity, and the permitted capacity was
2 based on average annual flow.

3 MR. HILL: It's my understanding, as I tried to
4 explain to my bosses, that our practice has been to
5 try to match, and --

6 COMMISSIONER CLARK: What's permitted.

7 MR. HILL: Right. -- with what we've used in our
8 calculations for used and useful. And sometimes the
9 matching is -- sometimes we've had to go a collection
10 system, sometimes we have used the monthly, sometimes
11 the annual. And so the attempt on the part of our ADM
12 staff (phonetic) has been to match the numerator and
13 the denominator.

14 COMMISSIONER CLARK: Wait a minute. What do you
15 mean, "match the numerator and the denominator?"
16 What's the "numerator," and what's the "denominator?"

17 MR. HILL: The denominator would be the plant
18 capacity, and the numerator would be the demand of the
19 customer, the flow going through the plant.

20 COMMISSIONER CLARK: I see.

21 MR. HILL: And so if one is stated as a monthly
22 average, then we would use a monthly average. If one
23 is stated as an annual average, then we would use an
24 annual average.

25 COMMISSIONER CLARK: So we haven't changed our

1 policy.

2 MR. HILL: That's my belief, yes, ma'am.

3 MS. HELTON: The court disagreed. Diana Caldwell
4 argued to the court in the Florida Cities case that we
5 didn't -- this wasn't a matter of changing policy;
6 this was a matter of matching, the matching concept
7 that Mr. Hill just described. And the court --

8 COMMISSIONER CLARK: I guess what I don't
9 understand is that it seems to me that they said you
10 have to use maximum monthly flow. Is that right,
11 maximum --

12 MS. HELTON: The court said that absent competent
13 substantial -- well, let's look at the actual language
14 of the opinion. I'm reading from Page 14 and 15 of
15 the January 12th opinion from the court:

16 "Because this policy shift was essentially
17 unsupported by expert testimony, documentary opinion,
18 or other evidence appropriate to the nature of the
19 issue involved, the PSC must, on remand, give a
20 reasonable explanation, if it can, supported by record
21 evidence," in parentheses, "(which all parties must
22 have an opportunity to address)," end parentheses, "as
23 to why average daily flow in the peak month was
24 ignored."

25 COMMISSIONER CLARK: And the reason it is

1 ignored, according to what you said, is that you match
2 -- when you're determining used and useful, you use
3 the same criteria that was used for the permit. If
4 the permit used maximum monthly flow, then you would
5 use that. If the permit didn't use it, you use
6 average. And is that what you have in all of these
7 cases?

8 MR. HILL: Again, we looked at 20 or 30 past
9 cases and that has been our attempt, to match.

10 MS. HELTON: Unfortunately, I don't believe that
11 we have any orders that specifically say that, and we
12 didn't say that in the Florida Cities decision. And I
13 don't think that we have said that in the Florida
14 Water decision, that what we're concerned about is
15 matching the numerator and the denominator. Because
16 otherwise you have a skewed used and useful result.

17 COMMISSIONER DEASON: One would think it would be
18 intuitive, that's what you would want it to be.

19 COMMISSIONER JACOBS: I don't get that leap of
20 logic there that you wouldn't. I don't understand how
21 you could explain matching.

22 COMMISSIONER CLARK: I think what we've got to do
23 is go back to the court and indicate that the reason
24 you've used it is the matching concept. When you are
25 -- when you are trying to determine how much of a

1 plant is used, you should use the same criteria. And
2 if the plant is permitted using maximum monthly flow,
3 then it's appropriate to use maximum monthly flow to
4 determine used and useful. But where it's permitted
5 using average annual flow, then you use that. And it
6 seems to me, at least in the Florida Water -- SSU,
7 that is, in fact, what happened.

8 COMMISSIONER JACOBS: Now, there was a change,
9 as I understand, that did occur.

10 MS. HELTON: Yes, there was a change. And as I
11 understand it, in about 1992, DEP changed the way they
12 did their permitted capacity. They gave the utility
13 the option of doing maximum average daily flow, a
14 three-month average daily flow, and annual average
15 daily flow. And the utility, as I understand it, is
16 able to choose which demand they want placed on the
17 permit.

18 And depending on which demand they want on the
19 permit makes a difference as far as what capacity they
20 are rated at at DEP and how quickly they come to that
21 capacity. And it also makes a difference for us as
22 far as how -- what the used and useful determination
23 is.

24 And the problem is we did know about that change.
25 And there should have been something in the record to

1 explain that change, I believe, is what I'm trying to
2 get at.

3 COMMISSIONER CLARK: Well, it seems like what it
4 said, the order said, apparently, that if we can we
5 have to explain it. And I think what we should do is
6 go back and explain it. Or explain it -- explain it
7 in this case at oral argument as to why we did it.
8 Say, "You have taken issue with that because we
9 haven't explained it." But the reason you do it is
10 you want to match the numerator and the denominator;
11 you want to use the same basis of determining how much
12 of the plant is used on the basis that it was
13 permitted.

14 MR. SMITH: All of which is fine, because -- I
15 mean, if that is supported by the order, then the
16 court can take it up and run with it. But if it's not
17 supported by the order, then we're in sort of the same
18 situation.

19 COMMISSIONER CLARK: Well, but then we can issue
20 an amendatory order. I suppose we can --

21 MR. SMITH: Not at this point.

22 (Simultaneous conversation)

23 COMMISSIONER CLARK: But we need to explain it on
24 oral argument.

25 MS. HELTON: What testimony am I going to use to

1 support that? All we have, in my opinion, is the
2 permit that has annual average daily flow.

3 COMMISSIONER CLARK: Well, Mr. Hartman said it's
4 been our practice to rely on the flow data in the most
5 recent DEP operating permits -- permits to calculate
6 used and useful. If they are using average annual
7 flow for the permit, then it's appropriate to use it
8 for used and useful.

9 MR. SMITH: Looking at some of these -- I mean,
10 we'll do whatever you want to do, Commissioner, that's
11 fine. But one of the things that the court picked up
12 on is on Page 11 in the opinion, they said you say
13 that it is your policy to match, and then you turn
14 around, and the next -- two days later and you issue
15 one where the permit, apparently, had the -- whichever
16 one we relied on, and then you turned around and did
17 it the old way, and you said it was your policy.

