BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of	**DOCKET NO. 971663-WS**
Petition of Florida Cities Water Company for limited proceeding to recover environmental litigation costs for North and South Ft. Myers Divisions in Lee County and Barefoot Bay Division in Brevard County.	

VOLUME 1

Pages 1 through 194

PROCEEDINGS:	**HEARING**
BEFORE:	CHAIRMAN JULIA L. JOHNSON COMMISSIONER J. TERRY DEASON COMMISSIONER SUSAN F. CLARK COMMISSIONER JOE GARCIA COMMISSIONER E. LEON JACOBS, JR.
DATE:	**Wednesday, August 12, 1998**
TIME:	Commenced at 9:30 a.m. Concluded at 11:00 a.m.
PLACE:	Betty Easley Conference Center Room 148 4075 Esplanade Way Tallahassee, Florida
REPORTED BY:	H. RUTHE POTAMI, CSR, RPR Official Commission Reporter

APPEARANCES:

ROSANNE GERVASI and **TIM VACCARO,** Florida Public Service Commission, Division of Legal Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0870, appearing on behalf of the **Commission Staff.**

HAROLD McLEAN, Associate Public Counsel Office of Public Counsel, 111 West Madison Street, Room 812, Tallahassee, Florida 32399-1400, appearing on behalf of the **Citizens of the State of Florida.**

B. KENNETH GATLIN, Gatlin, Schiefelbein and Cowdery, 3301 Thomasville Road, Suite 300, Drive, Tallahassee, Florida 32312, appearing on behalf of **Florida Cities Water Company.**

WITNESSES

EXHIBITS

P R O C E E D I N G S

(Hearing convened at 9:30 a.m.)

CHAIRMAN JOHNSON: We're going to go on the record. Counsel, could you read the notice?

MS. GERVASI: Pursuant to notice, this time and place has been designated for a hearing in Docket No. 971663-WS, Petition of Florida Cities Water Company for limited proceeding to recover environmental litigation costs for North and South Fort Myers Divisions in Lee County and Barefoot Bay Division in Brevard County.

CHAIRMAN JOHNSON: We'll take appearances.

MR. GATLIN: My name is B. Kenneth Gatlin, law firm of Gatlin, Schiefelbein & Cowdery, 3301 Thomasville Road Tallahassee, Florida 32103 -- something like that. 12, I think -- appearing on behalf of Florida Cities Water Company.

MR. McLEAN: I'm Harold McLean from the Office of Public Counsel. The address is 111 West Madison Street, Tallahassee, Florida, 32399, appearing on behalf of the citizens of the State of Florida.

MS. GERVASI: I'm Rosanne Gervasi appearing with Tim Vaccaro on behalf of the Commission Staff.

CHAIRMAN JOHNSON: Preliminary matters?

MS. GERVASI: Commissioners, we have some proposed stipulations that are set forth in the prehearing order on Page 34.

CHAIRMAN JOHNSON: Let me interject one thing. I notice that we have some customers here. Are they here to provide any additional comments, or are they here to just observe?

MR. McLEAN: Madam Chairman, I'm advised Mr. Dyer is here from the Barefoot Bay area, and he would like to present live testimony to the Commission.

MS. GERVASI: I beg your pardon. I didn't realize that that would probably be the first order of business before we get into the other preliminary matters.

CHAIRMAN JOHNSON: Then if we could, I know, Mr. Dyer, you've been sworn in before, but for purposes of this proceeding, and if there's anyone else here that would like to provide customer testimony, if you could stand and raise your right hand.

(Witness duly sworn.)

CHAIRMAN JOHNSON: Thank you. You may be seated. And welcome. Counsel, is this the appropriate time then to take that particular

testimony?

MS. GERVASI: I think this would be as good a time as any, Madam Chairman.

CHAIRMAN JOHNSON: Mr. McLean?

MR. McLEAN: Thank you, Madam Chairman, The Citizens call Mr. Clinton Dyer, please.

CHAIRMAN JOHNSON: Mr. Dyer, if you could just be seated.

COMMISSIONER GARCIA: Madam Chairman, Mr. Dyer testified at Barefoot Bay.

CHAIRMAN JOHNSON: Yes.

COMMISSIONER GARCIA: If I'm not mistaken, Mr. Dyer, you also gave us something in writing at Barefoot Bay, right?

WITNESS DYER: The purpose of my being here is to have what I wrote to you entered into the record, and with your permission, that's exactly what I'd like to do is read my July 17th, 1998, to the Commission.

COMMISSIONER CLARK: Mr. Dyer, is that the letter -- I think you sent it to me. Or it was about rate base and those --

WITNESS DYER: The letter addresses issues that came up at the Barefoot Bay hearing wherein that we were discussing the base rate and it got confused

with the rate base. So I promised I would clarify that, and I did so in my letter.

And in order to substantiate what has been said, I would like to read it today so it is entered into the record.

CHAIRMAN JOHNSON: Okay, Mr. Dyer, please proceed.

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CLINTON DYER

was called as a witness on behalf of the Citizens of the State of Florida and, having been duly sworn, testified as follows:

DIRECT STATEMENT

WITNESS DYER: I thank you very much, Commissioners. As I told Commissioner Clark at the Barefoot Bay Division customer service hearing, July 14th, 1998, I offered to furnish you with documented evidence of the PSC Staff's propensity to arbitrarily apply rates that neither ensure good service or fair rates.

I asked Staff is there a rule that establishes the base rate. Marshal Willis replied no, but his explanation to me is the problem. Staff does not understand that when sales decline, profits decline. Gas station owners who fail to sell

sufficient gas to make a profit would be entitled to a profit, like monopolies, using Staff's philosophy, by getting some money from customers who don't always stop there for gas. "Why not," Staff reasons, "After all, they did make an investment."

I then asked the Commissioners if they would accept arbitrary figures. I perceived that you would not. However, confusion arose between base rate and rate base, and the issue became obscure. I offer the following to clarify the issue, as promised.

Staff's response, Order No. PSC-96-1147-FOF-WS, Docket No. 951258-WS, Page 47, Revenue Allocation: We find that there are benefits of reuse to the water customers of Barefoot Bay, and these benefits must be recognized in the water revenue increase.

The average usage of the customer and the need to send a stronger price signal to achieve water conservation should be considered when determining whether and how much of the reuse cost to allocate to its customers. We agree. We note that the utility has suggested an investigation into the appropriate criteria for an allocation to be initiated.

Although we do not believe that a docket for such an investigation needs to be established, we do

find that an informal investigation as to the method of allocation may be warranted. Until we are able to establish firm criteria, we find that it is more appropriate for this issue to be handled on a case-by-case basis.

My observation is Staff has no basis in law to defy established principles and practices of accounting.

For example: "Intermediate Accounting, the Matching Process. One of the most important duties of an accountant is to act as an historian. It is his function to record, classify, and summarize business activities so that the data can be used in evaluating the past as well as planning the future.

Both cost and revenues are expressed in the matching process in terms of the homogeneous qualitative element common to both, a money price. The price for the business effort or cost is found in the amount paid for the goods and services at the time these were originally acquired.

The price that is assigned to the business accomplishment or revenue is the bargained amount arrived at between buyer and seller. These costs may be marshalled into different combinations where the business unit unites different acquisitions to the

development of its services or products. Ultimately such costs individually or as regrouped are assigned to the revenue that they have produced. The use of historical costs in the matching process is commonly referred to as application of the cost principle.

Kindly note, accounting principles do not mention the need to send a stronger price signal to achieve water conservation. What legal principle does the PSC Staff apply to impose its will upon the people? And accounting principles do not state "We find that it is more appropriate for this issue to be handled on a case-by-case basis." And what legal principle permits the PSC Staff to experiment at the customers' expense? Staff is the problem.

Kindly refer to Order PSC-96-1147-FOF-WS, Docket No. 951258-WS, Page 48 and 49: "Rates and Rate Structure, Revenue Allocation Between Base Facility and Gallonage Charges."

The second paragraph: We have traditionally allocated fixed costs to the base facility charge and variable costs to the gallonage charge. We find this method most appropriate in determining the proper rate structure. Furthermore, when establishing the rate structure, we must also consider the effects on conservation and the previous allocation from prior

rate cases to assure continuity in rates.

Further, Melinda G. Pace's letter, 1/18/96 to Mr. and Mrs. John Bickel stated that there is no profit built into the base facility charge; all profit is built into the gallonage charge.

Now, there are two sets of rules; one on fixed and gallonage charges, and one with exceptions to those charges. We also have a contradiction to those statements.

Kindly refer to FCWC rate filing Docket 951258-WS: Common equity is included in the adjusted capital structure," Page 126, Column 7, which is shown on Page 10 and 12, $1,148,521 water, and $7,519,843 sewer, which $2,654,417 is common equity. 8.75% return on common equity is $232,261, and is in the rate base for water and sewer; Pages 51 and 75.

The meter charges versus usage charges line chart, which is -- accompanies the letters that were sent to you, and the fixed base rate versus gallonage volume bar chart enclosed substantiate that both Melinda Pace's letter and the statement made by Staff is untrue.

One wonders if they know how serious the problem is. How difficult it is for an ordinary citizen to uncover the fact that the information given

by Staff not true. Staff is the problem.

Third paragraph: When the shift in revenue allocation goes more towards the base facility charge which promotes revenue stability for the utility, we become concerned that it will promote usage. Based on this adjustment and the effects it could have on conservation, we find it appropriate to allocate 58% of the revenue to the base facility charge and 42% to the gallonage charge for water. This will essentially maintain the current revenue allocation for water.

For wastewater we find the allocation of 62% of the revenue to the base facility charge, and 38% to the gallonage charge is appropriate.

Staff said "Although the Commission has no rules on allocating revenue requirement to the base facility charge or gallonage charge... (as read)

Staff would have you believe that there are no guiding accounting practices and principles, so they have developed one.

With the multitude of public service commissions throughout the country, what have they learned about fixed rates?

Now, we hope the Commissioners will exact a definitive rule that addresses only the application of matching costs.

Staff is the problem. The PSC Staff ought to make certain that the facts and figures presented to the PSC by the utility company is a factual representation of the cost incurred and that they are reported in accordance with generally accepted practices and principles of accounting, and that the service meets the needs of the customers and analysis of the figures and activities reflect good service at a fair price -- at a fair rate.

But Staff marches to a different drummer. Conservation can be found in utility company programs that reduce water losses and water intrusion. Customer conservation programs are either voluntary or forced. Some customer conservation programs are directed at equipment that limit water consumption; that is, water restricting devices and low water consumption toilets, recently discovered to create more problems than they solve.

However, PSC Staff's philosophy is to force conservation by raising the price. The market price controls access, and that's legal, but regulated monopolies apply only the real costs to establish a fair return. Everything else is a figment of Staff's imagination.

First and foremost, forced conservation is

rationing and must be applied equally to all. Higher costs punish the poor and doesn't restrain the wealthy. That violates Amendment 14 of the Constitution; "nor deny to any person within its jurisdiction the equal protection of the laws."

Second: If water conservation is a serious threat to the welfare of the people, appropriate legislative action must address the issue on purely scientific revelations and the means to make life's necessities accessible to the people even if some of the costs must come from general funds.

Third: Staff must relegate conservation to what the company can do to reduce losses and inflow. Staff could provide helpful conservation information to customers on a periodic basis, including statistical data on availability, purity, problems, projects, and funding of water supplies.

We suggest that the Florida Public Service Commissioners request Staff to concentrate on accounting practices and principles and good service at a fair price.

I respect all the people involved, and the conflicting ideas should facilitate better solutions. We cannot progress without Staff's change in philosophy.

Government agency action can be abusive and arrogant. The testimony, Docket No. 951258-WS, FCWC Barefoot Bay Division hearing 4/1 and 2, 1996, of Witness Blizzard: DEP said, we don't. Those are your problems, deal with it. We expect to see construction under the schedule in the amended consent order regardless of the risks and the potential huge downside financially.

We can't emphasize too strongly such responses are intolerable and reflect the attitude of the agency. Florida Cities Water Company, too, can be perplexed by the arrogance of government agencies and the agency's agenda. Staff did nothing to reprimand the person and the agency for their disdain of Florida Cities Water Company's management and the customers who ultimately pay the cost.

I hope the Commissioners take a more solemn evaluation of all testimony, recognizing Staff has no greater wisdom and provides no better enlightenment than other interested parties.

Please work with our legislators, as Senator Patsy Kurth requested, so as to promote more economical rules and regulations. Hopefully, that may include giving private utility customers the same tax relief enjoyed by public utility customers or some

financial help in providing communities to an economical way of taking over private water and wastewater services.

God bless those in government service who directly affect people's lives, and God bless those on the receiving end. I do not know who needs it more.

I thank you very much for this opportunity.

CHAIRMAN JOHNSON: Thank you, Mr. Dyer.

COMMISSIONER CLARK: Mr. Dyer, we did get your letter, and it was a lengthy letter presenting lots of issues. You will get a response from us.

WITNESS DYER: Thank you.

CHAIRMAN JOHNSON: Thank you very much. Any other customers to testify?

Seeing none, were there any questions of Mr. Dyer?

MR. GATLIN: No questions.

MS. GERVASI: No questions. Thank you. At this juncture, I believe we could move on to the preliminary matters.

And we have, perhaps as a first order of business, some proposed stipulations set forth in the prehearing order that need to be ruled upon. They are contained on Page 34 of the prehearing order, and there are six proposed stipulations.

We would like to bring to your attention, before you rule on these, to Proposed Stipulation No. 6, which the parties propose that the company amortize rate case expense over ten years, and before you vote on that, we'd like to bring to your attention the fact that Section 367.0816 provides for a four-year recovery period -- four-year amortization period, rather, for rate case expense.

Staff is recommending approval of this stipulation because the utility and OPC have both agreed that it's in the best interests -- in their best interests to amortize over a longer period of time, and we an analogize the approval of this proposed step as being similar to allowing a utility to waive a statutory deadline, since the statute is there for the protection of the utility.

CHAIRMAN JOHNSON: Any questions, Commission?

COMMISSIONER DEASON: What is it that you want us to do with these stipulations at this time?

MS. GERVASI: To approve them, Commissioner. We're recommending approval of all six. We just wanted to bring that point to your attention on Proposed Stipulation No. 6 before you vote on them.

COMMISSIONER DEASON: How can we approve

No. 5?

MS. GERVASI: That amount is in the record, and it was just an amount that no party took issue with. So rather than litigating what the amount was, the parties were able to reach a consensus as to that figure.

COMMISSIONER DEASON: Well, I have no problem with saying the amount is "X," whatever "X" is, but when you define it or characterize it as fair and reasonable, I have a problem with that.

MS. GERVASI: Commissioner, you may have the wrong version of the prehearing order is what I'm wondering, because Proposed Stip No. 5 reads that the amount incurred totals 3,826,210, and does not refer to the fair and reasonableness.

COMMISSIONER DEASON: I do not have the latest version.

COMMISSIONER CLARK: I don't either.

MS. GERVASI: And we apologize for that confusion.

COMMISSIONER CLARK: Your point on Question 6 is that the law says it's over four years?

MS. GERVASI: Yes, ma'am.

COMMISSIONER CLARK: Tell me again what the law says.

MS. GERVASI: Section 367.0816 states -- let me read it to you directly. It states that the amount of rate case expense determined by the Commission pursuant to the provisions of this chapter to be recovered through a public utilities rate shall be apportioned for recovery over a period of four years. At the conclusion of the recovery period, the rate of the public utility shall be reduced immediately by the amount of rate case expense previously included in rates.

COMMISSIONER CLARK: Well, does that give us any latitude to approve the stipulation? The use is "shall".

MS. GERVASI: It does say "shall," and I think it's arguable as to whether or not you should approve that stipulation in light of that statute. But like I said, we analogize it to the statutes that provide for deadlines for processing cases, and we've allowed parties to waive that; and this would be similar to waving something like that, since the parties all agree that it's in the best interest of the customers.

COMMISSIONER DEASON: It seems that that particular section that you read from seems to assume that it is an amount of rate case expense which the

Commission has approved for recovery in rates, and that once that recovery is -- it should be done every four years, and once that recovery is complete, then rates need to be reduced.

I do not read all of that into here. I don't think that this stipulation says that we're going to allow the company to recover this amount in rates. At least, I assume that's not what this stipulation is saying.

MS. GERVASI: No, sir.

COMMISSIONER DEASON: It's just whatever counting convention they're going to use. We're not saying that it can be included in rates for recovery from customers.

MS. GERVASI: Correct. I think what we're saying is that if you approve any rate case expense at all, that rather than amortizing it over the four-year statutory period, that it be recovered over ten years.

COMMISSIONER CLARK: Well, I think that's different than what you just suggested, Commissioner Deason. You're saying you interpret this as "shall amortize rate case expense over ten years" as an accounting matter, and Ms. Gervasi just said if it is included in rates, it would be over a 10-year period; that's what that stipulation means.

MS. GERVASI: That's my understanding of the stipulation, unless the parties have a different understanding.

COMMISSIONER JACOBS: I think the statute is very narrow in terms of our discretion. It sounds like if it's rate case expense, it shall carry that term.

If there is some other treatment of it -- is what I think you're saying, Terry -- if there's some other treatment in order for recovery outside of rate case expense, then perhaps there's discretion.

But what I'm hearing that statute to say is that if we determine that this should be recovered in rate case expense, it can only be done over four years.

COMMISSIONER DEASON: Well, I guess I need clarification as to what the purpose of this language is in the proposed stipulation; what is it to accomplish, and in what context is it presented.

MR. GATLIN: May I respond?

CHAIRMAN JOHNSON: Uh-huh.

MR. GATLIN: Well, we had proposed that the expenses, if the Commission allows them to be recovered over a 10-year period of time, and it seemed to make sense to us that -- and it would be in the

interest of the customers to spread the rate case expenses over the same period of time, which would mean there would be a lower amount collected from the customers.

COMMISSIONER DEASON: A lower amount, but for a longer period time.

MR. GATLIN: Right. Right. And it seems to me that the statute in this particular factual situation that we have in this case is really to the company's benefit, and we believe that we could waive that requirement and not collect it over four years, but collect it over ten years.

COMMISSIONER DEASON: So it's in the context of if there is approval by this Commission, to allow the recovery of rate case expense.

MR. GATLIN: Sure.

CHAIRMAN JOHNSON: Mr. McLean, did you want to add anything?

MR. McLEAN: I was going to say that there is nothing in this stipulation that should indicate to you that you're compelled to approve any rate case expense.

The point we were trying to address here -- and I don't think we nailed it down exactly -- was if you are to approve rate case expense, we have agreed

amongst ourselves, to the extent that we can, that it's fine to spread that rate case expense over ten years as opposed to four.

At first blush, the statute seems like it does limit your discretion quite a bit, but both Mr. Gatlin and I believe that that statute is written to serve our own interests, our own clients' interest, and both of us feel that we could waive it.

It's not something that I want to make a -- much of a stand on. I'm not sure that it does or not, but I know in this instance nobody is going to complain about it if the Commission decides to spread it over ten years.

But the point is it doesn't go to the substance of the allowance; it goes to what sort of accounting convention you're going to engage in to spread the cost and over how many years, if any cost is approved or if expense is approved.

We're happy that the company -- first of all, we don't think they ought to get any rate case expense, but if they do, we're happy that the company wants to recover it over ten years as opposed to four. And it somewhat distressed us to see them getting beaten over the head and saying, well, you're going to have to take it over four years, when in fact it's to

our advantage if they take it over ten because it amounts to less money.

It may or may not bear any rate of return. It certainly does not at -- part of company's request is that it not bear a rate of return until their next rate case. So it may be cheaper to spread it over ten years than over four. Does that make sense?

COMMISSIONER CLARK: Yes, it does make sense, but I'm just wondering -- I don't have the figures, but if it's not a huge amount, you may be talking about a penny either way, and it may be better to collect it over four years.

MR. McLEAN: As I say, I don't want to be remembered for this particular stance, but it seems to me that if the company is willing to stretch it until the end of the Christian era, should that come about, that's fine with us. The less collected the better. Justice delayed is -- well, I better not finish that one.

But the point is, the company asked for it over ten years, and there's some fairly scary language in the statute that says we've got to collect it over four. Maybe if you call it something else, everybody would feel better about it, because it isn't rate case expense. This isn't a rate case expense; this is a

limited proceeding. But I sincerely hope that it's a moot issue, since we oppose the award of any rate case expense. But if they want to spread over ten, that's okay with us.

CHAIRMAN JOHNSON: Any other questions, Commissioners?

COMMISSIONER DEASON: Well, now that I have the correct language, I can move approval of Stipulations 1 through 5.

COMMISSIONER CLARK: Second.

CHAIRMAN JOHNSON: There's a motion and second. Any further discussion?

All those in favor, signify by saying aye.

COMMISSIONER GARCIA: Aye.

COMMISSIONER CLARK: Aye.

COMMISSIONER DEASON: Aye.

COMMISSIONER JACOBS: Aye.

CHAIRMAN JOHNSON: Aye. Show it approved unanimously.

There's a Stipulation 6.

COMMISSIONER CLARK: I personally would just leave it.

COMMISSIONER DEASON: I would take no action. If we get to that point, we can consider what our options are.

COMMISSIONER CLARK: And the fact that they have stipulated among themselves.

CHAIRMAN JOHNSON: Okay. Any other discussion on the point?

Show the Commission taking no action on Proposed Stipulation 6.

MS. GERVASI: Thank you. Commissioners, since the filing of the prehearing order, the parties have formulated a newly proposed stipulation for your consideration.

The parties propose to stipulate that the prefiled testimony of all the witnesses shall be inserted into the record as though read; that the witnesses need not be present; that all prefiled exhibits shall be identified and received into the record; that all testimony and exhibits shall be received in the order set forth in the prehearing order; and that all discovery, including requests for production of documents and interrogatories and any deposition transcripts from depositions which have been taken in this docket and any late-filed deposition exhibits may be received into the record as well.

In light of this proposed stipulation, the parties' witnesses are not present to testify at this

hearing. Staff is recommending approval of the proposed stipulation, as we believe that it will save time and expenses and at the same time result in a full record being obtained.

Nevertheless, we would like to bring to your attention one matter, and that is that we believe that the record will contain evidence that the utility should recover the litigation expenses that it's requesting as well as evidence that it should not recover the costs at all. But in the event that the Commission were to determine, number one, that it has the authority to grant the utility's request, and, number two, that it should grant the request, but that the utility acted imprudently to a degree in incurring the costs, that there is no witness who testifies as to an alternative methodology for recovering a portion of those costs but not all them.

And we just wanted to bring that to your attention before you rule on this newly proposed stipulation.

COMMISSIONER CLARK: I do have a question. The stipulation uses the phrase "may be entered into the record." When will we know?

MS. GERVASI: I think what the parties have indicated to us is that they will not object to our

offering in any of the discovery or deposition exhibits.

COMMISSIONER CLARK: Oh. We'll do that here.

MS. GERVASI: Yes, ma'am.

COMMISSIONER CLARK: So that it's not a matter of later on somebody is going to say, well, I also want this.

MS. GERVASI: Correct.

COMMISSIONER CLARK: All right.

COMMISSIONER DEASON: This is this large stack of paper that we're going to go through and identify, correct?

MS. GERVASI: Yes, sir.

COMMISSIONER JACOBS: I take it that you don't think Ms. Merchant's testimony addresses the prudency issues adequately.

MS. GERVASI: No. We do believe that it does, but Ms. Merchant, what she doesn't do is she doesn't testify as to a specific methodology for --

COMMISSIONER JACOBS: She sets out the standards, but she doesn't say then how to apply those standards to the facts of this case.

MS. GERVASI: Correct. She doesn't give a methodology for a partial recovery.

COMMISSIONER JACOBS: Okay.

MS. GERVASI: That's not to say that the Commission couldn't construct some sort of partial recovery based on the evidence of the record.

I think that arguably you could do that based on the record if you were to determine that there isn't competent, substantial evidence for all or for none.

We deposed several of the utility's key witnesses twice on the matter and were not able to get any further information as to what a partial recovery should be, so that if we were to put them live on the stand in cross-examination, I think it would be doubtful that we would get more than what we will have from putting all the evidence in the record in the deposition testimony.

CHAIRMAN JOHNSON: So, Ms. Gervasi, what was your point? Because I thought you started off by saying we had to do an all or nothing, but then I thought you ended up saying that there is some -- we may create our own alternatives.

MS. GERVASI: My point is that there is specific evidence for all or nothing, and there isn't specific evidence for anything in between.

CHAIRMAN JOHNSON: Now, do we need what

you're calling specific evidence in order to craft something in between?

MS. GERVASI: I don't believe so. I think you still could. I just wanted you to know that there isn't any specific evidence for a specific alternative means for providing partial recovery. That's something that you'd have to construct from the record.

CHAIRMAN JOHNSON: Thank you.

COMMISSIONER CLARK: Let me sort of ask at you a different question. We don't have any witness saying "If you allow it, I recommend this amount based on this sort of the methodology"?

MS. GERVASI: Correct.

COMMISSIONER CLARK: But you do have suggestions as to different methodologies?

MS. GERVASI: What we have -- no, we don't. What we have in the record, I think that the record will reflect that the utility may have acted imprudently in certain ways, and that there may be a way for the Commission to determine from the record what percentage -- a percentage of how prudent or imprudent their actions were.

In other words, you may be able to glean from the record a percentage of time that was spent

imprudently in the federal trial and then construct some sort of middle of the road recovery from there, which is similar to what was done in the coal inventory case that the Florida Supreme Court --

COMMISSIONER CLARK: Yes, but in that case you had a 90-day and 45-day, and we basically looked at the middle.

MS. GERVASI: Right.

COMMISSIONER CLARK: And you did have specific recommendations. I'm just concerned you're suggesting we don't have that here.

MS. GERVASI: Well, in that case, the Court found that it was within the Commission's discretion to reject both the inventory values that were in the record after finding that there wasn't competent and substantial evidence to approve either. And the Commission chose a reasonable alternative, which my understanding is was not in the record, that that happened to be a value that was midway between the two.

So arguably you could construct a middle recovery, but we don't have any specific evidence as to what that middle recovery should be.

And, Commissioners, one other thing that I want to point out to you, too, is that we don't

believe that if we were to go to a live hearing, that we'd be able to get any more information on that point.

It is the utility's burden to show why they should get some kind of middle recovery, and I don't believe that the record will show that they've met that burden.

COMMISSIONER JACOBS: Generally when you have controversies on attorneys' fees, you have some standards that you go against in a civil matter. It might be lodestar or something like that.

Do we have, or is it possible to make reference to any criteria or any kind of bar procedures that will give guidance on these particular figures for time spent on this matter?

MS. GERVASI: Whether lodestar could apply, something -- maybe we could, the parties could, brief that point perhaps, and we could consider it in the recommendation if we were to get to that third tier.

I think you have to first determine whether the Commission can give any recovery at all.

COMMISSIONER JACOBS: Right. I understand.

MS. GERVASI: And then if it can, should it as a policy question. And then if it should, was everything prudent that the utility did? Perhaps not.

And then whether or not we should give them an alternative or a partial recovery is something that --

COMMISSIONER JACOBS: Are we saying that we have adequate evidence in the record to look at the actions taken by the utility in pursuing their defense of their matter, and in evaluating those, to determine whether or not that chain of conduct was prudent or not? Do we have adequate evidence?

MS. GERVASI: Yes, sir, I believe we do have that.

COMMISSIONER JACOBS: And after having made that determination then, how do you then take that and apply it onto the fees that they're being asked to recover?

MS. GERVASI: Correct. Now, that portion of it is what is not in the record.

COMMISSIONER JACOBS: Okay. And then the point there is if there was some extraneous model, i.e., a lodestar kind of approach, my question now is do we have to have the underpinnings for that in the record? Can we make reference to it? Can we incorporate it by reference, that procedure?

MS. GERVASI: Certainly because it's contained in case law, I think you can always apply the law to the facts or the evidence in a case.

COMMISSIONER JACOBS: Mr. Gatlin, you had a point?

MR. GATLIN: Yes. We have a witness, Mr. Geddie, who testified to the reasonableness of the cost, and he offered a couple of ways that he thought you could determine that. That's what we would offer to the Commission in determining whether the costs are reasonable; what we have offered, or will offer.

COMMISSIONER DEASON: Do we have the discretion at this point to say that based upon the record that we're going to have at this time, that based upon that record we determined that, first of all, legally we can provide the relief requested, and that as a policy matter we should grant relief, but we're unsure of the exact amount because we've not analyzed every dollar that has been expended, that we can at that point reopen the record to get evidence on that?

