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OF COUNSEL  
THOMAS F. WOODS

July 10, 1998

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

HAND DELIVERY

RECORDS AND  
REPORTING

98 JUL 10 AM 11:47

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RE: Docket No. 971663-WS  
Petition of Florida Cities Water Company for limited proceeding to  
recover environmental litigation costs for North and South Ft. Myers  
Division in Lee County and Barefoot Bay Divisions in Brevard County.

Dear Ms. Bayo:

Enclosed for filing, on behalf of Florida Cities Water Company, in  
the above docket are an original and fifteen (15) copies of the  
following:

1. Rebuttal Testimony of Gerald S. Allen; 07308-98
2. Rebuttal Testimony of Michael Murphy; 07309-98
3. Rebuttal Testimony of Mike Acosta; 07310-98
4. Rebuttal Testimony of Gary Baise; and 07311-98
5. Rebuttal Testimony of John D. McClellan. 07312-98

Also enclosed for filing is an original and fifteen (15) copies of  
a certificate of service related to the above filing.

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Please acknowledge receipt of the foregoing by stamping the enclosed  
extra copy of this letter and returning same to my attention.

Thank you.

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Very truly yours,

*[Signature]*  
B. Kenneth Gatlin

BKG/ldv  
Enclosures

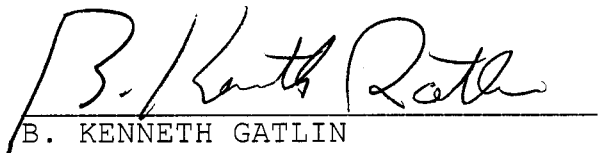
cc: Harold McLean, Esq. (Via Hand Delivery)  
Rosanne Gervasi, Esq. (Via Hand Delivery)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of FLORIDA )  
CITIES WATER COMPANY, seeking ) Docket No. 971663-WS  
recovery of environmental )  
litigation costs in a Limited )  
Proceeding for its NORTH and )  
SOUTH FT. MYERS DIVISION in )  
Lee County and BAREFOOT BAY )  
DIVISION in Brevard County, )  
Florida )

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Rebuttal Testimonies of: Gerald S. Allen, Michael Murphy, Mike Acosta, Gary Baise, and John D. McClellan has been furnished by hand delivery to Rosanne Gervasi, Esq., Division of Legal Services, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850 and to Harold McLean, Esq., Office of Public Counsel, c/o The Florida Legislature, 111 W. Madison Street, Room 812, Tallahassee, FL 32399-1400, on this 10<sup>th</sup> day of July, 1998.



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FLORIDA CITIES WATER COMPANY

07308-98

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FLORIDA CITIES WATER COMPANY  
RATE APPLICATION FOR RECOVERY OF LEGAL EXPENSES  
REBUTTAL TESTIMONY OF GERALD S. ALLEN  
TO DIRECT TESTIMONY OF  
HUGH LARKIN, JR. AND PATRICIA W. MERCHANT  
DOCKET NO. 971663-WS

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. Did you prepare prefiled testimony in this case?  
A. Yes.  
Q. What is the purpose of your rebuttal testimony?  
A. The purpose of my testimony is to rebut certain  
parts of the direct testimony of Hugh Larkin, Jr.  
prefiled on behalf of the Florida Office of Public  
Counsel, and Patricia W. Merchant on behalf of the  
Public Service Commission.  
Q. Beginning at line 18, page 3 of his prefiled  
testimony, Mr. Larkin states, "[I]f the Company had  
a basis to recover these expenses, it was to file a  
rate case at the time the expenses were being  
incurred and as for the recovery as part of a rate

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1 case, or to come before the Commission and ask for  
2 an Accounting Order allowing for the deferral of the  
3 legal fee to be considered in a single issue rate  
4 case." Why didn't FCWC take one of actions  
5 suggested by Mr. Larkin?

