STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| FLORIDA CITIES WATER COMPANY,<br><br>Petitioner,<br><br>vs.<br><br>STATE OF FLORIDA, PUBLIC SERVICE COMMISSION,<br><br>Respondent. | ) | Case No. 98-1347FC |

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case before Larry J. Sartin, a duly designated Administrative Law Judge of the Division of Administrative Hearings, on April 27, 1998, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Wayne L. Schiefelbein, Esquire
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For Respondent: Diana W. Caldwell
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ACK ____
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APP ____
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STATEMENT OF THE ISSUE

The issue in this case is the amount of attorney's fees and costs Petitioner, Florida Cities Water Company, should be awarded pursuant to Section 120.595(5), Florida Statutes (Supp. 1996).

PRELIMINARY STATEMENT

Florida Cities Water Company appealed a Final Order Denying Application for Increased Wastewater Rates and Reducing Rates

entered by the Florida Public Service Commission to the District Court of Appeal, First District. The decision of the Florida Public Service Commission was subsequently reversed and remanded for further proceedings.

On January 12, 1998, the First District Court of Appeal granted a motion for attorney's fees filed by Florida Cities Water Company. The Order granting the motion provided, in part, the following:

> This case is remanded to the Public Service Commission for determination of the amount thereof. If the parties are unable to agree on an amount of attorney's fees, the question should be referred to the Division of Administrative Hearings.

On March 18, 1998, after failing to agree on the amount of attorney's fees to be awarded, the parties filed a Joint Petition for Resolution of Attorney's Fees with the Division of Administrative Hearings. The matter was designated Case No. 98-1347FC and was assigned to the undersigned.

On March 26, 1998, the parties filed a Partial Stipulation on Award of Attorney's Fees. The parties stipulated to certain facts and agreed to the scope of the proceedings:

> 7. The parties stipulate that the appropriate scope of the proceeding before the Division of Administrative Hearings regarding the award of attorney's fees is whether or not the lodestar figure of $74,648.14 should be adjusted in light of "the results obtained" by FCWC in its appeal.

A Notice of Hearing was entered scheduling a formal hearing for April 27, 1998. At the hearing, Petitioner presented the testimony of Frank Seidman, B. Kenneth Gatlin, Kathryn Cowdery,

and Rick Melson. Petitioner also offered fourteen exhibits, which were accepted without objection.

Respondent presented the testimony of Marshall W. Willis. Respondent also offered five exhibits. All were accepted into evidence, with a ruling on the relevancy of Exhibit 5 being reserved.

A transcript of the hearing was filed on May 7, 1998. Both parties filed proposed orders on May 18, 1998. The proposed orders have been fully considered in entering this Final Order.

## FINDINGS OF FACT

A. The Parties.

1. Petitioner, Florida Cities Water Company (hereinafter referred to as "Florida Cities"), is a utility providing water and wastewater service to two communities in Florida.

2. Respondent, the Florida Public Service Commission (hereinafter referred to as the "PSC"), has exclusive jurisdiction over water and wastewater service utility providers in Florida, including the determination of rates that utility providers may charge for their services. Section 367.011, Florida Statutes (1995).

B. Florida Cities' 1992 Approved Rate.

3. In arriving at an allowable rate which a water and wastewater service utility may charge, the PSC must determine, among other things, the amount of a utility's plant that is considered "used and useful." Section 367.081(2)(a), Florida Statutes (1995).

4. In determining the amount of Florida Cities' plant that was considered "used and useful" in 1992, the PSC determined the amount of investment costs in its North Fort Myers, Florida, plant which was potentially recoverable. Recoverable costs are limited to those expenditures which are considered to be for the public benefit. Florida Cities' recoverable costs as of 1992 were determined to total $6,343,868.00.

5. The amount of Florida Cities' recoverable costs was then multiplied by a fraction, the numerator of which was the average daily flow of the plant (calculated on a peak month basis) and the denominator of which was the capacity of the plant (this fraction is hereinafter referred to as the "Capacity Ratio"). In 1992, the average daily flow of the plant on a peak month basis was determined to be in excess of 1.0 million gallons per day (hereinafter referred to as "MGD"), and the capacity of the plant was determined to be 1.0 MGD. Therefore, the Capacity Ratio was determined to be 100 percent and Florida Cities' recoverable costs of $6,343,868.00 was determined to be 100 percent "used and useful." Florida Cities' "rate base" for 1992 was, therefore, determined to be $6,343,868.00.