MS. GERVASI: Commissioners, yes. And I think what we could do is, if you wanted, we could put on a Staff witness, continue the hearing, and put in supplemental Staff testimony on what an alternative methodology should be, since there isn't any statutory deadline for the processing of this case. It's a limited proceeding.

COMMISSIONER CLARK: Let me ask a question. It seems to me there may be two different measures of allocation. The company has asked for it to be spread across water and wastewater customers, all systems; and yet in the end there were only three systems that were found to have been in violation, and I know they make the argument the whole company, because they would be in some financial distress -- can you hear me?

MS. GERVASI: Yes.

COMMISSIONER CLARK: My question is, you know, let's just assume we find it can be done, that the amounts themselves were reasonable, but we don't think it should be allocated across all water and wastewater customers. I'm not sure there is evidence in the record that would allow us to do a different allocation.

I just want to make sure that if it comes to that and we feel we want to look at a different allocation, we would have the ability to continue the hearing and look at that. I don't want to do it now, because I think there's substantial issues -- I'm not sure it's a worthwhile endeavor.

MS. GERVASI: Ms. Merchant does testify that she believes in her opinion that it shouldn't be

spread over all of the systems, but only over those three systems that were found to be in violation.

COMMISSIONER CLARK: But as I recall, the company said initially that there was, you know, other systems involved, if they -- maybe their basis for saying that was just it was impacting the whole company.

You know, we may feel that, yes, the ratepayers should bear some, but you know management ought to bear some, too. We've done that before where we have indicated there should be some sharing, and I'm not sure there's testimony on that kind of issue that we have in the past done some sharing and that sort of thing; and I don't think there's testimony in there.

MR. GATLIN: Commissioner, we did offer testimony. Mr. Allen has testimony where we offer how that sharing should take place.

COMMISSIONER CLARK: Yes, 6%; right?

MR. GATLIN: I don't remember the percent.

COMMISSIONER CLARK: 6.9. Well, what happens if I don't agree with that?

MR. GATLIN: Well, I think the numbers are there, that you can --

COMMISSIONER CLARK: Well, I guess the logic

behind what we might suggest is we understand that they agree that since the fine was 309,000 as opposed to what it could have been, therefore they should only pay that much in legal fees, we may suggest that the fine isn't really the right bellwether for that, that there may be another reason to allocate more to the shareholders. And it's that kind of evidence that I don't think is in the record that we might want to look at. I'm not sure we need to look at it now.

I guess, Madam Chair, I'm just concerned that should we decide at a later point we would want more information on allocation or apportionment, that we're not precluded from reopening the record to get that.

MS. GERVASI: Yes, ma'am.

COMMISSIONER CLARK: You don't think we are precluded?

MS. GERVASI: No, I don't think you're precluded at all.

COMMISSIONER CLARK: Okay.

MS. GERVASI: I don't think you'd be stuck with deciding that the allocation should be 6% just because there's only evidence as to 6%, if you look at the record and decide that the percentage should be something else based on the record. Even though you

don't have a witness directly stating what that alternative percentage should be, I think it's within your discretion so long as you look only at the record if you determine that 6%, that there wasn't competent, substantial evidence for the 6%. But I also certainly agree that the record could be reopened to admit more evidence, should you believe it's required.

COMMISSIONER CLARK: Thank you.

CHAIRMAN JOHNSON: Any other questions? Do you want to go forward, then, with the stipulations?

MS. GERVASI: I'm sorry?

CHAIRMAN JOHNSON: Did you want to go forward with the stipulations?

MS. GERVASI: Yes, ma'am. We would propose that this stipulation be approved.

COMMISSIONER DEASON: The stipulation of having the testimony inserted into the record and cross-examination waived with selected depositions and discovery that we will later identify also being inserted into the record?

MS. GERVASI: Correct; yes, sir.

COMMISSIONER DEASON: I so move.

COMMISSIONER CLARK: Second.

COMMISSIONER JACOBS: Should we specifically include in there Commissioner Clark's point about the

option of reopening?

COMMISSIONER CLARK: I'm satisfied with the response I've gotten from Staff.

COMMISSIONER JACOBS: Okay.

CHAIRMAN JOHNSON: Any further discussion? Seeing none, all those in favor signify by saying aye.

COMMISSIONER GARCIA: Aye.

COMMISSIONER CLARK: Aye.

COMMISSIONER DEASON: Aye.

COMMISSIONER JACOBS: Aye.

CHAIRMAN JOHNSON: Aye. Show that approved unanimously.

Now I'm looking at the stipulation, and Number 3 says that all prefiled exhibits shall be identified and received into the record. Do you want to go through that? Do we need to do that now?

MS. GERVASI: Yes, ma'am, I believe so. I think we should go in order of the prehearing order and have the company proffer its testimony starting with direct testimony, and then we'll interject any discovery that we'd like to be inserted.

CHAIRMAN JOHNSON: Witness by witness?

MS. GERVASI: Witness by witness, correct. Maybe even before we get to that, we could -- we'd like to move -- to identify and move into the record

Staff's list of items for administrative notice that we've passed out to you, and we would proffer that that be identified as Staff's list of items for administrative notice.

CHAIRMAN JOHNSON: We will identify that as Exhibit 1, and that's Staff list of documents for official recognition?

MS. GERVASI: Yes, ma'am.

CHAIRMAN JOHNSON: It will be identified as Exhibit 1.

(Exhibit 1 marked for identification.)

MS. GERVASI: And I believe that the utility also has some lists that it wishes to have entered.

MR. GATLIN: Yes. We submitted three lists, First Request, Second Request, and Third Request, that have been filed and served on the parties, and we would request that that be identified as the next exhibit.

CHAIRMAN JOHNSON: I'm sorry. I don't have my copy of your lists. Do you have additional copies?

MR. GATLIN: I didn't bring copies of that file. I have three copies, if you'd like to have these.

CHAIRMAN JOHNSON: And I know, Mr. Gatlin, while you're being seated, the other Staff and Public

Counsel, you've reviewed the documents, and there's no objection?

MR. McLEAN: That's correct.

MS. GERVASI: Yes, ma'am.

CHAIRMAN JOHNSON: Okay. Then I will identify the --

MR. GATLIN: I assume that would be a composite exhibit with all three together.

CHAIRMAN JOHNSON: Yes, sir. I'll identify the company's list of documents for administrative notice as Composite Exhibit 2.

(Exhibit 2 marked for identification.)

MS. GERVASI: And then at this time if we could go in order of the witnesses as specified in the prehearing order starting on Page 5.

CHAIRMAN JOHNSON: Okay.

MS. GERVASI: And perhaps, Mr. Gatlin, you might want to proffer the direct testimony of Mr. Allen to start.

MR. GATLIN: Sure. One other preliminary item. I'd like to offer the affidavit of the service of the notice of the hearing on the customers, if I may, if that's appropriate now.

CHAIRMAN JOHNSON: Okay. We will mark that as Exhibit 3, and that's the affidavit of notice of

service.

(Exhibit 3 marked for identification.)

MR. GATLIN: I would like to offer the testimony to be inserted into the record as though read of Mr. Gerald S. Allen, which has been filed and served on all parties.

CHAIRMAN JOHNSON: It will be inserted into the record as though read. What were you saying, counsel?

MS. GERVASI: I'm sorry. Go ahead.

MR. GATLIN: This would not be an exhibit. This would be inserted into the record?

CHAIRMAN JOHNSON: Yes. I've done that.

MR. GATLIN: And then we would ask for a composite exhibit of Mr. Allen's exhibits, which would be GSA-1 through GSA-24, which would be Exhibit 4, I believe.

CHAIRMAN JOHNSON: I'll identify that as Exhibit 4, Composite Exhibit 4, GSA-1 through 24.

(Exhibit 4 marked for identification.)

MR. GATLIN: I'd offer the testimony --

MS. GERVASI: Before you go on to the testimony of the next witness, Staff would like to identify a Composite Exhibit No. 5, which would consist of the transcript of the deposition of

Mr. Allen taken on May 6th of 1998.

CHAIRMAN JOHNSON: Okay. We'll mark that 5, and short titled "Transcript of deposition of Allen."

(Exhibit 5 marked for identification.)

MS. GERVASI: Thank you.

FLORIDA CITIES WATER COMPANY

RATE APPLICATION FOR RECOVERY OF LEGAL EXPENSES

TESTIMONY OF

GERALD S. ALLEN

FLORIDA CITIES WATER COMPANY

RATE APPLICATION FOR RECOVERY OF LEGAL EXPENSES

TESTIMONY OF GERALD S. ALLEN

Q. Please state your name and business address.

A. Gerald S. Allen, 4837 Swift Road, Suite 100, Sarasota, Florida 34231.

Q. By whom are you employed and in what capacity?

A. I am the President of Florida Cities Water Company(FCWC).

Q. Is a summary of your educational and professional background attached at Exhibit 4 (GSA-1).

A. Yes.

Q. What positions have you held with FCWC and its parent, Avatar Utilities Inc. (AUI).

A. I held the position of Vice President, Engineering, Avatar Utilities Inc. (AUI), the parent company of FCWC, from April 1988 until December 1989; Executive Vice President, Engineering, from January 1, 1990 until December 29,1991; Executive Vice President and Chief Operating Officer from December 30, 1991 to June 30, 1996. I have been President, FCWC, since July 19, 1995 and President, AUI and its other subsidiaries since July 1, 1996.

Q. Please describe the operations of FCWC.

A. FCWC owns and operates water and wastewater systems

in Golden Gate (Collier County), North and South Ft. Myers (Lee County), Sarasota County, Carrollwood (Hillsborough County) and Barefoot Bay (Brevard County) and serves approximately 33,000 water and 25,000 wastewater customers. It has eight (8) water treatment facilities and six (6) wastewater treatment plants. At December 31, 1996, net utility plant property was approximately $120 million.

Q. Have you previously testified before the Commission?

A. Yes.

Q. What is the purpose of your testimony?

A. The purpose of my testimony is to (1) explain the purpose of FCWC's application in this docket, (2) describe the legal action brought against FCWC by the United States causing the legal expenses which FCWC is seeking to recover in this docket,(3) provide an overview of the history of the events and circumstances leading to this litigation,(4) describe efforts made by the FCWC to settle the matter before the litigation started , and (5) discuss the final outcome of the litigation.

Q. What did you rely upon for your testimony?

A. I relied upon my first-hand knowledge and the business records of FCWC and AUI.

Q. Will other witnesses provide testimony in this case?

A. Yes. Mr. Michael Acosta, Vice President, Engineering and Operations, FCWC, will provide testimony pertaining to permitting issues and construction of facilities at the Waterway Estates Wastewater Treatment Plant to upgrade it to Advanced Wastewater Treatment (AWT)[1] standards and the relocation of the effluent outfall. Mr. Gary H. Baise, Attorney, Baise and Miller, P.C. will cover the legal issues, legal proceedings, settlement discussions and offers after filing of the complaint by the United States Department of Justice (USDOJ) on behalf of the United States, and the outcome of the litigation. Mr. John D. McClellan, Regulatory Consultant, Deloitte & Touche LLP, will cover the prudence of FCWC's defense against the complaint from a financial perspective and the regulatory principles applicable to FCWC's request for rate relief. Mr. Michael Murphy, Vice President and Chief Financial

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[1] As defined in FDEP regulations (403.086), AWT means treatment which will provide a reclaimed water product that:
(1) contains not more than the following concentrations on a permitted annual average basis:
a. Biochemical Oxygen Demand - 5mg/l
b. Suspended Solids - 5mg/l
c. Total Nitrogen, expressed as N - 3mg/l
d. Total Phosphorus, expressed as P - 1mg/l

(2) has received high level disinfection, as defined by FDEP rule.

Officer, FCWC, will cover the litigation expenses, the method of recovery proposed by FCWC in this docket and the surcharge which FCWC proposes to collect from customers. Mr. L. Gray Geddie, Jr., Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., will provide testimony regarding the reasonableness of the conduct of the defense of the complaint by FCWC's attorneys and the fees and charges associated therewith.

Q. What is the purpose of FCWC's application in this docket?

A. The purpose is to seek approval to recover a portion of FCWC's legal expenses incurred by FCWC in its successful defense of legal action brought by the United States relating to alleged violations of the Clean Water Act (CWA), plus rate case expenses. Recovery is sought through a monthly customer surcharge applicable to FCWC's water and wastewater customers in S. Ft. Myers, N. Ft. Myers and Barefoot Bay. FCWC proposes that it be allowed to collect the surcharge for a period of ten years or until such time as the expenses have been fully recovered, whichever occurs first. FCWC recognizes that the Commission does not have jurisdiction over FCWC's rates in Collier, Hillsborough and Sarasota Counties

and upon approval of a surcharge as sought in this proceeding, FCWC will seek approval by Collier, Hillsborough, and Sarasota Counties of a surcharge to be applicable to its customers in those Counties.

The Original Complaint

Q. Describe the legal action brought by the United States.

A. The U.S. Department of Justice (USDOJ), on behalf of the United States, filed a complaint in the Middle District of Florida, Fort Myers Division, on October 1, 1993 (case number is 93-281-CIV-FTM-21), alleging that FCWC had violated the CWA at its Waterway Estates Wastewater Treatment Plant (Waterway) (Original Complaint)((Exhibit 4 (GSA-2)). Later, an amended complaint was filed which broadened the scope of allegations pertaining to violations of the CWA to include FCWC's Barefoot Bay (Barefoot) and Carrollwood Wastewater Treatment Plants (Carrollwood).

Q. What did the Original Complaint allege?

A. The Original Complaint alleged that FCWC (1) discharged pollutants from Waterway into the Caloosahatchee River during the period from October 1, 1988 to October 31, 1989 without a National Pollution Discharge Elimination System (NPDES)

permit, (2) discharged pollutants into a tributary canal leading to the Caloosahatchee River from on or about November 1, 1989 to July 14, 1991, at an unpermitted location, and (3) during each month during the period on or about July 1991 to March 1992, discharged pollutants in excess of the Total Nitrogen limitation in the NPDES permit and on at least three occasions (February 1992, April 1992, and June 1992), discharged effluent in excess of the toxicity limitation in the NPDES permit.

Q. What was the basis for civil penalty requested in the Original Complaint?

A. The Original Complaint requested a civil penalty in the amount of $25,000 per day for each alleged violation of the CWA including $25,000 per day in each month in which a monthly average was violated.

Q. What was the total amount of penalty requested?

A. The total civil penalty requested was $32,375,000 broken down by general allegation as follows:

(1) discharging without a permit - $9,900,000,

(2) discharging at an unpermitted location - $15,525,000, and

(3) exceeding permit limits for nitrogen and toxicity - $6,950,000.

Q. Did FCWC have the financial resources to pay this

penalty?

A. No.

Q. What was FCWC's response to the Original Complaint?

A. FCWC filed an answer to the complaint on November 22, 1994 denying the allegations (Exhibit 4 (GSA-3)).

Q. What was your role during the period prior to the filing of the Original Complaint?

A. Beginning in 1989 when the construction schedules were being revised, I kept up with progress toward upgrading Waterway to meet advanced wastewater treatment (AWT) standards and the construction of a new effluent outfall into the Caloosahatchee River and communicated with FCWC managers regarding same; provided overall engineering oversight with respect to the projects; reviewed and approved the award of contracts associated with these projects; participated to a limited extent in some of the negotiations with the contractor which constructed facilities in connection with the upgrade of Waterway; participated in meetings with the USEPA and USDOJ pertaining to enforcement actions and settlement; was actively engaged in the negotiations with the U.S. Environmental Agency (USEPA) on matters related to enforcement from

approximately mid-1991 forward and settlement negotiations with the USEPA and USDOJ prior to the filing of the Original Complaint by the USDOJ.

Q. After you became familiar with environmental regulation in Florida, what was your assessment of the relationship between the Florida Department of Environmental Protection (FDEP)[2] and the USEPA?

A. Until May 1995, the FDEP did not have delegated authority to administer the Federal NPDES program, yet it required permits for the construction and operation of wastewater treatment plants as well as for the disposal of final effluent, including surface water discharges covered by the NPDES permit program. This resulted in substantial duplication of the permitting process and of permits which were independent, not coordinated and had differing terms and conditions. Generally, the FDEP requirements were more stringent than those of the USEPA and it was my impression that the FDEP was the lead regulator. So, if the permittee could meet the requirements and standards of the FDEP, it could meet muster with the USEPA. This relationship was easily recognized. The FDEP had a much larger staff

[2] Formerly known as Florida Department of Environmental Regulation (FDER).

than the USEPA on a per facility basis and was much more intensely engaged in construction, permitting and operational issues, including enforcement.

Q. Please provide an overview of the situation which lead to the Original Complaint.

A. The NPDES permit which was issued by the USEPA expired in 1986. The USEPA denied renewal of the permit, ordered FCWC to cease discharge or upgrade Waterway to meet AWT standards, and relocate the effluent outfall. Subsequently, the USEPA issued two Administrative Orders which, among other conditions, set forth a schedule for compliance and a new NPDES permit for a discharge directly to the main channel of the Caloosahatchee River rather than the Canal which flows directly into the river. The schedule was amended twice due to circumstances recognized by the USEPA to be beyond the control of FCWC. The final schedule called for the relocation of the outfall by August 1, 1991 and compliance with the water quality standards set forth in the NPDES permit (See Exhibit 9 (MA-9)) by November 1, 1991. FCWC completed substantial improvements to the wastewater treatment plant, relocated the outfall and complied with all requirements of the amended schedule except with respect to consistently meeting

the nitrogen and toxicity limits set forth in the new NPDES permit.

Q. Why were the nitrogen and toxicity limits not met?

A. These limits were not met because two process units were not complete and in service.

Q. What caused the delay in completing these units?

A. Principally because the permitting process at the federal, state and local levels required much more time than FCWC anticipated at the time the schedules were developed. The schedules and circumstances pertaining to the permits and the permitting process will be covered in more detail in the prefiled testimony of Witness Acosta.

Q. Did the FDEP also require a permit for the operation of Waterway including the discharge to the Canal?

A. Yes. The FDEP permit, which had an expiration of August 2, 1988, was in effect when the USEPA denied renewal of the NPDES permit.

Q. Did the FDEP later establish a schedule for upgrading Waterway and relocating the effluent outfall out into the river?

A. Yes. Although amended as the work progressed, the final schedule set forth in a FDEP Consent Order called for substantial completion of construction (both plant upgrade and new outfall) by September 1,

1992 and certification of facilities in compliance by June 1, 1993.

Q. Did FCWC fully meet the final schedule?

A. Yes.

Q. From an overall compliance perspective, did you believe that the FDEP was generally satisfied with FCWC's performance with respect to compliance with the FDEP permits and Consent Orders applicable to Waterway including the construction of facilities required for the plant upgrade and new outfall.

A. Yes. This conclusion is corroborated by the deposition and testimony at trial of Dr. Abdul Daqi Ahmadi, Professional Engineer Administrator, Southwest District, FDEP in the Federal Court case.

Q. In your opinion, why did the USDOJ bring suit against FCWC in this case?

A. Although there was evidence of technical violations of the CWA, failure of the USEPA to pursue settlement administratively similar to Carrollwood and Barefoot through Consent Agreements and Orders Assessing Administrative Penalties (discussed in following sections) was clearly inconsistent. Therefore, I believe the USEPA and USDOJ were substantially influenced by similar litigation brought against the City of Cape Coral on March 15,

1991. The City's wastewater treatment plant located a few miles downstream of Waterway also discharged into the Caloosahatchee River. Like Waterway, it was a secondary treatment plant which was being upgraded. I believe the USEPA and USDOJ felt compelled to initiate litigation against FCWC to avoid the potential for having to defend their decision to lodge complaints against the City and under somewhat similar circumstances decline to lodge complaints against FCWC.

Q. Was the Cape Coral case settled?

A. Yes. The U.S. sought a civil penalty of $200 million from the City of Cape Coral but settled for a penalty of $750,000.

Q. Did FCWC have settlement discussions with the EPA prior to the matter being referred to the USDOJ?

A. Yes. FCWC had face-to-face meetings with the USEPA on April 4, 1991; June 19, 1991; and June 9, 1992. In addition to routine monthly Discharge Monitoring Reports and periodic progress reports, FCWC furnished the USEPA a vast amount of information relating to Waterway as a result of these meetings and communications with USEPA officials following the meetings. The USEPA indicated during these discussions that it was limited to settling such

cases to a maximum penalty of $125,000. Clearly these discussions revealed that the USEPA was seeking a settlement in a much greater amount and that the only way this was possible was through referring the matter to the USDOJ.

Q. Did FCWC keep the USEPA up to date regarding progress toward upgrading Waterway and relocating the effluent outfall?

A. Yes. FCWC took extraordinary steps to keep the USEPA informed. In addition to the monthly submittal of the Discharge Monitoring Reports and frequent conversations with USEPA officials, FCWC rendered written reports on the following dates:

April 10, 1988; July 22, 1988; April 24, 1989; July 14, 1989; Feb. 20, 1990; Feb. 23,1990; April 4, 1990; May 10, 1990; May 17, 1990; Sept. 24, 1990; Oct. 22, 1990; Dec., 11, 1990; Jan. 22, 1991; Feb. 21, 1991; Mar. 1, 1991; Apr. 12, 1991; May 23, 1991; June 24, 1991; July 17, 1991; July 24, 1991; Aug. 22, 1991; Sept. 25, 1991; Oct. 24, 1991; Nov. 5, 1991; Nov. 27, 1991; Dec. 1, 1991; Jan. 13, 1992; Jan. 24, 1992; Feb. 19, 1992; Feb. 20, 1992; Feb. 28, 1992; Mar. 27, 1992; Apr. 21, 1992; Apr. 28, 1992; May 27, 1992; Jun. 25, 1992;

and Oct. 12, 1992.

Q. Did FCWC have settlement discussions with the USDOJ prior to the filing of the Original Complaint on October 1, 1993?

A. Yes.

Q. Did FCWC have legal counsel during these discussions?

A. Yes.

Q. Did the USDOJ present a settlement offer?

A. Yes, by letter dated December 9, 1992 to FCWC counsel, Lee A. DeHihns, from Mr. Daniel S. Jacobs, USDOJ Trial Attorney, the USDOJ offered to settle the matter for $5,000,000 (Exhibit 4 (GSA-4).

Q. Did FCWC think this offer to be fair and equitable?

A. No.

Q. Why?

A. In view of the facts and circumstances surrounding the allegations, the settlement with the City of Cape Coral, and FCWC's belief that it was meeting permit limitations and water quality standards, FCWC did not believe the offer to be fair and equitable.

Q. Mr. Jacob's letter makes reference to a meeting scheduled on December 16, 1992 between FCWC and USDOJ and USEPA official as a final opportunity to settle the claims. Was this meeting held?

A. Yes.
Q. Who attended, what was discussed and what was the final outcome?
A. This information is as stated in my memorandum to files dated December 22, 1992 at(Exhibit 4 (GSA-5). Neither Mr. Jacobs nor any of the USEPA officials present exhibited any inclination to settle the matter for anything less than $5,000,000.
Q. Did FCWC counter the USDOJ settlement offer of $5,000,000?
A. Yes, on December 23, 1992, after careful consideration and with advice of legal counsel FCWC, through Mr. DeHihns, offered to settle the matter for $250,000.
Q. What was the basis for this offer?
A. The basis for the offer is set forth is Mr. DeHihns letter to Mr. Robert B. Gordon, dated December 18, 1992 (Exhibit 4 (GSA-6).
Q. Did the USDOJ accept this offer?
A. No, the offer was summarily and totally rejected.
Q. Did FCWC present another counter offer?
A. Yes, in January 1993, FCWC increased its counter offer to $500,000.
Q. Did the USDOJ accept this counter offer?
A. No.

Q. Do you know why the USDOJ did not accept FCWC's counter offer?

A. Not specifically; however, I do know that the USDOJ Trial Attorney in charge of the matter expressed the highest degree of confidence that the USDOJ would prevail on the Court to grant much higher penalties should a settlement not be reached. This Trial Attorney stated in my presence on at least one occasion that, "[T]the government could get at least $1,000,000 by just showing up in court in this matter." When the Cape Coral settlement was mentioned to Mr. Jacobs, he indicated that the U.S. held private companies, such as FCWC, to a higher standard than that applicable to municipalities.

Q. Was settlement discussed after the Original Complaint was filed but before the Court rendered its judgement?

A. Yes. Mr. Baise will address such discussions in his testimony.

<u>The Amended Complaint</u>

Q. When was the Amended Complaint filed?

A. March 30, 1995 (Exhibit 4 (GSA-7)).

Q. What did the Amended Complaint allege?

A With respect to <u>Waterway</u>, the Amended Complaint alleged that in addition to the allegations

contained in the Original Complaint, the exceedance of the NPDES permit limits for nitrogen during the period in or about July 1991 to March 1992 was expanded to include allegations of exceedances with respect to both the concentration of nitrogen and loading limitation which effectively doubled the number of days of alleged violations.

With respect to Barefoot, the Amended Complaint alleged that (1) during the period on or about April 1, 1990 to October 31, 1991, pollutants from Barefoot were discharged into the Sebastian River, without a NPDES permit; (2) from time to time during the period 1990-1993, effluent was discharged which exceeded the maximum limitations of USEPA Administrative Order 90-106 (AO 90-106) or NPDES Permit Number FL0042293 for TSS, Fecal Coliform, Dissolved Oxygen (DO), Biological Oxygen Demand[3](BOD), pH and Total Residual Chlorine (TRC); (3); on at least three occasions during the period 1992-1994, the effluent failed the test for chronic whole effluent toxicity in NPDES Permit Number Fl0042293; (4) during part of the period 1991-1993,

[3] Biological Oxygen Demand is not a scientific term; therefore, it is presumed that the intended term was Biochemical Oxygen Demand.

BOD was not monitored as required by NPDES Permit Number Fl0042293[4]; and (5) during part of the period 1991-1993, testing for TRC using the method specified in NPDES Permit Number Fl0042293 was not accomplished.

With respect to Carrollwood, the Amended Complaint alleged that (1) during the period in or about August 1990 to June 1991, pollutants were discharged into Sweetwater Creek without a NPDES permit; and (2) from time to time during 1991, pollutants were discharged in excess of the limitations in NPDES Permit Number FL0029319 for TSS, Total Phosphorus, Fecal Coliform, Total Nitrogen, CBOD and TRC.

Q. Did FCWC agree with these allegations?

A. No. The majority of the allegations with respect to Carrollwood and Barefoot had previously been settled by USEPA Consent Agreements and Orders Assessing Penalties.

Q. What was the basis for the civil penalties requested in the Amended Complaint?

A. The Amended Complaint requested civil penalties in the amount of $25,000 per day for each alleged

[4] Carbonaceous Biochemical Oxygen Demand (CBOD) was actually reported.

violation of the CWA including $25,000 per day in each month in which a monthly average was violated.

Q. What was the total amount of the civil penalty requested?

A. The total penalty requested was $104,325,000 broken down between the three wastewater treatment plants as follows:

Waterway - $42,825,000,

Barefoot - $35,400,000, and

Carrollwood - $26,100,000.

Q. Did FCWC have the financial resources to pay this penalty?

A. No.

Carrollwood

Q. At what point did you become involved in the enforcement issues pertaining to Carrollwood?

A. My involvement begin in 1989 after it became evident that the viability of connecting Carrollwood to the Hillsborough County wastewater system continued to be tenuous and other alternatives should be pursued.

Q. What was your involvement thereafter?

A. I kept up with progress toward completing studies of the impact of continuing the discharge to Sweetwater Creek, provided general engineering oversight during the design of the new wastewater treatment plant,

participated to a limited extent in negotiations in connection with the FDEP and the Hillsborough County Pollution Control Commission pertaining to the new wastewater treatment plant, participated in negotiations with the USEPA pertaining to the final Administrative Order and the Consent Order (both discussed below), reviewed and approved the award of contracts for engineering services and construction, and participated in the early stages of negotiations with Hillsborough County which lead to finally connecting Carrollwood to the County system.

Q. Please provide an overview of the situation and circumstances which lead to the allegations of the Amended Complaint with respect to Carrollwood.

A. In June 1975, the USEPA issued a NPDES permit, having an expiration date of August 15, 1980, authorizing the discharge of WWTP effluent to Sweetwater Creek and setting water quality limits for the discharge.