6 A. Until the Court issued its Judgement and Memorandum  
7 Order on August 20, 1996 ((Exhibit\_\_\_\_(GSA-24))),  
8 FCWC had no solid basis for predicting the outcome  
9 of the litigation and therefore did not have a basis  
10 for seeking recovery. In fact this outcome did not  
11 become final until the U.S. Court of Appeals for the  
12 Eleventh Circuit dismissed the respective appeals of  
13 the parties at their request on August 6, 1997. See  
14 Exhibit\_\_\_\_(GHB-104).

15 Q. In your opinion, would the Commission have  
16 considered multiple rate applications as the legal  
17 expenses occurred?

18 A. No. I don't believe the Commission would have  
19 considered recovery until the outcome of the  
20 litigation had been finally decided. The litigation  
21 was very dynamic and was fraught with ancillary  
22 issues primarily as a result of the overzealous  
23 prosecution by the DOJ. A snapshot at any given  
24 point would significantly differ from a snapshot a  
25 few weeks later and this situation existed for

1 almost four years. Therefore, it was not possible  
2 to accurately predict the additional legal expenses  
3 from any given point to the conclusion of the case.

4 Q. Referring to page 5 of Mr. Larkin's testimony  
5 beginning at line 10, Mr. Larkin states, "[T]hat  
6 this case provides an excellent example of how  
7 passing to the customers the expenses associated  
8 with the utility's violation of federal law would  
9 insulate the utility management from compliance with  
10 the CWA. It is worthy of note that neither the EPA,  
11 DOJ, nor the federal Judge was ever aware that the  
12 Company might shift the expenses of litigation  
13 [to]its customers." How do you interpret this  
14 question and response?

15 A. First, I believe Mr. Larkin is stating that if  
16 utilities are allowed to recover expenses associated  
17 with defending themselves against alleged violations  
18 of the Clean Water Act (CWA),it would remove  
19 incentives to comply. Second, he concludes or at  
20 least implies that the Court's final decision would  
21 have been influenced had it known that the Company  
22 might seek recovery of legal expenses sustained in  
23 defending itself. Third, Mr. Larkin concluded that  
24 the excerpt from my testimony at deposition on  
25 November 13, 1995 concealed the Company's intent to

1 later seek recovery of said expenses.

2 Q. Do you agree with Mr. Larkin that if utilities are  
3 allowed to recover expenses associated with  
4 defending themselves against alleged violations of  
5 the Clean Water Act (CWA), it would remove incentives  
6 to comply?

7 A. No. First, I became involved in water and wastewater  
8 utility management before the enactment of the Clean  
9 Water Act (CWA), the Safe Drinking Water Act and  
10 many other laws governing water and wastewater  
11 utilities and have first hand experience with their  
12 evolution. I have witnessed the conflicting  
13 interpretations of these laws and the evolution of a  
14 new legal specialty. Compliance has always been a  
15 top priority personally and I have consistently  
16 promoted strict compliance as always being in the  
17 best interests of my employer and its utility  
18 customers. Those to whom I have reported since  
19 employment by Avatar Utilities Inc. and its  
20 subsidiaries, including Florida Cities Water  
21 Company, have strongly supported this position. The  
22 reasons include, but are not limited to, a  
23 demonstration of good environmental stewardship and  
24 corporate citizenship, avoidance of economic  
25 sanctions, maintaining productive relationships with

1 regulatory agencies and fostering professional pride  
2 throughout the company. To imply that the ability  
3 to recover a part of the Company's legal expenses in  
4 connection with defending itself against grossly  
5 overstated allegations of violations of the law  
6 represents a disincentive to comply borders on  
7 insult.