C. Florida Cities' 1995 Application for Rate Increase and the PSC's Reduction of Rate Base.

6. Subsequent to the determination of Florida Cities' rate base and its approved utility rates in 1992, Florida Cities was required by the Florida Department of Environmental Protection (then known as the Florida Department of Environmental Regulation) (hereinafter referred to as "DEP"), to expand its North Fort Myers plant. As a result of DEP's action, Florida

Cities incurred additional plant costs of approximately 1.6 million dollars.

7. As a consequence of having incurred additional plant costs, Florida Cities requested that the PSC treat the additional costs, plus other costs incurred by Florida Cities since 1992, as recoverable costs and as an addition to its rate base. Florida Cities' application was filed in 1995.

8. After consideration of Florida Cities' application for rate increase, the PSC issued a Notice of Proposed Agency Action Order Granting Final Rates and Charges on November 2, 1995. In this order the PSC essentially determined that all additional plant expansion costs incurred by Florida Cities constituted recoverable costs. The PSC also determined that Florida Cities' Capacity Ratio was 100 percent and, therefore, all of its recoverable costs was treated as "used and useful." The decision of the PSC resulted in an increase of Florida Cities' utility rate of approximately 17.89 percent. The proposed decision of the PSC was, however, challenged and proceeded to hearing before the PSC.

9. On September 10, 1996, the PSC entered a Final Order Denying Application for Increased Wastewater Rates, Reducing Rates, Requiring Refund and Requiring Reports (hereinafter referred to as the "PSC Final Order").

10. In the PSC Final Order, the PSC treated all of the 1.6 million dollars in costs associated with the expansion of the plant required by the DEP as recoverable costs. The PSC, however, reduced the Capacity Formula to 65.9 percent. This

resulted in a reduction in Florida Cities' rate base of approximately 2.4 million dollars.

11. The reduction in the Capacity Formula to 65.9 percent was caused, in part, by the manner in which the PSC determined the numerator of the Capacity Formula. The PSC modified the manner in which it calculated the numerator of the Capacity Formula:

> Instead of using the average daily flow calculated on a peak month basis, it used the average daily flow calculted on an annual basis (to which it added a "reserve" of 4.58 percent)
> . . . .

12. The reduction in the Capacity Formula from 1992 to 1995 was also caused by the plant capacity figure used by the PSC. The PSC used a permitted capacity of 1.5 MGD instead of the actually designed and built capacity of 1.25 MGD. Florida Cities had urged use of the 1.25 MGD actual capacity figure.

13. As a result of the PSC's conclusion that only 65.9 percent of the amount of recoverable costs was used and useful, Florida Cities' rate base was reduced to $5,525,915.00, a decrease of Florida Cities' used and useful plant as determined in 1992 of over $800,000.00.

14. Although the PSC included the additional costs incurred by Florida Cities in order to comply with DEP regulations, the PSC's use of a Capacity Ratio of 65.9 percent to determine the amount of the recoverable costs considered used and useful had a net effect of disallowing approximately 2.4 million dollars in proposed rate base (1.6 million dollars incurred to meet DEP regulations plus the $800,000.00 reduction of 1992 rate base).

D. Florida Cities' Appeal of the PSC's Final Order.

15. Florida Cities appealed the PSC Final Order to the District Court of Appeal, First District (hereinafter referred to as the "First District Court"). Florida Cities Water Company v. Florida Public Service Commission, 23 Fla. L. Weekly D238 (Fla. 1st DCA January 12, 1998).

16. On appeal, Florida Cities raised two grounds for reversal of the PSC's Final Order:

a. The Capacity Ratio used by the PSC to determine the amount of its recoverable costs which was considered used and useful was flawed. Florida Cities urged the First District Court to increase its Capacity Ratio to 100 percent; and

b. The PSC should have included all costs Florida Cities had incurred in order to comply with DEP regulations as part of its rate base without regard to the Capacity Ratio. Florida Cities argued that the 1.6 million dollars it had incurred to comply with DEP regulations should be included as part of its rate base without regard to what the Capacity Ratio was determined to be.