In September 1977, the Hillsborough County Pollution Control Commission (HCPCC) notified FCWC that Carrollwood was not in compliance with the temporary operating permit (TOP) issued by the FDEP since it had not been upgraded to advanced wastewater treatment (AWT)standards and since the

County intended to acquire Carrollwood, it would not be advisable for FCWC to upgrade the WWTP to AWT standards. In June 1978, HCPCC notified FCWC that the TOP would expire on September 1, 1978 and stating that Carrollwood must be acquired by the County, connected to a regional WWTP or otherwise develop alternative means of effluent disposal. Nevertheless, the FDEP issued a new TOP in April 1979 authorizing the continued discharge until September 1980. However, in October 1979, the FDEP notified FCWC that the wasteload allocation for Carrollwood called for no discharge to the receiving waters (Sweetwater Creek).

In view of the circumstances and directives from the HCPCC and FDEP, FCWC perused connecting to the County's wastewater system. Between June 1979 and July 1990, FCWC received six written responses to its requests to connect to the County's system indicating connection dates successively in the future, the earliest being 1983 and the latest being 1991, a span of nine years. In March 1988, the County notified FCWC that it anticipated capacity becoming available in early 1990 and the capacity fee applicable to the Carrollwood connection was $5,538,000 based on then current rates.

Furthermore, FCWC requested that the City of Tampa consider allowing Carrollwood to connect to its system but in June 1986, the City declined to offer such service.

In April 1980, FCWC applied for renewal of the NPDES permit. The USEPA responded in September 1984 by denying renewal of the permit because the FDEP had determined that the wasteload allocation to Sweetwater Creek called for no discharge and indicating that an Administrative Order would be forthcoming. The Order, issued in November 1984 directed FCWC to submit a plan for the elimination of the discharge to Sweetwater Creek, cease discharging to the creek by June 1987 and to comply with all of the requirements of the previous NPDES permit. In the meantime, the FDEP continued to authorize the discharge via temporary operating permits.

FCWC having found no other alternative and based on the County's representations that capacity would be available, albeit unable to commit to a specific date, entered into a contact with an engineering firm in January 1987 to design the necessary pumping station and forcemain required to transport wastewater to the County's system. The

completed plans and specifications for these facilities were submitted to the County in June 1987 by FCWC's engineer with a request, on behalf of FCWC, that FCWC be placed on the waiting list for County wastewater treatment capacity.

In 1987, a bill known as the Grizzle-Figg Bill was enacted which FCWC believed would, under certain criteria, allow a continued discharge to Sweetwater Creek. The FDEP agreed that such discharge might be permissible and in March 1988 issued a new TOP setting forth such discharge as a possible alternative provided all criteria could be met. In September 1988, FCWC retained a consultant which undertook extensive scientific studies to evaluate the impact of a continued discharge on the creek. The report, which indicated "minimal negative impacts" on Sweetwater Creek assuming that the WWTP was upgraded to meet AWT standards, was transmitted to the FDEP on June 19, 1989 (Exhibit 4 (GSA-8)). Therefore, in view of the ever decreasing prospect of being able to connect to the County's wastewater system, FCWC undertook the design of a new WWTP meeting AWT standards by awarding a contract to Dyer, Riddle, Mills and Precourt, Inc. on April 11, 1989 (Exhibit 4 (GSA-9)). The construction permit

application for the upgraded plant and associated facilities was filed with the FDEP on November 15, 1989. The FDEP issued the permit on July 27, 1990. Bids for the construction were received on July 26, 1990 but in view of recent heightened prospects of connecting Carrollwood to the County's system, the award of a contract was withheld.

FCWC kept the USEPA advised on its efforts to eliminate the discharge or otherwise develop alternatives satisfactory with the FDEP and the Hillsborough County Environmental Protection Commission (HCEPC). FCWC met with the USEPA on July 31, 1990 to report on FCWC's plans and progress, and filed an NPDES permit application for the continued discharge to Sweetwater Creek. Although, the USEPA did not commit to any particular action, the meeting was positive. On September 27, 1990, the USEPA issued Administrative Order 90-100(wKS)(Exhibit 4 (GSA-10)) which established water quality standards and required regular progress reports regarding FCWC's construction of the new WWTP meeting AWT standards. On April 19, 1991, FCWC and the USEPA entered into a Consent Agreement and Order Assessing Administrative Penalties, Docket No. CWA-IV 90-542 (Exhibit 4 (GSA-11)) assessing a penalty of

$15,000 for FCWC's past violations of the CWA. On May 28, 1991, NPDES Permit No. FL0029319 authorizing the discharge to Sweetwater Creek and setting forth a schedule for completion and placement into operation the WWTP meeting AWT standards. The schedule called for "operational level attainment" by February 1, 1993.

In the meantime FCWC continued to pursue connecting to the County's system but prepared plans and obtained permits from the FDEP and HCEPC for the construction of the new WWTP meeting AWT standards. After protracted negotiations, FCWC and Hillsborough County entered into an agreement on June 5, 1991 which provided for connecting to the County's system and collection of County connection and treatment fees on a monthly basis (Exhibit 4 (GSA-12)). By letter dated June 24, 1991, the USEPA was notified of this agreement. FCWC completed construction of the pumping station and forcemain required to connect to the County's system on December 13, 1991 and the discharge of effluent from Carrollwood to the County's system commenced on January 2, 1992. The USEPA was notified on February 10, 1992 that the Carrollwood WWTP had been inactivated. The USEPA acknowledged receipt of the notice on March 3, 1992

and advised FCWC that Administrative Order No. 90-100(wKS) had been complied with and placed in an inactive status. By letter bearing the same date, the USEPA notified FCWC that NPDES Permit No. FL0029319 had been inactivated.

Barefoot

Q. At what point did you become involved in the enforcement issues pertaining to Barefoot?

A. My first involvement to any appreciable degree began in 1989 as the plans were nearing completion and the permit applications were being finalized for an injection well for wastewater disposal.

Q. Have you previously testified before the Commission regarding some of the matters which will be covered in this testimony?

A. Yes, in the Barefoot Bay Division rate case, Docket No. 951258-WS.

Q. Did the Commission consider the requirements of the various environmental regulatory agencies relating to the Barefoot Bay wastewater treatment plant in Docket No. 951258-WS?

A. Yes. The Commission gave consideration to FCWC's investment to meet environmental requirements in the Barefoot plant in Docket No. 951258-WS. The Commission's decision in that Docket is reflected in

Order Nos. PSC-96-1147-FOF-WS, PSC-97-0223-FOF-WS, and PSC-0516-FOF-WS. These Orders are offered as Composite Exhibit 4 (GSA-13).

Q. Please provide an overview of the situation which lead to allegations with respect to Barefoot as set forth in the Amended Complaint.

A. Following the commencement of the discharge of treated wastewater effluent to a canal leading to the north prong of the Sebastian River sometime in the mid-1980s, FCWC investigated numerous measures including the upgrading of the WWTP to AWT standards, construction of additional percolation ponds, land application of reclaimed water and the construction of an injection well in an effort to meet the requirements of the various regulatory agencies having jurisdiction including the FDEP, the St. Johns River Water Management District and the USEPA. These efforts initially led to FCWC's purchase of a 40-acre tract for land application for the construction of additional percolation ponds or spray land application. The FDEP and FCWC entered into a Consent Order on October 18, 1988 under which FCWC was ordered, among other things, "[W]ithin one hundred twenty (120) days of the effective date of this Consent Order, Respondent [FCWC] shall submit

to the Department an engineering report setting forth a plan for the ultimate elimination of the surface water discharge of effluent from Respondent's facility by the construction of a deep injection well." The Consent Order is attached hereto at Exhibit 4 (GSA-14). However, as explained in my testimony in Docket No. 951258-WS, the injection well option was not deemed viable and irrigation or spray land application was ultimately deemed viable only if FCWC owned the land where the reclaimed water was applied. Ultimately, FCWC upgraded Barefoot to meet AWT standards and purchased an additional 316 acres of land for reclaimed water disposal (irrigation), entered into a contract to provide reclaimed water to the Barefoot Bay Golf Course and obtained permits for same as well as a "wet weather discharge" to the San Sebastian Canal. FCWC filed an application for renewal of the NPDES permit with the USEPA on December 16, 1994. Upon the FDEP's receiving delegated authority to administer the NPDES program on May 1, 1995, the application was forwarded to the FDEP for issuance. On June 6, 1995, the FDEP issued an order granting authority to continue discharging to the canal (Exhibit 4 (GSA-15)) and the final

permit for Barefoot (including a wet weather discharge) was issued on September 5, 1997 (Exhibit 4 (GSA-16)).

On September 14, 1989, the USEPA observed the discharge from Barefoot into the San Sebastian Canal. On February 28,1990, FCWC filed an application for an NPDES permit and by letter dated March 23, 1990, the USEPA acknowledged receipt of the permit on March 6, 1990 (Exhibit 4 (GSA-17)). However, the USEPA misplaced the permit application and FCWC refiled same on June 8, 1990 (Exhibit 4 (GSA-18)).

On September 26, 1990, the USEPA issued Administrative Order No. 90-106 which set forth water quality standards for the discharge and among other requirements, required FCWC to file monthly DMRs with the USEPA (Exhibit 4 GSA-19)). A "show cause" hearing was held by the USEPA in Atlanta on August 14, 1991. A summary of that meeting is at Exhibit 4 (GSA-20). By letter dated August 23, 1991 (Exhibit 4 GSA-21)), FCWC provided additional information to the USEPA which was requested during the "show cause" hearing. On September 16, 1991, the USEPA issued NPDES Permit No. FL0042293 (Exhibit 4 (GSA-22)) which authorized the Barefoot

discharge effective November 1, 1991. The permit provided for ceasing discharge by June 30, 1995.

On September 25, 1991, the USEPA issued Administrative Complaint and Consent Agreement and Order Assessing Administrative Penalties, Docket No. CWA-IV 91-538, assessing a penalty in the amount of $6,000 in settlement of the violations alleged in the Administrative Order No. 90-106 (Exhibit 4 GSA-23)).

FCWC requested that the USEPA accept CBOD in lieu of BOD as the appropriate water quality standard and by letter dated October 28, 1993, the USEPA notified FCWC that it intended to modify the NPDES permit accordingly. The NPDES permit was finally modified to reflect this change on March 24, 1994.

Q. Until the Amended Complaint was filed, did the USEPA give any indication to FCWC that it was considering the imposition of penalties for previously reporting CBOD rather than BOD or for exceeding any NPDES permit limits?

A. No.

Q. Did FCWC attempt to settle the litigation with the USDOJ after the Original and Amended Complaints were filed but prior to trial?

A. Yes, FCWC made numerous efforts to settle with the USDOJ prior to trial but was unsuccessful. FCWC made an offer of judgement to the USDOJ in the amount of $500,000 on March 14, 1995 which was summarily rejected. Witness Baise's testimony will cover settlement negotiations in more detail.

Q. When did "discovery" commence in the litigation?

A. Discovery commenced on March 11, 1994 when the USDOJ filed its first request for the reproduction of documents.

Q. Were you deposed by the USDOJ?

A. Yes. However, when initially deposed on March 27, 1995, on advice of counsel, I declined to answer questions and invoked my right under the Fifth Amendment although I did not believe that I had violated the law in any respect. This advice was prompted by a U.S. Supreme Court decision on January 23, 1995 to deny certiorari in the case of Weitzenhoff v. United States, decided by the U.S. Court of Appeals for the Ninth Circuit. I was advised that under Weitzenhoff, anyone who discharges water, no matter how clean, under circumstances where there is a technical violation of a statute, regulation, or permit can be convicted of a felony even if that person had no knowledge

whatsoever of any technical violations, or if that person actually believed that he or she was complying with the law in all respects. I was further advised that it does not matter that a person had no idea that his or her conduct might violate the law, and further it does not matter that the discharges are entirely clean and comply in all respects with all federal and state standards.

In the fall of 1995, I decided that I would testify and the USDOJ was so notified. My deposition was taken on November 13 and December 15, 1995.

Q. When was the trial held?

A. The trial, lasting eight days, was held during the period March 25-April 5, 1996.

Q. What was your involvement at trial?

A. I acted as FCWC company representative and testified.

Final Outcome of Litigation

Q. What was the final outcome of the litigation?

A. In its order (Exhibit 4 (GSA-24)), the Court found that any "potential risk of harm" to the environment had not been quantified. The USDOJ had stipulated in its pre-trial discovery responses and at trial that it had no evidence showing that the violations

of the CWA resulted in any environmental harm.

With respect to Barefoot, the Court concluded that the TRC violations occurred because FCWC was unaware that the test method approved by the USEPA did not provide precise results and that the levels measured could have been reported as "not detectable," such that FCWC would have been deemed to be in compliance and furthermore, that BOD could have been calculated from CBOD and had this been done, the BOD limits would not have been violated. With respect to toxicity, the Court noted the discrepancy between the plant capabilities and the toxicity requirements of the NPDES permit. In summary, the Court found that the TRC and BOD violations were not serious and that the toxicity test violations were somewhat serious.

With respect to Carrollwood, the Court found that none of the violations were serious.

With respect to Waterway Estates, the Court found that most of the violations were not serious. Furthermore, the Court found that the discharges to an unpermitted location violations were somewhat mitigated by the fact that the canal was a previously approved discharge location.

The Court entered judgement against FCWC civil penalties as follows:

Barefoot	$ 5,610.10
Carrollwood	14,675.00
Waterway	289,425.00
Total	309,710.00

Q. Was FCWC satisfied with the outcome of the litigation?

A. Yes. I believe the Court's judgement is consistent with FCWC's early assessment of the ultimate outcome and with FCWC's analysis in formulating settlement offers.

Q. Did FCWC pay the judgement to the United States?

A. Yes.

Q. Did the Court find AHI liable in any way for violations of the CWA?

A. No.

Legal Counsel

Q. When did FCWC first retain outside legal counsel in the matters which were the subject of the Original and Amended Complaints?

A. FCWC first retained the firm of Parsons and Landers in April 1991 which provided counsel in connection with Waterway, Carrollwood and Barefoot in the early discussions of settlement. Parsons and Landers

involvement essentially ceased with respect to Carrollwood and Barefoot when FCWC and the USEPA entered into the Consent Agreements and Orders Assessing Administrative Penalties which FCWC believed resolved these matters. With respect to Waterway, Parsons and Landers remained the principal legal counsel until Altson and Bird was retained but thereafter had a very limited role.

Q. Why was Parsons and Landers selected for these services?

A. Jay Landers, the lead attorney with the Parsons and Landers firm was formerly the Secretary of the FDEP had substantial knowledge of USEPA Region IV through this experience and legal expertise with regard to the permitting process and enforcement.

Q. Why did FCWC select Alston & Bird?

A. Lee A. DeHihns, the Alston & Bird attorney who provided counsel, was the former USEPA Region IV General Counsel and Acting Region Administrator. Through this experience he had attained expertise in the legal and administrative aspects of the CWA. Furthermore, he was acquainted with most of key administrative and legal staff members at USEPA Region IV.

Q. Describe the services Mr. DeHihns provided?

A. Mr. DeHihns provided advise and counsel to FCWC on the legal implications of the allegations leading to the Original Complaint, represented FCWC at meetings between FCWC and the USEPA Region IV officials during the period of settlement discussions, and acted as an advisor to Jenner & Block and FCWC's General Counsel during the period beginning after Jenner & Block was retained in June 1993 until the Original Complaint was filed and limited counsel from time to time after it was filed.

Q. What other attorneys eventually become involved?

A. In May 1993 when it became evident that the prospect of a settlement was not good, FCWC and its General Counsel consulted with Weil, Gotshal & Manges, the Avatar Holding Inc. Corporate Counsel and other law firms. Weil, Gotshal & Manges had provided legal services to Avatar Utilities Inc. subsidiaries from time to time on matter related to environmental law. However, FCWC's General Counsel concluded that attorneys having extensive expertise in CWA law could better serve FCWC inasmuch as the statutory penalties were enormous and consequently the future of FCWC was at stake. This lead to the selection of Mr. Gary H. Baise with the firm of Jenner & Block. Mr. Baise was selected because his area of expertise

and specialization in the law dealt with the issues involved in the FCWC case; he was recommended to the FCWC General Counsel by a number of attorneys in the this field of law; the firm's ability to provide legal backup, paralegal assistance, etc.; and the prestige of Jenner & Block.

Later, local counsel in Ft. Myers was retained to assist in the filing of documents with the Court in Ft. Myers and proceedings preliminary to trial. The firm of Henderson, Franklin, Starnes & Holt, P.A. was selected after consideration of a total of three firms because of recommendations of local attorneys, their familiarity with the local Federal District Court and its rules, their size and ability to provide backup, and their nearness to the Court and ability to file documents on short notice. Mr. John A. Noland was the principal attorney in this case.

Mr. Richard J. Leon with the firm of Baker and Hostetler was retained in early 1995 to assist with settlement negotiations with the USDOJ. Mr. Leon, a former USDOJ official, had extraordinary experience in negotiating with the USDOJ.

Q. Did Mr.Baise leave Jenner & Block after he was retained?

A. Yes, Mr. Baise left the firm at the end of 1994 and joined the firm of Gabeler, Baise & Miller. This firm later changed to Baise & Miller.

Q. Who were Mr. Baise's co-counsel who provided legal services in connection with the case?

A. Co-counsel included Don G. Scroggin, Alexander M. Bullock and Lance W. High.

Q. Who represented Avatar Holdings Inc.?

A. Avatar Holdings Inc. was represented by Weil, Gotshal & Manges LLP. The lead attorney was David B. Hird.

Legal Expenses

Q. What was the total legal expenses associated with FCWC defense which forms the basis for the recovery sought in this rate proceeding?

A. The total outside expenses which forms the basis for recovery is $3,826,210. See Exhibit 11 (MM-2).

Q. Were any of these expenses associated with AHI's defense?

A. No.

Q. Please provide a breakdown of these expenses by category.

A. The breakdown is as follows:

Attorney Fees & Expenses	$ 3,634,470
Expert Witness Fees & Expense	190,314

Fact Witness Fees & Expenses 1,426

Total $ 3,826,210

Q. Does this total include any amounts for FCWC personnel, travel, document production or copying, or incidentals?

A. No.

Q. Did FCWC sustain any expenses in these categories?

A. Yes, but FCWC is not attempting to recover such expenses in this proceeding.

Q. Can these expenses be separated as to the Barefoot Bay, Carrollwood and Waterway systems?

A. No. From the early stages of discovery following the filing of the Original Complaint, the scope changed dramatically and until the Amended Complaint was filed in March 1995, included, for purposes of discovery, all FCWC facilities. Therefore, it was not until over two years after the Original Complaint was filed that the scope of much of the legal work narrowed to the extent that only Waterway, Carrollwood and Barefoot were involved. The discovery, pretrial motions, briefs and other proceedings were so intermingled that an attempt to account for legal expenses on a specific plant or system basis was not possible.

Q. Did FCWC take measures to control legal expenses?

A. Yes. FCWC took several measures to control legal expenses including the following:

(1) The FCWC General Counsel renegotiated attorney billing rates with Mr. Baise when he left the firm of Jenner and Block in December 1994. The rates for Mr. Baise and Mr. Scroggin were reduced from $275 and $225 per hour respectively, to $200 for each. These billing rates were well below the typical rates in the Washington D.C. area for attorneys having special expertise in CWA litigation.

(2) The FCWC General Counsel monitored legal expenses carefully and consulted with Mr. Baise frequently regarding legal expense budgets. All invoices for legal services were first carefully reviewed by FCWC General Counsel and transmitted to FCWC for review prior to payment.

(3) Discovery entailed the furnishing of over one million pages of documents and millions of bytes of data on computer storage media. It was decided fairly early in the discovery process to limit the review of documents by FCWC's counsel for confidential and privileged documents. To have followed typical procedures and had counsel to review each document for confidential and privileged content, redact the confidential and privileged

portions and defend the discovery motions which would have likely resulted would have resulted in substantially higher legal fees. The USDOJ was essentially given access to FCWC files at ten locations, selected the documents desired and FCWC copied same and submitted to the USDOJ through its legal counsel.

(4) Every effort was made to schedule depositions so that attorney time was minimized.

Q. Of the total amount of $3,826,210, how much is FCWC seeking to recover through rates?

A. FCWC is seeking to recover from all customers, without regard to rate making jurisdiction, $3,589,368 plus rate case expenses. See Exhibit 11 (MM-3) and Exhibit 11 (MM-4).

Q. What is the basis for this amount?

A. The most rational basis for determining the amount that FCWC is justified in recovering is to compare the offer of settlement presented by the USDOJ prior to the filing of the Original Complaint with the final judgement rendered by the Court. The offer presented by the USDOJ by letter dated December 12, 1992 provided for FCWC's payment of a penalty in the amount of $5,000,000 (Exhibit 4 (GSA-4) whereas the final judgement was $309,700 or 6.19 percent of

the offer. Therefore, FCWC would forego recovery of 6.19 percent ($236,842) of its legal expenses associated with its defense but is justified in recovering the remainder or 93.81 percent of the total. Therefore, when combined with the penalty, FCWC will forgo the recovery of $547,562. This compares closely with the $500,000 settlement offer presented to the USDOJ before the litigation was initiated and before FCWC had sustain any appreciable legal expenses.

Q. Of the total amount FCWC is seeking to recover, how much is it seeking to recover from its customers in Lee County and Barefoot Bay?

A. FCWC is seeking to recover $2,265,833 plus rate case expenses from these customers (See Exhibit 11 (MM-4)).

Q. Did FCWC act responsibly and make reasonable efforts to comply with regulatory requirements with respect to Waterway, Carrollwood and Barefoot?

A. Yes. First, environmental regulatory compliance has been and remains a top priority FCWC goal. From both a view of the facts at the time decisions were made by FCWC and a view in hindsight, it is my opinion that FCWC acted reasonably and in good faith in dealing with environmental regulatory compliance

matters with respect to Waterway, Carrollwood and Barefoot. FCWC faced almost insurmountable challenges requiring extraordinary measures in meeting the directives of the FDEP and USEPA as well as the other regulatory agencies having any jurisdiction. Throughout the entire course of meeting these mandates, FCWC was under constant pressure to achieve results faster. In the case of Carrollwood and Barefoot Bay, FCWC pursued alternative courses simultaneously in an effort to expedite meeting the mandates of the FDEP and USEPA. In the case of Waterway, FCWC thoroughly investigated all potential alternatives and pursued upgrading the WWTP and relocation of the outfall expeditiously after it was deemed to be the only reasonable alternative. However, it faced obstacles which it could not have reasonably foreseen which caused delays. In addition to meet the mandates of the FDEP and the USEPA, FCWC had to satisfy numerous other regulatory agencies, some of which had requirements and goals which conflicted with those of the FDEP and USEPA. From the perspective of overall outcomes, I believe the FDEP was satisfied with FCWC's performance as is implicit in the deposition and testimony at trial of current and

former FDEP officials. Furthermore, as evidenced by its actions with respect to the imposition of modest penalties in the case of Carrollwood and Barefoot long before the USDOJ filed the Original Complaint as discussed in the preceding testimony, I believe the USEPA was satisfied with the outcomes at these facilities.

Second, FCWC always considers customer rate impacts in making decisions on matters which effect rates and certainly did so in considering alternatives for meeting the mandates of the FDEP and USEPA in the case of Waterway, Carrollwood and Barefoot Bay. It must be recognized that environmental regulatory agencies focus on achieving goals aimed at compliance in the most expeditious manner and generally give little consideration to the cost and resulting impacts on customer rates. In fact, my experience in dealing with environmental regulators clearly reveal that generally they have little knowledge of rate making. This required that FCWC balance the desires of the FDEP and USEPA to expedite action with customer rate impacts of the action. In dealing with the regulatory compliance matters in the case of Waterway, Carrollwood and Barefoot Bay, FCWC was the only advocate for its

customers with respect to rate impacts. Had FCWC not acted responsibly in this regard, customer rates would have undoubtably been higher.

Q. Why do you think recovery of these expenses through customer rates is justified?

A. FCWC should be allowed to recover through rates reasonable and prudently incurred expenses in connection with fulfilling its obligations pertaining to the provision of service to its customers. This encompasses expenses of all kinds, including legal expenses. It is clearly prudent that FCWC, like any other business enterprise, avail itself of legal services. To act otherwise would not be in the best interest of its customers. Such expenses are not unlike any other expense incurred in the course of fulfilling its obligations with respect to the provision of service to its customers.

In the past, FCWC has been presented with numerous settlement demands by claimants, including regulatory agencies. It has consistently acted in a reasonable manner with advice of legal counsel and in most instances reached settlement with claimants. However, there have been other instances where claimants acted in an unreasonable manner and

settlement could not be reached and litigation resulted. The legal expenses associated with settling such claims or if settlement is not reached, litigating claims settlement, has historically been deemed prudently incurred expenses and recovered through rates. The circumstances and actions taken by FCWC in dealing with the USDOJ claim do not differ in any material sense from historical cases and the expenses incurred should be recovered through rates. In this case, after careful consideration with the advise of competent legal counsel, FCWC concluded that the settlement demand which the USEPA presented to FCWC prior to the filing of the Original Complaint was clearly unreasonable. This conclusion was borne out by the judgement rendered by the Court. The settlement demand of $5,000,000 presented by the USDOJ prior to filing the Original Complaint was sixteen times the $309,710 judgement rendered by the Court. Alternatively expressed, the judgement was six percent of the settlement demand. If only Waterway, which was the only facility alleged to be in violation of the CWA in the Original Complaint, is considered, the judgement of $289,425 is $210,575 or 42 percent less than FCWC's counteroffer of $500,000

rendered in January 1993 prior to filing of the Original Complaint and $190,290 or 38 percent less than the total penalties imposed by the Court's final judgement for all violations at Waterway, Carrollwood and Barefoot.

Q. Does this conclude your testimony?

A. Yes.

MR. GATLIN: I would like to offer the testimony to be inserted into the record as though read of Mr. Gary H. Baise.

CHAIRMAN JOHNSON: It will be so inserted.

MR. GATLIN: And would like to identify as a composite exhibit Mr. Baise's Exhibits GHB-1 through GHB-110.

CHAIRMAN JOHNSON: We'll mark those as Composite Exhibit 6, GSB-1 through 110.

(Exhibit 6 marked for identification.)

MS. GERVASI: And Staff would like to identify a composite exhibit consisting of transcripts of the deposition of Mr. Baise taken May 20th of 1998, as well as late-filed deposition Exhibits 1, 2, and 3.

CHAIRMAN JOHNSON: We'll mark that as 7, and that will be short titled "Transcript of depositions and late-filed depositions of Witness Baise."

(Exhibit 7 marked for identification.)

MS. GERVASI: Thank you.

FLORIDA CITIES WATER COMPANY
RATE APPLICATION FOR RECOVERY OF LEGAL EXPENSES

TESTIMONY OF
GARY H. BAISE

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Q: Please state your name and business address.

A: Gary H. Baise, Baise & Miller, P.C., 815 Connecticut Avenue, N.W., Suite 620, Washington, D.C. 20006-4004.

Q: By whom are you employed and in what capacity?

A: I am a partner in the law firm of Baise & Miller, P.C.

Q: Have you previously testified before the Commission?

A: No.

Q: What is the purpose of your testimony?

A: The purpose of my testimony is to describe (1) my assessment of the alleged violations of the Clean Water Act ("CWA") pertaining to the Florida Cities Water Company ("FCWC") Waterway Estate Wastewater Treatment Plant ("Waterway") prior to the United States filing a complaint, as amended, against FCWC on October 1, 1993 (Original Complaint), (2) the legal issues, legal proceedings, and settlement discussions after the filing of the complaint by the United States Department of Justice ("DOJ") on behalf of the United States, and (3) the outcome of the litigation. This testimony explains almost four years of very complex litigation which took many legal twists and turns. The attempt here is to provide detail sufficient to cover the most important aspects of the litigation. *See* Exhibit 6 GHB-1 (which provides an outline of the various individuals involved in the litigation).

Q: What was your role in this litigation?

A: I was retained by FCWC approximately four months prior to the complaint being filed and was the lead attorney in defending FCWC against these allegations.

Q: What did you rely upon for your testimony?

A: I relied upon my first-hand knowledge, a review of applicable documents, as well

as the knowledge and efforts of the litigation team.

Q: **Did you prepare documents describing in summary form the most significant events and activities from the time you were retained until the final conclusion of this litigation?**

A: Yes. We prepared a document styled TIME LINE, *U.S. v. Florida Cities Water Company* which is attached as Exhibit 6 GHB-2 and contains an overall timeline and other outlines of the efforts undertaken.

Q: **Do you understand the purpose of FCWC's application in this docket?**

A: Yes.