18 COMMISSIONER CLARK: Wait a minute. I didn't --
19 what did the court say?

20 MR. SMITH: Okay. Okay. Reciting the dialogue,
21 but now this so-called miscalculation, as in
22 mismatching, occurred repeatedly in numerous cases
23 over several years. Yes, that's right. But then the
24 PSC in an order issued February 25, denying a motion
25 for rehearing in an order entered September 12th, two

1 days after its final order, the PSC identified the
2 matter as an issue of Commission policy. And at that
3 time we went back to, apparently, the mismatch. And
4 they picked up that we said it was a policy. And
5 that's one of the things that --

6 COMMISSIONER CLARK: What I'm having difficulty
7 with is that it seems to me the policy is that you
8 match the used and useful -- the way you calculate
9 used and useful as being what's on -- what the permit
10 was issued for.

11 MR. SMITH: Yes, ma'am.

12 COMMISSIONER CLARK: And the policy is not that
13 you use a maximum monthly flow.

14 MR. SMITH: I think that the problem -- I think
15 the court picked up that the policy was, in fact, that
16 even though we -- somebody may have to correct me.
17 I'm not familiar with all the details of the case.
18 But the problem was that, in fact, the mismatching was
19 the policy in the court's opinion.

20 CHAIRMAN JOHNSON: Well, what were they relying
21 upon in this case, whatever they decided? What were
22 they relying on? What evidence was there to suggest
23 that we --

24 MR. SMITH: Well, they cited a number of cases --

25 MS. HELTON: There were a string of cases where

1 annual average --

2 CHAIRMAN JOHNSON: Max.

3 MS. HELTON: -- max month capacity had been used
4 to determine used and useful.

5 COMMISSIONER CLARK: Yes, but they also -- was
6 that used on their permit? Without that other piece
7 you don't know if we have changed our policy.

8 MS. HELTON: Can I read the line of questioning
9 that the order relies on there? To me it's a little
10 bit of a stretch.

11 CHAIRMAN JOHNSON: Before you do that,
12 though --

13 COMMISSIONER CLARK: You mean their order or our
14 order?

15 MS. HELTON: Our order.

16 CHAIRMAN JOHNSON: Before you do that, was there
17 a policy of a mismatch or --

18 MR. HILL: No, we didn't have a policy of
19 mismatch. And to my knowledge, we haven't had. We
20 have had, to the extent the permit was silent, we
21 would use the max month. If the permit had something
22 on it, we would be consistent with the permit. And as
23 I went back and looked at the -- I don't know how many
24 years we went back, 15 or 20 cases, I didn't see an
25 apparent mismatch in the schedule that I gave Dr. Bane

1 and Mr. Talbott when they were asking me for an
2 explanation of what was happening.

3 CHAIRMAN JOHNSON: Thank you. You wanted to read
4 something?

5 MS. HELTON: Yes. The line of questioning that
6 this finding is -- or this statement is based on is
7 Mr. Twomey is asking Mr. Hartman, who is, I believe, a
8 paid expert Florida Water witness.

9 Mr. Twomey: "And I would like to ask you --
10 first, in this case, Mr. Hartman, help me be clear in
11 understanding. In terms of calculating used and
12 useful, it's my understanding that SSU has calculated
13 the wastewater treatment plant used and useful
14 percentage by taking the ratio of the average daily
15 use of the high use month to the plant's permitted
16 capacity. Is that generally correct?"

17 And the answer is: "For wastewater treatment
18 plant, I believe most of the calculations, or all the
19 calculations are based upon the maximum monthly
20 utilization, yes."

21 COMMISSIONER JACOBS: Whose witness was that,
22 now? That's ours?

23 MS. HELTON: No, that's Mr. Hartman, who is a
24 Florida Water witness.

25 COMMISSIONER JACOBS: So --

1 COMMISSIONER CLARK: Let me take a look at that.

2 COMMISSIONER JACOBS: So the court relied on that
3 testimony from their witness on our policy?

4 MS. HELTON: No. No, no, no.

5 COMMISSIONER JACOBS: I'm sorry.

6 COMMISSIONER DEASON: He's just saying that's the
7 way they calculate to it, right? He's not saying why
8 it's correct. He's just said that's the way we did
9 it.

10 MS. HELTON: And from that, we say it has been
11 our -- what the Staff recommendation relies on is that
12 transcript page where they say SSU Witness Hartman
13 testified that most or all calculations for wastewater
14 treatment plants are based on the maximum month
15 utilization. He further testified that this maximum
16 month meant the average of the days of the maximum
17 month.

18 COMMISSIONER JACOBS: What did the order say?
19 What did our order say?

20 MS. HELTON: If I could read a little bit more
21 from the recommendation:

22 "Staff has reviewed the utility's DEP operating
23 permits for wastewater treatment plants and where the
24 permit shows a flow upon which the capacity is based,
25 that flow should be used in used and useful

1 calculations." There is no record cite there.

2 COMMISSIONER CLARK: Well, they were looking for
3 a record cite as to the change in the policy, is that
4 right?

5 MR. SMITH: They were looking for an explanation.
6 You've got to understand this is a strict
7 interpretation of the APA. And that's what is out
8 there now and they're going to apply.

9 COMMISSIONER CLARK: Yes. Let me ask, is that
10 what that file -- that folder is, is all the old cases
11 on it?

12 MR. TALBOTT: This here?

13 COMMISSIONER CLARK: Yes, what is that?

14 MR. TALBOTT: Well, this is the information about
15 the case.

16 MR. HILL: Yes, my boss asked me what went wrong,
17 what happened, why are we in this particular
18 situation. And so we put together an explanation,
19 obviously, made some schedules. One of them includes
20 the past 15 or 20 wastewater cases and whether there
21 was matching or mismatching. And then the rest is
22 information that we had from those other cases, Palm
23 Coast rate cases.

24 COMMISSIONER CLARK: I'm sorry. What was the
25 first thing you said, whether there was matching or

1 mismatching?

2 MR. HILL: Yes, to show the court what our
3 engineers recommended and this Commission has adopted
4 as far as the use of the numerator and the
5 denominator.

6 COMMISSIONER CLARK: In how many cases?

7 MR. HILL: About 15 or 20; 15 or 20. It was
8 about 20.

9 COMMISSIONER CLARK: And do they all show that we
10 are consistent in using a numerator and denominator
11 that comes either -- if the permit is annual flow,
12 then we use annual flow.

13 MR. HILL: We have them matching in all except
14 two, Commissioner. And one of them is the one that is
15 on appeal that we missed, Florida Cities. And the
16 other that I see is Lake Placid, and that one was also
17 that we missed. So with the exception of two that we
18 missed, yes, they match.

19 COMMISSIONER CLARK: Is that the one they mention
20 in here?

21 (Inaudible).

22 COMMISSIONER CLARK: What was the one we missed,
23 was missed?

24 MS. HELTON: I think they mentioned in the
25 opinion the -- it's not Bear Creek, but --

1 MR. HILL: Barefoot.

2 MS. HELTON: Barefoot.

3 UNIDENTIFIED SPEAKER: Barefoot Bay.

4 COMMISSIONER CLARK: Is that on appeal?

5 MR. SMITH: No.

6 MR. HILL: No, ma'am.

7 COMMISSIONER JACOBS: Then this case that is on
8 appeal, it does not appear that we missed. We did
9 what we've consistently done?

10 MR. HILL: Yes, sir. We matched in these, yes,
11 sir.

12 CHAIRMAN JOHNSON: But the court is saying we
13 haven't been consistent.

14 COMMISSIONER CLARK: That's the thing I need to
15 know. Maybe we have to supply supplemental authority
16 that shows the cases that we have matched them. Let
17 me ask this: Are they all matching maximum month
18 flow?

19 MR. HILL: Oh, no, ma'am. I mean, they match
20 whatever the denominator is. Again, these are just --
21 these are what Staff put together and --

22 COMMISSIONER JACOBS: What I'm hearing is that
23 that's the policy. The court respectfully
24 misconstrued the policy. I'm not comfortable with
25 trying to back away from the policy, and that's what

1 essentially we're saying. Do we back away from the
2 policy?

3 CHAIRMAN JOHNSON: Well, I don't think we're
4 saying --

5 COMMISSIONER CLARK: No.

6 CHAIRMAN JOHNSON: -- from the policy. They're
7 saying we have to prove it up. And it seems to me --

8 COMMISSIONER JACOBS: No, look. No. If we
9 concede error in the present case, didn't we do
10 consistently what we did in the present case?

11 CHAIRMAN JOHNSON: The error that she was saying
12 let's concede is that we didn't have the evidence in
13 the record, not that we didn't do the same thing we've
14 been doing.

15 COMMISSIONER JACOBS: Then let's isolate on that.
16 Let's not -- let's be very narrow. If we're going to
17 talk about something, let's talk about the procedural
18 point of having competent substantial evidence --

19 MS. HELTON: And that's -- and if I gave you the
20 impression that I thought otherwise, then I misspoke
21 or spoke too broadly. My concern is not with the
22 policy -- Mr. Hill doesn't want to call it a policy.
23 I believe it's a policy. The policy, per se, is the
24 fact that we don't have competent substantial evidence
25 in the record to support it.

1 COMMISSIONER JACOBS: To support an ongoing
2 policy.

3 (Simultaneous conversation).

4 CHAIRMAN JOHNSON: -- incipient policy. We kind
5 of -- because we've not been consistent all the time,
6 the court is saying, "Well, what really is your
7 policy. First of all, you have nothing in writing and
8 there is two or three times where you did it
9 differently. How are you going to tell me what your
10 policy is?" That's kind of what --

11 COMMISSIONER CLARK: It's not two or three times.

12 CHAIRMAN JOHNSON: He said Barefoot Bay, this
13 one.

14 COMMISSIONER CLARK: Okay.

15 CHAIRMAN JOHNSON: I thought it was three --

16 MR. SMITH: The court said in the Florida Cities
17 case, "You've deviated from your policy. Your policy,
18 based on these orders that we've seen, and the policy
19 statement -- the statement you made two days later, we
20 find that you have deviated from your existing policy,
21 and it's not simply correcting a miscalculation. You
22 have changed your policy for calculating used and
23 useful by going to this average annual daily flow.
24 And, therefore, since there was no competent --" well,
25 it says, "You couldn't explain -- there is no

1 explanation for the policy change, and that standing
2 alone would be grounds for reversal.

3 But even more, there was no competent substantial
4 evidence to support the other piece of your decision,
5 which was the calculation of the total capacity of
6 that plant of 1.5 million gallons per day."

7 MR. TALBOTT: But the first statement they make
8 isn't correct.

9 MR. SMITH: Well, all I can say at this point is
10 that that was their interpretation.

11 MR. TALBOTT: I understand that.

12 COMMISSIONER CLARK: But we have -- I think what
13 we should do in this coming case is explain to them
14 what our policy is, it's a matching of those two
15 things.

16 COMMISSIONER JACOBS: The last time I read
17 (inaudible) the last time I read an agency's
18 interpretation of their own statute the court took
19 deference.

20 MR. SMITH: That's right. And the court
21 recognized that and said that typically in the
22 opinion, but not in this case.

23 COMMISSIONER JACOBS: They took exception to that
24 rule.

25 MR. SMITH: Well, no. I mean, they considered

1 it, but -- well, you know, the decisions are entitled
2 to deference and so on.

3 CHAIRMAN JOHNSON: David, they actually had the
4 -- I guess the first part of that. I thought they
5 were focusing more on the fact that we didn't have the
6 evidence in the record. But they said that -- they
7 affirmatively stated that we changed our policy.

8 MR. SMITH: Right. And then there is a footnote
9 on Page 15, I think, where it's pretty clear. It
10 says, "To the extent, if any, the discrepancy is
11 attributable to a change in policy, no explanation for
12 such a change has been offered. No policy change has
13 been, in fact, articulated in this regard. For the
14 reasons discussed in the previous action, no such
15 policy change could be upheld, in any event."

16 COMMISSIONER DEASON: Well, what is the court's
17 interpretation of what our policy is?

18 MR. SMITH: Their interpretation, you know --

19 COMMISSIONER DEASON: To have a change in policy
20 and say it's a change in policy, they have to know
21 what our original policy was. What is their --

22 MR. SMITH: They believe that our policy,
23 consistent with the cases that were cited, was that we
24 did not match the numerator and denominator in
25 calculating the --

1 COMMISSIONER DEASON: Is that the two cases that
2 are the exception that they're relying on?

3 MR. SMITH: Well --

4 MR. HILL: I think that one of the problems is
5 that many of us often say what the Commission's policy
6 is, and I think one of the problems is until it is
7 brought before you and (inaudible) issued a policy,
8 there really is not a policy. I know we, as staff,
9 are often guilty of saying this is the Commission's
10 policy, and you've corrected us at the conferences.

11 And this is one of those where what is the
12 appropriate meaning we have given a particular
13 denominator, and to my knowledge that has never been
14 brought to your attention, except in the Southern
15 States case and through a used and useful issue in the
16 Palm Coast. To my knowledge that's never been an
17 issue that's been brought to you.

18 COMMISSIONER DEASON: Well, let me ask a
19 question. Does the court think that our policy is to
20 use the maximum month, regardless of what the
21 denominator is? They think that's our policy, to use
22 the maximum month?

23 (Simultaneous conversation).

24 COMMISSIONER CLARK: And that's what wrong with
25 it. That's a misunderstanding on their part. But I

1 guess the problem is -- it's what you're saying, it's
2 intuitive. Because however you size your plant, if
3 you say you're going to -- the plant is sized for X
4 capacity, then our job -- and you have \$100,000
5 investment, in order to determine used and useful,
6 it's our job to say, well, how much of that plant is
7 used and useful.

8 And it's axiomatic that you use the same basis
9 for determining used and useful as in the permit.
10 That's the policy. I mean, it's not even a policy,
11 it's -- what do you call it in a --

12 (Simultaneous conversation).

13 MS. HELTON: And that's what Ms. Caldwell argued
14 to the court.

15 (Simultaneous conversation).

16 MR. TALBOTT: No brainer.

17 (Laughter).

18 CHAIRMAN JOHNSON: No brainer. Use the no
19 brainer word.

20 COMMISSIONER JACOBS: The problem we have is how
21 do we go back to them and try to explain to them --

22 UNIDENTIFIED SPEAKER: Well, I think our first
23 shot is in SSU -- I'm sorry.

24 (Simultaneous conversation).

25 COMMISSIONER JACOBS: Unless there is some

1 sentiment to backing away from that policy and then --
2 I think we're in a much worse position if we try and
3 manipulate what we do now to somehow appease the
4 court. If we try and muddy up what we're doing, if we
5 have record evidence that simply it hasn't been
6 enunciated yet, then we go back and try and do
7 something that somehow clarifies that record evidence,
8 I think we're in the worse case. I think we stand --
9 well, let me not get too far, but I think if we have
10 evidence, we may have to -- you know, the court may --
11 you know, we may have to face the music with the court
12 until we help them understand this.

13 But I think what I'm hearing is that the policy
14 had been misconstrued by the court, and I think it is
15 incumbent upon us to help them understand that. If
16 they don't want to listen, that's one thing. But I
17 think it's wrong for us not to tell them.

18 COMMISSIONER CLARK: Where is -- you know, they
19 seem to -- what does our guide, our DORP say?

20 MR. TALBOTT: I'd be surprised if there's
21 anything in them.

22 COMMISSIONER CLARK: Well, they cite to it.

23 MR. SMITH: The court cites the DORP.

24 MS. HELTON: Well, I'm a little bit confused
25 about that, because the version of the DORP that I

1 have there is different --

2 COMMISSIONER CLARK: (Inaudible).

3 MS. HELTON: It's different than what the court
4 cited to. But it seems to me the Sailfish case that's
5 there under the used and useful category deals with
6 water, not wastewater. And it doesn't seem to me to
7 deal with annual average max month. So that -- and
8 the engineers can tell me better. So that kind of
9 confused me a little bit. But it does say there, you
10 know, this is the current policy. And I think that's
11 what they picked up on.

12 COMMISSIONER JACOBS: (Inaudible).

13 MS. HELTON: In the DORP.

14 CHAIRMAN JOHNSON: The DORP says --

15 COMMISSIONER CLARK: What is the DORP?

16 MR. TALBOTT: Digest of Regulatory Policies or
17 Philosophies. But it doesn't really have any weight.
18 It's not a rule. It's not an order. It's not case
19 law. We put it together mostly and make it available
20 to new staff as a training tool.

21 COMMISSIONER JACOBS: That does not override a
22 stream of final orders, appealable final orders from
23 this Commission. (Inaudible) stream of final orders
24 is what viewpoint.

25 MR. TALBOTT: Well, lawyers tell me that DORP

1 doesn't have any weight. It's a training document.

2 COMMISSIONER CLARK: Well, somebody cited it.

3 MR. SMITH: Somebody cited it. And I think it
4 does indicate what the agency believes; that is, what
5 the current state of affairs is.

6 COMMISSIONER JACOBS: If that's the case, every
7 order we came out with, final order we came out with
8 that contradicts the DORP, it was an appealable order
9 (inaudible).

10 COMMISSIONER CLARK: I think my view is that --

11 MR. SMITH: The only question is did you explain
12 the deviation from the policy? And you don't agree
13 that the policy is what the court thinks it is, that's
14 fine. On the other hand, with the question of do we
15 have something that explains that, do we have the
16 evidence, do we have the testimony to explain that?
17 And it's not a question of --

18 COMMISSIONER CLARK: Well --

19 COMMISSIONER DEASON: Well, there is the past
20 decisions of the Commission. It's 18 out of 20. And
21 we screwed up on two. I don't know. I mean, that
22 says this is the way we do it, so there's no need to
23 give an explanation to the court, because we followed
24 what we have been doing.

25 COMMISSIONER CLARK: I think the important thing

1 is to have the court understand that they've
2 misunderstood the policy. And, as Commissioner Deason
3 said, it seems like it's intuitive that we match the
4 two. And we have somehow -- I don't think we should
5 confess error. And I think what we should do is say,
6 "We realize in this case you believe that it was a
7 change in policy." And you have to fashion like a
8 one-minute argument that tells them why it is you have
9 to match them to get an appropriate result.

10 (Simultaneous conversation).

11 COMMISSIONER CLARK: I thought that's what this
12 -- what you showed here.

13 COMMISSIONER JACOBS: What they're saying is that
14 the court -- and I think with merit, I think we have
15 to get very wrong on this point. The court is looking
16 to -- looking to the record to try to support for
17 that, and they haven't found it, so they're going to
18 have a tough time, even if they make that argument,
19 have a tough time persuading the court, absent
20 something in the record. And I think that's just
21 where we are. But I still maintain that we are in
22 that posture. Even in that posture we do ourselves a
23 disservice to do anything otherwise. I think -- and I
24 understand your position (inaudible), but I really do
25 think on all we do, we do a disservice if we don't go

1 up there, and if we really believe that's the policy
2 and try and get the court to understand that and
3 certainly hold true to it from now on.

4 COMMISSIONER DEASON: Why is it that the second
5 paragraph in your side-by-side comparison here, why is
6 it that that does not explain what we did?

7 COMMISSIONER CLARK: And what our policy is.

8 MR. HELTON: The problem I have with the second
9 paragraph is that what is it -- what record testimony
10 is it based on? And, also, too, I don't think it
11 fully explains that -- we're concerned about a
12 matching concept. I think you have to read that into
13 there. I think that's kind of a stretch. And I
14 think, too, to me the clincher is -- the problem is
15 you get a skewed used and useful calculation if you
16 don't have the matching. That, to me, is missing from
17 the Florida Water decision. That's what gets it there
18 for the Palm Coast.

19 COMMISSIONER CLARK: And that's what -- and
20 that's what you'll do when you make the oral argument.
21 What you'll say is, you know, it is -- it is implicit
22 in this that when your permit was issued on the basis
23 of average annual, that when you're trying to
24 determine how much of that plant is used, you should
25 use the same basis for calculating, and we've done

1 that. We may have made a mistake in one case, but --
2 one case? What was the other one, again?

3 MR. WILLIS: Barefoot Bay and Lake Placid. We
4 missed it. We just flat-out missed it.

5 COMMISSIONER DEASON: What ratio did we use?

6 MR. WILLIS: They both had annual average. For
7 the flows we used maximum. We just flat missed it.

8 COMMISSIONER DEASON: So the error was to the
9 benefit of the utility, if we made an error.

10 MR. HILL: Oh, yes.

11 MR. WILLIS: It was definitely to their benefit.

12 COMMISSIONER CLARK: Yes. And, you know, I think
13 the reason it's not in your brief and is --

14 COMMISSIONER DEASON: And the thing is -- but if
15 Public Counsel had appealed those two, we would have
16 been overturned there because they would have been not
17 consistent with our policy, and he would have
18 prevailed. And we would have had to have done it
19 differently. Would we not have, following the court's
20 logic?

21 MR. HILL: I think the court's logic says that we
22 use max month, and so we would not have prevailed in
23 the court, because that's exactly what we used, was
24 max month for the numerator and then used average for
25 the denominator.

1 UNIDENTIFIED SPEAKER: From the permit.

2 MR. HILL: From the permit. Again, this was a
3 change --

4 COMMISSIONER DEASON: Well, no -- but if we had
5 explained correctly that our policy is to be
6 consistent, if we had changed policies -- if Public
7 Counsel had said, "You changed policies to the
8 detriment of the ratepayer. This is a bad decision,
9 overturn it," the court probably would have overturned
10 it.

11 MR. HILL: Yes, sir. I'm sorry. I
12 misunderstood.

13 COMMISSIONER DEASON: That's what I'm saying.

14 MR. HILL: Yes, sir.

15 COMMISSIONER DEASON: Well, I tend to agree with
16 Leon, that we need to -- I know it's not going to be
17 an easy task at the court. It seems like nothing is
18 easy at the court these days, but I think we should
19 not admit error. We should go in and try to do our
20 very best job respectfully to explain what we think
21 the situation is. And if we get overturned again; we
22 get overturned. But I don't think we need to admit
23 error.

24 CHAIRMAN JOHNSON: Did Public Counsel -- they
25 supported us on this proposition -- is this the case?

1 MS. HELTON: Public Counsel filed a cross-appeal
2 in this case. However, they supported the Commission
3 -- they wrote a brief supporting the Commission's
4 order on most of the issues raised by Florida Water,
5 including this issue.

6 CHAIRMAN JOHNSON: Are they going to argue
7 tomorrow -- or next week?

8 MS. HELTON: It's next Tuesday. No. They were
9 planning on arguing on the issues raised in their
10 cross-appeal, but not the issues raised in Florida
11 Water's appeal.

12 COMMISSIONER CLARK: Do you know who's arguing it
13 for them?

14 MS. HELTON: For whom?

15 COMMISSIONER CLARK: Public Counsel.

16 COMMISSIONER DEASON: For Public Counsel.

17 MS. HELTON: Charlie Beck is arguing it on the
18 cross-appeal. He wrote the cross-appeal brief.

19 (Simultaneous conversation).

20 COMMISSIONER CLARK: Even if -- you're nervous
21 about the record support. And what the court seems to
22 indicate is it's critical when you want to change your
23 policy, but we're not changing our policy.

24 MR. SMITH: Let me say something. That's
25 certainly true what you said. But if you have an old

1 policy and it's challenged, if you don't have record
2 support for it, you're going to be in the same boat.

3 COMMISSIONER JACOBS: Right.

4 MR. SMITH: You can say our policy is so and so,
5 look at all these orders. Somebody challenges it, and
6 you said, "Well, it's our policy." Okay. Where's the
7 evidence? And that's the problem. And when a policy
8 is matured -- I mean, not only that, if you rely on a
9 nonrule policy, and somebody can demonstrate that that
10 should have been a rule, you're subject to a rule
11 challenge over there based on an unadopted rule.

12 COMMISSIONER DEASON: We may have a policy that
13 says when we make a comparison, we compare apples to
14 apples. So we have to have an expert witness to say,
15 "Well, you need to compare apples to apples"?

16 COMMISSIONER JACOBS: Well, see, that's what a
17 never win situation is.

18 MR. SMITH: No, I don't think it's a no win
19 situation. You know, if your policy is challenged in
20 whatever context, you know, you need record support
21 for it. And that's the bottom line.

22 UNIDENTIFIED SPEAKER: Or a rule.

23 MR. SMITH: Or a rule.

24 COMMISSIONER CLARK: But Commissioner Deason's
25 point is just how deeply do you have to go in this

1 policy. Do you have to say, "We're going to use
2 regularly accepted mathematic equations or accounting
3 terms in all of our policies." And I don't think you
4 have to.

5 MR. SMITH: Well --

6 COMMISSIONER CLARK: And I think what we have to
7 say here is simply that it's our policy to match the
8 -- used and useful, we will use whatever they have
9 used to gain their permit. If they use average annual
10 flows, that's what we've used; maximum daily flows,
11 that's what they have used. In the few cases where we
12 made an error, we made an error and it probably wasn't
13 taken up because it was to the benefit of the utility.
14 And was Public Counsel even in there?

15 COMMISSIONER JACOBS: So as not to have her go in
16 and seeming arrogant to the court --

17 COMMISSIONER CLARK: Yes, I agree.

18 COMMISSIONER JACOBS: -- I'm wondering do we
19 acknowledge the procedural evidentiary issue? I don't
20 know if that means much to the court. They see that
21 as a very substantive issue. They will tell you very
22 much so. But what I'm asking now is is it worthwhile
23 -- is there a difference from saying we acknowledge
24 that we didn't have record support for what we
25 considered to be an ongoing and very substantial

1 agency policy?

2 MS. HELTON: You mean be upfront about it?

3 COMMISSIONER JACOBS: Yeah.

4 CHAIRMAN JOHNSON: But then, see, there's two
5 things, because, to me, what we're trying -- I'm
6 following you, Commissioner Jacobs. There's two
7 threshold issues here. First, we're going to tell
8 them, you're wrong, this is our policy. And we didn't
9 put it in the record, but we don't think we should
10 have had to, because it's common sense. So that's
11 hard to say.