17. Florida Cities' challenge to the Capacity Ratio used by the PSC was based upon two alleged errors:

(1) The PSC's use of permitted capacity of 1.5 MGD was improper. Florida Cities argued that the PSC should have used actual plant capacity of 1.25 MGD; and

(2) The method elected by the PSC to determine the average daily flow of the plant was a novel and unexplained deviation from past PSC policies. Florida Cities argued that the PSC

should have continued to determine average daily flows based upon a peak month basis rather than an annual basis.

18. As to the 1.6 million dollars in costs Florida Cities sought to have included in its rate base, Florida Cities' two arguments were alternative theories advanced to support the same end: 100 percent inclusion of the 1.6 million dollars it had incurred as a result of meeting DEP regulations. While the two arguments were interrelated with regard to the starting point (it had spent 1.6 million dollars on plant) and the result Florida Cities was attempting to achieve (inclusion of 1.6 million dollars in rate base), the two arguments involved different methods of reaching the desired result: (a) direct inclusion; or (b) inclusion through an increase in the Capacity Ratio.

19. As to the remaining $800,000.00 reduction in Florida Cities' rate base, only one of the arguments raised by Florida Cities applied to this amount: the argument that the Capacity Ratio utilized by the PSC was flawed.

E. The First District Court's Decision.

20. The First District Court agreed with Florida Cities' contention that the Capacity Ratio used by the PSC was flawed. The First District Court found that both the calculation of the numerator and the denominator of the Capacity Ratio by the PSC was in error.

21. With regard to the numerator, the First District Court concluded that the PSC's determination of average daily flows by using annual flows constituted a shift in agency policy which was

"'unsupported by expert testimony, documentary opinion, or other evidence appropriate to the nature of the issue involved.'"

22. The First District Court remanded the matter to the PSC to "give a reasonable explanation, if it can, supported by record evidence (which all parties must have an opportunity to address) as to why average daily flow in the peak month was ignored."

23. With regard to the denominator, the First District Court opined that "no competent evidence of any substance supports the PSC's determination" of plant capacity. The First District Court concluded that the denominator should be 1.25 MGD.

24. The First District Court rejected Florida Cities' contention that amounts it had expended to comply with DEP regulations should be included in its rate base without regard to the Capacity Ratio. The First District Court concluded that the 1.6 million dollars spent to comply with DEP regulations could be included in rate base "only to the extent the improvements they effect or the facilities to which they relate are 'used and useful in the public service.'"

25. The ultimate impact of the First District Court's decision depends upon what action the PSC takes on remand with regard to determine the appropriate numerator for the Capacity Formula.

26. The PSC issued an Order of Remand on April 14, 1998. In the Order of Remand, the PSC indicated its position that the decision of the First District Court regarding flows was "an invitation" to take additional testimony and evidence on the issue. The PSC, therefore, reopened the record and scheduled a

second evidentiary hearing to determine how average daily flows should be calculated.

27. Florida Cities filed a Motion to Stay the PSC's second evidentiary hearing, pending resolution of an appeal of the PSC Order of Remand.

28. Until a final determination is made concerning the intent of the First District Court in remanding the matter to the PSC, it cannot be absolutely concluded what the "result obtained" in this case will be. The parties have, however, assumed for purposes of the matter that the Capacity Ratio should be approximately 98.6 percent. That is the best "result" which can be obtained by Florida Cities in this matter.

F. Florida Cities' Motion for Attorney's Fees.

29. As part of its appeal, Florida Cities also filed a Motion for Attorney's Fees. Florida Cities sought an award of attorney's fees pursuant to Section 120.595(5), Florida Statutes (Supp. 1996).

30. In particular, Florida Cities requested that the First District Court:

> 1. Grant attorneys [sic] fees to Appellant for this appeal;
>
> 2. Remand this case to the Division of Administrative Hearings to determine attorneys fees; and
>
> 3. Grant such other relief as the Court may deem appropriate.