Background of Gary H. Baise

Q: **Please describe your education and experience.**

A: I received my law degree from Indiana University in 1968. I was then hired by the U.S. Department of Justice's Civil Division, where I served as an attorney in the general litigation section. In this position, I handled cases for the U.S. Department of Agriculture and other agencies. After serving approximately two years in the U.S. Department of Justice, I was asked to help the new Administrator organize and lead the then newly-created U.S. Environmental Protection Agency ("EPA"). I was named Assistant to the Administrator, and served as Chief of Staff at EPA from November 1970 until 1972. At the beginning of 1972, Administrator Ruckelshaus asked me to lead the EPA Office of Legislation, Legislative Counsel and Intergovernmental Affairs.

In 1973 I was asked to become Executive Assistant to the Director of the FBI. Later that same year I became Associate Deputy Attorney General of the United States. I then served as Acting Deputy Attorney General of the United States from October 1973 to April 1974.

In April 1974 I left government service and entered private practice. I practiced environmental law at the law firm of Beveridge and Diamond from 1974 until April 1989 when I joined the Browning-Ferris Industries Corporation ("BFI"). I served as BFI's Vice President of External Affairs until December 1991. I then resumed the private practice of law in the environmental field, where I continue until this day. A copy of my resume is attached as Exhibit 6 GHB-3.

Q: **Please describe your experience and background relating to environmental regulation and litigation.**

A: I have handled cases concerning the Clean Water Act ("CWA"), Clean Air Act, wetlands, National Environmental Policy Act, pesticides, and Superfund issues, and virtually every other area of environmental law. I have represented numerous industries in filing challenges to EPA regulatory actions in the U.S. Court of Appeals in Washington, D.C. I have also counseled companies and trade associations on their problems with EPA. A list of my reported cases is attached as Exhibit 6 GHB-4.

First Contact With Case

Q: **When did you first become aware of this case?**

A: Edwin Jacobson, president of Avatar Holdings Inc., contacted me in December 1992 and asked about my litigation experience relating to the CWA. He described the difficulties that his company was having settling a case in EPA's Region IV. Mr. Jacobson indicated that settlement discussions had been occurring for some time and looked increasingly futile. He said that the company may have no alternative but to litigate the case, and wanted to know if I was available.

Q: **When were you retained to handle this case?**

A: I received a call from Dennis Getman and was retained in June of 1993. Mr.

Getman is General Counsel of FCWC and Executive Vice President and General Counsel of Avatar Holdings Inc. As I recall, he asked me a number of questions and requested that I review some documents, which would be sent to me by the firm of Weil, Gotshal & Manges. I received a memorandum from Weil, Gotshal and Manges on June 2, 1993, which provided a general outline of the facts and suggested one possible defense that FCWC might have to this action.

Q: **With what firms (give periods) were you associated during your engagement by FCWC?**

A: I was associated with the following firms:

Jenner & Block from initial engagement until December 1994

Gabeler, Baise & Miller from January 1995 until October 1995, and

Baise & Miller from October 1995 to present.

Q: **What did you do during the period following your engagement by FCWC until the Original Complaint was filed by DOJ on October 1, 1993?**

A: In June 1993, we began reviewing documents sent to us by FCWC, and the law firms of Alston & Bird, and Weil, Gotshal & Manges. These records showed that Waterway, owned by FCWC, was a privately-owned and governmentally-regulated wastewater treatment facility operating in N. Fort Myers, Florida. The documents also indicated that on two prior occasions Waterway had been granted CWA permits, known as National Pollution Discharge Elimination System ("NPDES") permits, which allow a discharger to discharge treated wastewater effluent into waters of the United States.

<u>The Permit Renewal Problem</u>

Q: **How did Waterway's situation change?**

A: In 1986, FCWC was required to renew its NPDES permit for Waterway to

discharge into the Caloosahatchee River adjacent to Fort Myers. In the summer of 1986, FCWC officials were notified by EPA Region IV that the permit renewal application would be denied, which would require the facility to cease its discharge into the river. EPA Region IV based its decision upon its understanding that Waterway lacked a wasteload allocation from Florida Department of Environmental Protection[1] ("FDEP") that allowed the plant to discharge into the canal that connected to the Caloosahatchee River. EPA's understanding was incorrect. Nevertheless, based upon this erroneous information, EPA denied renewal of the NPDES permit for the facility in December of 1986, even though the facility had no record of violating Florida water quality standards or its NPDES permit.

FCWC officials immediately started working with the FDEP and EPA to develop a resolution of the matter because this was a public health facility and, unlike a manufacturing facility, could not shut down for repairs or cease operations.

Q. What steps did you take to initiate your investigation of this case?

A. In the summer of 1993, we began the development of a timeline of events, based on documents provided by FCWC, to demonstrate that the company had moved as expeditiously as possible to construct a new pipeline to the Caloosahatchee River and meet the water quality limits of the new NPDES permit issued in September 1989 (See Exhibit MA-9). This timeline served to prove that any delay in compliance was not FCWC's fault. We reviewed FCWC's documents in order to determine facts to take to DOJ to demonstrate that Waterway was technically discharging into the Caloosahatchee River, not in an unapproved

[1]Formerly known as the Florida Department of Environmental Regulation.

location as alleged by EPA. In this regard, we researched the specificity required in defining "outfall location." In addition, we researched and prepared memoranda on the denotation of "receiving waters" and the definition of "outfall location." We also reviewed administrative decisions of what constitutes a "receiving water" under the CWA and how such waters are designated in the renewal of a permit. The facts that we developed contradicted DOJ's position that the company delayed its compliance with the CWA by taking too long meet these requirements.

Discussions With EPA

Q: **Please describe any additional effort to settle this matter after you were retained by FCWC?**

A: On July 21, 1993, we met with DOJ and EPA Region IV staff in Atlanta. DOJ counsel's key points at the meeting were that FCWC discharged pollutants without an NPDES permit, discharged in the wrong location, and that FCWC delayed its compliance efforts in order to save money. We demonstrated to DOJ counsel that outside government regulatory bodies were responsible for much of the delay in moving the discharge point from the canal to the middle of the river. In addition, we pointed out how extremely rare it was for EPA to rescind an NPDES permit from a facility that was meeting water quality standards and the effluent limitations in its NPDES permit. We also suggested in this meeting that EPA failed to follow its own regulations for rescinding an NPDES permit. Finally, we raised with DOJ and EPA staff the fact that a discharge outfall could be within the "15 second rule," and therefore the current discharge location was covered by the permit.

As a result of this meeting, DOJ counsel and EPA staff agreed to review our

arguments and the timeline we submitted. In the meeting EPA indicated that there may be some time for which the agency would give credit to FCWC and not seek a penalty.

On September 1, 1993 David Berz, of Weil Gotshal & Manges, representing FCWC, and I met with DOJ counsel, Daniel S. Jacobs, to discuss our research on a number of issues. We presented him with our results and memorandum which we believed demonstrated that DOJ and EPA did not have a compelling case against FCWC that merited substantial penalties under the CWA. We suggested that given the facts we had developed for Waterway, the case did not support penalties of more than two hundred thousand dollars, if that.

Mr. Jacobs stated that FCWC's position was not close to the number that DOJ was seeking. DOJ had already demanded $5 million in penalties from FCWC and never moved from this amount at the meeting. We referred him to awards in previous CWA cases in an effort to convince him that the settlement offer presented by him in December 1992 was much too high. See Exhibit GSA-4.

Q: **What other actions did you undertake in August and September 1993?**

A: In September, in a telephone conference call, Mr. Berz and I again tried to convince Mr. Jacobs that EPA and DOJ were in error with regard to the allegations against FCWC. We discussed our continuing research and explained to Mr. Jacobs that an NPDES permit could not be rescinded unless one of four criteria set forth in EPA's regulations were met. Mr. Jacobs rejected our arguments and made it clear that DOJ would be filing a complaint in U.S. District Court, an action that he had been threatening for well over a year.

<u>The Complaint and Answer</u>

Q: **When and where was the complaint filed by DOJ and what did it allege?**

A: DOJ filed the complaint on October 1, 1993 in the U.S. District Court, Middle District of Florida initiating an action for civil penalties under the CWA. The complaint alleged that FCWC had been discharging without an NPDES permit at Waterway, discharging in the wrong location, and violating the provisions of its NPDES permit issued in September 1989. ("Original Complaint"). See Exhibit GSA-3. Each of these allegations were asserted to be separate, daily violations of the CWA. FCWC faced penalties of up to $25,000 per day, per violation.

Q: What steps did FCWC take to respond to the DOJ Complaint?

A: In October and November 1993, we undertook substantial amounts of legal research to determine and analyze potential defenses including statute of limitations and other affirmative defenses. In addition, we reviewed a large number of FCWC documents and on November 12 and 19 met with FDEP officials concerning the compliance history at Waterway. We determined that delays in state and local review of FCWC construction plans contributed to FCWC's difficulties in coming into compliance with the EPA Administrative Order issued in May 1987 and the 1989 NPDES permit. See Exhibit MA-8.

Q: **Did FCWC file a response to the Original Complaint?**

A: Yes. On November 22, 1993, we filed an answer to the Complaint. See Exhibit GSA-2. FCWC denied the allegation that it was not authorized to discharge pollutants into the Caloosahatchee River. FCWC also denied the allegation that the unnamed canal was not a permitted discharge location. Regarding plaintiff's claim that FCWC violated the 1989 NPDES permit, FCWC answered that these allegations were conclusions of law requiring no response. FCWC pleaded ten defenses, including that its application for the renewal of its permit was improperly denied by EPA and that Plaintiff's claims were barred because FCWC

had paid penalties at the Waterway facility assessed by the FDEP under comparable Florida law. In addition, we plead the following affirmative defenses: the doctrines of impossibility, estoppel, waiver, and laches. FCWC also plead that state, local and federal governments unnecessarily delayed issuing permits and enacting zoning changes necessary before it could initiate construction of an advanced wastewater treatment facility or relocate the outfall, which prevented it from meeting compliance schedules. FCWC also plead that it had at all times acted in a proper and reasonable manner, had caused no environmental harm, exercised due care, and acted in good faith to fill all requirements of the CWA.

Q: **Did FCWC retain additional counsel following the filing of the Original Complaint?**

A: Yes. In early 1994 FCWC retained the firm of Henderson, Franklin, Starnes & Holt, located in Ft. Myers where the action was filed.

Q: **Why was this firm needed?**

A: We needed a firm to move our admission *pro hac vice* and to serve as local counsel. The local rules for the Middle District require the retention of local counsel. This firm was familiar with the Federal District Court, its rules and procedures, and could respond rapidly to emergency filings. It also filed most pleadings before the Court. Also, we sought and relied upon Henderson, Franklin's advice regarding strategy on a regular basis.

Beginning of Discovery

Q: **What was your next action after answering the Complaint?**

A: We began the discovery phase of the case by interviewing potential witnesses at FCWC and at FDEP with respect to wasteload allocation and CWA water certification issues. We also began drafting initial document requests. We

reviewed an enormous number of documents at FDEP's offices in an effort to prove that Waterway did have a wasteload allocation to discharge into the Caloosahatchee River. FDEP officials such as Dr. Abdul Ahmadi and his colleagues repeatedly stated that they were unaware of any reason that a waste treatment facility would be issued a "no discharge" wasteload allocation because the state permit contained an implicit wasteload allocation. Concurrently, we filed Freedom of Information Act ("FOIA") inquiries with at least four EPA regional offices. The purpose of these FOIA requests was to obtain EPA records to demonstrate how rare it was to deny an NPDES permit and also to determine the circumstances nationwide under which an NPDES permit had ever been denied.

In November and December 1993, we began preparing responses to the Court's standard interrogatories that required the Plaintiff to set forth a brief statement of the case, describe the basis of federal jurisdiction, outline the discovery anticipated by the Plaintiff, and describe any dispositive motions that the Plaintiff anticipated filing. Exhibit 6 GHB-5. FCWC was asked to agree or disagree with the Plaintiff's statement of the case, state whether all parties that should be joined had been joined, outline the discovery anticipated by FCWC, and describe any dispositive motions that the Defendant anticipated filing. The parties were asked to estimate the time required to complete all discovery, the time required for trial, and whether a preliminary pretrial conference was necessary.

The U.S. filed its answers to the Court's standard interrogatories in January 1994. Exhibit 6 GHB-6. DOJ anticipated that following a period of informal discovery it would commence formal discovery, including interrogatories, document requests, oral depositions, and requests for admissions.

FCWC filed its answers to the Court's standard interrogatories in February 1994. Exhibit 6 GHB-7. FCWC stated that it did not believe that it had committed the violations of the CWA alleged in the Complaint. FCWC told the Court, "[t]he crux of this litigation is the U.S. Environmental Protection Agency's improper denial on December 8, 1986 of FCWC's application to renew its NPDES permit." FCWC advised the Court that settlement negotiations had taken place and would continue as events warranted, and that discovery was required by both parties. FCWC anticipated that it would need to take 15 fact depositions, a number of expert depositions, and serve written discovery, including interrogatories and requests for admissions. FCWC stated that it anticipated filing a motion for summary judgment.

***Q*: Did DOJ respond to FCWC's answer and affirmative defenses?**

A: Yes. On December 15, 1993, DOJ filed a Motion for an Extension of Time in which to file a motion to strike FCWC's affirmative defenses. Exhibit 6 GHB-8.

***Q*: Did the DOJ move to strike FCWC's affirmative defenses?**

A: Yes. On February 3, 1994, DOJ filed its motion to strike FCWC's affirmative defenses. Exhibit 6 GHB-9. DOJ argued that all of FCWC's affirmative defenses should be stricken as a matter of law. DOJ filed a 16-page memorandum in support of its motion. Exhibit 6 GHB-10.

***Q*: Did the DOJ file a request to produce documents?**

A: Yes. On February 14, 1994, FCWC received the DOJ's first request for production of documents, which contained 45 separate document requests. Exhibit 6 GHB-11. These were extensive requests, which required FCWC to undertake massive efforts to obtain, for example, "all financial reports, statements,

balance sheets, budgets, prepared by or on behalf of FCWC since January 1, 1980." This encompassed reviewing data developed over a period of 14 years. DOJ also requested: all noncompliance reports submitted by Defendant to EPA or the State of Florida; all documents relating to discussions, meetings, and correspondence between FCWC and its contractors and subcontractors; all documents relating to any test results, laboratory analyses, flow measurements or concentration analyses of any pollutants discharged from the facility; all designs, including any plans and specifications, and modifications thereof, for the treatment elements and processes at the Facility; all documents that identify, describe or explain the treatment processes and operations at the Facility; all documents relating to all operating, maintenance and inspection procedures at the Facility, and any and all changes in these procedures, which were designed to, or had the effects of, preventing, increasing, reducing, or otherwise affecting discharges, violations of water pollution laws, regulations, or violations of your NPDES Permit. Each of these requests required a substantial effort to search and review FCWC files which covered a six to fourteen year period.

Q: **What did you do after receiving the document request?**

A: We asked FCWC to use its staff to retrieve as much of the material as possible in order to hold down costs. Notwithstanding this effort, we still had to review what amounted to tens of thousands of pages of material, which were assembled, for the most part, by FCWC, reviewed in part by counsel, and submitted to the DOJ pursuant to its request.

Q: **What was the next step you took on behalf of FCWC?**

A: During March and April of 1994, we continued our document review and filed additional FOIA requests to EPA regional offices regarding other NPDES permit

denials. By April 6, 1994, we had produced all the documents in response to DOJ's first document production request. My estimate is that we turned over tens of thousands of pages of material. In addition, in April 1994, we filed our first request for production of documents to DOJ and we started preparing for the first of what became approximately fifty (50) depositions taken by both sides.

***Q*: What occurred next in the litigation?**

A: On April 12, 1994, FCWC submitted its first request for production of documents to DOJ covering 30 different categories. FCWC wanted all documents relating to the denial or issuance of permits for Waterway; all documents relating to EPA's analysis of any impacts that Waterway's discharges may have had on the receiving waters or public health; all documents relating to water quality impacts, water quality certifications, waivers of water quality certification, determination of significant noncompliance, water quality based effluent limitations ("WQBELs"); wasteload allocations; compliance/noncompliance indexes; and memoranda of agreements between EPA and the State of Florida regarding the approval process for wasteload allocations under the permitting programs. FCWC also sought documents regarding all communications among various agencies, federal and state, about this facility.

Depositions Begin

***Q*: When did DOJ begin its depositions?**

A: DOJ took its first deposition on April 21, 1994, when it conducted the examination of Julie Karleskint. Exhibit 6 GHB-12. Ms. Karleskint, FCWC's Manager of Operations, was the person knowledgeable about the FCWC's discharges and alleged exceedences and could explain the apparent toxicity exceedences at Waterway. Her testimony demonstrated that FCWC was

not necessarily responsible for those exceedences. In addition, Ms. Karleskint was questioned at length on construction issues at Waterway; and about her knowledge of Fiesta Village, Golden Gate, Southgate, Poinciana, Barefoot and Carrollwood even though these facilities were not at issue at this time. Ms. Karleskint was also questioned about environmental audits and audit programs undertaken by FCWC. She was asked about components of a typical environmental audit and what she had done to audit FCWC's facilities. She also discussed her job responsibilities regarding regulatory compliance and how she reviewed all discharge monitoring reports and operating reports looking for exceedences. DOJ asked about other individuals within FCWC who would be knowledgeable and attend meetings regarding regulatory compliance. DOJ asked what caused the nitrogen violations and some of the modifications which had been undertaken to resolve exceedence issues at Waterway. She was also questioned by DOJ on what steps FCWC undertook to bring Waterway into compliance with EPA's Administrative Order.

Expansion of the Litigation

***Q*: Did DOJ then attempt to expand its discovery requests to include FCWC facilities other than Waterway?**

A: Yes. DOJ did this for the first time during the deposition of Ms. Karleskint, stating that it would seek information on other FCWC facilities. In response to this expansion FCWC filed a motion for a protective order to limit the government to documents relevant to the Complaint at that time, which concerned only Waterway. Exhibit 6 GHB-13. DOJ further demanded production, in two days, of all previously redacted documents in their entirety, including documents relating to other FCWC facilities. FCWC objected, noting that the

complaint was limited to claims concerning Waterway, and that the schedule to produce these additional documents was patently unreasonable. FCWC opposed this substantial expansion of discovery, as it had already produced more than 100,000 pages of documents for inspection and copying by DOJ. On April 18, 1994, the Court granted, in part, FCWC's motion for a protective order. Exhibit 6 GHB-14. This order granted FCWC's request, in part, by not requiring FCWC to immediately produce all redacted documents in their entirety. The documents did, however, have to be produced within 20 days of the Court's order, subject to claims of confidentiality and privilege.

Q: **During this time did you become aware that DOJ counsel was attempting to contact former FCWC employees?**

A: Yes. In April of 1994, we became aware that DOJ was calling and pressuring former employees to meet with its counsel. DOJ urged these former employees not to inform FCWC of these meetings or to permit FCWC counsel to attend these meetings. In our letter of April 19, 1994, we objected to DOJ's efforts to undertake *ex parte* contacts with former FCWC employees, which was specifically prohibited under Florida caselaw and the Canons of Ethics. Exhibit 6 GHB-15. In a letter of April 20, 1994, DOJ acknowledged that there could be a conflict with appropriate procedure and acquiesced in our request until they completed their study of the matter. Exhibit 6 GHB-16.

After its review of this matter, DOJ, in June 1994, moved to allow such *ex parte* contacts. Exhibit 6 GHB-17. The DOJ filed an 11-page memorandum in support of its motion, with attachments, arguing that it had a right to have *ex parte* contacts with former employees of FCWC. DOJ took exception to the cases in the Middle District of Florida prohibiting such *ex parte* contacts, and attempted to

distinguish them from the facts in FCWC's case. DOJ's memorandum discusses, in great detail, the applicable rule of the Florida Rules of Professional Conduct, the ABA model rule on which it was based, the ABA interpretation of this model rule, the Florida Bar opinion on the Florida rule, and the caselaw. The general rule is that a lawyer may not contact a party the lawyer knows to be represented by counsel, unless the lawyer has the consent of the other lawyer. For corporate parties, this rule applies to persons with managerial responsibility on behalf of the organization. In the Middle District of Florida the prohibition applies to former as well as current employees.

On July 15, 1994, FCWC filed its memorandum in opposition to DOJ's request. FCWC explained the facts concerning DOJ's contacts with former FCWC employees and its interest in protecting privileged information from disclosure. *See* Exhibit 6 GHB-18.

On August 5, 1994, DOJ sought permission to file a reply memorandum, in conflict with the local practice. Exhibit 6 GHB-19. This reply brief did not effectively attack our legal arguments, but rather contained spirited arguments about whose version of the facts was correct. On August 17, 1994, FCWC filed a memorandum in opposition to DOJ's reply motion, arguing that local practice does not permit reply memorandum and defended FCWC's view of the facts.

Several months later, on February 13, 1995, the Court granted a protective order barring DOJ from *ex parte* contacts. See Exhibit 6 GHB-20. On March 16, 1995, the Court issued an order denying DOJ's motion to allow *ex parte* contacts, and specifically required DOJ to give FCWC counsel notice before it contacted former FCWC employees. The Court also denied FCWC's motion to disqualify DOJ due to these *ex parte* contacts which are discussed below. Exhibit 6

GHB-21. 111

Q: When did FCWC begin taking depositions and for what purpose?

A: On May 5, 1994, we deposed John Marlar, one of the key EPA Region IV water experts. Exhibit 6 GHB-22. I considered Mr. Marlar one of the three or four most knowledgeable persons in EPA on permitting issues under the CWA. Therefore, I wanted to use Mr. Marlar's deposition to demonstrate how wasteload allocations are developed under Sections 201 and 303 of the CWA. I questioned Mr. Marlar about the 1975 "Lower Florida River Basin Water Quality Management Plan, December 1975" that demonstrated how wasteload allocations were developed and approved by EPA and the state. The deposition also demonstrated that EPA was not following its regulations regarding wasteload allocation approvals. Mr. Marlar testified that it was EPA's general practice that all wasteload allocations to be approved by the agency before including them in an NPDES permit. Mr. Marlar stated that the wasteload allocation approval process was necessary to keep the process orderly. Mr. Marlar also testified that a 1981 document was a planning document and not a requirement for EPA to use in issuing an NPDES permit. This key document, entitled "The Caloosahatchee River Wasteload Allocation Documentation, Lee County," was relied upon by Ms. Kagey to deny renewal of Waterway's NPDES permit. His admission in this first deposition that the 1981 document was a planning tool convinced me that we were on the right track regarding the entire wasteload allocation issue. I also questioned him on how EPA could rescind an NPDES permit when there was no evidence of Florida's water quality standard being violated and no effluent limitation violations. He admitted that denial of a permit renewal appeared to be a rare event. Mr. Marlar had signed some of the documents denying the renewal of

Waterway's permit; therefore, we wanted to determine what he knew about Waterway and to explore his knowledge relating to the general issue of the number of permits for which renewal had been denied where a facility was meeting water quality standards and effluent limitations set forth in the NPDES permit and the specific issue of the authority EPA used to deny renewal of FCWC's permit. We questioned Mr. Marlar in detail about the process for issuing administrative orders and NPDES permits and about FCWC's permit renewal application and the basis for the denial of that permit.

On May 17, 1994, we deposed Peter McGarry, who was Chief of the Region IV Enforcement Unit from 1982 to 1992. He had referred the matter to DOJ for an enforcement action against FCWC regarding the Waterway facility. Exhibit 6 GHB-23. He did not participate in the EPA denial of FCWC's permit renewal application. In his testimony, Mr. McGarry did not recall whether anyone contacted FDEP to determine FCWC's wasteload allocation. Additionally, he did not have knowledge of any other situation when a facility's NPDES renewal application was denied while it was meeting effluent limitations and water quality standards. I questioned Mr. McGarry about his knowledge regarding EPA's wasteload allocation process and how that process related to Section 303 of the CWA. Mr. McGarry also testified about how a wasteload allocation is developed and about his knowledge regarding Waterway's wasteload allocation. I also questioned Mr. McGarry about the DOJ charge that Waterway was discharging in the wrong location. He could not point to any aspect of the Waterway NPDES permit which indicated that Waterway was discharging in the wrong location. Finally, Mr. McGarry identified additional individuals in EPA who would be knowledgeable regarding enforcement issues related to Waterway.

Q: **What steps did you take after the depositions of Ms. Karleskint, Mr. Marlar and Mr. McGarry were taken?**

A: During the months of May, June, and July of 1994, we reviewed the documents produced by EPA Region IV as well as FOIA materials from several EPA regional offices. The documents obtained through FOIA requests confirmed my view that it was exceedingly rare for EPA to rescind or deny renewal of an NPDES permit where the facility was meeting water quality standards and NPDES permit effluent limitations. We also examined all of EPA's manuals, policy directives and training course materials that in any way explained EPA's permitting process, water quality standards setting, wasteload allocation development, total maximum daily load studies, and state approval procedures as they related to water quality management plans. During this time, FCWC received the DOJ response to our first request for production of documents.

Motion to Disqualify

Q: **Did you have occasion to move to disqualify DOJ counsel?**

A: Yes. On October 25, 1994, FCWC moved to disqualify DOJ counsel from further participation in this case because of his possible violation of ethics rules and case law. Exhibit 6 GHB-24. As discussed above, plaintiff's counsel had *ex parte* communications with a former high level managerial employee of FCWC. *Ex parte* contacts with parties represented by counsel, without advance notice to the counsel, are inappropriate and may be grounds for dismissal from representation. FCWC's memorandum set forth the facts regarding a trip to Australia by DOJ counsel and his contact, while allegedly on vacation, with Mr. Robert H. French, former Senior Vice President of FCWC who was living in

Australia. We argued that under the law in the Middle District of Florida relating to such contacts, these contacts should result in the disqualification of the DOJ attorney. DOJ opposed this motion to disqualify. On February 15, 1995, the Federal Magistrate held a hearing on DOJ's motion to allow *ex parte* contacts and on FCWC's motion to disqualify DOJ counsel. Exhibit 6 GHB-25. Although the judge did not issue an order that day, he made it clear that he was not pleased with DOJ counsel's activities in Australia and in the United States and indicated that there should be no more *ex parte* contacts by DOJ's counsel with FCWC's former employees. In court, Magistrate Judge Swartz stated that he would only disqualify counsel if their actions were "unconscionable" and indicated, however, that he did not agree with DOJ's actions stating: "[they don't] have carte blanche authority to go contact every witness in a lawsuit." The court, on March 16, 1995 denied our motion to disqualify counsel, because the court did not see Mr. Jacobs' actions as sufficiently unconscionable. Exhibit 6 GHB-26.

***Q*: What additional discovery work was done during this time?**

A: On June 16, 1994, DOJ launched a major expansion of the litigation by requesting documents from many of FCWC's wastewater treatment plants and related sewage systems. Exhibit 6 GHB-27. DOJ sought virtually every document relating to the Fiesta Village, Golden Gate, Poinciana, Gulf Gate, South Gate, Barefoot Bay, Carrollwood and Waterway facilities. In its 15-page, 62-paragraph request, DOJ sought: all environmental audits of any FCWC wastewater treatment plant, regardless of date; all federal and state permit requests; all documents on test results of any discharges from any of these four facilities; all documents on the treatment processes and operations at these four facilities; all

daily operation and maintenance logs for these facilities; all documents relating to minutes, notes, and memoranda describing meetings held by the Defendants at any of their facilities where compliance with the CWA was discussed; and all documents relating to capital, operating or maintenance costs of water pollution control equipment installed or considered for installation to achieve water quality standards or water quality limits. DOJ even requested employee desk calendars and appointment books.

Regarding the environmental audits prepared by FCWC officials, FCWC seriously considered opposing the release of these audits to DOJ, as these audits had been prepared under the protection of the attorney-client privilege. Yet after reviewing the audits from all of the facilities, it appeared that the audits actually helped FCWC. We also advised FCWC that if it opposed the request by DOJ for the production of these documents, it would be a legal side-show and cost tens of thousands of dollars. At the end of the effort a court would likely order disclosure of the audits or allow FCWC to redact only small portions of the documents, and FCWC would appear as if it had something to hide. Based on all of the facts, FCWC produced the audit documents to DOJ.

This massive document request from DOJ appeared to be an attempt to put pressure on FCWC to settle. The new expansion of the principle case suggested that DOJ knew at this point that its initial case was weak and it needed to place additional pressure on FCWC to force a settlement by attempting to increase FCWC's legal and internal company costs.

By early July FCWC had begun its response to this request which required a substantial effort by lawyers, paralegals and FCWC personnel. This document production continued through July and August of 1994, and we completed our

response to the Second Request for Production of Documents on August 24, 1994. We collected, reviewed, considered thousands of documents for privilege and produced thousands of pages to DOJ. FCWC also produced significant amounts of financial data from its computer database. FCWC personnel handled much of this work, but we also spent substantial time on this request, particularly to ensure that no privileged material was produced.