8 At \$25,000 per day per violation as provided  
9 by the CWA, the greatest financial peril virtually  
10 always faced by alleged violators are penalties, not  
11 legal expenses. In the instant case, the Company  
12 faced potential penalties up to \$104 million which  
13 is forty-six times the legal expenses it seeks to  
14 recover in this docket. The Company has never  
15 attempted to recover fines or penalties nor is it  
16 seeking to do so in this case. To adopt Mr. Larkin's  
17 conclusion, one would have to also conclude that the  
18 public defender act, which provides legal defense to  
19 those who cannot afford it, removes all perils  
20 associated with criminal acts and therefore is a  
21 disincentive to comply with the law. It is nonsense  
22 to conclude that recovery of legal expenses is a  
23 disincentive to comply with the CWA or any other law  
24 or rule.

25 Q. Do you agree with Mr. Larkin's conclusion that the

1 excerpt from your testimony at deposition on  
2 November 13, 1995 concealed the Company's intent to  
3 later seek recovery of said expenses?

4 A. No. My responses at deposition were based on the  
5 facts before me at that time when the Company faced  
6 penalties up to \$104 million. The recovery of legal  
7 expenses through rates was an issue that I had given  
8 little thought to at that time. Furthermore, I did  
9 not have the benefit of knowing that the Court would  
10 dismiss almost half of the allegations in summary  
11 judgement and ten months later find penalties in the  
12 amount of \$309,710 which was but a small fraction of  
13 the legal expenses sustained by the Company. I  
14 initially stated that I doubted that the Company  
15 would expect to include the expenses in rate base  
16 but upon immediate reflection indicated that I  
17 didn't know and that a decision would not be made to  
18 seek rate base treatment or any other treatment of  
19 the legal expenses until the outcome of the case was  
20 resolved. It is important to note that the DOJ had  
21 ample opportunity to bring the issue up at trial but  
22 did not do so. The DOJ trial counsel did not  
23 examine me, Mr. Cardy, the Company's rate making  
24 expert, any other Company witness, or the DOJ's  
25 financial expert regarding rate treatment of



1 penalties or legal expenses at trial in this case.  
2 To conclude that my testimony at deposition, which  
3 was not introduced into evidence at trial and  
4 presumably was never viewed by the Court, misled  
5 both the DOJ and the Court, and influenced the  
6 Courts decision is clearly without factual basis.

7 Q. Do you agree with Mr. Larkin's conclusion that the  
8 Court's final decision would have been influenced  
9 had it known that the Company might seek recovery of  
10 legal expenses sustained in defending itself.

11 A. No. Legal expenses sustained by defendants in CWA  
12 litigation and the source of funds to pay same are  
13 not among the factors set forth in the Act for  
14 determining the validity of allegations or the  
15 amount of penalties as will be discussed by Mr.  
16 Baise in his rebuttal testimony.

17 Q. Under the same circumstances and limiting the facts  
18 to those known to you at the time, would your  
19 responses to questions by the DOJ regarding recovery  
20 of expenses through rates been different?

21 A. No.

22 Q. Beginning at line 24, page 12 of Mr. Larkin's  
23 prefiled testimony, he states, "[T]he environmental  
24 agencies either find the utility is or is not in  
25 compliance with the requirements of the law. If

1           these agencies are mistaken as to whether a  
2           particular utility's wastewater treatment facilities  
3           comply with the law, then normally the company's own  
4           engineers can prove the company's compliance with  
5           the requirements of the law. No legal expenses  
6           would be incurred, since it would be a matter of  
7           testing to determine whether the utility complies or  
8           does not comply with the environmental  
9           requirements."

10    Q.    Was this the approach that FCWC initially took in  
11           1986 after the USEPA notified FCWC that it intended  
12           to deny renewal of the NPDES permit for the Waterway  
13           Estates Wastewater Treatment Plant and for several  
14           years thereafter in dealing with the EPA and DEP?

15    A.    Yes. In fact, FCWC's engineers immediately opened  
16           communications with both agencies and started  
17           developing an action plan which FCWC believed would  
18           resolve the issues. There was never a dispute  
19           regarding the action which was necessary to satisfy  
20           the demands of the EPA and DEP. The EPA's  
21           dissatisfaction arose over the timeliness of  
22           completing the work set forth in the action plan.  
23           There was no legal counsel involvement until this  
24           dissatisfaction surfaced and little from that point  
25           in time until the DOJ entered the picture. The DOJ

1 was making demands on FCWC of a magnitude which  
2 could have placed the Company in serious jeopardy  
3 and it was prudent that the Company engage legal  
4 counsel in a more assertive manner.