31. The First District Court entered the following order on Florida Cities' Motion for Attorney's Fees:

> The motion by appellant for attorney's fee is granted. If the parties are unable to agree on

an amount of attorney's fees, the question should be referred to the Division of Administrative Hearings.

G. The Parties' Effort to Agree.

32. Florida Cities submitted copies of invoices to the PSC documenting the attorney's fees and costs incurred by it in connection with the appeal of the PSC's Final Order. Florida Cities proposed several findings of fact, which are hereby accepted by reference, relating to the manner in which it determined attorney's fees and costs. Those findings of fact include paragraphs 27 through and including 32.

33. The PSC reviewed the invoice copies submitted by Florida Cities and stipulated and agreed that the number of hours and the hourly rates attributable to the appeal of the PSC Final Order were reasonable. The parties stipulated that the total amount of attorney's fees and costs incurred by Florida Cities on the appeal of the PSC Final Order amounted to $74,648.14.

34. On March 18, 1998, the PSC and Florida Cities filed a Joint Petition for Resolution of Attorney's Fees with the Division of Administrative Hearings. The parties stipulated in the joint petition that they had negotiated in good faith but were unable to agree on the amount of attorney's fees which should be paid to Florida Cities. The parties stipulated and agreed that $74,648.14 is the appropriate lodestar figure. The parties were unable to agree, however, whether the lodestar figure should be adjusted in light of the "results obtained" by Florida Cities on appeal. Therefore, consistent with the order of remand from the First District Court, the matter was referred

to the Division of Administrative Hearings for the limited purpose of determining whether the agreed upon lodestar figure of $74,648.14 should be reduced based upon the "results obtained" by Florida Cities on appeal.

H. The "Result Obtained" on Appeal.

35. On appeal, Florida Cities argued that it was entitled to a total increase in its rate base of approximately 2.4 million dollars: (a) the 1.6 million dollars it expended to comply with DEP regulations; and (b) the $800,000.00 reduction in rate base which resulted from the PSC's modification of the Capacity Ratio. In effect, Florida Cities argued that it should be allowed to treat 100 percent of its recoverable costs as its rate base.

36. As a result of the First District Court's decision and assuming a Capacity Ratio of 98.6 percent will be achieved, Florida Cities was successful on appeal in increasing its rate base by approximately 2.2 million dollars. Of this amount, approximately $879,000.00 was attributable to the First District Court's conclusion that the PSC had used the incorrect plant capacity. The remaining 1.3 million dollars was attributable to the First District Court's conclusion that the methodology used by the PSC to determine average annual daily flows was a policy change which was unsupported by the record.

37. Had Florida Cities succeeded on both issues it raised on appeal, it would not have resulted in any appreciable increase in Florida Cities' rate base over the increase in rate base allowed by the First District Court. A utility plant cannot be treated as used and useful in excess of 100 percent of its costs.

38. The two issues Florida Cities raised on appeal, at least as to the 1.6 million dollars it was required to expend to meet DEP regulations, were alternative theories for achieving the same result: total inclusion of the 1.6 million dollars in its rate base. Florida Cities contended that the 1.6 million dollars should have been included directly in its rate base because it was required to make the expenditure by a government agency. In the alternative, it argued that the Capacity Ratio used to determine the amount of recoverable costs considered used and useful should have been increased to 100 percent. This alternative argument would also have resulted in inclusion of the 1.6 million dollars in its rate base. Regardless of which argument was accepted by the First District Court or whether the First District Court had accepted both arguments, Florida Cities could not have achieved any substantially greater result than it did.

39. As to the remaining $800,000.00 reduction in 1992 rate base, Florida Cities' argument concerning the direct inclusion of amounts required to be expended to comply with DEP regulations did not relate to this amount. Only Florida Cities' two-pronged argument concerning the Capacity Ratio supported Florida Cities' argument that its rate base should be increased by this amount. Florida Cities' arguments concerning this amount was successful.