Additional Depositions

***Q*: What occurred next?**

A: Throughout the fall of 1994, DOJ deposed a number of FCWC personnel. These depositions were part of the expansion of the case and were intended to provide DOJ with information regarding the operation of the Barefoot Bay and Carrollwood facilities.

DOJ deposed Larry Good, regional manager at FCWC, on October 10, 1994, in order to explore his knowledge of the facts surrounding the Carrollwood plant during the 1980s. Mr. Good testified regarding FCWC's effort to connect with the Hillsborough County wastewater system and the City of Tampa wastewater treatment system, as well as FCWC's efforts to upgrade the Carrollwood facility to advanced wastewater treatment ("AWT").

On October 11, 1994, DOJ took an extensive, 221 page deposition of William Sansbury, the Division Manager of the Barefoot Bay Division of FCWC. DOJ questioned Mr. Sansbury extensively about Barefoot Bay, its spray fields, and overflows. Mr. Sansbury explained that major storms had caused problems at the spray fields. DOJ also sought information as to who knew about the lack of federal NPDES permits at Barefoot Bay. Mr. Sansbury was asked about the discharge monitoring reports ("DMRs") and the exceedences relating to the

DMRs. 117

On October 12, 1994, DOJ deposed Glen Siler, one of the wastewater operators at the Barefoot Bay plant. DOJ counsel questioned Mr. Siler about the history of the Barefoot Bay facility as it related to spray fields and the operation of the facility, and regarding toxicity testing and the Barefoot Bay discharge. DOJ attempted to establish that there were a number of unpermitted discharges from Barefoot Bay.

***Q*: What depositions did FCWC take during this period?**

A: We deposed Connie A. Kagey, the EPA permit writer who denied the Waterway permit renewal application. Exhibit 6 GHB-28. Ms. Kagey testified that she performed little or no investigation before denying the permit. Her file contained the two pages that formed the sole basis for revoking the Waterway permit. These two pages were from a 1981 non-binding planning study, ("The Caloosahatchee River Wasteload Allocation Documentation, Lee County"), which assessed the need for a regional wastewater treatment facility in the Fort Myers area. This study did not in fact require a zero or no wasteload allocation for FCWC's Waterway facility. This study was merely a planning document, and, assuming that the Waterway facility would be shut down at some point in the future, the drafter of the study assigned a zero wasteload allocation to the Waterway facility. This planning study had no effect on Waterway's existing wasteload allocation. Ms. Kagey never requested the entire document, did not determine that this was a planning document, and from these two pages improperly denied FCWC's NPDES permit application for a new permit.

Dr. Abdul Ahmadi, Professional Engineer and Administrator of FDEP, later testified that this 1981 report was a planning report, not an official document which could be used to determine wasteload allocations for NPDES discharge

permits. A review of the report or a telephone call by Ms. Kagey to Florida state officials would have revealed this fact. Instead, Ms. Kagey's failure to look beyond the two pages in her file created havoc and substantial costs for FCWC. Through her deposition we sought to determine Ms. Kagey's level of knowledge with regard to writing NPDES permits. Her testimony confirmed that although she had been writing these permits since 1984, she had a limited understanding of EPA's regulations regarding permit writers.

It was very important to establish in her deposition that the 1986 Waterway permit denial was based on either EPA effluent limitation guidelines or water quality standards. If she admitted that fact, it would demonstrate that she had not written an NPDES permit based on best professional judgment. Ms. Kagey, as a permit writer, could have used the 1981 wasteload allocation if she was drafting a "best professional judgment" permit. In her deposition testimony, she admitted that she based her decision on effluent limitations, not upon her best professional judgment. By this time we had determined that the Caloosahatchee River wasteload allocation study of January 1981 had never been officially approved by either the State of Florida or EPA's Region IV. Ms. Kagey's only excuse for using the 1981 no-discharge wasteload allocation was that it was the most recent information she had in her file. She also testified that she did not know for a fact whether the 1981 wasteload allocation was approved by EPA. We also spent time on questioning her about her review of the State of Florida operating permits which were attached to the Waterway NPDES application. She knew that Waterway had a valid state operating permit and yet she made no effort to make sure her decision was consistent with FDEP's prior decisions. It was clear from her deposition that she did not know what the status was of the 1981 document;

however, she proceeded to make a decision which was not reviewed by her supervisors and that decision led to FCWC being forced to spend millions of dollars which did not improve the water quality of the Caloosahatchee River. The deposition also demonstrated that Ms. Kagey could not recall a single instance where EPA had denied an NPDES permit to a permit holder who was in compliance with state water quality standards and the permit's effluent limitations. She admitted that she did not consider or use any of the four reasons EPA can use to deny renewal of an NPDES permit to an applicant as the basis for her decision.

Q: What other depositions did you take that supported your position in the case?

A: In October of 1994, we deposed Bruce Barrett, who served as the Director of the Water Management Division for EPA's Region IV from April 1985 to September 1989, and one of Ms. Kagey's supervisors. Mr. Barrett admitted that FCWC had a unique situation, and that, knowing the circumstances as he did now, he would not make the same decision again. He stated in his deposition that "I don't see the basis for the federal action denying the permit based on the correspondence." He was unable to name any circumstances in which the EPA had denied a permit renewal and stated that such a decision is an "unusual event." He further stated that "on the basis of the limited review that I've done today, there would appear to be some inconsistencies." Exhibit 6 GHB-29.

***Q*: Did you determine whether the denial of the permit to Waterway was a rare event?**

A: Yes, we did come to a conclusion with respect to that matter. In testimony given by several EPA officials, no one could remember more than possibly one NPDES

permit renewal being denied during the entire period of time they had served with the agency. Through inquiries to several EPA Regions, we could never find any evidence of a permit renewal being denied where the facility and its discharge did not violate water quality standards or its effluent limitations as set forth in the permit.

Q: **Where were the new facilities located that DOJ raised in its discovery?**

A: Gulf Gate and Southgate are in Sarasota County, Carrollwood is in Hillsborough County (Tampa) and Barefoot Bay is in Brevard County.

Q: **Why did DOJ seek new information on the Barefoot Bay and Carrollwood facilities, and what was the concern?**

A: The Barefoot Bay wastewater treatment plant ("Barefoot") was placed into service in the early 1980's using percolation ponds.Under certain conditions the ponds overflowed, discharging treated effluent into a nearby agricultural canal. These discharges were not covered by an NPDES permit. FDEP was informed by FCWC of these discharges and had given the facility a temporary operating permit ("TOP"). Throughout the 1980's, FCWC officials worked with FDEP to develop alternatives to discharge; however, none of these options proved viable. During this period, Barefoot had Florida TOPs but did not have an NPDES permit.

From 1975 to 1984, Carrollwood operated pursuant to an NPDES permit as well as under Florida's regulatory scheme. After 1984, FCWC was unable to obtain an NPDES permit from EPA because Florida would only grant a TOP. Carrollwood continued to operate under Florida TOPs as well as under an EPA administrative order. Although DOJ argued that FCWC was not complying with the CWA, it ignored EPA's own administrative record regarding these two facilities. EPA had

undertaken administrative actions against both facilities through Consent 121 Agreements and Orders Assessing Administrative Penalties, assessing a penalty of $6,000 against Barefoot Bay on November 6, 1991 and $15,000 against Carrollwood on March 3, 1992. The administrative record demonstrates that in setting these penalties, EPA Region IV considered FCWC's good faith cooperation and the lack of any environmental harm caused by any violations. See Exhibit GSA-22 and Exhibit GSA-11.

Discovery later demonstrated that DOJ had failed to review key documents in EPA files or talk with EPA's own employees who had knowledge of the facts at issue at both Barefoot and Carrollwood. The administrative record showed that an EPA enforcement officer, Roy Herwig, had issued the Administrative Order at Barefoot which proposed the $6,000 penalty. Mr. Herwig's notes indicated that EPA had reviewed FCWC's actions in light of the statutory mitigation factors under CWA § 309(g)(3). Mr. Herwig's notes also indicated that at Barefoot FCWC's economic benefit from noncompliance was approximately $73. Under the mitigation factor "Other matters that justice may require," Mr. Herwig noted on EPA's behalf: "The enforcement team considered the fact that Respondent [FCWC] has been working closely with the Florida Department of Environmental Regulation since 1985 to develop a solution to the problem. Since being contacted by EPA, Respondent has been very cooperative. Consideration was given to calculating liability on a daily basis beginning with the initial overflow in 1985. However, since the respondent had been working with DER and since the effluent being discharged would have met the limitations contained in the permit now being issued by EPA, it is believed that the true violation was limited to that of not applying for an NPDES permit." Exhibit 6 GHB-30

Mr. Herwig concluded that he thought Barefoot was fully resolved and "none of this would be revisited." Exhibit 6 GHB-30

The administrative record for the Carrollwood Consent Agreement showed that EPA estimated the delayed compliance penalty at the facility to be worth $203. The EPA official who investigated Carrollwood, Thomas Plouff, testified in his deposition that "the case was settled, long since settled." Exhibit 6 GHB-30. Based on this information it was clear that EPA and DOJ had failed to check with the EPA enforcement officers before bringing new actions against FCWC. The testimony of these key employees and the documents contained in the administrative record demonstrated that DOJ failed to conduct a competent preliminary review and factual inquiry before pursuing claims against these two facilities.

Q: **What did DOJ do in an attempt to prove its case at Barefoot Bay and Carrollwood?**

A: In addition to extensive requests for production of documents, discussed above, DOJ deposed several additional FCWC employees with regard to Barefoot Bay and Carrollwood.

DOJ continued to press its case by taking the depositions of additional FCWC employees, including Johnny Overton, Paul Bradtmiller, Gerald Allen, Jack Tompkins and Jim Elder.

Mr. Bradtmiller was deposed for two days by DOJ on November 18 and 21, 1994. Exhibit 6 GHB-31. He was questioned about the various facilities' discharge monitoring reports, interaction with Avatar executives, organizational structure of Avatar Utilities, and efforts by FCWC to bring Waterway into compliance. Mr. Bradtmiller also discussed EPA's negative attitude at its show cause hearing in

Atlanta and noted that Mr. McGarry did not have a favorable attitude toward FCWC.

Mr. Overton was Executive Vice President of Avatar Utilities Services, Inc. and reported to Mr. Allen at the time his deposition was taken. He had previously been the Senior Vice President of FCWC. Exhibit 6 GHB-32. Mr. Overton was questioned extensively about sprayfield overflows, FCWC's efforts to correct the problems and the company's efforts to buy additional sprayfield capacity. In addition, DOJ attempted to intimidate FCWC by staging inspections of the Carrollwood, Southgate and Barefoot facilities. In addition to DOJ personnel, the inspectors were accompanied by Mark Klingenstein, who later testified as an expert witness for the government at trial on the issue of alleged environmental harm.

Mr. Tompkins was the Operations Manager at FCWC and reported to Mr. Bradtmiller. Exhibit 6 GHB-33. He was responsible for obtaining permits for Waterway. He also handled construction issues at Waterway. In his deposition, DOJ wanted to demonstrate that the delay in constructing Waterway's new facilities caused the nitrogen violations at the facility and that various FCWC employees knew that the facilities were discharging without federal permits, particularly at Barefoot and Carrollwood.

Q: **In addition to the depositions already taken, was there a further dispute concerning interviews of former employees?**

A: Yes. As I described earlier in my testimony, DOJ's attempts to undertake *ex parte* contacts with former FCWC employees was a major issue in the conduct of this litigation. After filing our papers on the matter in 1994, on January 30, 1995, I was notified again by DOJ that it would no longer voluntarily refrain from

conducting interviews of former employees of FCWC and its parent company. 124 Exhibit 6 GHB-34. DOJ counsel stated that: "any such interviews will be conducted without further notice to Florida Cities and its parent companies." On February 3, 1995, FCWC filed an emergency motion seeking a temporary protective order preserving the status quo until the Court heard our motion. This issue was intertwined with FCWC's motion to disqualify government counsel because DOJ counsel had been contacting former high-level, managerial employees without notice to FCWC's counsel, in contravention of caselaw in the Middle District of Florida. DOJ counsel acknowledged that it had engaged in *ex parte* contacts with FCWC's former employees, and defended those actions, claiming that specific DOJ regulations superseded the ethical rules and decisions of the local courts. DOJ counsel replied to our motion on February 9, 1995. See Exhibit GHB-35. On February 13, 1995, the Court granted our request for a temporary protective order until a hearing could be held. See Exhibit 6 GHB-20. On March 16, 1995, U.S. Magistrate Judge Swartz issued an order, discussed above, which barred DOJ counsel from interviewing former high-level FCWC employees without notice to FCWC counsel. Magistrate Judge Swartz's order was affirmed by the Honorable Ralph W. Nimmons, Jr., the U.S. District Judge assigned to try this matter. Exhibit 6 GHB-26.

Q: **Did some witnesses called by DOJ for depositions avail themselves of their rights under the Fifth Amendment and decline to testify at deposition?**

A: Yes.

Q: **Please explain.**

A: In January of 1995, I learned of the case of U.S. v. Weitzenhoff, 35 F.3d 1275 (9th Cir. 1994), cert. denied, 115 S. Ct. 939 (1995). Exhibit 6 GHB-36. The

holding of the case was particularly troubling as it related to potential criminal liability under the CWA. The case held that if a potential party was aware of the requirement for an NPDES permit and had knowledge that the party's facility did not have a permit or was violating the permit, such a person could be charged with a criminal violation of the CWA. I immediately forwarded this case to the general counsel of FCWC. In an abundance of caution, and because DOJ counsel had suggested criminal action on occasion by alleging that a number of our employees had knowingly violated the CWA, we recommended that current and former employees discuss this matter with independent counsel. I believed it important that each employee examine the Weitzenhoff case and his or her situation and act accordingly. As a result, in the early part of 1995, a number of current and former employees invoked their Fifth Amendment rights. However, these employees were willing to testify if given immunity for the matters which were at issue in this litigation. We formally advised DOJ counsel of our position on July 13, 1995. DOJ counsel never responded to our request for immunity.

Q: **What occurred next?**

A: During the first part of March 1995, we responded to interrogatories served by the U.S. Exhibit 6 GHB-37. These interrogatories requested information on "all directors, officers, and employees of Defendant from January 1, 1980 to the present." It was an extraordinary undertaking to identify all employees over a 15-year period. Moreover, for each employee DOJ counsel wanted to know the term of employment, the reason for termination, total compensation, and each person's responsibilities as they related to environmental laws and regulations. Another interrogatory requested any violations of federal, state, or local environmental laws or regulations from 1988 to the trial of this matter, by date and type of each

violation, including all violations of any permit at any facility owned or operated by FCWC. Another request was to identify, for each violation, from 1980 to present, the nature of the violation, the reason for the violation, any and all measures taken to prevent the violation, persons who were aware of the violations, and the date they became aware of the violation. FCWC was also requested to identify each wastewater treatment plant owned or operated by it since 1980, and the years the plant discharged into waters of the United States. We spent substantial time in March 1995 preparing responses to these interrogatories and reviewing documents for these responses and for upcoming document production. We also prepared and filed our own interrogatories upon the U.S. and on March 22, 1995, we filed our second request for production of documents. See Exhibit 6 GHB-38. FCWC's first set of interrogatories and second request for production of documents represented an opportunity to determine the basis of the Plaintiff's case against FCWC. We requested answers to basic questions, for example: summarize the facts supporting allegations in the complaint; identify all persons who have knowledge of the allegations in the complaint; identify persons to be called as fact or expert witnesses; and identify the facts relevant to the determination of the penalty. The documents requested included: the procedures, practices and internal agency guidelines regarding water quality-limited stream segments; coordination with state and local permitting authorities; Region IV permit renewal denials; and environmental harm, if any, caused by FCWC's discharges. The responses to these requests would provide FCWC with an understanding of why Plaintiff thought that FCWC had violated the CWA and with the evidence supporting that belief.

***Q*: Did you undertake additional efforts to settle the case at this time?**

A: Yes. We believed that we had such a strong case that DOJ should reconsider reducing its claim from $5 million down to $500,000 or less. We still believed that the fine should be no more than $100,000 to $200,000, and FCWC and I agreed that we should add an additional amount for the value of saving the expense of further litigation. On March 14, 1995, FCWC served DOJ with a Rule 68 Offer of Judgment in the amount of $500,000. That is, we offered to pay $500,000 to settle the case. Exhibit 6 GHB-39. We thought this offer would add some pressure on the government to settle. The letter was handed to DOJ counsel at the beginning of a deposition. DOJ counsel indicated that this was not a "serious" offer and, I was told, proceeded to literally throw the letter across the room without reading the three page offer. DOJ counsel then stated that he would proceed to add other claims to his complaint.

The Amended Complaint

***Q*: What steps did DOJ then take?**

A: On March 30, 1995, after engaging in extensive discovery, the U.S. amended its complaint to include a number of charges against Barefoot and Carrollwood which increased FCWC's liability to over $100 million. (Amended Complaint). See Exhibit GSA-7. At Barefoot the government claimed that from April 1, 1990 to November 1, 1991, FCWC discharged into Sebastian Creek without a federal NPDES permit. The government further claimed that from November 1990 to June 1991, FCWC violated provisions of an administrative order by exceeding the order's allowance for total suspended solids, fecal coliform, dissolved oxygen and biological oxygen demand. Finally, the government claimed that provisions of a particular NPDES permit involving test methods for total residual chlorine were also violated.

At Carrollwood, the government claimed that FCWC discharged effluent without a federal permit from August 1990 to June 1991. It further claimed that during October, November and December of 1991, FCWC discharged in violation of an NPDES permit with regard to its allowances for total suspended solids, total phosphorus, fecal coliform, total nitrogen, carbonaceous biochemical oxygen demand and total residual chlorine.

Q: **Did the Amended Complaint name Avatar Holdings Inc. as an additional defendant?**

A: Yes.

Q: **Did you provide Avatar Holding's defense to the allegations contained in the Amended Complaint?**

A: No. Avatar Holdings retained Weil, Gotshal and Manges as its attorneys. We believed DOJ counsel would subsequently argue that Avatar exercised complete control over FCWC and we wanted to demonstrate there was a corporate structure in place separating the two entities.

Q: **Did you coordinate the work involved with Weil, Gotshal and Manges attorneys from the time after the Amended Complaint was filed until the conclusion of the litigation?**

A: Yes, but neither myself nor any of my co-counsels provided services for Avatar Holdings.

Q: **What action did you take to protect FCWC's interest with respect to the Amended Complaint?**

A: On April 4, 1995, FCWC filed a Notice of Intention to Oppose the U.S. for leave to file an amended complaint. See Exhibit 6 GHB-40. On April 14, 1995, we filed a memorandum in partial opposition to plaintiff's motion for leave to

amend the complaint. *See* Exhibit 6 GHB-41. In our memorandum, we argued that DOJ should be denied leave to amend the complaint under Federal Rule of Civil Procedure 15(a). This rule sets forth the standard that leave to amend be freely granted, unless there exists a substantial reason to deny such leave. The futility of a proposed amended complaint, however, is sufficient reason to deny a motion to amend. Applying these principles to our case, we argued that it would be futile for the government to amend the complaint in light of the CWA provision (Section 309(9)(b)(A)) that expressly forbids EPA from seeking to collect in court penalties for which EPA has already collected in an administrative proceeding. Specifically, EPA had issued a Consent Order for $6,000 at Barefoot on November 6, 1991. With respect to Carrollwood, EPA had settled all claims for discharging without an NPDES permit for $15,000; EPA closed out the Carrollwood matter on March 3, 1992. FCWC further argued that EPA's original case had suffered a potentially lethal blow from the improper denial of the permit renewal for Waterway. We also argued that DOJ was attempting to salvage its initial case by engaging in open-ended and massive discovery in a transparent attempt to support its failed case by seeking to find any technical violation, no matter how trivial, at any of the several other facilities owned and operated by FCWC.

***Q*: How did the court rule on your motion?**

A: On April 26, 1995, the Court granted FCWC's motion, and ordered DOJ to file a Revised Amended Complaint on or before May 5, 1995. This Revised Amended Complaint was to be filed with the limitation that paragraphs 16 and 30 of the Proposed Amended Complaint and any allegations relating to paragraphs 16 and 30 that were not relevant to the remaining claims "shall not be permitted." See

Exhibit 6 GHB-42. Paragraphs 16 and 30 of the Amended Complaint concerned discharges at Barefoot and Carrollwood without a permit, allegations covered by the Consent Agreements and Orders Assessing Administrative Penalties previously settled with EPA.

Revised Amended Complaint

Q: **Did DOJ file a Revised Amended Complaint?**

A: Yes. On May 4, 1995, DOJ filed its Revised Amended Complaint. Exhibit 6 GHB-43. To our surprise, the government filed substantially the exact same complaint as it had proposed prior to the court's order.

Q: **Did FCWC respond to this new complaint?**

A: Yes. On May 9, 1995, FCWC moved to strike portions of the Revised Amended Complaint. Exhibit 6 GHB-44. FCWC argued that the Court, in its April 26, 1995 order, had already ruled that certain claims regarding Barefoot and Carrollwood would not be permitted. We relied on the Court's order, incorporating into our motion the Court's own words for not permitting these claims: "It is evident that even if the Plaintiff had viable claims against Barefoot Bay and Carrollwood, it should have been aware of these claims at the time of the filing of the original complaint. Raising such claims [shortly] before the expiration of discovery is clearly prejudicial to the Defendant."

Q: **Did the government respond to this Motion to Strike?**

A: Yes. On May 12, 1995, DOJ moved for reconsideration of the Court's April 26, 1995 order disallowing claims for unpermitted discharges at Barefoot and Carrollwood. Exhibit 6 GHB-45. DOJ filed a 20-page memorandum, with more than 25 pages of exhibits supporting this motion. The main point of DOJ's position was that the earlier consent decrees did not bar the present action because

the consent decrees only settled matters for the dates noted on the orders. For Barefoot, the government argued that the Administrative Order only resolved the violation on September 14, 1989. For Carrollwood, the government argued that the Administrative Order in question only resolved violations during June 1987 through July 1990. As the dates of violations in the revised amended complaint differed from the dates mentioned in the two Administrative Orders, the government argued that the new complaint was not futile. The government bolstered its argument with a basic principle of contract law that "the terms of an unambiguous contract are exclusively contained within the four corners of the document itself, and 'the instrument must be construed as it is written.'"

Q: **Did FCWC answer the new DOJ amended complaint?**

A: Yes. On May 20, 1995, FCWC in its answer denied DOJ's complaint. See Exhibit 6 GHB-46. Additional affirmative defenses were added: 1) that plaintiff's claims were barred because FCWC had paid administrative penalties at the two new sites and therefore could not be charged with the violations that DOJ alleged in its complaint; 2) that plaintiff's claims were barred because they were the subject of earlier settlement agreements with EPA; 3) that plaintiff's claims were barred by the doctrine of *res judicata*; 4) that plaintiff in some instances improperly sought duplicative penalties for the same violation; and 5) that plaintiff violated the defendant's Fifth Amendment due process rights.

Q: **Did the government respond to FCWC's motion to strike portions of the Revised Amended Complaint?**

A: Yes. On May 25, 1995, DOJ filed its opposition to FCWC's motion to strike substantial portions of their Revised Amended Complaint. See Exhibit 6 GHB-47. DOJ argued that in its April 26, 1995 order, the court sustained

FCWC's opposition to the Barefoot and Carrollwood unpermitted discharge claims, but otherwise allowed the filing of the amended complaint. DOJ further claimed that FCWC was belatedly seeking to preclude DOJ from asserting all claims for violations of the CWA at the two additional facilities.

Q: **Did discovery resume?**

A: Yes. In addition to the controversy surrounding the amended complaint, a number of other activities were ongoing in April and May of 1995. In terms of discovery, in mid-April, FCWC responded to the U.S.'s Third Document Request. Exhibit 6 GHB-48. The government's third request for production of documents again required a substantial effort. This request sought: various minutes of board of directors meetings; all FCWC monthly operating statements, regardless of date; substantial financial records; and all documents reviewed by any expert retained by FCWC for the purpose of testifying in this case. Documents responsive to this request were made available throughout April 1995, in Sarasota, Barefoot Bay, and Miami. Portions of the document request required additional time, and production was made by June 1995.

Early in May, we prepared for further document production and also for upcoming 30(b)(6) depositions.

<u>FCWC's Motion for Partial Summary Judgment</u>

Q: **Did FCWC file other motions?**

A: Yes. April 26, 1995, we filed a Motion for Partial Summary Judgment. Exhibit 6 GHB-49.

Q: **Did the government respond to FCWC's motion for summary judgment?**

A: Yes. On June 7, 1995, DOJ filed its Opposition to FCWC's Motion for Partial Summary Judgment. Exhibit 6 GHB-50. On June 21, 1995, the Court

denied FCWC's Motion for Partial Summary Judgment on the *void ab initio* issue. Exhibit 6 GHB-51.

Q: **Did the Court respond to additional motions at this time?**

A: Yes. The Court also reversed its earlier rulings and allowed DOJ to proceed with its causes of action for discharge without a permit at Barefoot and Carrollwood.

Q: **What happened next?**

A: The next day, June 23, 1995, DOJ filed its Motion for Partial Summary Judgment. Exhibit 6 GHB-52. This massive brief and exhibits required substantial legal and factual research to oppose. The main thrust of the government's motion was to argue strict liability at three FCWC facilities and establish that Avatar Holdings, FCWC's parent, could be held liable for violations under the CWA. Under the CWA, the government noted, a strict liability standard is imposed for all "violations." To the degree that the government could prove a "violation," it argued that it should be afforded the benefit of summary judgment. The brief then went on to demonstrate that FCWC did indeed violate the CWA as alleged in the complaint. The District Court rejected DOJ's Motion because it exceeded the applicable page limitations under the local rules.

Q: **Were additional efforts undertaken to settle the case during 1995?**

A: Yes. Earlier, FCWC had hired Richard Leon of the firm of Baker & Hostetler to help with settlement negotiations. Mr. Leon, a former senior member of DOJ's Environmental Enforcement section, was personally acquainted with Mr. Jacobs. After several attempts by Mr. Leon to get settlement moving, he was unable to convince DOJ that our position regarding the three facilities was correct; therefore we suspended our efforts to settle the case for a period of time.

Additional Discovery

Q: What other litigation activities were ongoing in or about May 1995?

A: In addition to moving to strike portions of the Revised Amended Complaint, we undertook an additional round of depositions (James Greenfield and Roosevelt Childress), document production, research, and interrogatories.

The deposition of Roosevelt Childress, of EPA Region IV, was important in establishing the facts of EPA's denial of FCWC's permit renewal, the process for reviewing wasteload allocations in permit decisions at EPA, the status of Waterway under Florida's water program, and the rarity of permit denials. Mr. Childress agreed that Ms. Kagey had relied exclusively on two pages from a 1981 Florida planning document in denying FCWC's permit. He then explained the method by which EPA is supposed to review wasteload allocation documents for permit decision and described a special wasteload allocation unit within EPA which determines the official, applicable wasteload allocation for permitting decisions. According to Mr. Childress, Ms. Kagey did not follow EPA procedures in relying on the 1981 planning document for a wasteload allocation, without confirming this critical assumption through additional research. Mr. Childress agreed that Waterway continued to have a Florida discharge permit throughout the 1980s, and that FDEP did not require "no discharge" from the Waterway facility. According to Mr. Childress, by certifying that a federal permit for Waterway was acceptable to it, Florida indicated that it did not require that Waterway cease discharging. Mr. Childress further testified that he was unaware of any other permit renewal denial in Region IV, which had at that time more than 13,000 active NPDES permits.

Mr. Greenfield, EPA Region IV wasteload allocation TMDL coordinator, also testified in his deposition about the development and use of wasteload allocations.

His testimony explained the rules for determining whether a stream is a "water-quality limited stream," when wasteload allocations are required, the state role in developing wasteload allocations, and EPA's role in approving wasteload allocations. Both Mr. Childress's and Mr. Greenfield's depositions were important in understanding EPA's wasteload allocation and permitting systems, what happened when FCWC's permit renewal was denied, and why that denial did not follow EPA procedures or regulations.

We also responded to the U.S.'s second set of interrogatories and first request for admissions. Exhibit 6 GHB-53. The government's second set of interrogatories required FCWC to gather substantial factual information. DOJ requested: the facts supporting the denials by FCWC of the allegations in the revised amended complaint; the facts supporting each of FCWC's affirmative defenses; and the facts supporting any denials in response to the government's requests for admission. FCWC counsel and FCWC personnel spent much of May and June 1995 responding to these requests.

DOJ's first requests for admission also required a substantial legal and factual effort. DOJ made 41 requests for admission, including: the relationship of FCWC to its parent corporations; the elements of a CWA violation, that is, whether FCWC's activities constituted a discharge of pollutants; the number and type of exceedences by FCWC; the facts concerning the alleged discharges without an NPDES permit; and the administrative orders at Barefoot and Carrollwood.

We also served the government with a request for Federal Rule of Civil Procedure 30(b)(6) depositions in order to get the agency on record regarding its position was on wasteload allocations, EPA's administration of its own regulations, and the fact that the agency had contracts with states in the southeast which set forth

the procedures on how wasteload allocations were to be approved by EPA and the states. That spring and summer our research also included a substantial legal and factual inquiry into the inferences to be drawn from invoking the Fifth Amendment at depositions; the legal standard for comparability between state and federal enforcement under the CWA; the possibility of a Bivens claim against the government; the upset defense; the effect of an administrative order on permit requirements; the potential for Rule 11 sanctions against the government; claim splitting and issue splitting under the CWA; the discoverability of expert reports; the standard for scientific experts; attorney client and work product issues, and other matters. Exhibit 6 GHB-54. Briefly, I'll explain why each subject of legal research was important.

The comparability between state and federal enforcement was an issue because the CWA states that the government may not impose a civil penalty for a violation that has already been the subject of an administrative order. In addition to the federal administrative orders, which we successfully argued barred a portion of the government's case, there were state administrative orders applicable in this case. We considered whether these state administrative orders might be used to bar additional parts of the government's case.

The upset defense was a fact-based potential defense to some of DOJ's claims. The CWA recognizes that equipment failures and the like may cause temporary exceedences of permit limits, and under certain circumstances may excuse an apparent violation. We considered whether this defense might be used to defend against some alleged violations.

In a number of instances where an administrative order had been issued, construction schedules and compliance limits were set forth that were at variance

with the permit limitations. We considered whether these administrative order limitations might vary the permit requirements to some extent, thereby reducing the number of alleged violations.

DOJ counsel had obstructed our discovery and had vexatiously multiplied the proceedings. We therefore considered filing a motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure. After some research, we concluded that the Court was already aware of the conduct of DOJ counsel. We also decided that it would not be cost-effective to pursue Rule 11 sanctions, particularly given the 1993 federal rule changes, which made imposition of monetary damages against the government unlikely.

We also began researching EPA administrative decisions on claim splitting and issue preclusion with the idea of knocking out a portion of the plaintiff's claims should the Court agree with the government's Motion to Reconsider. We found that several administrative and court decisions had held that if EPA had an opportunity to pursue a claim administratively, but did not, then it was precluded from pursuing the same claims later in court. Ultimately these decisions were used, after a complex series of filings, to ensure that even if the EPA administrative orders were held to cover only a limited set of violations, the fact that EPA clearly knew of other alleged violations at the time of the administrative orders prevented EPA from taking another bite at the same apple and bringing these claims in a later action.

Q: **What was the result of this research?**

A: Our research culminated in FCWC's second Motion for Partial Summary Judgment, filed on September 11, 1995. Exhibit 6 GHB-55. In this motion, FCWC sought to dismiss the vast majority of the DOJ's claims related to Barefoot

and Carrollwood, particularly those claims which had been the subject of prior administrative settlements. The memorandum of law that accompanied the motion not only addressed FCWC's affirmative motion but also responded to DOJ's earlier motion.

Q: **What did you do after filing the Second Motion for Partial Summary Judgment?**

A: In the fall of 1995, we began to examine a number of discovery issues, including discovery of expert reports and attorney-client privileged documents. DOJ and FCWC fought over whether certain expert reports would be discoverable. As noted above, FCWC produced to DOJ tens of thousands of pages of documents. Finally, the standard for use of scientific testimony was likely to be an issue for trial, as FCWC depended for its case in mitigation on the expert testimony of engineers and others about the unavoidable construction delays that occurred. Also, DOJ was relying on economic assumptions and calculations of dubious merit; therefore, we knew we had to have experts to respond to DOJ's case. Accordingly, it was important to understand the evolving legal standard for offering expert scientific testimony.

Q: **What depositions were taken during the summer and fall of 1995?**

A: Numerous follow up depositions were taken and defended, including , in addition to Roosevelt Childress and James Greenfield discussed in the forgoing, those of: John Marlar, Branch Chief for EPA's Environmental Compliance Branch; Fritz Wagener, Chief of the Water Quality Standards Section, EPA Region IV; Ken Kwan, EPA Region IV Environmental Engineer, who testified both personally and as EPA's Rule 30(b)(6) witness; Roger Pfaff, Acting Branch Chief for the Water Permits and Enforcement Branch, EPA Region IV; Roy Herwig,

Environmental Engineer in NPDES Enforcement Section, EPA Region IV; Thomas Plouff, EPA Region IV Environmental Engineer; and Michael Hom, EPA Region IV Supervising Environmental Engineer. These depositions, all taken by FCWC, required substantial preparation, including review of the relevant documents, EPA regulations and policies, and permits. A summary of these depositions is attached as Exhibit 6 GHB-56. DOJ took numerous depositions as well, including those of Ed Jacobson, John Sladkus, Leon Levy (two days), Julie Karleskint (two additional days), Paul Bradtmiller, Pat Lehman (one and one-half days), Gerald Allen (two days), and our experts Douglas Smith and Randall Armstrong. Exhibit 6 GHB-57. In Mr. Allen's deposition, DOJ counsel sought information about FCWC company structure and organizational information. The deposition included extensive questioning concerning the NPDES permit situation at Barefoot, Carrollwood, and Waterway. DOJ attempted to establish connections between the subsidiary, FCWC, and the corporate parent, Avatar Holdings Inc., in an attempt to hold the parent liable for knowing violations of the CWA. Mr. Allen's testimony highlighted the extraordinary efforts to solve the problems at Barefoot.

Q: **During the fall of 1995, what major litigation activities were ongoing?**

A: During September 1995, we engaged in additional discovery activities. We served our third set of interrogatories and fourth request for production of documents upon EPA. Exhibit 6 GHB-58. The government, in turn, filed its fifth request for production of documents. Exhibit 6 GHB-59. FCWC's third set of interrogatories sought information on the referral by EPA to DOJ for civil enforcement of this matter. FCWC's fourth request for production of documents sought information on the government's experts and the referral by

EPA to DOJ for civil enforcement. In contrast to these limited, targeted requests, DOJ sought a huge, additional amount of data in its fifth request for production of documents. DOJ sought: complete audited financial statements for 1994; documents on the effluent and influent at Barefoot during 1990 and 1991; all documents regarding the negotiations between FCWC and EPA on the administrative orders; and additional documents on the discharges at Waterway, Barefoot and Carrollwood.

We also interviewed potential witnesses: Dr. Ahmadi, Jack Schenkman, Larry Griggs, Patrick Lehman, Christianne Ferraro, and Al Castro. We also interviewed FDEP officials in the Tampa regional office, and we met with Hillsborough County officials to discuss Carrollwood.

Q: **What major litigation activities were ongoing in October of 1995?**

A: The dominant litigation activity during this month consisted of the taking and defending of depositions. Julie Karleskint's deposition was reopened for two additional days, October 2 and October 16, 1995. During these additional days of testimony, Ms. Karleskint testified about the operation of and the upgrades to the Barefoot and Carrollwood facilities. She reviewed the steps that FCWC took to raise the performance levels of Barefoot during the construction of the AWT facility, allowing both plants to operate at levels that provided treatment above the level of secondary treatment. In addition, Ms. Karleskint was questioned extensively by DOJ counsel regarding each of the permit (or administrative order) exceedences at these two facilities. Ms. Karleskint's testimony established that these exceedences were *de minimis* and did not result in violations of water quality standards.

On October 3, DOJ deposed Paul Bradtmiller and Patrick Lehman. On October

17, Patrick Lehman was further deposed. On October 18, DOJ deposed Charles McNairy. On the 20th, DOJ deposed Dr. Abdul Ahmadi. On October 23, we deposed DOJ's expert, Mark Klingenstein. On October 26, FCWC deposed DOJ's other expert, Eileen Zimmer. These depositions were all part of the push to prepare for trial.

On October 31, FCWC filed a Notice of Dispositive Authority citing the just-decided case Borough of Ridgway for the proposition that *res judicata* bars the government from raising claims it could have raised in an earlier action. Exhibit 6 GHB-60.

Q: **Did the District Court rule on any of the Motions the parties kept filing?**

A: Yes. On November 22, 1995 the District Court ruled on the various summary judgment motions that each party had filed. This was a major victory for FCWC because the Court virtually eliminated DOJ's case against Barefoot and Carrollwood and eliminated over $50 million in potential penalties. Exhibit 6 GHB-61. Adopting the *res judicata* argument, the court granted FCWC's request for summary judgment to FCWC on paragraphs 11-23 and 30 of the second amended complaint. The court denied summary judgment to FCWC on other claims and granted summary judgment in favor of the government on all NPDES permit violations at each facility. The Court's order narrowed the case considerably, and it signaled to us to focus on mitigation of penalties as to the remaining claims at the three facilities. DOJ had, up to this point, focused almost exclusively on Barefoot and Carrollwood. The Court's ruling changed the direction of DOJ's case significantly.

Q: **What other major litigation activities were ongoing during November 1995?**

A: During November we were also preparing for the depositions of Gerald Allen (by

DOJ) and Bennie Shoemaker, FDEP, Department of Environmental Protection (by FCWC). We deposed Mr. Shoemaker regarding his role in working with EPA to provide information on Waterway. Mid-month we interviewed Michael McWeeny, Director of the Hillsborough County Utility Department, and William Schafer, Director of Planning for the Sanitary Sewer Department of the City of Tampa, potential witnesses for trial. In addition, throughout November we examined all the documents we had gathered in order to select trial exhibits. Also in November, DOJ, FCWC and Avatar Holdings conducted our required pre-trial meeting to exchange exhibits, provide witness lists and discuss settlement. During this meeting, DOJ orally issued a revised settlement offer of $2,200,000, its first revised proposal since its initial offer of $5,000,000 in 1993. This reduction of the proposed penalty by DOJ indicated to me we were making progress but this new proposal was still not reasonable in view of the facts developed through discovery.

Preparation for Trial

Q: **What did you do in December 1995 to prepare for trial?**

A: In December 1995, we continued our ongoing trial preparation. We forwarded to DOJ our list of exhibits. We designated portions of depositions and proposed stipulations. Exhibit 6 GHB-62. There were also extensive discussions regarding the proposed stipulations, which would have limited the scope of trial. DOJ counsel asked FCWC to stipulate that the discharges from Waterway to an unpermitted location were intentional. FCWC rejected this proposed stipulation. In addition, DOJ wanted FCWC to stipulate that each discharge had the potential to cause environmental harm. FCWC rejected this proposal as well because FDEP personnel and our experts were prepared to testify that FCWC discharges

did not cause environmental harm. DOJ also sought agreement with a stipulation that FCWC's parent, Avatar Holdings, had derived wrongful profits of more than $7 million during the period of the violations. Because DOJ's proposed stipulations bore no relationship to reality, it was impossible to agree to any item and therefore we were unable to agree to limit the issues in dispute at trial. During November and December 1995, we were also reviewing DOJ's intended trial materials. For example, in late November 1995, DOJ had identified more than 900 potential trial exhibits. Exhibit 6 GHB-63. We were required to understand and develop responses to the evidence represented by each of these exhibits, a lengthy and complex process. Concurrently, FCWC continued to narrow the list of exhibits it planned to use at trial. Prior to the Court's November 22, 1995 Order, FCWC had initially identified approximately 1800 trial exhibits which would be used to defend FCWC's actions at Barefoot and Carrollwood. After the Court's ruling, we refined that list, first to 600 exhibits, and then to 200 exhibits because various issues had been dismissed by the Court's November 22, 1995 decision. This refining process was needed both to clarify our points for trial and because trial time was limited, because at that time the trial was scheduled for the first week of January 1996.

Joint Pretrial Statement

***Q*: Was there a Joint Pretrial Statement filed with the Court?**

A: Yes. On December 6, 1995, the parties filed a Joint Pretrial Statement that described the respective viewpoints of the case. Exhibit 6 GHB-64. DOJ claimed that the Court had found FCWC liable for NPDES permit violations at Waterway, Barefoot, and Carrollwood. DOJ argued that Avatar, the parent company, either directed or caused these violations, and pervasively controlled

FCWC's environmental practices. DOJ further claimed that applying CWA Section 309 required the Court to reach the conclusions that (1) the violations were serious, (2) Avatar had derived substantial economic benefit from the violations, and (3) each defendant could afford a substantial penalty.

FCWC acknowledged that it was technically liable only for certain violations under the CWA. The heart of FCWC's case, however, involved presenting evidence in light of the six mitigation factors listed in Section 309(d) that the Court must consider in determining a penalty. These factors are: (1) the seriousness of the violations; (2) the economic benefit, if any; (3) any history of violations; (4) any good faith efforts to comply; (5) the economic impact of a penalty; and (6) such other factors as justice may require.

In the pretrial statement, DOJ indicated that it would call 11 witnesses at trial. DOJ stated that it would rely on an expert witness, Mark Klingenstein, as its principal witness to make its case against FCWC. DOJ was intending to call this witness even though from our discovery it was evident that he apparently had spent little time talking to EPA personnel about prior enforcement actions taken against Barefoot Bay and Carrollwood. Indeed, Mr. Klingenstein had no involvement with the three facilities until he reviewed the paper record contained in the EPA file, some four years after the events at issue.

FCWC advised the Court that the evidence and admissions established the fact that DOJ had no evidence that any of FCWC's actions had caused environmental harm at any of the three facilities. FCWC stated that the evidence would further establish that each of the facilities was authorized to discharge secondarily treated effluent pursuant to rigorous regulation by the State of Florida. Moreover, FCWC had evidence that established that it had received no economic benefit from any

violation. EPA's own documents demonstrated that FCWC was acting in good faith to resolve the problems at issue. FCWC could also establish that even a modest penalty would cause a severe economic impact on the company. Finally, FCWC would be able to demonstrate that this entire action was the result of EPA's failure to follow its own regulations when FCWC properly applied for the Waterway NPDES permit renewal.

FCWC indicated that it might call as many as twenty-five (25) witnesses. To counter DOJ expert Mr. Klingenstein's background and testimony, we advised the Court that among others, we would be calling four expert witnesses who had prepared expert reports: Roger Hartung, Douglas Smith, Randall Armstrong and Keith Cardey. Mr. Hartung is a former EPA enforcement official, who had the responsibility of overseeing thousands of enforcement cases within EPA. His testimony would demonstrate that EPA had violated its own regulations regarding wasteload allocation approvals, and that EPA did not normally pursue enforcement cases against small facilities, such as those of FCWC. In his testimony he also explained to the Court how the CWA actually worked so the Court understood terms and the framework with which FCWC had to comply.

Douglas Smith, a senior partner with the consulting engineering firm Black & Veatch, would testify as to FCWC's record in operating the facilities and how well these facilities were run. He also could discuss the improvements at Waterway and whether they had been undertaken in a reasonable amount of time. Mr. Smith had both an academic background and practical experience with respect to the design and environmental impacts resulting from the operation of a wastewater treatment plant.

Randall Armstrong had worked at FDEP and would testify about water quality

issues and the development of the 1981 study relied upon by EPA to deny FCWC an NPDES permit. He also was needed to give his analysis of water quality data. Keith Cardey is an expert in the area of Florida Public Service Commission regulation and the economic effects of PSC regulation on privately-owned, publically regulated utilities. He was needed to show that FCWC had no economic incentive to delay expenditures for CWA compliance at any of its facilities.

In addition to preparing and filing the pre-trial statement, a number of pre-trial disputes were ongoing at this time, including DOJ's efforts to depose six witnesses after the close of discovery. Exhibit 6 GHB-65. FCWC opposed this request, noting during the normal discovery period, that DOJ had ample notice of all of these potential witnesses, except for Mike McWeeny, Director of the Hillsborough County Utilities Department. FCWC consented to the deposition of Mr. McWeeny. Exhibit 6 GHB-66. Magistrate Judge Swartz agreed with our position and permitted the deposition of Mr. McWeeny only. Exhibit 6 GHB-67. Additionally, DOJ filed two motions to compel production of documents. FCWC filed its own motion to compel DOJ to respond in full to our first set of interrogatories, and a motion for a protective order to quash a deposition subpoena to Leon Levy.

FCWC's Trial Brief and Proposed Findings of Law and Fact

Q: **What else did you do to prepare for trial this month?**

A: In December 1995, FCWC began drafting its trial brief and proposed findings of law and fact. During the preparation of these documents, DOJ filed a motion for expedited reconsideration of the Court's November 22, 1995 opinion. Exhibit 6 GHB-68. DOJ counsel moved for reconsideration, asserting that the claims

that the Court had dismissed on November 22, 1995 were not barred by the doctrine of *res judicata.* DOJ filed an 11-page memorandum claiming that the earlier administrative proceedings undertaken against FCWC's Barefoot and Carrollwood facilities did not bar the later judicial proceedings.

The Court denied DOJ's motion within three days without waiting for a response from FCWC. The Court made it clear to DOJ counsel that it had not "patently misunderstood" DOJ's position, and that there had been no change in law or facts since the prior submission. The Court ruled that it "has reviewed the Plaintiff's additional arguments and finds them unpersuasive regarding [the applicability of *res judicata.*]" Exhibit 6 GHB-69 .

On December 28, 1995, FCWC filed its findings of fact and conclusions of law, and the following day we filed our pre-trial brief. Exhibits GHB-70, GHB-71.

The findings of fact set forth in detail the facts we had been able to establish at Waterway, Barefoot, and Carrollwood which I shall summarize.

At Waterway, we were able to establish conclusively that in May 1986, seven months before EPA denied Waterway's permit renewal because Waterway supposedly had a zero or no discharge wasteload allocation, FDEP had sent a letter to EPA Region IV indicating that Waterway had a wasteload allocation. We argued that EPA made a mistake of monumental proportion and then the Agency failed to consider its own record.

The facts at Barefoot established that DOJ was attempting to seek substantial penalties based on a mistaken belief that Barefoot's discharges were violating total residual chlorine levels. Our discovery efforts had established that the Barefoot facility was using the correct chlorine testing equipment, and that it was known that this equipment would not report accurate levels at certain

concentrations. EPA itself, in a memorandum that EPA officials had refused to provide in discovery, required FCWC to report "nondetect" rather than an actual number, which EPA knew would be flawed. DOJ also sought penalties for FCWC's reporting of the Carbonaceous Biochemical Oxygen Demand ("CBOD") rather than the Biochemical Oxygen Demand ("BOD") parameter. The facts indicated that CBOD was the more accurate indicator of wastewater treatment plant performance. Indeed, EPA had revised the Barefoot NPDES permit to allow FCWC to report CBOD as opposed to BOD, in accordance with the Florida permit.

The most telling fact FCWC was able to put before the Court before trial was that DOJ and EPA counsel had admitted that they had no evidence of environmental harm at these three facilities. As a result of this admission alone, the facts and the law entitled FCWC to a significant mitigation of the penalty requested by DOJ. In FCWC's pre-trial brief of January 2, 1996, we argued to the Court that mitigation factors must be considered and that EPA had improperly denied FCWC's NPDES permit at Waterway. We directed the Court's attention to a Rule 30(b)(6) deposition where two supervisors in EPA's Region IV had testified that EPA staff member, Connie Kagey, had improperly denied FCWC's permit renewal, and she had failed to follow EPA's own regulations and procedures. Regarding Carrollwood, FCWC argued in its brief that the NPDES permit exceedences which occurred between July 1991 and January 1992 were technical violations that had to be considered in light of the permitting history of the facilities. Carrollwood's permit difficulties were created by one agency in Hillsborough County being unwilling and unable to allow Carrollwood to connect to Hillsborough County at the same time that FCWC was being ordered to

connect by another agency of Hillsborough County. DOJ counsel argued that Carrollwood should have ignored its permit requirements and connected with the City of Tampa. This was not economically feasible, and might well have been considered an unreasonable expenditure of funds.

***Q*: Was the trial conducted as scheduled in January 1996?**

A: No. Even though the Court's opinion on November 22, 1995 caused us to begin readjusting our case, FCWC was prepared to go to trial; however the trial was postponed until March 1996 due to the sudden illness of Gerald Allen, President of FCWC and a key witness at trial.

Motions in Limine

***Q*: What happened next?**

A: Before the trial began, FCWC and Avatar Holdings, submitted a motion in limine and memorandum in support to exclude the expert testimony and report of Mark Klingenstein in order to highlight the fact that DOJ's key witness could not meet the test for expert testimony. Exhibit 6 GHB-72. We argued that under Federal Rule of Evidence 702, large portions of Mr. Klingenstein's report addressed DOJ allegations that had been dismissed by the Court. Accordingly, the report was largely irrelevant and unhelpful. Moreover, Mr. Klingenstein's opinions were stated as "possibilities," not to reasonable degrees of scientific certainty. We concluded that Mr. Klingenstein's report was biased and based upon nonexistent analysis and therefore did not meet the standard of Rule 702. DOJ also filed a broad motion in limine, containing a multitude of requests. Exhibit 6 GHB-73. First, DOJ attempted to bar any evidence regarding EPA's unlawful denial of FCWC's 1986 NPDES permit renewal at Waterway. Throughout this action, DOJ had characterized FCWC's actions at Waterway "as

the wanton violations of a renegade company that was operating outside of the CWA's regulatory scheme." At this point, FCWC had clearly demonstrated that it had cooperated with federal and state regulatory officials, and we raised this in our response. Most importantly, however, we argued that DOJ's request unreasonably sought to limit the scope of the trial and to prevent the full scope of mitigating evidence permitted under the CWA.

In a particularly stunning move, DOJ next sought to exclude the testimony of current and former EPA officials, who had stated that EPA had operated in violation of its own regulations, including the testimony of Connie Kagey, Bruce Barrett, James Greenfield, and Roosevelt Childress, all present or former EPA employees. DOJ counsel knew that if these witnesses testified, they would confirm that EPA's own employee, Ms. Kagey, had failed to follow EPA's regulations for issuance of the Waterway permit renewal.

DOJ counsel further requested that all evidence relating to Barefoot's and Carrollwood's administrative orders, and the testimony of EPA's own enforcement officers, Roy Herwig and Tom Plouff, be excluded. We countered with the argument that DOJ could not prevent the full scope of mitigating evidence from coming into the trial.

DOJ further attempted to strike as witnesses any of FCWC's employees that it had not deposed. We countered that this was merely an attempt to circumvent Magistrate Judge Swartz's opinion of December 8, 1995, which barred depositions of these individuals as too late, DOJ having had two years to depose these individuals and not having done so. The Court disallowed the request to depose them after the close of discovery.

Finally, DOJ sought to bar FCWC from presenting any evidence showing that

delays in coming into compliance were caused by third parties, including federal, state, and local regulatory agencies. All of DOJ's motions in limine to limit testimony were rejected by the Court on the day the trial began. 151

Q: **Did FCWC file any other motions in limine to exclude expert testimony?**

A: Yes. During this time, FCWC also moved to exclude portions of the report and testimony of the government's expert witness Eileen Zimmer. Exhibit 6 GHB-74. This testimony was to have discussed the economic benefit allegedly resulting from FCWC's violations. The stated goal of Ms. Zimmer's report, entitled "Analysis of Wrongful Profits and Ability to Pay in U.S. v. Florida Cities Water Company," was to quantify the so-called wrongful profits realized by Avatar Holdings through its Barefoot Bay Development Corporation operations and by FCWC, and to determine the ability of Avatar and FCWC to pay a civil penalty for the alleged CWA violations. FCWC objected to Zimmer's testimony and report in part because she calculated alleged wrongful profits on claims for which the Court had already granted judgment for FCWC.

<u>The Months Before the Trial</u>

Q: **What other litigation activities were going on during late January and February of 1996?**

A: We used this time to readjust our case in light of the Court's November 22 decision. This decision, as mentioned earlier, changed the focus of the entire case. Given the extra time, we continued document preparation and developing lists of proposed joint exhibits to be more efficient at trial. One effort that was undertaken involved the substantial reduction of the number of trial exhibits in light of the Court's November decision. We did maintain as exhibits some documents from Barefoot and Carrollwood, however, because we believed we

would have to answer certain evidence in trial from DOJ counsel regarding these facilities.

In February 1996, there were additional settlement discussions. Once again, we attempted to convince DOJ counsel and a representative from the Assistant Attorney General's office how strong FCWC's case was with regard to all three facilities. We had specific arguments and documents that we made available to David Berz, settlement counsel for Avatar Holdings, which he in turn discussed with DOJ officials. Notwithstanding our efforts and evidence, settlement could not be reached.

In mid-to-late February 1996, we continued preparation of questions for witnesses at trial and cross-examination questions. We also continued preparation of a list of joint exhibits for DOJ and FCWC to file in Court.

Q: **What activities occurred in March 1996?**

A: Early in March 1996, in our continuing effort to convince DOJ of the incorrectness of its position, David Berz sent a letter on behalf of defendants to DOJ in one final effort to settle this case and save additional expense of trial and possible appeals. Exhibit 6 GHB-75. This effort was not successful, because DOJ once again rejected FCWC's settlement position.

During this time we also continued our efforts in preparing to address DOJ's objections to our exhibits, and we prepared our objections to their exhibits. We also prepared to put on a moot court session for the general counsel of FCWC and his colleagues, and to generally prepare for trial.

<u>The Trial</u>

Q: **When and where was the trial conducted?**

A: The trial was conducted on March 25, 27, 28, 29 and April 1, 3, 4, 5 (eight days),

1996 in the U.S. District Court for the Middle District of Florida in Tampa. 153

Q: Is a transcript of the trial included as part of your testimony?

A: Yes, at Exhibit 6 GHB-76.

Q: Who represented FCWC at trial?

A: I was lead trial attorney and was assisted by Alexander M. Bullock, Lance W. High and Don G. Scroggin.

Q: Were both FCWC and Avatar Holdings cases heard together?

A: Yes.

Q: Who represented Avatar Holdings at trial?

A: Mr. David B. Hird was the lead trial counsel, and his co-counsel was Joanne M. Tsotsos.

Q: What happened on the first day of trial?

A: The trial began with the Court ruling in FCWC's favor to exclude the wrongful profits analysis of DOJ's expert Eileen Zimmer. The Court then denied DOJ's motion to exclude any of our experts and their testimony. In addition, the U.S. offered an official offer of proof in lieu of the testimony of witnesses who asserted their Fifth Amendment privileges. Exhibit 6 GHB-77. DOJ argued that due to the unavailability of knowledgeable Avatar officers, and the subsequent absence of depositions or testimonial evidence, the U.S. should be able to draw adverse inferences as it deemed necessary. DOJ further argued that Avatar Holdings pervasively controlled the environmental practices of FCWC and must therefore be held liable for FCWC's violations of the CWA. The Court requested on the first day of trial we respond to this offer of proof. FCWC and Avatar Holdings submitted a joint memorandum addressing this issue on April 5, 1996. Exhibit 6 GHB-78. When we filed our response, we argued that adverse

inferences should not be drawn for several reasons. First, we noted that the Weitzenhoff case created an extremely broad standard of criminal liability under the CWA which triggered the personal decision of certain individuals to invoke the Fifth Amendment. If the government removed the threat of criminal prosecution, as requested by counsel, these individuals would have been willing to offer their testimony. But the government refused to grant immunity. We further noted that the government failed to ask these individuals particularized questions at their depositions and could not subsequently ask the Court to speculate as to what questions the government might have asked for the purpose of the Court's drawing adverse inferences. We also pointed out that the government had not been prejudiced by the invocation of the Fifth Amendment because it had a full and fair opportunity to learn the facts of this case through numerous depositions of high ranking corporate officials, broad document requests, and site inspections. Ultimately, the Court ruled against DOJ with regard to this motion.

After these preliminary matters were raised by the Court and DOJ, FCWC filed its witness list. Exhibit 6 GHB-79. The Court next called for opening statements, which Mr. Jacobs handled for DOJ, I handled for FCWC, and Mr. Hird handled for Avatar Holdings, Inc. In addition to the arguments already mentioned in this testimony, I pointed out that this case came down to the Court applying common sense in levying a penalty in light of the facts of this case, particularly where the evidence showed that DOJ had a "real inability to be able to get its facts straight." I told the Court that we would lay out the facts, which would show that significant mitigation should be applied with regard to any penalty assessed.