12 (Laughter).

13 Both those things. So with that in mind --

14 (Laughter).

15 COMMISSIONER CLARK: I don't think it's hard to
16 say. I mean, it's a matter that, you know, we may
17 not --

18 CHAIRMAN JOHNSON: Especially when she's saying
19 it.

20 (Laughter).

21 COMMISSIONER CLARK: What day is this, on the
22 10th?

23 MS. HELTON: It's next Tuesday, whatever that is.

24 COMMISSIONER CLARK: I'll be sitting behind you.

25 (Laughter).

1 COMMISSIONER CLARK: I guess my feeling is that
2 it just seems so fundamental to me. And what we may
3 need is some charts that indicate why -- somehow you
4 ought to be able to depict the notion of apples to
5 apples comparison.

6 MS. CALDWELL: I did. I put it in my brief, and
7 I thought it was very succinct. I mean, I showed how
8 you calculated average annual daily flow. I showed
9 how it would be a skewed result, and I did
10 calculations in my brief to explain the skewed result,
11 that it was a mathematical calculation. And I argued
12 that it was a mathematical calculation and I was --
13 you know, mixing apples and oranges. And I quoted
14 apples and oranges. And they didn't buy it. I mean,
15 I explained it to them as a mathematical calculation.

16 COMMISSIONER JACOBS: Because they didn't think
17 we --

18 MS. CALDWELL: Miscalculation.

19 COMMISSIONER CLARK: Well, that may be the
20 problem, because what you -- it's a matching concept.
21 It's not a math --

22 MS. CALDWELL: Well, you have to -- it skews --
23 it skews the result if you do not match them. You're
24 required to match them, otherwise you don't know what
25 the -- I mean, it really doesn't give you --

1 COMMISSIONER CLARK: I guess it probably goes
2 back to them understanding what the used and useful is
3 attempting to -- the calculation is attempting to
4 determine how much of the current plant should be paid
5 for by customers. And you should always start with
6 the permitted capacity, because you assume that it
7 matches the permitted capacity. And if you use --
8 whatever is used in the permitted capacity ought to be
9 the method you use to do these. And it may be that
10 fundamental, but I think we need to try again.

11 COMMISSIONER DEASON I agree. And it needs to
12 be done respectfully, and the court will either agree
13 or disagree. But I don't think we need to admit
14 error.

15 MR. SMITH: If that's what we do, no problem.

16 COMMISSIONER JACOBS: Which one of you want to do
17 it?

18 CHAIRMAN JOHNSON: The policy argument to me is
19 the easier part of that.

20 (Simultaneous conversation).

21 MR. SMITH: Well, you don't know who the panel is
22 at the DCA.

23 COMMISSIONER CLARK: No.

24 CHAIRMAN JOHNSON: Oh, it's not the same --

25 MR. SMITH: We don't know. I mean, there's --

1 there are two divisions. One group is assigned to the
2 administrative law and they're (inaudible). But I
3 think it may have been involved a semi-retired judge,
4 anyway.

5 COMMISSIONER CLARK: Is Ervin retired?

6 MR. SMITH: Beg your pardon?

7 COMMISSIONER CLARK: Is Ervin retired?

8 MR. SMITH: I think so, but I could be wrong.

9 But, in any case, a couple of them are still on there.

10 COMMISSIONER CLARK: Well, I just think that it
11 needs to be -- I'm uncomfortable confessing error,
12 because I don't think we erred. I don't know how else
13 to put it.

14 CHAIRMAN JOHNSON: So you don't think -- I agree
15 with you on the policy change, that it wasn't a policy
16 change. But it is incipient policy. And this is
17 something they're going to have to be very clear in
18 explaining. It is incipient policy, but we did not
19 have anything in our order or anything in the record
20 upon which to provide the necessary evidence. And
21 what you are saying we should argue is that because
22 it's --

23 COMMISSIONER CLARK: The notion of matching is so
24 fundamental, how do you put it in a rule? I mean,
25 maybe --

1 CHAIRMAN JOHNSON: Or how do you put it in the
2 order, or you don't need evidence.

3 MR. HELTON: We have a draft rule that's never
4 been proposed.

5 COMMISSIONER JACOBS: But at best, or worse,
6 maybe, it depends on the way you look at it, I think
7 it takes away from the court's sense that we so
8 violated some entrenched policy to the harm of this --
9 of this petitioner.

10 COMMISSIONER CLARK: Well, you know, you can
11 resort to end results doctrine and fundamental
12 fairness. It's not like we've violated fundamental
13 fairness, I think.

14 (TAPE CHANGE).

15 COMMISSIONER DEASON: Is the court saying there's
16 no evidence to do what we do? Is that part of the --
17 basically what they're saying? There's no evidence
18 for us to change a policy, which they felt was our
19 policy, but we're saying it's not our policy?

20 COMMISSIONER CLARK: I don't know.

21 MR. SMITH: In the Florida Cities case they were
22 saying that there was no competent, substantial
23 evidence to support the calculation of the total
24 capacity of the plant. And, otherwise, you know, the
25 policy should have said that. But, you know, you

1 deviated from the policy from our information, which,
2 you know, is the same difference, I guess, that there
3 was no evidence to support that policy. And the
4 application of it was not -- the way you did it was
5 not supported by any evidence. But that's my reading
6 of it.

7 CHAIRMAN JOHNSON: David, if they had determined
8 that it was our -- say they had reached that threshold
9 question, and they said, "Okay, this is their policy,"
10 would they have still said but we needed to have
11 evidence in the record?

12 MR. SMITH: Yes. I think they would have said
13 that you didn't have sufficient evidence for the plant
14 capacity.

15 CHAIRMAN JOHNSON: And that's where Susan's
16 argument is, is that we need to explain to them why it
17 is unnecessary for --

18 COMMISSIONER DEASON: Well, I guess I have an
19 even more fundamental question. Are we getting to a
20 point to where, then, whatever a utility files, that's
21 accepted as truth, and we have to put on evidence to
22 show -- for us to do anything different than what's in
23 their application?

24 MR. SMITH: No.

25 COMMISSIONER DEASON: Is the burden on us to put

1 evidence in to disallow anything they've requested?
2 Is that what we're getting to?

3 MR. SMITH: I think no. It's not a matter of us
4 having to prove up their case, you know, supplying
5 evidence to disprove their case. On the other hand,
6 if we choose to either -- let's say if we want to
7 change our policy and do something different, and
8 someone challenges it, if you don't have evidence,
9 then you're going to be subject to the same kind of
10 criticism, that you didn't properly support your
11 policy.

12 If you have a policy in place, a non-rule policy,
13 and you don't -- and someone challenges it, says
14 that's the wrong way to go. We say that's the way
15 we've been doing it, and someone says that's wrong.
16 And I don't know whether that occurred in the Florida
17 Water case or not.

18 COMMISSIONER DEASON: You're saying we've got to
19 have evidence on our policies.

20 MR. SMITH: If you haven't adopted it as a rule,
21 you may if someone challenges you. I think -- you
22 know, get out of this speculation. But it seems --

23 COMMISSIONER DEASON: Well, we have a policy that
24 says net plant is -- what we're going to have to put
25 in rate base is less accumulated depreciation, and you

1 don't do it on a gross plant basis. I mean, this is a
2 very simplistic thing. But we've got to have an
3 expert on every case that says, "Now, we don't put
4 gross plant in; we have to take the depreciation out
5 to make it (inaudible). I mean, it's so absurd.
6 Everybody knows that's the way you do it, but nobody
7 testifies that that's the way you do it. Everybody
8 just knows that's the way you do it.

9 MR. SMITH: Well, if you're subject to challenge,
10 you know. I think that's the question. I mean, if
11 people accept our policies, and have for years, and
12 have never mentioned areas where we don't have an
13 adopted rule for policy, and that (inaudible) wrong.
14 As soon as someone challenges it, as I say, you know,
15 the Administrative Procedure Act has now got more
16 traps than you can believe. Because if you do have a
17 policy, which could be a rule --

18 COMMISSIONER DEASON: See, that's the problem I
19 have. What if somebody very -- an attorney comes in
20 and says, "They have no evidence that says rate base
21 should be based upon net plant instead of gross."

22 MR. SMITH: I don't think they will.

23 COMMISSIONER DEASON: So they come in and say,
24 "They didn't prove up, so, court, you've got to
25 reverse their decision and do it on gross plant."

1 That's an absurd result.

2 MR. SMITH: They have to raise the issue.

3 COMMISSIONER DEASON: Where?

4 MR. SMITH: In the hearing.

5 COMMISSIONER JACOBS: (Inaudible.)

6 MR. SMITH: Right. You can't -- you can't decide
7 on appeal that all these things that you now look back
8 and decide that might be, you know, against the
9 interest and are going to be raised on appeal, you have
10 to bring it --

11 COMMISSIONER DEASON: Was this a specified
12 delineated issue?

13 MS. HELTON: Yes.

14 COMMISSIONER DEASON: Not just what is used and
15 useful, because it's always an issue in every case,
16 but is the issue do we match or do we use maximum
17 month versus average month?

18 MS. HELTON: The issue --

19 MR. HILL: In Southern States, Commissioner, we
20 have specific issues, but in no other case. In
21 Florida Cities it was merely used and useful as was in
22 Palm Coast, but we had a witness to cover the
23 numerator and denominator. We specifically made it an
24 issue in Southern States because they did catch us
25 with our pants down in Florida Cities. I admitted

1 that to Dr. Bane in her office in (inaudible). You
2 know, they caught us midstream in Florida Cities and
3 we relied upon a permit for the very matching reasons
4 this makes sense.

5 In Southern States we took it to another level,
6 and said this needs to be a specific issue. And then
7 in Palm Coast we put a witness on.

8 COMMISSIONER CLARK: What is the issue?

9 MS. HELTON: The issue is what is the appropriate
10 flow data to use for calculating used and useful for
11 wastewater treatment plant and effluent disposal? And
12 Staff's position was -- I think I have that listed in
13 my table.

14 COMMISSIONER CARK: What does it say?

15 MS. HELTON: It's known demands which match the
16 plant design data, which are the three-month average
17 daily flow, annual average daily flow, or maximum
18 month average daily flow reduced by excessive
19 infiltration and/or inflows should be used. If the
20 designed demand data is not known, then the average
21 daily flow in the maximum month should be -- excuse me
22 -- maximum month reduced by excessive infiltration
23 and/or inflows should be used.

24 COMMISSIONER CLARK: What is SSU's position?

25 MS. HELTON: The average daily flow in the

1 maximum month should be used in order to provide for
2 some consideration of economies of scale, and that
3 those facilities from the permitted capacity have a
4 designed basis of annual average or three-month
5 average daily flow. There should be no adjustment for
6 excessive infiltration and/or inflow as indicated.

7 COMMISSIONER CLARK: Do they agree with our
8 policy?

9 MR. HILL: No, no. They want the mismatch, so
10 that they get a higher used and useful. They want the
11 monthly average as the numerator and the annual as the
12 denominator, which will automatically increase their
13 used and useful.

14 CHAIRMAN JOHNSON: And they had testimony to
15 support the mismatch?

16 MR. HILL: I do not know.

17 COMMISSIONER CLARK: Let me ask, what did we do
18 in their prior case? Did we match?

19 MR. HILL: In their prior case we did the best we
20 could to match everything, yes, ma'am.

21 COMMISSIONER CLARK: I think we should show that.
22 And the court didn't reverse us on that one. They
23 didn't appeal it, did they?

24 MR. WILLIS: Are you talking about the 920199
25 docket?

1 MR. HILL: Yes.

2 COMMISSIONER CLARK: Yes.

3 (Simultaneous conversation).

4 MR. WILLIS: All the permits were based -- they
5 were probably prior to 1993, so there were no permits
6 with annual average daily flows at that point.

7 COMMISSIONER CLARK: So --

8 MR. WILLIS: DEP changed it's practice about the
9 permitting process in 1993.

10 COMMISSIONER CLARK: And what did they do to the
11 maximum?

12 MR. WILLIS: That's where they allowed the
13 utility to elect which level they wanted to set
14 capacity at. And in the prior rate case of Southern
15 States that was prior to that point, a '92 docket
16 based on a '91 test year.

17 MR. HILL: That's where the denominator would not
18 have been specified on the permit, and so we would
19 have used the max month.

20 COMMISSIONER CLARK: Well, it seems to me that I
21 would not recommend that we confess error. I think we
22 should respectfully explain to them that the policy
23 has always been to look to the permit and see on what
24 basis the permit is issued, and that we compare apples
25 to apples. And whether or not that should be in a

1 policy -- that has to be in a policy, in a rule, I
2 think is a matter of debate. Just how refined do your
3 rules have to get? And at some point it becomes, the
4 minutia to which you have to include in your rule
5 makes them unworkable. You have that common sense law
6 that dictates, in this case, that it is appropriate to
7 match it.

8 COMMISSIONER DEASON: Well, it seems to me that
9 if there was a delineated issue that Southern -- I
10 want to say Southern States, but Florida Water
11 Services, whatever, that they have a burden, then, to
12 put evidence on, too. At least Mr. Crouch, I see him
13 shaking his head, that there was no evidence in the
14 record --

15 MR. CROUCH: I don't think they provided a
16 witness for that issue at all. Nobody did.

17 COMMISSIONER CLARK: Which sort of supports the
18 notion that nobody thought it needed evidence, that it
19 was a matter of common sense for, you know, an
20 application of generally known ratemaking principles
21 that you would look to base a text on. The less that
22 you can use -- use your basic regulatory authority.

23 MS. HELTON: And I don't want to beat a dead
24 horse, but then why did we go to the bother in the
25 Palm Coast case of having Karen Amaya put on the stand

1 to support this, and why was their refuting testimony
2 based on -- to rebut Ms. Amaya's testimony on behalf
3 of the utility, which is going to be heard the next
4 day?

5 MR. HILL: It is my belief that the court is,
6 indeed, clamping down on us and that we do not have
7 the latitude that we have had in the past. In my
8 meetings with Dr. Bane and Mr. Talbott, I have asked
9 to reorganize the (inaudible) they have approved
10 because they are putting on witnesses in every case
11 from now on. Because I think they are (inaudible),
12 and that's why we now are making decisions to put on
13 witnesses.

14 COMMISSIONER CLARK: Yes. You know, that is an
15 entirely reasonable answer in the sense that in order
16 for us to do the best we can to comply with changes in
17 the law, we're finding ourselves having to go through
18 the burden and expense of putting on witnesses, but we
19 thought we did the right thing, and it made sense, and
20 we ought not have to do it. But if you tell us we do,
21 we will.

22 CHAIRMAN JOHNSON: But they have already told us
23 we have to in this case before.

24 COMMISSIONER CLARK: No, but I think the point is
25 that we think that with all due respect, they have

1 sort of misunderstood the policy. They've only looked
2 at one part of it. The policy is that you look at
3 what's the basis on which it's permitted so that you
4 use that in the denominator.

5 MR. HILL: Yes, ma'am.

6 COMMISSIONER CLARK: And you use an apples to
7 apples comparison in that equation, so your numerator
8 has to be based on the same --

9 COMMISSIONER DEASON: I just want to make it
10 clear that if I sincerely thought that we made an
11 error, I'd be the first to say let's go over there and
12 tell them right now we've made an error and let's
13 avoid some of this debate and discussion, and we'll go
14 and do better in the future.

15 But this was not -- you know, the court may tell
16 us we made an error, but that doesn't mean that I
17 think we made an error. I mean, I don't think we did
18 in this case. And I think this case is a little bit
19 different than the -- even if you assume that the
20 given -- if the court said we made an error, we made
21 an error in the previous case. I still think this
22 case is enough different to try to go forward and
23 convince the court otherwise.

24 CHAIRMAN JOHNSON: Different than the one where
25 they ruled upon that we did make a mistake?

1 COMMISSIONER CLARK: And I really think that the
2 thrust --

3 COMMISSIONER DEASON: Whether the court thinks so
4 or not is a different question.

5 COMMISSIONER CLARK: It's the notion of sort of
6 basic regulatory philosophy upon which all policies
7 are built. And you can cite a litany of matching
8 things. If you annualize an expense, you annualize
9 the revenue.

10 COMMISSIONER DEASON: That's good, Susan.

11 (Laughter).

12 COMMISSIONER CLARK: Well, that's the point. You
13 have to have a matching if you do correct ratemaking,
14 and that's fundamental. And you may be able to find
15 that in what -- what is that book on ratemaking? And
16 you can add it as a supplemental --

17 MR. TALBOTT: Bonbright.

18 COMMISSIONER CLARK: -- as a recognized text.

19 COMMISSIONER DEASON: The court said that you
20 don't use a year-end rate base with average revenue,
21 unless it's extraordinary circumstances and the
22 company has the burden to show that. I mean, that's
23 matching?

24 COMMISSIONER CLARK: I think that's -- when are
25 your (inaudible).

1 MS. HELTON: Tomorrow afternoon and Friday
2 afternoon.

3 COMMISSIONER CLARK: I'll try to be here.

4 CHAIRMAN JOHNSON: One last question. How are we
5 going to distinguish Diane's case -- I mean, why are
6 these two cases different? Diana.

7 MS. HELTON: I guess I'm going to have to come up
8 with that.

9 COMMISSIONER CLARK: The first thing that I think
10 they've misunderstood, what the policy is. And the
11 policy is that we use whatever is permitted by DEP.
12 And I think you can even say that prior to '93 it was
13 always average annual flow. And after '93 they are
14 now allowing them to elect what the permitted capacity
15 is. But the point is, the policy is based on a basic
16 -- it's not really even a policy. It's a basic
17 regulatory principle that you use matching.

18 MS. CALDWELL: A point -- I think a distinction,
19 too, to be made in the Florida Cities case, in the PAA
20 there was a mismatch between the flows. And so there
21 was -- the numerator and the denominator did not
22 match. One was average annual daily flow and the
23 other was -- and then that was never raised during the
24 case. And nobody ever raised that as an issue during
25 the case, and it was never discussed, and then it was

1 changed when the final order was written. So I think
2 that may be a distinguishing factor for the SSU case,
3 to say that, you know, we've always matched them.

4 COMMISSIONER CLARK: Well, we may -- we may need
5 to -- is the time for going back to the court on the
6 Florida -- on the first case over?

7 MR. SMITH: Yes.

8 COMMISSIONER CLARK: Okay.

9 CHAIRMAN JOHNSON: You all think up some grounds
10 for distinguishing it. Now, do we need to rule, or is
11 this just a direction? That's just our direction to
12 go ahead and to not concede to error.

13 COMMISSIONER CLARK: You've convinced me, and I
14 have the utmost confidence in you. This one is a
15 winner. They both were winners. Just need to explain
16 ourselves better.

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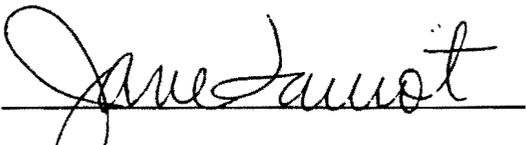
STATE OF FLORIDA)

COUNTY OF LEON)

I, JANE FAUROT, RPR, do hereby certify that the foregoing proceedings were transcribed from cassette tape. And the foregoing pages numbered 1 through 52 are a true and correct transcription of the proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing action.

DATED THIS 28th day of February, 1998.



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