I. The Consequences of Florida Cities' Failure to Prevail on All Issues.

40. Had Florida Cities prevailed in its contention that costs incurred as the result of meeting government requirements should be included directly in rate base, such a decision would

have had significant consequences to most, if not all, utilities in Florida. Such a decision would also have probably had an impact on future rates approved for Florida Cities. Having failed to prevail on this issue, however, prevented the application of this theory by other utilities in Florida to the determination of their rate bases and to the determination of the appropriate rate base for Florida Cities in the future.

41. The loss of the benefit to other utilities and Florida Cities in future rate cases, which would have occurred had Florida Cities prevailed, did not have any impact on the "results obtained" by Florida Cities in the immediate proceedings. While the failure of the argument and the avoidance of the impact on rate-making, which would have resulted had Florida Cities prevailed, was of great consequence to the PSC, the rejection of the argument by the First District Court did not reduce the result Florida Cities hoped to have obtained on appeal.

J. Attorney's Fees and Costs of Proceedings Before the Division of Administrative Hearings.

42. Florida Cities incurred attorney's fees and costs in the instant proceeding before the Division of Administrative Hearings. Florida Cities has sought recovery of those fees and costs. The parties have not agreed upon the appropriateness of the inclusion of such fees and costs.

43. Mr. Schiefelbein acted as lead counsel during the attorney's fees phase of this matter. As of April 23, 1998, four days before the hearing before the Division of Administrative Hearings, Florida Cities had incurred the following attorney's fees during the attorney's fees phase of this matter:

| Attorney | Hourly Rate | Total Fees |
|---|---|---|
| Mr. Schiefelbein | $150.00 | $6,135.00 |
| Mr. Gatlin | $175.00 | 490.00 |
| Ms. Cowdery | $150.00 | 37.50 |
| Total | | $6,662.50 |

44. It was estimated that an additional 22 hours of Mr. Shiefelbein's time would result in an additional $3,300.00 of fees attributable to completion of the attorney's fees phase of this proceeding "through a Final Order of the Administrative Law Judge." This estimate was based upon 4 hours for witness preparation, 4 hours for other hearing preparation, 4 hours to attend the hearing, and 10 hours for review of the hearing transcript and submittal of a proposed order.

45. The hourly rate charged by counsel for Florida Cities for the attorney's fees phase of this proceeding was reasonable and a combined total of 66 hours to complete this phase of the proceeding was a reasonable number of hours to pursue this matter.

46. Mr. Melson, an expert witness for Florida Cities in this proceeding, charged $220.00 per hour for his preparation for and attendance at the hearing before the Division of Administrative Hearings. Mr. Melson spent 2.6 hours preparing for the hearing and 2.5 hours attending the hearing. Mr. Melson's fee amounted to 1,122.00.

47. Mr. Seidman, another expert witness for Florida Cities, charged an hourly rate of $90.00 and spent 20.75 hours in preparing for and attending the hearing. It was stipulated that Mr. Seidman's total fee of $1,867.50 was reasonable.

48. Although Florida Cities did not argue that all fees and costs incurred by it during the attorney's fees phase of this proceeding should be recovered, it did seek recovery of the foregoing fees and costs. Those fees and costs totaled $12,952.00.

CONCLUSIONS OF LAW

A. Jurisdiction.

49. The Division of Administrative Hearings has jurisdiction of the parties to, and the subject matter of, this proceeding. Section 120.595(5), Florida Statutes (Supp. 1996); and Order of the First District Court entered January 12, 1998.

50. By Order of the First District Court, Florida Cities' motion for attorney's fees and costs was granted by the First District Court pursuant to Section 120.595(5), Florida Statutes (Supp. 1996). The only issue left for resolution by the First District Court was the amount of attorney's fees and costs to be awarded.

B. The "Lodestar Approach."

51. The method for determining reasonable attorney's fees, which is founded on the federal "lodestar approach," is well established in Florida. In Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145, 1151-1152 (Fla. 1985), the Supreme Court of Florida summarized the steps to be followed in computing attorney's fees:

> In summary, in computing an attorney fee, the trial judge should (1) determine the number of hours reasonably expended on the litigation; (2) determine the reasonable hourly rate for this type of litigation; (3) multiply the result of (1) and (2); and, when appropriate, (4) adjust

> the fee on the basis of the contingent nature of the litigation or the failure to prevail on a claim or claims. [Emphasis added].