After the opening statements, DOJ called its first witness, Mark Klingenstein.

This testimony involved his review of all of the documents he had read with respect to all three facilities. Mr. Klingenstein made the general arguments that FCWC's violations were serious and possibly could have been prevented if FCWC had been more concerned about the environment. Mr. Klingenstein's general purpose seemed to be to show that FCWC could have moved much faster had it adopted alternatives available to it, which had not been sufficiently explored.

Q: **What happened on the second day of trial?**

A: The second day, March 27, 1996, Mr. Bullock conducted the cross-examination of Mr. Klingenstein. From the cross-examination, it appeared that Mr. Klingenstein had done little work in terms of interviewing EPA employees with respect to the facts of the case and had not reviewed the complete administrative record for any of these facilities. Throughout cross-examination Mr. Bullock established that Mr. Klingenstein was unable to present any proof of environmental harm but nevertheless offered a professional opinion that there was a potential for harm from the discharges from Waterway. This testimony was later refuted by FDEP officials who testified that they found no evidence of any actual harm created by the Waterway facility. Mr. Klingenstein also offered an opinion as to Carrollwood and Barefoot, although he had no personal knowledge of the facilities other than the knowledge he gained from having read selected documents provided to him by DOJ counsel. During his testimony, DOJ stipulated that it had no evidence of environmental harm at any of the three facilities. It was apparent that Mr. Klingenstein was straining to reach a conclusion without having sufficient documentation and information to prove his point.

Q: **What else happened on the second day of trial?**

A: DOJ had a short re-direct of Mr. Klingenstein and then called Jack Schenkman, Chairman of the Board of North Fort Myers Utility. DOJ called Mr. Schenkman in an effort to bolster Mr. Klingenstein's testimony that FCWC could have connected Waterway with the North Fort Myers Utility wastewater treatment plant very quickly and therefore would not have been discharging without an NPDES permit and discharging in the wrong location for a long period of time. FCWC had rejected this option based on a study of the options because the company would have had to build a very expensive pipeline and pay substantial connection fees to a utility which was financially unstable. Furthermore, these substantial fees would have passed on to FCWC's customers.

Q: **What happened on the third day of trial?**

A: On the third day, DOJ called William Schafer, Director of Planning for the sanitary sewer department for the City of Tampa. DOJ's purpose for calling Mr. Schafer was to attempt to demonstrate that FCWC could have connected Carrollwood to the City of Tampa at an earlier date than the facility actually was connected to the Hillsborough County facility. DOJ's argument was that FCWC could have avoided CWA violations by implementing different options sooner. Our cross-examination demonstrated that the connection line would have been over 15,000 feet long and would have to have been constructed through residential areas, which would have been exceedingly expensive and difficult to undertake because of disturbing roads and trees. Moreover, FCWC would have been required to obtain building permits and easements, through commercial districts and residential neighborhoods, which would take time to implement. Trial Transcript, Exhibit 6 GHB-76, March 28, pages 12-13.

Next DOJ called Avatar Holdings Chairman of the Board, Leon Levy, in an attempt to establish the respective roles and lines of authority and communication between Avatar Holdings and FCWC. DOJ was unable to demonstrate that Mr. Levy had any day to day control over the activities of Avatar's subsidiary FCWC. DOJ's final witness on this day was Eileen Zimmer who offered her opinion as to FCWC's and Avatar's ability to pay a penalty.

Q: **What happened on the fourth day of trial, March 29, 1996?**

A: On this day, DOJ called Roger Pfaff, an employee of U.S. EPA in Atlanta, where he is the Chief of the Enforcement Section in Water Management. Although DOJ attempted to use Mr. Pfaff to testify about the government's BEN model for showing economic benefit of avoided or delayed costs during noncompliance, the Court struck his testimony from the record because he had not been listed as a witness on this subject.

On the same day, we began our direct case by calling Michael McWeeny, Director of the Hillsborough County Utilities Department. The purpose of his testimony was to establish that FCWC had attempted to hook up with the county, and the county had in fact delayed the process for FCWC.

Our next witness was Douglas G. Smith, Senior Partner and Regional Environmental Manager for Black and Veatch, an engineering consulting firm. Mr. Smith explained to the Court how wastewater treatment facilities work, defined terms, explained levels of treatment in a plant, described the types of discharge, and, as an expert, offered his opinion on the environmental impacts effluent from wastewater treatment facilities have on receiving waters. Exhibit 60 GHB-80. Mr. Smith demonstrated to the Court the excellent job FCWC had done in operating the three facilities at issue and he explained all the

engineering, chemical, and environmental actions undertaken by FCWC to the Court. Mr. Smith testified with a reasonable degree of scientific certainty that none of the discharges from any of FCWC's plants had a negative impact on the receiving waters of Florida. He also testified that FCWC had taken a reasonable amount of time to do its work at Waterway in contrast to DOJ's allegation concerning substantial delay.

Q: **What happened on the fifth day of the trial, April 1, 1996?**

A: DOJ continued its cross-examination of Mr. Smith and FCWC conducted its re-direct.

We then continued the presentation of FCWC's case by calling Randall Armstrong, Executive Vice President of Phoenix Environmental Group. Mr. Armstrong testified as an expert witness. He was employed by FDEP during the 1980s and participated in the 1980 and 1987 water quality surveys of the Caloosahatchee River. Mr. Armstrong was also involved in the creation of the 1981 planning document upon which Connie Kagey relied to reject the NPDES permit renewal. Mr. Armstrong testified that the 1981 study was for planning purposes only, and had no effect upon any existing wasteload allocation. In addition, Mr. Armstrong had reviewed over ten years of data for the section of the Caloosahatchee River near the Waterway plant outfall and he found no dimunition in water quality. He was an expert on computer modeling and water quality impacts on surface water and his opinion was important to show FCWC's discharge into the canal caused no environmental harm.

FCWC next called Roger Hartung, who held a number of positions in EPA Region VI during his twenty-three year tenure at EPA, including Deputy Water Division Director. FCWC called Mr. Hartung because he is considered one of the

top enforcement and permitting experts in all of EPA. He testified on EPA permitting and enforcement issues, how permit writers perform their job duties, and how wasteload allocations are developed, approved, and inserted into NPDES permits. He testified that in his twenty-three years experience with the EPA, he had never known of an NPDES permit being denied whenever a facility treating human wastes was meeting water quality standards and effluent limits. His testimony demonstrated that in denying the Waterway NPDES renewal, EPA had violated its own regulations.

Q: **What happened on the sixth day of trial?**

A: Our first witness was Patrick Lehman, the former Vice President for Operations at FCWC during the period of time when the Waterway renewal application was denied. Mr. Lehman testified as to the steps FCWC took in attempting to solve its permitting dilemma. Mr. Lehman had been involved in developing a report that reviewed all of FCWC's options, including the possible connection to North Fort Myers Utility. He also testified on how FCWC had come to a decision to move the Waterway discharge from the unnamed canal into the middle of the Caloosahatchee River. Mr. Lehman's testimony demonstrated that FCWC took its environmental responsibilities seriously, and knew that it could not shut down its facility and thereby create a significant public health problem.

On the afternoon of April 3, 1996, FCWC called Connie Kagey, the EPA permit writer who had caused the entire problem for FCWC at Waterway by relying on a 1981 Florida planning document to deny the NPDES permit application, in violation of EPA's regulations. Ms. Kagey admitted, pursuant to Mr. Bullock's cross examination, that she would not use a draft wasteload allocation in writing a permit. Thee evidence established that the 1981 wasteload allocation was never

officially approved by EPA or FDEP, therefore it was a violation of EPA's 160 regulations to use this document to deny FCWC's 1986 permit renewal application

After this testimony, we read in portions of depositions of EPA Region IV employees, which further demonstrated that EPA had violated its own rules with regard to denying the Waterway NPDES permit.

After reading these depositions, FCWC called Paul Bradtmiller, a Senior Vice President, who joined FCWC in 1991. He testified as to how after a long and tortuous process, FCWC was finally able to interconnect its Carrollwood facility with Hillsborough County. He also testified as to the difficulties FCWC experienced in reaching the point of building an advanced waste water treatment facility at Carrollwood. However, the county finally decided to allow an interconnect rather than an additional facility.

After this, FCWC called Ronald D. Blackburn, an environmental administrator for FDEP, Fort Meyers District. The purpose of Mr. Blackburn's testimony was to prove that the wasteload allocation number and document relied on by Ms. Kagey was merely a planning document and not valid for use in an NPDES permit. He also testified that FCWC's Waterway had always had a wasteload allocation to discharge into the canal and the Caloosahatchee River and established that EPA's 1986 decision was based on incorrect information.

FCWC's next witness was Mike Acosta, Vice President of Engineering and Operations for FCWC. The purpose of this testimony was to explain the permitting procedure Waterway experienced, and to explain why it took several years to obtain all the state, local, and federal permits to construct the facility. Mr. Acosta outlined in detail the delays caused by the U.S. Army Corps of

Engineers, FDEP, and county authorities. His testimony demonstrated that FCWC took its environmental responsibilities seriously and that FCWC was frustrated by these delays.

Following Mr. Acosta, FCWC called Larry Good, Regional Manager for FCWC. Mr. Good testified about FCWC's extensive efforts to connect Carrollwood with one of the Hillsborough County regional wastewater treatment plants. He also discussed FCWC's efforts to find other alternatives to discharge during the 1980s. As our next witness, we called Gerald Allen, President of FCWC, whose testimony covered several significant areas. Mr. Allen explained the process by which a privately owned, governmentally regulated utility must approach all decisions regarding substantial capital investment under the Florida Public Service Commission's "prudence standard." Using a hypothetical scenario, Mr. Allen performed a sample rate base calculation for the Court to demonstrate the decision making process used by public utilities to determine the prudency of an investment. Using this discussion as the basis of his testimony, Mr. Allen explained why each of the options reviewed by FCWC at Barefoot during the 1980s was neither a feasible nor prudent alternative to discharge. His testimony provided a clear picture of FCWC's efforts to convince FDEP to grant permission for FCWC to upgrade its treatment plant to advanced secondary treatment and then to AWT status. In addition, Mr. Allen also testified about the process to upgrade the Waterway plant to AWT status and the reasons that any other alternatives were neither prudent nor practical. His testimony lasted into April 5, 1996.

Q: **What else happened on the last day of trial, April 5, 1996?**

A: After Mr. Allen completed his testimony, FCWC called Julie Karleskint, the

operations manager for FCWC. The purpose of this testimony was to describe the problems FCWC had with BOD/CBOD reporting, and the fact that what FCWC had reported was more accurate than what EPA had required FCWC to report. She testified that EPA was in fact attempting to assess penalties on a mere reporting error. She also testified concerning the total residual chlorine violations at Waterway and the fact that EPA had a document which exonerated FCWC's reported TRC violations. She advised the Court that FCWC was using a testing method required by EPA and if that method was used it was understood that it would measure to the levels necessary to report accurately. Her testimony destroyed DOJ's case with regard to CWA violations based on TRC exceedences. FCWC then called Keith Cardey, an expert in the areas of Florida Public Service Commission regulation and the economic effects of PSC regulation on privately-owned, publically-regulated utilities. The purpose of this testimony was to show that FCWC had no economic incentive to delay environmental expenditures at any of its facilities.

After Mr. Cardey, FCWC called Dr. Abdul B. Ahmadi, the FDEP's engineer in charge of domestic wastewater facilities for the state of Florida, South District. Dr. Ahmadi testified that the Waterway facility had a wasteload allocation and did not violate Florida water quality standards by discharging into the canal. He further testified that the Waterway facility always had a wasteload allocation to discharge in 1985 and 1986, in spite of EPA's determinations in 1986. This testimony further undermined DOJ's position. Dr. Ahmadi then testified as to the length of time it took Waterway to go through the permitting procedure and the construction plan approval by FDEP. The testimony indicated that Waterway could still be discharging into the canal leading to the Caloosahatchee River to

this day without violating the permit. Dr. Ahmadi was FCWC's final witness. Mr. Ed Jacobson, President of Avatar Holdings Inc., was then called by Avatar to explain the company's structure and the relationship of certain employees with Avatar. Avatar also called Ms. Georgia Metcalf, President of Barefoot Bay Development Corporation, to testify as to financial issues relating to the development corporation.

Avatar then called Charles McNairy, a certified public accountant and chief financial officer, of Avatar Holdings. He testified as to that company's income and losses.

After this, DOJ moved to enter the deposition of Jack Tompkins as rebuttal testimony to the testimony of Mr. Allen, Mr. Bradtmiller, and Ms. Karleskint. Mr. Jacobs then proceeded to read in portions of Mr. Tompkins depositions, to which we objected on the ground that the testimony was confusing, cumulative, and misleading. Finally, the Court asked that the parties submit brief regarding the admissibility of Mr. Tompkins' deposition. After some procedural issues were discussed on the filing of post-trial briefs, the trial was concluded. This occurred at approximately 7:00 p.m. on Good Friday evening.

Post-Trial Activities

Q: **Upon conclusion of the trial, what was the next work undertaken?**

A: Soon after the trial was concluded, DOJ filed a memorandum of law that once again raised the issue of drawing adverse inferences from those who asserted the Fifth Amendment privilege. In addition, on April 16, 1996, FCWC moved to strike the deposition testimony presented in Court by DOJ of Jack Tompkins. Exhibit _____ GHB-81. On April 18, 1996, the parties submitted proposals for post-trial submissions. Exhibit 6 GHB-82. FCWC continued its review of

trial transcripts, in preparation for the filing of post-trial motions and its post-trial brief.

Q: **Did the Court rule on any motions during this time?**

A: Yes. On May 8, 1996, the Court denied FCWC's and Avatar's motions to strike the Jack Tompkins deposition. Also, by order of May 8, 1996, the Court denied DOJ's motion to draw adverse inferences from the assertion of the Fifth Amendment privilege, and ruled that depositions of several FCWC and Avatar personnel deposed by DOJ were inadmissible. The Court found that Plaintiff's assertions that the witnesses would have provided evidence in support of its claims did not form a "sufficient predicate upon which to base adverse inferences." The Court stated that "the mere fact that the witnesses held positions of authority and responsibility does not without more lead to the conclusion that they could have given testimony that would support Plaintiff's liability case. . . Further, Plaintiff has not set forth the substance of any documentary evidence. . . which demonstrates that the witnesses could have given adverse testimony." Exhibit 6 GHB-83.

Q: **Did the government file a post-trial brief?**

A: Yes. On June 5, 1996, the Plaintiff filed a post-trial brief and proposed findings of fact and conclusions of law, requesting that the Court impose a civil penalty of $4,861,500 on FCWC and a similar penalty on Avatar. Exhibits 6 and 6 GHB-84 and GHB 85. The key point expressed in this pleading was that "a substantial civil penalty [was] warranted in this case, primarily because of the extensive history of serious Clean Water Act violations at their plants and the Defendant's lack of serious, timely efforts to remedy them." DOJ went on to state that "[i]n each instance, Defendants simply chose not to take the steps necessary

to remedy long-standing problems, putting their short-term financial self-interest ahead of compliance with the law and care for the environment." DOJ's brief ignored the evidence developed at trial, failed to consider all of the mitigation factors of the CWA, ignored the fact that EPA had violated its own regulations with respect to Waterway, and that it had conceded that there was no actual environmental harm caused by the discharges at the three facilities.

***Q*: Did FCWC file a post-trial brief and proposed findings of fact and conclusions of law?**

A: Yes. This brief, like the trial itself, focused on the mitigation evidence. We argued that this evidence "demonstrates that none of Florida Cities' actions resulted in serious violations of the CWA, that none of those violations caused any environmental harm or placed the State of Florida's surface waters at risk, and that Florida Cities at all times cooperated in good faith with EPA and FDEP." We further stated that "more than one-third of the violations at issue (those relating to discharges without a permit at Waterway and total residual chlorine at Barefoot) would not have occurred but for EPA's own mistakes or omissions." In light of the evidence, we argued for a *de minimis* penalty. Exhibits 6 and 6 GHB-86 and GHB-87.

Q: Did DOJ file additional motions during this period?

A: Yes. On May 16, 1996, DOJ filed a motion for reconsideration of the Court's order on adverse inferences and the Court's imposed page limits for post-trial brief submissions. Exhibit 6 GHB-88. In its memorandum in support of this motion, the government reargues at length its position that Avatar Holdings controlled the environmental policies of FCWC. DOJ did not really explain why adverse inferences should be drawn, but rather just argued for finding Avatar

Holdings liable. 166

On May 21, 1996, FCWC filed a memorandum in opposition to Plaintiff's motion for reconsideration. Exhibit 6 GHB-89. FCWC objected to DOJ's motion, arguing that DOJ failed to explain either why the Court had fundamentally misunderstood the government or that there had been a change in law or the facts since the prior decision. On May 31, 1996, the Court denied the government's motion for reconsideration on the drawing of adverse inferences. The Court concluded that DOJ had argued for holding Avatar Holdings liable and not for drawing adverse inferences, and had confused the issue by including evidence not at all relevant to the inference issue. Exhibit 6 GHB-90.

***Q*: Were there additional briefs filed by DOJ?**

A: Yes. On July 16, 1996, DOJ filed a brief citing additional authority--two cases that it believed to be relevant that had been decided since the trial of this matter. *See* Exhibit 6 GHB-91. One case dealt with the amount of the penalty assessed against a defendant in a similar CWA case. The other case was relevant to the unpermitted discharge violations at Barefoot and Carrollwood, where the Court had held in its November 22, 1995 decision that certain claims were barred by *res judicata*. On July 19, 1996, we responded that the penalty case, Dean Dairy Products, had facts dramatically different from our own facts, and was therefore distinguishable. In this case the Court assessed a penalty in excess of four million dollars. Likewise, we argued that the *res judicata* case, Borough of Ridgeway, was irrelevant on factual grounds. We also noted that this citation was DOJ's seventh request for reconsideration in this case, and that DOJ had not set forth any of the grounds necessary for reconsideration. Exhibit 6 GHB-92. On July 23, 1996, the Court ordered the parties to brief the issues relating to *res*

judicata. Exhibit 6 GHB-93. Specifically, the Court directed us to file a memorandum addressing the effect of In re: Borough of Ridgway and Manning v. City of Auburn on the Court's November 22, 1995 Order precluding claims in the Second Amended Complaint on the basis of *res judicata*. As a result of this Court Order of July 23, 1996, DOJ filed a reply memorandum in support of reinstatement of those claims on August 8, 1996. Exhibit 6 GHB-94. If we lost this issue it meant FCWC would have to return to trial. On August 9, 1996, FCWC filed a joint response with Avatar. Exhibit 6 GHB-95. We argued that in both Ridgway and Manning, the courts would have applied *res judicata* if the facts supported such application of the doctrine. We distinguished FCWC's case from these two, demonstrating how the necessary factual prerequisites for application of *res judicata* were met in FCWC's case. On August 16, 1996, the Court reaffirmed it November 22, 1995 Order granting *res judicata* effect to claims in paragraphs 16, 17-23, and 30 of the Second Amended Complaint, agreeing with our argument that the facts in FCWC's case did indeed mandate application of *res judicata*. Exhibit 6 GHB-96.

The Judgment

***Q*: When did the Court issue its judgment on the litigation?**

A: On August 20, 1996, the Court issued its opinion. Exhibit 6 GHB-97. This opinion described the statutory maximum penalty that could have been levied against FCWC. The Court's computation concluded that FCWC could have been liable for $6,600,000 at Barefoot Bay for 264 violations. Yet, after reviewing all of the statutory mitigation requirements, the Court assessed a penalty of only $5,610. The Court computed that the Carrollwood violations could have amounted to $14,675,000 for 587 violations. Incorporating the mitigation factors,

however, the Court assessed an actual penalty of $14,675. At Waterway, the 168 Court computed 1281 violations, which could have amounted to a $32,025,000 penalty. The Court assessed an actual penalty of $289,425 for violations at Waterway. This amounted to an assessed total penalty of $309,710 out of a potential penalty of $104,325,000.

Q: **After the Court issued its opinion, did FCWC take all appropriate action to recover legal fees and other litigation costs?**

A: Yes. Virtually immediately we began preparations to apply for costs and attorneys' fees under Federal Rules 54 and 68. Exhibits 6 and 6 GHB-98 and GHB-99. FCWC argued that it was entitled under Federal Rules of Civil Procedure 54 and 68 to recover costs it incurred because the amount eventually awarded was less than the Offer of Judgment FCWC had made in March 1995. Under Federal Rule 68 a Defendant who makes an offer of settlement to a Plaintiff, who then rejects the offer, and where the verdict at the close of the case is for an amount less than the rejected offer, the Plaintiff is then liable to the Defendant for all costs incurred by the Defendant after the offer was made. FCWC argued that because the government rejected its $500,000 Rule 68 offer of judgment, and the ultimate judgment was for less than this amount, the government must pay FCWC's costs, as specified in Rule 68. For fees we argued that attorneys' fees are recoverable under the Equal Access to Justice Act ("EAJA"), to "prevailing parties" that prove that the government has litigated in "bad faith." FCWC argued that the government's repeated maintenance of claims that were found to be barred by *res judicata* amounted to bad faith, and that attorneys' fees were therefore recoverable. On September 23, 1996, DOJ opposed FCWC's motion for costs and attorneys' fees. Exhibit 6 GHB-100.

On February 3, 1997, the Court reluctantly denied FCWC's motion for costs and attorneys fees. Exhibit 6 GHB-101. The Court ruled that where the United States is the Plaintiff, Rule 68 for costs cannot be put into effect without an underlying waiver of sovereign immunity. Because the CWA is silent on this issue, the Court concluded that the EAJA was the only other provision that could provide such a waiver in this instance, and it held that the EAJA's waiver was only for "prevailing parties." As FCWC was found liable for at least some penalties, FCWC was held not to be a prevailing party, notwithstanding the offer of judgment. On attorneys' fees, the Court ruled that the application of *res judicata* was not clear cut, and that the government's action did not amount to litigation undertaken vexatiously, wantonly or for oppressive reasons. Accordingly, the Court ruled that FCWC was not entitled to recover its attorneys' fees as a strict matter of law.

The Appeal

***Q*: Did either party appeal the Court's decision of August 20, 1996?**

A: Yes. On October 18, 1996, DOJ filed an appeal, as appellant. Exhibit GHB-102. The issues raised on appeal were the following: (1) did the district court impose the proper standard of parent corporation liability under the CWA; (2) did the district court err in determining that prior administrative orders should be given *res judicata* effect in subsequent judicial proceedings; (3) did the district court err in prohibiting the plaintiff from conducting interviews of ex-employees of the defendants without allowing attorneys for the defendants notice and an opportunity to attend the interviews; (4) did the district court err in not drawing adverse inferences from the refusal of nearly all of Avatar's key officers to testify based on Fifth Amendment grounds; (5) did the district court abuse its discretion

in applying the statutory penalty factors of seriousness and history of violations in assessing the penalty in this case.

Q: **Did FCWC appeal?**

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A: Notwithstanding that FCWC felt the penalty was not fully warranted, FCWC did not initiate an appeal on the merits of the District Court's decision because the opinion was well reasoned and well supported by the law and the evidence. In effect, FCWC determined it had won in the District Court. Once the government appealed, however, FCWC decided to file a cross-appeal regarding the District Court's denial of its motion for costs and attorneys' fees on November 1, 1996. Exhibit 6 (GHB-103). FCWC believed that there were strong arguments for the Eleventh Circuit to reverse the District Court's ruling that the doctrine of sovereign immunity prevented FCWC from recovering its costs against the government under Rule 68.

Q: **Did anything else occur in December?**

A: Yes. DOJ then failed to file a civil appeal statement form on time. On December 31, 1996, DOJ moved to file its civil appeal statement out of time. We did not oppose this motion because we thought it would be expensive to argue, unproductive, as the Court was likely to grant DOJ's motion to file out of time. On January 29, 1997, the Court in fact granted DOJ's motion.

Q: **Were any settlement discussions undertaken after the filing of the appeal and cross-appeal?**

A: Pursuant to the Eleventh Circuit rules, both parties agreed to attempts at mediation. Mediation conferences were held on March 19, 1997, April 9, 1997, April 25, 1997, May 9, 1997, and May 21, 1997. During these discussions, DOJ's appellate counsel attempted to obtain FCWC's consent to a DOJ attempt to seek

vacatur of the opinion of Judge Nimmons of August 20, 1996. We believed that DOJ was desperate to expunge this opinion from the record, specifically with regard to *res judicata*. On occasion, there were discussions with DOJ about whether FCWC's penalty could be significantly reduced or eliminated if FCWC joined in DOJ's vacatur motion. DOJ, however, insisted on having it both ways; it wanted FCWC's agreement to join or not oppose vacatur, but also wanted to preserve its appeal if the vacatur motion was denied. DOJ wanted FCWC's agreement essentially for nothing, since any reduction in penalty was contingent on the Court granting the motion.

Q: **What was the outcome of these mediation efforts?**

A: After many telephone conference calls, and individual calls with appellate counsel for DOJ, FCWC advised DOJ that it would not agree to any further extensions of time for DOJ to file its appellate brief. After internal DOJ discussions, DOJ counsel advised us that DOJ and EPA would agree to abandon its appeal if FCWC abandoned its cross-appeal, and both parties would accept Judge Nimmons's decision as final. FCWC agreed. On August 6, 1997, the Eleventh Circuit issued an order dismissing the government's appeal and FCWC's cross-appeal with prejudice. Exhibit GHB-104.

Overview of Litigation Effort

Q: **What is your estimate of the number of documents produced by FCWC in response to discovery requests?**

A: Over 400,000 individual documents were produced by FCWC in response to DOJ's discovery requests. These documents ranged from one page to over one-hundred pages in length. My best estimate is that FCWC produced a million plus pages to DOJ for review and copying. On occasion when FCWC produced the

documents, DOJ did not make a copy of the documents after review.

Q: **How many pleadings did FCWC and the DOJ file during the course of the litigation?**

A: 132 pleadings were filed, which amounted to a total of 1,566 pages of written material, plus an additional 751 pages of exhibits. See Exhibit 6 GHB-105.

Q: **How many witnesses did FCWC and the DOJ depose and how many days of depositions did each represent?**

A: FCWC took 22 depositions of 17 witnesses (some witnesses being deposed more than once). This represented approximately 20 days of depositions or 133.25 hours of deposition. See Exhibit 6 GHB-106. DOJ took 32 depositions of 26 individuals over 33 days.

Q: **Did you take steps to keep costs as low as possible?**

A: Yes. Throughout the litigation I examined the bills thoroughly and reduced legal fees, quite substantially at times, whenever it appeared that any work was duplicated or any billed time resulted in value not being added. See Exhibit 6 GHB-107 for correspondence with the client about my ongoing reduction of legal fees. Exhibit 6 GHB-108 provides a month-by-month breakdown of the hours worked and the average hourly billing rate. In addition to reducing hours billed when necessary, I never billed for dinner meetings with clients, nor was non-working travel time (between Washington, D.C. and Florida, for example) billed. I carefully monitored airline ticket charges and tried to get attorneys to fly Valu Jet as frequently as possible to keep travel costs down. Soon after it was determined that DOJ intended to review tens of thousands of documents and after consultation with FCWC's general counsel, it was concluded that substantial FCWC attorney time could be avoided and thus legal expenses

reduced if the DOJ was given substantial latitude in reviewing documents without prior screening for confidential and privileged content which is the usual practice. This practice was adopted for a substantial part of the discovery and significantly reduced legal expenses. Finally, I reduced billed hours when it appeared time was not being used by a given attorney as efficiently as it could have been. All these matters are discussed in the cover letters to the bills. Exhibit 6 GHB-109. In addition, rates for attorneys' fees and paralegal fees were set at levels below market rates in Washington, D.C. at times to ensure that bills would not be excessive. See Exhibit 6 GHB-110 for a discussion of one such reduction, reducing my time from $275 per hour to $250. The rates discussed in this letter actually came down further, and my time and Don Scroggin's time was billed from this point on at a rate of $200 per hour for us both. Finally, all assignments were structured taking into account the billing rates of individuals and work was shared with Avatar's attorneys whenever that proved most efficient.

Q: **In your opinion, did FCWC prevail in this litigation?**

A: Yes.