5 Q. Had FCWC challenged the USEPA on its denial of  
6 renewal of the NPDES permit for the Waterway Estates  
7 Wastewater Treatment Plant in 1986, do you believe  
8 the ultimate outcome would have been different?

9 A. No, I don't believe the outcome would have been  
10 significantly different. It is my opinion that had  
11 FCWC challenged the denial and prevailed, the USEPA  
12 would have issued an administrative order mandating  
13 the upgrading of the treatment plant and relocation  
14 of the outfall initially instead of an order calling  
15 for the elimination of the discharge<sup>1</sup>. Since such  
16 initial order would not have altered FCWC's action  
17 plans, I conclude that the schedule would not have  
18 been altered. Therefore, the outcome would have not  
19 been altered.

20 Q. Beginning at line 21, page 22 of his prefiled  
21 testimony, Mr. Larking refers to "the criminal  
22 defense of some of the Company's employees." Were  
23 criminal charges brought against any past or current

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1. See prefiled direct testimony, Gerald S. Allen,  
page 10, line 6 through p. 11, line 2.

1 Company employees by the United States or the State  
2 of Florida or to the best of your knowledge were  
3 criminal investigations ever undertaken by the  
4 United States or the State of Florida with respect  
5 to any matter surrounding or arising from the  
6 litigation in this docket?

7 A. No current or former employees were charged or, to  
8 be best of my knowledge, investigated. So, there was  
9 no need for "criminal defense." I can't explain  
10 Mr. Larkin's characterization other than another  
11 example of conclusions without factual basis.

12 Q. Did the Company retain, on behalf of certain current  
13 and former employees, legal counsel to represent  
14 their personal interest?

15 A. Yes, on a limited basis in view of the case,  
16 Weitzenhoff v. United States, cited at page 32 of my  
17 prefiled direct testimony. However, this matter is  
18 not relevant in this docket since the Company is not  
19 seeking recovery through rates any of the expenses  
20 associated with such legal services.

21 Q. What is your interpretation of Ms. Merchant's  
22 prefiled direct testimony with regard to the  
23 recovery of the legal expenses sought by FCWC in  
24 this docket?

25 A. Ms. Merchant seems to be presenting her personal

1 opinion regarding the criteria which the Commission  
2 should apply in arriving at its decision regarding  
3 recovery. She presents no opinion regarding whether  
4 or not recover should be allowed or the amount  
5 thereof, if any. However, she is firm in stating  
6 that recovery, if allowed, should be through rates  
7 applicable to N. Ft. Myers, Barefoot Bay and  
8 Carrollwood wastewater customers only.

9 Q. What criteria should the Commission apply in  
10 arriving at its decision.

11 A. The fundamental foundation governing the recovery of  
12 expenses through rates is the "reasonable and  
13 prudent" criteria and it should be applied by the  
14 Commission in arriving at a decision in this case.  
15 The Commission should consider the decisions of the  
16 Company regarding its legal defense of the  
17 allegations of the DOJ and the "reasonableness and  
18 prudence" of these decisions in light of the facts  
19 available to the Company at the time they were made.  
20 Of course, important to the "reasonable and prudent"  
21 test is evaluating the ultimate results of these  
22 decisions which was the Federal Court's judgement  
23 following the trial: penalties of less than one  
24 percent of the maximum penalty claimed in the  
25 Original Complaint, less than one-half percent of

1           the maximum penalty claimed in the Amended Complaint  
2           and slightly over six percent of the settlement  
3           offer rendered by the DOJ prior to the Original  
4           Complaint.

5 Q.   Does this conclude your rebuttal testimony.

6 A.   Yes.