52. Florida Cities and the PSC were able to stipulate to the number of hours reasonably expended on the appeal, the reasonable hourly rate for the appeal, and the result of multiplying those numbers. The parties also stipulated to the amount of reasonable costs. Consequently, the parties stipulated that the lodestar figure in this case is $74,648.14.

53. No claim has been made that the lodestar figure should be adjusted due to the "contingency nature of the litigation." All that remains for determination in this matter is whether the lodestar figure agreed to by the parties should be reduced due to a "failure to prevail on a claim or claims."

C. Reduction for the "Results Obtained."

54. In Rowe, the Court stated the following concerning the need to reduce the lodestar figure based upon the "results obtained":

> The "results obtained" may provide an independent basis for reducing the fee when the party prevails on a claim or claims for relief, but is unsuccessful on other unrelated claims. When a party prevails on only a portion of the claims made in the litigation, the trail judge must evaluate the relationship between the successful and unsuccessful claims and determine whether the investigation and prosecution of the successful claims can be separated from the unsuccessful claims. In adjusting the fee based upon the success of the litigation, the court should indicate that it has considered the relationship between the amount of the fee awarded and the extent of success.

472 So. 2d at 1151.

55. At issue in this matter is the question of what constitutes a "claim" for purposes of the determining whether Florida Cities was successful or unsuccessful on appeal. The case of Danis Industries Corporation v. Ground Improvement Techniques, Inc., 629 So. 2d 985 (Fla. 5th DCA 1993), aff'd, 976 So. 2d 976 (1994), provides some guidance. In Danis Industries the plaintiff sought recovery of the balance due on a subcontract of $476,000.00 and damages for breach of contract in the amount of $799,000.00. Plaintiff was partially successful on the claim for the balance due on the subcontract and unsuccessful on its claim for breach of contract. On appeal, the court reversed an award of attorney's fees which failed to reduce the lodestar figure by the "results obtained," stating:

> Once [defendant] demonstrated that [plaintiff] did not prevail on all of its arbitration claims, [plaintiff] had the burden of either allocating its attorney's fees based on its successful claims or showing why the fees could not be allocated. . . . [Plaintiff] could have met this burden by showing that the arbitration claims were so interrelated that the unsuccessful claims did not substantially increase the attorney's fees incurred. . . . [Citations omitted].

629 So. 2d at 988. Danis Industries obviously involved two independent "claims," one of which plaintiff was at least partially successful on and the other plaintiff was unsuccessful on. See also, Fashion Tile & Marine, Inc. v. Alpha One Construction & Associates, Inc., 532 So. 2d 1306 (Fla. 2d DCA 1988).

56. State Farm Fire & Casualty Company v. Becraft, 501 So. 2d 1316 (Fla. 4th DCA 1986), also involved a case in which there were two distinct claims, one involving a claim under personal

injury protection and the other involving a claim under uninsured motorist limits. Even though the claims involved separate "claims," the court determined that the bulk of the investigation and prosecution of the two claims was so intertwined that the lodestar figure should not be reduced.

57. This case is unlike those case cited by the parties which have addressed the need to reduce the lodestar figure due to the results obtained. In most of those cases, there were clearly multiple claims. In this case it is difficult to determine whether Florida Cities was advancing one claim by alternative theories or multiple claims. It can in fact be viewed in both ways. Either way this case is viewed, however, the results obtained by Florida Cities were insignificantly less than they would have been had it prevailed on both of the issues it raised.

58. First, this case can be viewed as an appeal involving one claim: the PSC should not have excluded approximately 2.4 million dollars in Florida Cities' rate base. Florida Cities' advanced two alternative theories to support this claim: (a) most of the 2.4 million dollars excluded by the PSC was required to be incurred to meet DEP regulations and should, therefore, be included directly in rate base; or (b) the Capacity Ratio used by the PSC should be increased from 65.9 percent to 100 percent. Whether Florida Cities prevailed on one or both issues it raised in support of its claim, the result it hoped for was essentially the same--100 percent inclusion of an additional 2.4 million dollars in its rate base.