Q: **Why?**

A: We prevailed because we successfully barred more than half the government's claims. Moreover, as to the remaining claims, we successfully put forth evidence that compelled the judge to seriously mitigate all penalties to just $10 and $25 per day. FCWC agreed to certain penalties in order to enhance its credibility with the Court that it was not disagreeing with EPA on every issue. We were able to reduce $104,000,000 in potential penalties into $309,710 in actual liability. It is indeed ironic that the Court's finding of penalties was substantially less than FCWC's settlement offer of $500,000 made almost four years earlier in January

1993, nine months before the Original Complaint was filed by the U.S., and well before FCWC had sustained legal expenses of any significance.

Q: **In your opinion, was the government overzealous in bringing this litigation against FCWC?**

A: **Absolutely.**

Q: **Does this conclude your testimony?**

A: Yes.

MR. GATLIN: I would like to offer for insertion into the record as though read the testimony of Mr. L. Gray Geddie, Jr.

CHAIRMAN JOHNSON: It will be inserted as though read.

MR. GATLIN: I would like to have his exhibit, which is identified now as LGG-1 as the next exhibit number.

CHAIRMAN JOHNSON: We'll mark it as Exhibit 8. LGG-1?

MR. GATLIN: Yes.

(Exhibit 8 marked for identification.)

MR. GATLIN: Yes.

MS. GERVASI: Staff doesn't have an exhibit to go along with that direct testimony.

FLORIDA CITIES WATER COMPANY

RATE APPLICATION FOR RECOVERY OF LEGAL FEES

TESTIMONY OF L. GRAY GEDDIE, JR.

Q. Please state your name and business address.

A. L. Gray Geddie, Jr., 300 North Main Street, Greenville, South Carolina 29601.

Q. By whom are you employed and in what capacity?

A. I am a shareholder in the law firm of Ogletree, Deakins, Nash, Smoak & Stewart, P.C. ("Ogletree:). Our firm has offices in various cities in the Carolinas, as well as in Atlanta, Washington, Houston, Birmingham, Nashville and Albany. We specialize in the areas of labor and employment law, environmental law, and litigation. I currently serve as the head of the litigation group at Ogletree.

Q. Tell us about your educational and professional background and training.

A. I received a B.A. in Economics and Business Administration from Furman University in Greenville, South Carolina in 1966. My law degree is from the University of South Carolina where I received my J.D. in 1969. Following graduation from law school, I worked for the Tennessee Valley Authority ("TVA") as a trial attorney, until the Fall of 1974. While at TVA, I was introduced to the field of environmental law, and was trial counsel on some noteworthy cases for TVA, including environmental challenges to a number of TVA projects including the *Strip Mine Coal* case, the *Duck River Dam* project, and the early stages of the *Tellico Dam* case. My litigation work at TVA was not limited to environmental cases, however. I was responsible for a broad range of cases involving such matters as land condemnation, automobile accidents, contract matters, employment issues, and other matters of interest to TVA.

Q. What did you do when you left TVA in 1974?

A. After TVA, I accepted a position with the firm of Thompson, Ogletree and Deakins, a

predecessor firm to my current firm. My trial work has continued with Ogletree and in recent years, has been concentrated in the environmental and toxic tort areas. These cases include common law actions as well as actions premised upon the federal Clean Water Act, the Clean Air Act, the Toxic Substances Control Act, Superfund, and the numerous state and federal regulations that implement these statutes. A partial listing of the environmental cases that I have been responsible for over the past ten years includes:

Whitfield v. Sangamo

Kelly v. Para-Chem Southern

Zehr v. Hoechst Celanese

Johnson v. Hoechst Celanese

Braswell Shipyards v. Beazer East

Commercial Realty v. Beazer East

Dent and Conoco v. Beazer East

Moore Drums v. Lockheed

Interstate Associates v. Textron

Textron v. Pitney Bowes

Thomason v. Johnson & Johnson

Timmerberg, et al. v. NIPA Hardwicke Chemical Company

U.S.A. v. Schlumberger (Pickens County and Chem-Dyne Superfund Sites)

U.S.A. v Hoechst Celanese (NESHAPs Enforcement Action)

Numerous state and federal enforcement actions

Environmental Permit Challenges for Laidlaw, International Paper, and others

Q. Do you belong to any professional associations?

A. I am a member of the Bars of the State of South Carolina and the District of Columbia. I am

admitted to practice in those jurisdictions as well as the Second, Fourth, Fifth, Sixth, and Eleventh Circuit Courts of Appeal and the United States Supreme Court. I am a member of the American Bar Association, the Defense Research Institute, and the South Carolina Defense Trial Lawyers Association. I have been a frequent lecturer on environmental litigation issues before those organizations as well as business and industry-related trade associations.

Q. Have you ever testified before the Commission before?

A. No.

Q. What have you been asked to do with regard to this case?

A. I was retained to provide an expert opinion as to the reasonableness of the legal fees incurred by Florida Cities Water Company ("FCWC" or "Florida Cities") in defending the enforcement action brought by the Department of Justice ("DOJ"), for the Environmental Protection Agency ("EPA"), for alleged violations of the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) permit program. I met with officials of Florida Cities on October 7, 1997, in Tallahassee, Florida. I met with Dennis Getman, Gerald Allen, and Ken Gatlin to gather background on the case. I had already been furnished a copy of the Court decisions and was generally familiar with the issues that had been litigated. At this meeting I was furnished with a copy of certain legal memoranda regarding the procedures of the Florida Public Service Commission. I was asked to do an investigation and evaluation of the legal progress of the case, the positions taken by the company during the case, and to come to an opinion as to the reasonableness of the legal fees that were paid by Florida Cities in the defense of the case.

Q. Have you reached such opinions?

A. Yes. It is my opinion that the legal fees incurred by Florida Cities were necessary and

reasonable in light of the number and type of violations alleged, the magnitude of the civil penalties sought, the litigation strategies used by the DOJ attorneys, and the ultimate outcome of the case.

Q. In reaching that opinion, what did you do?

A. I was initially provided with a copy of the decision written by United States District Judge Ralph W. Nimmons, Jr., dated November 22, 1995. This decision allowed me to get a general feel for the allegations made by the Department of Justice in the case, the litigation positions taken by both sides during the progress of the case, and the ultimate resolution of the issues by the Court. The government through its Amended Complaint sought to recover statutory penalties under the Clean Water Act in an amount in excess of $104,000,000. In the ultimate opinion of the Court issued on August 20, 1996, those penalties were reduced to $309,710. In my opinion, this result was an astonishing victory for FCWC and a tribute to the quality of the defense presented by the company and its attorneys. As noted by the Court, the mitigation evidence offered by FCWC was very persuasive and compelled the reduction in the amount of penalties. Specifically, the Court essentially adopted the company's positions on the important mitigation issues of the seriousness of the Clean Water Act violations, the history of past violations, the company's good faith efforts to comply with the requirements of the regulations, the economic impact of the proposed penalty, and the other equitable factors brought to the court's attention by the company's evidence. The scope of the remedy sought by the government, namely the $104 million, made this case a "bet the company" case in that FCWC simply could not afford to pay the penalties sought. Even the government's own economic expert noted that FCWC could only pay a penalty of $7.5 million and would have to borrow the money to pay that. As noted by Judge Nimmons, "Florida Cities does not have the ability to pay the statutory maximum penalty." With the

prospect of an unfavorable outcome affecting the ability of the company to survive, it was certainly reasonable for the company to present a vigorous defense led by the finest, most experienced lawyers that the company could find. It was through the efforts of those attorneys that the extraordinary results in this case were obtained.

Q. In reaching your opinion, how did you define the term "reasonable"?

A. I was guided by the previous decisions of the Florida Public Service Commission and those of the United States Supreme Court. Mr. Gatlin provided me with the following language from the Florida PSC:

> Although we find that fines associated with violations of DEP and EPA should be borne by the shareholders of the utility, we believe it is reasonable for UWF (the utility) to recover the costs of defending such fines. As the Commission previously concluded, the legal expenses incurred for defending fines from DEP and EPA could facilitate avoided or reduce amount of fines.

The United States Supreme Court, in the case of *City of Burlington v. Dague* addressed the issue of the reasonableness of attorneys' fees awarded under the Clean Water Act. The Court approved "lodestar" attorney fee method is calculated by multiplying the attorney's hourly rate times the number of hours expended. In view of the Supreme Court, there is a strong presumption that the "lodestar" represents the reasonable fee under the Clean Water Act. The Court noted that the attorney's hourly rate is influenced by the skill and sophistication as well as the experience of the attorney and the number of hours expended will depend upon the difficulty of the issues in the case.

Q. Did you evaluate the services provided by FCWC's attorneys against this definition of "reasonableness"?

A. Yes. In my opinion, the legal fees paid to the firms defending FCWC against the exorbitant fines and penalties sought by EPA were reasonable under the circumstances of this case. It was an extremely complex case with diverse and novel issues that seemed to pop up on a

regular basis. The situation was exacerbated by the efforts of the opposing attorneys to thoroughly litigate every issue possible to the highest degree. The complexity of the case coupled with the financial exposure to the company fully justified the effort that went into the defense of the case by the attorneys involved. The extraordinary results obtained after the trial through the decision of the Court are perhaps the best evidence of the effectiveness of defense counsel's efforts and advocacy. In sum, it is my opinion that the hourly rate of the attorneys was reasonable, the scope and extent of the legal work done was reasonable, and that the total legal fees sustained by the company were reasonable under the circumstances of this case. There can be little doubt that the legal expenses suffered by FCWC resulted in a drastic reduction of the potential penalties ultimately paid by the company.

Q. Did you do any background search for information on the various attorneys involved in the case?

A. Yes. I was already familiar with Lee Dehihns of Alston & Bird as I handled matters with him while he was employed by EPA Region IV. With regard to the Washington attorneys, I contacted my firm's Washington office and inquired as to the professional reputations of Richard Leon, David Berz, Gary Baise and Don Scroggin. Their reputations within the D.C. Bar were outstanding. Lastly, I relied upon FCWC and Ken Gatlin for information on the Florida firms and they likewise were first-rate in every respect.

Q. What did you do next?

A. As mentioned earlier, I met with FCWC officials in Tallahassee to gather background information on the EPA/DOJ enforcement action. I wanted to know how the case was staffed, including the decision process involved in their selection of outside counsel to litigate the matter. Next, I telephoned the lead counsel on the case — Gary Baise — and set

up a meeting at his offices in Washington, DC. Mr. Baise sent me copies of his legal fees statements, and selected litigation documents, prior to that meeting. At the meeting, discussed more fully later in this testimony, Mr. Baise and I discussed the overall strategy for defending the enforcement action, as well as the specific findings and rulings on which he believed the case turned. Mr. Baise described his basic billing process, how the case was staffed by his firm, and answered my questions on how and why certain specific strategies were researched and advanced. While at his offices I also reviewed Mr. Baise's compilations of the pleadings and discovery, and viewed the document productions from the underlying enforcement case. I requested, and was provided with, copies of certain pleadings and discovery papers for closer review. At various times subsequent to this visit, I requested and was provided with additional information on the underlying lawsuit.

Q. Was there anything that you requested from Mr. Baise that was not provided?

A. No.

Q. Who else did you speak with concerning the legal fees?

A. In evaluating the bills of the other firms, I categorized each firm as either trial counsel of settlement counsel. The trial counsel firms included the firms associated with Gary Baise, the firms associated with Don Scroggin, and the local counsel in the case, Buddy Hume and John Noland of the Ft. Myers law firm of Henderson, Franklin & Starnes. The settlement counsel firms were Alston & Bird of Atlanta, Baker & Hostetler of Washington, Weil, Gotshall & Manges of Washington, Hopping, Green, Sams & Smith of Tallahassee, and Landers and Parsons of Tallahassee. In my opinion, the decision to split the functions of trial and settlement counsel was a prudent one in that it permitted each firm to utilize its talents and experience on the job given to it by FCWC. It also allowed the settlement negotiations to continue at the same time that trial preparations were underway, thereby freeing the trial

and settlement counsel to work independently of each other.

Q. How did you communicate with the various counsel involved in the case?

A. Insofar as the settlement counsel were concerned, I was provided with copies of their invoices for services rendered and I contacted the primary attorney in each of the firms to verify that the work as described in the invoices had been done and to seek any additional information these counsel could provide. There contacts were:

Alston & Bird. I talked with Lee Dehihns, the partner who coordinated the effort of the firm on behalf of FCWC. He was asked to facilitate a settlement of the Water Act matter while it was before Region IV of EPA in Atlanta. Mr. Dehihns is a former Deputy Regional Administrator at EPA Region IV and served for a time as Acting Regional Administrator. He had worked with the pertinent Region IV personnel and was very familiar with the Region's enforcement policies, past practices, and settlement strategies. The effort to administratively settle the matter turned out to be unsuccessful. Once the matter was referred from EPA Region IV to the DOJ, the role of Alston & Bird was substantially reduced, as shown by the minimal invoices in 1994 - 1996. I have reviewed the charges of Alston & Bird ($28,246) and in my opinion, the amount of time spent and the charges paid were reasonable and consistent with charges for similar services from other firms in the Atlanta area. Mr. Dehihns rate of $250 and later $275 per hour was reasonable based upon the prevailing legal rates in Atlanta for lawyers of his caliber. Because of Mr. Dehihns' past EPA experience, he was uniquely qualified to represent FCWC in the settlement negotiations.

Hopping, Green, Sams & Smith. I reviewed the invoices paid to the Hopping law firm which totaled $4,111. I then telephoned Kathleen Blizzard of the firm and

discussed the scope and extent of her work on the Clean Water Act case. Ms. Blizzard had previously handled an enforcement matter concerning the Barefoot Bay Treatment plant and had negotiated a Consent Order with EPA Region IV in the late 1980s. That Consent Order formed the basis of the Federal District Judge's decision that a major portion of the remedy sought by the Justice Department in the Clean Water Act case was barred by the doctrine of *Res Judicata*. In order to be able to advance the argument, trial counsel asked Ms. Blizzard to review her files, review the pleadings in the Clean Water Act case, conduct the appropriate legal research, and draft an affidavit in support of FCWC's Motion for Summary Judgment. My review of the records and my interview of Ms. Blizzard lead to the conclusion that the time spent on the project, the hourly rate of $165 per hour, the quality of the work, and the importance of her work to the eventual outcome of the case were reasonable.

Baker & Hostetler. I examined the invoices paid to the Baker firm and I interviewed the partner involved in the case, Richard Leon of the firm's Washington office. Mr. Leon has had a long and distinguished career, including a stint as the Deputy Assistant Attorney General of the United States. He supervised the part of the Justice Department where DOJ trial counsel Dan Jacobs worked. Mr. Leon had also worked with Gary Baise in a successful settlement of a similar case involving the Tenneco Company in the past. Mr. Leon was asked to review the facts and pleadings in the case at bar with a view towards a possible settlement of the case. At the time he was employed, the litigation had become "bare knuckled" in Mr. Leon's view and he felt that he could use his credibility within the Justice Department, particularly with trial counsel Dan Jacobs, to independently assess the case and help

facilitate a settlement. The charges for these services totaled $30,941, the vast bulk of which represented the time of Mr. Leon. He met with Mr. Jacobs and other representatives of the Justice Department and worked in coordination with David Berz, counsel for Avatar. The two of them tried without success to reach a pre-trial settlement of the case. Mr. Leon's time consisted of his review of the pleadings, documents and depositions taken in the case. His work was dependent in some part upon the timing of the summary judgment rulings made by the Court. Mr. Leon charged $300 per hour for his services, a rate which I find to be consistent with other Washington practitioners with his level of experience and his sophistication in enforcement matters. In my opinion, the charges of Baker & Hostetler in this matter were reasonable and were calculated towards reaching a settlement that would have been in the best interests of FCWC and its rate payers. Unfortunately, the government was unwilling to settle the matter on an acceptable basis prior to trial.

Landers & Parsons. I reviewed the invoices of the Landers firm and spoke with Jay Landers regarding the work done by his firm. Mr. Landers is the former Secretary of the Florida Department of Environmental Regulations, the state equivalent of EPA. FCWC asked Mr. Landers in 1991 and 1992 to try and facilitate a settlement of the *Waterway Estates* case before EPA referred the case to the DOJ. His efforts preceded those of Lee Dehihns of Alston & Bird but regrettably were unsuccessful in preventing the case from being filed. Mr. Landers also prepared an affidavit under the supervision of the Baise & Miller firm regarding the administrative order entered into in the late 1980s which covered the *Carrollwood* settlement. The affidavit was an important part of the successful *Res Judicata* argument adopted by the Federal District Court Judge in his final order. The total charges paid to the Landers firm

were $5,404, which represented principally the work done by Mr. Landers at the rate of $150 per hour. In light of the importance of his work, the hourly rate, the small number of hours spent, and the result in the case, the fees paid by FCWC to Landers & Parsons were reasonable.

Weil, Gotshall and Manges. David Berz of this firm had performed legal services on behalf of Avatar in the past and played an active role in the selection of Gary Baise as lead trial counsel for FCWC in this case. The charges by Mr. Berz and his firm for legal services provided on behalf of Avatar are not a part of the rate proceeding. However, specific charges for work performed on behalf of FCWC in an attempt to settle the case are included. Those charges total $45,250. Mr. Berz's efforts to resolve the case coincided with the efforts of Richard Leon. In the end, Mr. Leon played a lesser role and the lead spokesperson for FCWC became Mr. Berz. Berz contacted Lois Schiffer of the DOJ and asked for an independent assessment of the case by a DOJ official more senior than trial counsel Dan Jacobs. Mr. Berz and FCWC believed that Mr. Jacobs was overzealous in his prosecutorial duties. Mr. Berz's efforts were partially successful in that Ms. Schiffer assigned Bob Homiak, a senior DOJ attorney, the task of conducting an independent review of the case. Mr. Berz consulted with Mr. Homiak on the case, supplied him with pertinent documents, and essentially discussed the pros and cons of each side's positions with a view towards settlement. Though the efforts of the two men came close to a settlement, the re-entry of Dan Jacobs into the discussions ended the settlement possibilities and an eventual trial on the merits became inevitable. Mr. Berz's efforts, at $405 per hour, were expensive but were within the fee range of Washington attorneys with his level of experience and his wealth of background knowledge. In my view, the

potential settlement of the matter prior to trial was a prudent and reasonable goal for FCWC. Mr. Berz's efforts and his contacts almost accomplished the goal but ultimately failed. In light of his services, the time spent, and value of the sought-after goal, my opinion is that the limited services provided to FCWC by Weil, Gotshall & Manges firm were reasonable.

Q. Did you ever request any information from these other firms that was not provided to you?

A. No.

Q. Did you ever request any information from Florida Cities that was not provided to you?

A. No.

Q. What did you do to determine the reasonableness of the trial lawyers' fees?

A. I followed the same procedures that I followed in evaluating the fees paid to settlement counsel. I reviewed the bills and invoices of the various firms. These documents contained a description of the services provided, the hourly rate of the attorney involved, and a description of any specific expenses such as copying charges or travel expenses for which the firms sought reimbursement. I also reviewed the pleadings filed in the case, the motions filed by all the parties, the briefs in support of the motions, certain transcripts of hearings, and the trial transcript. This review was necessary for me to make a judgment as to the zealousness with which the government attorneys pursued their allegations in the Complaint. My conclusion from this review is that the government attorneys vigorously pursued every theory of their case to the greatest extent possible. They constantly sought to expand the scope of discovery in the case, they vigorously sought to interview FCWC executives in apparent violation of the applicable Florida rules of professional conduct, they repeatedly filed motions to reconsider after virtually every ruling made by the Court in the case, and in general used the power of the DOJ to seek every advantage available to them. I cannot

determine the number of professional government personnel that were involved as those records are not available to me but my sense is that the DOJ "threw the book" at FCWC in their efforts to prevail in this case.

With this background in mind, FCWC with the help of David Berz of the Weil, Gotshall and Manges law firm in Washington asked Gary Baise, then with the firm of Jenner & Block, to head up the defense of the case. Mr. Baise had previously been employed by the EPA in several high-level positions and was thoroughly familiar with the provisions of the Clean Water Act. Mr. Baise had an excellent track record in defending companies against enforcement actions filed by the DOJ under this law. He was an excellent choice by FCWC and the defense that he put together was very successful.

When originally employed as trial counsel, Mr. Baise's hourly rate for legal services was $275 and those of his trial staff were somewhat less. These rates, considering the level of experience of Mr. Baise and his associates and the degree of difficulty involved in the defense of the case, were reasonable. Mr. Baise's primary associate was Don Scroggin of the Jenner & Block firm. These two lawyers had worked closely together on many cases for many years. Their teamwork and dedication to the needs of the client survived the breakup of their law firm a few months before trial.

The specific trial strategy adopted by the Baise/Scroggin team is fully discussed in the pre-filed testimony of Gary Baise and will not be repeated here. Suffice it to say that the defense met every challenge presented to them by the prosecution. The defense was handled with the same degree of zealousness as that of the prosecution. Indeed, the defense attorneys had little choice but to conduct the defense in that manner. I was concerned and paid particular attention to the duplication of services by the firms with which Baise and Scroggin were associated over the course of the case. My concerns were answered by the fact that though

the names of the firms may have changed, the individual attorneys involved remained the same. In a sense, the defense that began with Gary Baise and Don Scroggin at Jenner & Block and ended with them being at separate firms did not change at all. The only change of significance was that the hourly rate was reduced from $275 at Jenner & Block to $200 per hour at the subsequent firms. This reduction was made on January 1, 1995. Almost two-thirds of the fees paid to their firms for services in this case were at the reduced rate.

On October 16, 1997, my partner, Nancy Monts and I traveled to Washington to confer with Florida Cities' lead trial counsel, Gary Baise and his staff. At the Baise firm, we reviewed eight volumes of pleadings, seven volumes of discovery documents, and had access to more than fifty depositions. In light of the fact that the trial transcript was available, I saw no need in reviewing the fifty-plus depositions. However, we did review the expert reports that were filed in the case by the experts for both sides. Gary Baise, Liz Pollener and their paralegal Yoyo Juette met with us for almost seven hours in their offices and made every document that we requested available to us for review. These documents included selected briefs, motions and legal research memoranda.

We discussed the overall strategy of the defenses to the positions taken by the government attorneys in their Complaint, how those positions changed over the course of the litigation, and how the issues in the case were resolved by the Court when presented to it. Mr. Baise described his basic billing process, how the case was staffed, and answered my questions as to how and why certain strategies were researched and advanced. Mr. Baise was very forthcoming in his responses and has sent me additional information as requested.

I contacted Don Scroggin on November 6, 1997 and he confirmed the FCWC certainly received great value from the legal services rendered. We did not review each separate time entry but from an overall standpoint, Mr. Scroggin essentially carried the load on the trial

preparation, summary judgment, and the trial itself. His hourly rate of $200 was reasonable in my judgment and the work done by Mr. Scroggin was prudent, well thought out, and consistent with the company's theory of the case. In sum, he and his firm delivered superior legal services at a reasonable cost to FCWC.

FCWC General Counsel Dennis Getman selected the Ft. Myers, Florida law firm of Henderson, Franklin & Starnes as local counsel in the federal court action. I spoke with John Noland and Buddy Hume of the firm regarding the scope of their work in the case. As reflected on their time sheets and billings, their work was of the traditional local counsel role of appearing at hearings, giving advice on the local court rules and customs, conforming pleadings to the local rules, and assisting in trial preparations. Mr. Hume was also asked to help out on the legal research under Florida law regarding the *ex parte* contacts of former FCWC officials by the DOJ lawyers. The Henderson firm did not participate in the actual trial itself but provided trial preparation assistance under the direction of Mr. Scroggin. The hourly rates of the Henderson lawyers ranged from $175 to $210 per hour, a fee within the median range of the Price Waterhouse Statistical Survey, and therefore reasonable under the circumstances. The total bill of $34,635 over the two and one-half years of effort was also reasonable.

Q. From your research, do you know the total legal expenses associated with FCWC's defense of the enforcement action?

A. The total legal expenses incurred by FCWC and paid to the law firms involved in the defense of the Clean Water Act case were $3,615,264. A breakdown of the total by law firm and by invoice numbers is attached as Exhibit A to this testimony.

Because my assignment was to render an opinion as to the reasonableness of the legal fees, my testimony does not address whether, for example, an expert witness' fee is reasonable.

My opinion is limited to the fees charged for services provided by the outside counsel's office (for example, attorney and paralegal rates and time). Mr. Baise's testimony will cover whether particular additional categories of expenses (for example, the retention and use of experts), incurred at the direction of outside counsel, were reasonable under the circumstances of the litigation. It is clear that expert witnesses were required to meet the government's allegations in their Complaints. The experts selected are described by Mr. Baise in his testimony. The selection process was prudent and reasoned and the experts who offered testimony did an excellent job.

Q. In reaching your opinion, did you consider the propriety of settlement negotiations and the reasonableness of the parties' positions?

A. Yes. The settlement discussions are spelled out in detail in the testimony of Gary Baise and various attempts to reach a settlement at various times by Lee Dehihns, David Berz, Jay Landers, and Richard Leon are well described in my earlier testimony. In sum, FCWC made many attempts to settle the matter, including a $500,000 offer of judgment, all of which were rejected by the DOJ attorneys. The District Court judgment of $309,710 makes it clear that the DOJ attorneys' rejection of the settlement offers was unreasonable. On the other hand, the judgment amount underscores the reasonableness of the positions taken by the attorneys for FCWC. In my opinion, the settlement positions taken by FCWC in this case were reasonable in every respect.

Q. Were there any measures in place at FCWC to control the cost of legal fees?

A. Yes. Each law firm was required to bill FCWC on a monthly basis and the bills were broken down by the attorney or legal assistant involved, the rate charged by the individual, and a description of the work being charged for. These invoices were reviewed by FCWC General Counsel Dennis Getman who reviewed them in detail. It was Mr. Getman who requested a

cut in the hourly fee of Messrs. Baise and Scroggin when they left the Jenner & Block firm. This reduction amounted to a tremendous savings over the course of the litigation.

In addition, the Court itself imposed limits on the number of discovery depositions and expert witnesses that could be called. This prevented anyone from engaging in unnecessary discovery as far as depositions were concerned. A review of the record demonstrates that it was the government attorneys who constantly tried to broaden the scope of discovery. When the Court agreed to broaden the scope, the FCWC lawyers had no choice but participate.

Lastly, in the area of out-of-pocket expenses, the law firms were instructed that travel should be at a reasonable expense level (moderate hotels, coach airline tickets, etc.), major copying charges should be done by professional copy services, and other out-of-pocket expenses should be itemized and kept to the minimum necessary to do the job. My review of the charges indicate that these instructions were followed and that the out-of-pocket charges were prudent and were reasonable.

Q. Were the hourly rates reasonable in the FCWC cases?

A. As my firm has offices in Washington and Atlanta, I am familiar with the rates charged by attorneys in those cities. I supplemented this knowledge with a review of the 1996 Price Waterhouse Law Firm Statistical Survey. My analysis indicated that the rates charged by the various attorneys in this case were reasonable. For example, it is clear that the $275 and then $200 per hour rate charged by Messrs. Baise and Scroggin were below that charged by attorneys with comparable experience and expertise in the Clean Water Act enforcement actions. The rates of Messrs. Leon and Berz are somewhat higher than expected but those rates were justified because of the specialized expertise of those two attorneys. On balance, as the vast bulk of the fees were paid to Messrs. Baise and Scroggin's law firms and a

comparatively small portion of the totals were paid to Messrs. Leon and Berz, the estimated composite hourly rate paid to the Washington attorneys was reasonable.

With regard to the Florida lawyers, I relied on the Price Waterhouse report for the Southern states and determined that all of the rates charged by the Florida firms were within the group median and were, in my opinion, reasonable.

Lastly, the paralegal or legal assistant rates charged by the various law firms were compared to the Price Waterhouse survey and they fall within the range charged by comparable firms. As such, my opinion is that the legal assistant hourly rates were reasonable.

Q. In conclusion, are there any reasonable steps that could have been taken by FCWC to reduce the legal fees they paid in this case?

A. In my opinion, the company took reasonable steps to keep the legal fees in check. It made an offer of judgment early in the case of $500,000, and after the trial court decision tried to recover many of the legal costs it had incurred under the Federal Rules of Civil Procedure. The District Court reluctantly denied this motion because of the fact that the losing party (the DOJ) was an agency of the federal government and that the government had not agreed to be sued in this manner. Had the plaintiff been a private litigant rather than the government, FCWC would likely have prevailed. Similarly, had the plaintiff been a private litigant rather than the federal government, the prosecution of the case and the necessary response to that prosecution would most likely have been significantly less. In the end, FCWC did what it had to do to prevail in this case — those efforts were prudent — those effects were reasonable — and perhaps most importantly, those efforts were effective.

L. Gray Geddie, Jr.

(Transcript continues in sequence in Volume 2.)

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