59. In fact, Florida Cities only prevailed on one of its issues. The result it obtained as a consequence, however, was still close to 100 percent inclusion of the additional 2.4 million dollars in rate base.

60. Secondly, this case may be viewed as two claims, one of which Florida Cities argued alternative issues in support of. One claim involved the inclusion of $800,000.00 in its rate base which the PSC had not allowed. In support of this claim, Florida Cities only advanced one argument: that the Capacity Ratio used by the PSC should be increased from 65.9 percent to 100 percent.

61. The other claim pursued by Florida Cities involved the 1.6 million dollars it was required to spend to meet DEP regulations. In support of this claim, Florida Cities argued alternative theories: (a) the 1.6 million dollars should have been included directly in its rate base; or (b) the Capacity Ratio used by the PSC should be increased from 65.9 percent to 100 percent.

62. Viewed as two claims, Florida Cities clearly prevailed as to the first claim. The First District Court agreed that the Capacity Ratio used by the PSC should be increased to almost 100 percent. As to the second claim, Florida Cities also clearly prevailed based upon the First District Court's acceptance of the second alternative argument. Florida Cities could not have achieved any significantly greater result on this second claim had it prevailed on its argument that the 1.6 million dollars should have been included directly in its rate base.

63. Based upon the foregoing, it is concluded that the lodestar figure agreed to by the parties in this case should not reduced by the results obtained. Florida Cities is entitled to full reimbursement of the $74,648.14 of attorney's fees and costs incurred by it on its appeal of the PSC's Final Order.

D. Entitlement to Fees and Costs for Proceedings Before the Division of Administrative Hearings.

64. Florida Cities has also suggested that the PSC should be ordered to pay attorney's fees and costs totaling an additional $12,952.00 attributable to the proceedings before the Division of Administrative Hearings.

65. The PSC has contested an award of fees and costs attributable to this phase of the proceeding. The PSC has cited State Farm Fire & Casualty v. Palmas, 629 So. 2d 830 (Fla. 1993), in support of its position. In that case, the Court found that statutory fees may be awarded for litigating the issue of entitlement to attorney's fees but not for litigating the amount of attorney's fees. See also, Crittenden Orange Blossom Fruit v. Stone, 514 So. 2d 351 (Fla. 1987).

66. Florida Cities has argued that State Farm and Crittenden should be distinguished from this case because Florida Cities' award in this matter is attributable to a gross abuse of agency discretion. Florida Cities has also cited Ganson v. State, 554 So. 2d 522 (Fla. 1st DCA), quashed on other grounds, 566 So. 2d 791 (1990), in support of its argument. In Ganson, the First District Court allowed an award of fees and costs attributable to the portion of the proceedings to determine the

amount of fees and costs to be awarded under another provision of Chapter 120, Florida Statutes.

67. The difficulty with this issue is that the argument presented by the parties concerning attorney's fees and costs for proceedings before the Division of Administrative Hearings concerns Florida Cities' entitlement to fees and not the amount thereof. The question of entitlement is a question that only the First District Court can answer. Based upon the order of the First District Court awarding fees in this matter, it is not clear whether the First District Court intended to award fees and costs attributable to the portion of the proceedings before the Division of Administrative Hearings.

68. Florida Cities sought in its motion for attorney's fees and award of "attorneys [sic] fees to Appellant for this appeal . . . ." [Emphasis added]. The First District Court "granted" the "motion by appellant for attorney's fee . . . ." While it does not appear, therefore, that the First District Court awarded fees beyond the proceedings of the "appeal," the First District Court only remanded the matter for a determination of the "amount of attorney's fees." Therefore, while the Division of Administrative Hearings has jurisdiction to determine the amount of attorney's fees and costs incurred which "may" be awarded to Florida Cities, it is without jurisdiction to determine whether any amount should be paid.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that the $74,648.14 in attorney's fees and costs that the parties have stipulated is the lodestar figure, for purposes of the First District Court's award of attorney's fees and costs should not be reduced in light of the "results obtained."

DONE AND ORDERED this 17th day of June, 1998, in Tallahassee, Leon County, Florida.

LARRY J. BARTIN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes.