BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for Limited Proceeding to Recover Costs of Water System Improvements In Marion County By Sunshine Utilities of Central Florida, Inc.
_____/

Docket No. 992015

Filed: July 23, 2002

DIRECT TESTIMONY

of

JAMES H. HODGES

on behalf of

SUNSHINE UTILITIES OF CENTRAL FLORIDA, INC.

Q: Please state your name and business address.

A: James H. Hodges. My address is 10230 E. Hwy 25 Belleview, FL 34420.

Q: What is your occupation?

A: I am the founder, owner, operator and president of Sunshine Utilities of Central Florida, Inc. ("Sunshine").

Q: What is the purpose of your testimony?

A: The purpose of my testimony is to: (i) describe my job responsibilities as founder, owner and president of Sunshine; and (ii) justify the salary I receive from Sunshine in fulfilling those job responsibilities.

Q: Are there exhibits to your testimony?

A: Yes. I am sponsoring the following exhibits:

Exhibit ___ (JHH-1)	Copy of Order No. PSC-94-0738-FOF-WU and Opinion of the Florida First District Court of Appeal.
Exhibit ___ (JHH-2)	Revised Page E-6 and Attachment E-6A to Sunshine's 2001 Annual Report.

Q: Please describe your relationship with Sunshine.

A: I started the utility operations in 1974, and actually constructed the majority of the utility's water plants and distribution systems in Marion County. I have served as Sunshine's president since the company started operations. I own 50% of the utility. My wife, Clarise, owns the other 50%. I also serve on the utility's board of directors.

Q: Please describe Sunshine's history from a regulatory perspective.

A: Prior to 1981, Sunshine was regulated by Marion County. On May 5, 1981, Marion County transferred its jurisdiction of private water and sewer utilities to the Florida Public Service Commission (the "Commission"). Shortly thereafter, Sunshine filed for certification and a staff assisted rate case. At that time, Sunshine did not operate as an integrated system, but had approximately 16 separate systems. The Commission was concerned that the quality of service and the rates would vary from system to system. Thus, in March of 1984, the Commission ordered Sunshine to consolidate its utility structure and to adopt uniform rates for all of its customers.

Q: How has Sunshine changed since it was first regulated by the Commission?

A: The utility has grown from a Class C utility serving approximately 777 customers in 1981 to a Class B utility which now provides water

service to approximately 2871 water customers through 21 separate small systems around Marion County. These systems continue to be under a uniform rate structure as required by the Commission.

Q: What are your job responsibilities for Sunshine?

A: Working for Sunshine is my only occupation. It is my full-time job. In addition to making day-to-day decisions in the normal operation of the utility, I make all of the major management decisions that the affect the utility. More specifically, I manage the utility's finances, I am responsible for the company's profit sharing plan, I oversee the environmental compliance matters, and I plan the future growth and direction of the utility. I also oversee customer service and employee issues.

Q: Do you view your job responsibilities for Sunshine as different from the responsibilities of a president of a large publicly-traded corporation?

A: Yes. Sunshine is not a large publicly-traded corporation – it is a family-owned and operated utility. In my view, a president of a large corporation basically wears one "hat" and that is to make broad policy decisions regarding the management of the company, leaving the day-to-day operational duties to others. My role and responsibilities for Sunshine Utilities are much more than that. I wear a number of different "hats". In addition to making policy decisions concerning the growth and direction of Sunshine Utilities,

I am on-call 24 hours a day, 7 days a week, 365 days a year to respond to any type of issue that may arise concerning the operation of Sunshine. In fulfilling my everyday duties to my customers, I rely on my experience in responding to utility service emergencies, my experience in designing, constructing and operating public water systems, my experience in costing construction projects and evaluating acquisitions, my experience in replacing and upgrading equipment, and my general knowledge of all regulatory agencies associated with water utility operation (e.g., the Commission, DEP, water management districts, health department). This is a tremendous amount of responsibility. This is my job.

Q: How many employees does Sunshine currently have?

A: Sunshine currently has 9 employees.

Q: You stated that Sunshine's utility operations are comprised of 21 separate water systems located around Marion County. Does that utility structure present challenges to you in your job?

A: Yes it does. Each of the 21 separate water systems has its own unique characteristics. Each system has its own unique operational issues, its own unique environmental compliance issues, and its own unique customer service issues. In my job, I am ultimately responsible for all of these matters.

Q: What salary do you currently receive from Sunshine?

A: I currently earn an annual salary of $91,731.

Q: When was Sunshine's last rate case prior to this limited proceeding?

A: Sunshine's last rate case proceeding was conducted by the Commission over twelve years ago in Docket No. 900386-WU.

Q: Was your salary established in that prior proceeding?

A: Yes. My salary for the year 1990 was established at $69,055 in Order No. PSC-94-0738-FOF-WU. That Order was issued by the Commission in response to a mandate of the Florida First District Court of Appeal reversing the Commission's earlier decision that my salary should be reduced to $43,372. A copy of Order No. PSC-94-0738-FOF-WU and the opinion of the First District Court of Appeal is attached to my testimony as Exhibit ____ (JHH-1).

Q: According to Sunshine's most recent annual report, your salary increased from $69,055 in 1990 to $91,731 in 2001. What are the reasons for the increase?

A: My salary was increased to keep up with inflation. It is my understanding that my current salary is actually below my 1990 salary when you adjust the 1990 salary using the Commission's approved price index rate adjustment factors.

Q: Have your job responsibilities changed since the Commission established your salary in Docket No. 900386-WU?

A: My basic responsibilities have not changed. However, because Sunshine now serves more customers today than it did in 1990, my ultimate responsibilities to customers have increased since my 1990 salary was established.

Q: Sunshine's 2001 Annual Report indicates that you spent "50%" of your time as an officer of the utility "compared to time spent on total business activities." Does that mean that you work only part-time for the utility?

A: Absolutely not. As I have stated, overseeing the operations of a water utility with 21 separate water systems is a full-time job. I work full-time for the utility just as I did in 1990.

Q: Do you know why the 2001 Annual Report reflects that you spend 50% of your time as an officer of the utility compared to time spent on total business activities?

A: Prior to 1991, I was the sole owner of Sunshine. However in 1991, I gave half of my ownership interest in the utility to my wife, the utility's vice-president, Clarise Hodges. It is my understanding that Ms. JoAnn Schneider, who was Sunshine's office manager from 1984 through June 1997, filled out the annual report in 1991 to reflect that myself and my wife each held a 50% ownership interest in the

utility and simply replicated that "50%" factor in the section of the report dealing with the percentage of time spent as officer of the utility. The reference to "50%" has been carried forward in each of our annual reports since 1991. The reference to "50%" was never intended to suggest that I only work part-time for the utility. As I have mentioned, I have always worked full-time for Sunshine.

Q: Are you aware that Commission staff has interpreted your 2001 Annual Report as an indication that you work less than full-time for the utility and therefore your salary should be reduced?

A: Yes I am aware of that. However, our annual report was never intended to indicate that I work less than full-time for the utility. To remove any doubt of that effect, we have amended our 2001 Annual Report to clarify that I continue to work full-time for the utility. A copy of the amended 2001 Annual Report is attached to my testimony as Exhibit ____ (JHH-2).

Q: Mr. Hodges are you retired?

A: No I am not.

Q: Are you employed by any person or entity other than Sunshine?

A: No. I work full-time for Sunshine.

Q: Are there any other comments that you would like to make with respect to this matter?

A: Yes. The Commission's annual report form, in particular the section on compensation of officers, is confusing. Language in that form requires that a regulated water utility list for each officer: "the time spent on respondent as an officer, compared to the time spent on total business activities and the compensation received as an officer from the respondent." Because Sunshine is a family-owned and operated business with only nine employees, three of which are officers, it is impossible for Sunshine to estimate the percentage of time that its officers spend in their roles as officers compared to their time spent on total business activities for the utility. For example, I am a full-time employee of Sunshine and perform a variety of functions for the utility that include managing the day-to-day decisions in the normal operation of the utility, making all major management decisions that affect the utility, managing the utility's finances, overseeing Sunshine's profit sharing plan, addressing environmental compliance matters, planning for future growth and direction of the utility, and addressing customer service and employment issues as they arise. These activities are performed more in my role as an owner, employee and operator of the utility, than in the role of a president in a traditional sense. Moreover, although the compensation I receive from Sunshine is classified as an officer salary, this compensation is for all of the work I perform for the utility, which includes work performed in

roles other than the role of utility officer. In summary, I would respectfully submit that the instructions on page E-6 of the Annual Report form do not call for the information necessary to determine whether a particular person works full-time for a family-owned and operated water utility.

Q: Do you have suggestions on how the Commission could revise the Annual Report section on officers' compensation to make it less confusing?

A: Yes. I would suggest that column (c) of page E-6 of the Annual Report form – "Compensation of Officers" -- be revised to read:

> For each officer, list the time spent on ~~respondent~~ the utility as an officer compared to the time spent on total business activities unrelated to the utility and the compensation received as an officer from ~~respondent~~ the utility.

The Commission also should consider adding a new section to the form:

> For each officer, confirm whether the officer works full-time for the utility.

Q: Does this conclude your direct testimony?

A: Yes.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for a Rate Increase in Marion County by Sunshine Utilities of Central Florida, Inc.	)	DOCKET NO. 900386-WU ORDER NO. PSC-94-0738-FOF-WU ISSUED: 06/15/94

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
SUSAN F. CLARK
JULIA L. JOHNSON
DIANE K. KIESLING
LUIS J. LAUREDO

ORDER COMPLYING WITH DCA MANDATE
AND
NOTICE OF PROPOSED AGENCY ACTION
ORDER ALLOWING RECOVERY OF APPELLATE RATE CASE EXPENSE

BY THE COMMISSION:

NOTICE IS HEREBY GIVEN by the Florida Public Service Commission that the action discussed herein is preliminary in nature, except for the adjustments made pursuant to the First District Court of Appeal mandate, and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

BACKGROUND

Sunshine Utilities of Central Florida, Inc. (Sunshine or utility) is a Class B utility providing service for approximately 2,087 water customers in Marion County, Florida. By Order No. 23935, issued December 4, 1990, this Commission suspended Sunshine's proposed rates and granted an interim water rate increase, subject to refund. By Order No. 24484, issued May 7, 1991, the Commission approved final rates designed to generate $509,703 in annual revenues, or a 9.69 percent increase. By that same Order, the Commission also required the utility to refund the excess interim rates collected. On May 23, 1991, Sunshine protested Order No. 24484 and a formal hearing was held on October 2 and 3, 1991.

By Order No. 25722 (Final Order), issued February 13, 1992, the Commission set final rates and charges and required a refund. The utility filed a Notice of Appeal of Order No. 25722 with the First District Court of Appeal (DCA) on February 26, 1992. The appeal also included issues involved in Docket No. 881030-WU, an overearnings investigation. On August 30, 1993, the DCA filed its opinion in this case. It affirmed in part, reversed in part and remanded this case to the Commission for further proceedings in accordance with its opinion. A mandate was issued on September 15, 1993. This Commission has complied with the requirements of the mandate and our adjustments and findings are set forth below.

RATE BASE

Our calculation of the appropriate rate base for the purpose of this proceeding is depicted on Schedule No. 1-A, attached to this Order. Those adjustments which are self-explanatory or which are essentially mechanical in nature are reflected on that schedule without further discussion in the body of this Order.

Profit and Markup

In Docket No. 881030-WU, Sunshine's rate base included an allowance for profit and markup on labor and materials on plant constructed from 1983 through 1987 by Water Utilities, Inc. (WUI), a related company. By Order No. 21629, issued July 31, 1989, the Commission made an adjustment to remove a portion of the profit and markup. The utility protested that Order and the case was set for hearing. Prior to the prehearing conference, the utility informed our Staff that WUI had its own employees and also performed work for other companies. Based upon the facts as represented to them at that time, Staff believed that the work performed by WUI was comparable in cost to the work performed by other construction companies. Therefore, Staff made the decision not to recommend to the Commission removal of the costs associated with the profit and markup. Hence, by Order No. 22969, issued May 23, 1990, the following stipulation was approved:

> No adjustment is necessary to reflect the original cost of plant additions booked from 1983 to 1987. Based upon the information submitted by the utility, the amount of plant additions booked during that time appear reasonable.

At the hearing in this docket, Docket No. 900386-WU, our Staff auditor testified that WUI did nothing for Sunshine that Sunshine could not do for itself. The audit report disclosed that WUI did not have any employees nor did it do work for anyone else but Sunshine. It also stated that there appears to be no

reasonable basis for Sunshine to deal with WUI, except to provide a profit for the utility owner. Based on this evidence, our Staff believed that the utility, whether knowingly or not, had misrepresented the facts to the Commission in the previous case. Therefore, our Staff recommended, and we approved, a reduction of $187,379 to plant-in-service for the profit and markup on the plant constructed from 1983 to 1987 in Order No. 25722.

The DCA reversed the Commission's ruling on the profit and markup of the plant constructed from 1983 through 1987. In its opinion the DCA stated that:

> The general rule is that a party will be relieved from a stipulation entered into under a mistake as to a material fact, if there has been reasonable diligence exercised to ascertain such fact. On the other hand, if a party enters into an agreement, not as a result of a mistake of fact, but merely due to a lack of full knowledge of the facts, caused by the party's failure to exercise due diligence to ascertain them, there is no proper ground for relief. Sunshine Utilities of Central Florida, Inc. v. Florida Public Service Commission, 624 So.2d 306, 310 (Fla. 1st DCA 1993).

The DCA found no basis in the record to relieve the Commission of the stipulation it had accepted. The Court stated that the Commission had had ample time to ascertain whether WUI was a legitimate construction company. Thus, the DCA concluded that the Commission failed to exercise due diligence prior to entering the stipulation and that the Commission was bound by the stipulation on the cost of the plant additions for 1983 through 1987.

Therefore, in accordance with the mandate issued by the DCA, we have increased plant-in-service by $187,379, accumulated depreciation by $48,640, non-used and useful plant by $24,152, and depreciation expense by $6,558.

President's Salary

By Order No. 25722, the Commission also approved an adjustment to reduce the utility president's salary on the basis that Sunshine failed to present any evidence to substantiate the increase in its president's salary from 1989 to 1990, or to establish that the president's duties had expanded so as to justify the requested increase. The DCA reversed the Commission's ruling on the reduction to the president's salary stating that it was not supported by competent substantial evidence. Therefore, in accordance with the DCA's mandate, we have increased officers' salaries by $25,683, and made the corresponding $2,195 increase to

payroll taxes.

Employee Salaries

Sunshine shares its employees with Heights Water Company (Heights). Heights is a related utility company located in Citrus County. By Order No. 25722, issued February 13, 1992, the Commission found that using actual time would have been the most accurate method to allocate salaries; however, the Commission found that the record did not contain sufficient evidence to support an allocation adjustment for administrative salaries using actual time. Based on the record, the Commission found that the most reasonable method of allocation of salaries between the two companies should be based on equivalent residential connections (ERCs). The allocation was calculated by dividing the total number of ERCs for Heights and Sunshine by the number for Heights, which resulted in a 4.96 percent adjustment. This percentage was then multiplied by the total salary amount for both Sunshine and Heights.

In its opinion, the DCA affirmed in part, reversed in part, and remanded for further proceedings the Commission's allocation of the employee salaries. It reversed the Commission's ruling on the portion of the field employee salaries that was allocated based on ERCs. The DCA stated that the record included actual time sheets to support the amount charged to Heights for maintenance work. Based on that, the DCA found no competent substantial evidence to support the allocation of field employee salaries based on ERCs. Thus, it remanded with directions to the Commission to calculate field work by actual time. However, the DCA affirmed the Commission's decision to allocate the administrative salaries based on ERCs.

We have recalculated the adjustment by ERCs for the allocation of the field employee salaries, as mandated by the DCA. In Order No. 25722, the allocation of salaries to Heights of $4,275 was derived by multiplying the total administrative salaries of $86,190 by 4.96 percent (the percentage of total ERCs to Heights ERCs). This $4,275 amount was deducted from the $6,692 adjustment made in Order No. 25722, leaving an increase of $2,417 to salary expense. Therefore, we have appropriately readjusted salaries by $2,417 in accordance with the DCA mandate. We have also made the corresponding $205 reduction to payroll taxes.

RATE CASE EXPENSE

On November 17, 1993, Sunshine filed a Motion for Recovery of Additional Rate Case Expense, wherein it requested allowance of

recovery of its rate case expense through the appeal. Specifically, Sunshine asserted that it should recover $36,579. In support of its belief that legal expenses incurred on a successful appeal of an actual rate case order are recoverable, Sunshine stated that: 1) Section 367.081(7), Florida Statutes, empowers the Commission with the authority to allow Sunshine to recover rate case expense from ratepayers; 2) pursuant to Section 350.128(1), Florida Statutes, full adjudication of the merits of Sunshine's application for a rate increase includes appellate review; and 3) in West Ohio Gas Co. v. Public Utilities Commission of Ohio, 294 U.S. 63 (1934), the Court found that any expenses incurred in a successful litigation ancillary to the administrative rate proceeding must be included in the operating costs attributed to the utility's rates.

On November 29, 1993, the Office of Public Counsel (OPC) filed a Response to Motion for Recovery of Additional Rate Case Expense. In its Response, OPC contended that: 1) Sunshine should not receive any excess rate charges above what the Commission ordered because they have not demonstrated the prudence, necessity and reasonableness of the proposed additional expense; 2) Sunshine is seeking an out of test year, extraordinary, nonrecurring expense; 3) Sunshine was not successful in its appeal, based on the fact that all of Sunshine's claims were not reversed and remanded; 4) Sunshine gave no notice to OPC that additional rate case expense would be requested; and 5) there is no basis in the record to support the proposed additional expense, and further, there has been no discovery or cross-examination with respect to this additional expense.

On December 13, 1993, Sunshine filed a Memorandum in Opposition to Citizens' Response to Motion for Recovery of Additional Rate Case Expense. In its Memorandum, Sunshine first stated that if the Commission were to accept OPC's argument with respect to the rate case expense being an out of test year expense, then no rate case expense would ever be recovered since all rate case expense by definition is an out of test year, non-recurring expense that is substantiated through documentation filed after the conduct of the hearing. Second, the additional requested rate case expense is directly applicable to a given test year rate proceeding that is ongoing. Third, there are no statutes or rules which require Sunshine to give notice that it would be seeking additional rate case expense. Finally, Sunshine believes it has acted prudently, necessarily, and reasonably by showing all of the documentation of legal fees, including the affidavit of Attorney Melson.

On December 23, 1993, OPC filed a Motion to Strike Sunshine's Memorandum. As basis therefore, OPC states that Rule 25-22.037(2), Florida Administrative Code, does not contemplate or

permit the original mover of a motion to file a response or memorandum in opposition to a timely filed response to the mover's original motion. On January 4, 1994, Sunshine filed a Response to OPC's Motion to Strike, basically asserting that it was entitled to file its Memoranda because Rule 25-22.037, Florida Administrative Code, is silent as to the number of responses.

On February 4, 1994, Sunshine filed a Notice of Supplemental Authority, wherein Sunshine cites The Citizens of Florida v. Mayo, 324 So.2d 35 (Fla. 1975) in support of its request for rate case expense. On February 16, 1994, OPC filed a Motion to Strike Sunshine's Notice of Supplemental Authority. In the Motion to Strike, OPC basically asserts that reference to this case should have been included in the utility's initial motion; and the utility offers no Commission rule which authorizes such a submittal.

With respect to the various motions filed by the parties, we believe that the intent of Rule 25-22.037, Florida Administrative Code, was to allow a party to file one response to a motion. To allow otherwise would prevent the finality of the process. In any case, the different motions and responses have been summarized above. With respect to the Mayo case, we believe that we should be presented with all of the relevant arguments about rate case expense so that we may make our decision. Therefore, we have reviewed the Mayo case and the analysis has been incorporated herein.

The issue involving appellate rate case expense appears to be a case of first impression for this industry in that no other water or wastewater utility has ever requested additional rate case expense after a successful appeal. Apparently, this issue has not arisen in the telecommunications or electric and gas industries either. This is likely due to the fact that the majority of work related to appeals is generally performed, by in-house attorneys and the overall impact of outside attorneys expenses on revenues for utilities in those industries is very small. However, in the water and wastewater industry, rate case expense has a very material impact.

The analysis of this request for appellate expenses must begin with the Commission's basic authority to grant rate case expense. Section 367.081(7), Florida Statutes, states:

> The Commission shall determine the reasonableness of rate case expenses and shall disallow all rate case expenses determined to be unreasonable. No rate case expense determined to be unreasonable shall be paid by a consumer.

Although it is not specified in the above statute that "rate case expenses" are limited to those incurred to complete a rate case before the Commission, as opposed to an appeal, this provision has only been utilized thus far for rate case expenses in rate cases before the Commission.

Before going further into our analysis, it is appropriate to address the threshold arguments raised by OPC. OPC first argues that the utility is not entitled to the requested rate case expense because the utility has not demonstrated the prudence, necessity and reasonableness of the additional expense. We note that the utility has responded that it has provided the documentation of its legal fees and an affidavit supporting the reasonableness of the fees. It is not clear what further documentation the utility would need to provide at this point, beyond a breakdown of the time it spent by issue, which the utility has stated by letter, dated February 14, 1994, that it does not have and cannot provide. The fact that the utility has prevailed on several issues in its appeal suggests that it acted reasonably, prudently and out of necessity in appealing a portion of the Commission's Order.

OPC's second argument is that the requested rate case expense is a nonrecurring, out of test year extraordinary expense. We believe that the utility is correct in its response that one can argue that all rate case expense, including that incurred at the Commission level, is a nonrecurring, out of test year extraordinary expense. Such expense is always substantiated by documentation filed after the hearing. Also, this requested rate case expense clearly relates to a specific rate case proceeding. The utility cites to the West Ohio Gas case, in which the Court recognized that:

> the charges of engineers and counsel, incurred in defense of its security and perhaps its very life, were as appropriate and even necessary as expenses could well be.
>
> The Court went on to state later that:
>
> the Commission must give heed to all legitimate expenses that will be charges upon income during the term of regulation. . . .

We believe that these appellate rate case expenses are legitimate expenses that cannot be dismissed as out of test year expense since they are directly related to a rate case that has not yet been ultimately completed.

OPC's third argument is that the utility's appeal was not

successful because it did not prevail on all of the issues it appealed and, therefore, the utility should not recover the rate case expense related to all of the issues.

OPC's fourth argument is that the utility gave no notice that it intended to seek additional rate case expense after appeal. This argument must fail because there is no requirement that such notice be given, especially when the utility may not know whether it will appeal.

OPC's fifth argument is that there is no basis in the record to support the additional expense and that there has been no discovery or cross-examination with respect to the additional expense. We believe that this concern is addressed by issuing our decision on the rate case expense as a proposed agency action order. Therefore, if OPC or the utility believes it is necessary, each will have a point of entry to protest the decision.

Beyond OPC's arguments, there are several troubling questions that must be addressed. Does a utility have a right to appeal any order of the Commission? If a utility has a right to appeal any order of the Commission, is it entitled to recover all expenses related to any such appeal? Is the denial of recovery of all rate case expenses related to an appeal the equivalent of the Commission denying a utility its right to appeal? If a utility is entitled to some portion of such expenses, how should that portion be determined?

As to the first question, we believe that a utility has a right to appeal any order of the Commission (limited of course by the legal requirements for appeal of the particular order involved, the Rules of Appellate Procedure and other pertinent legal requirements). The right to appeal is a fundamental due process right.

As to the second question, we do not believe that a utility has a right to recover all rate case expenses associated with every appeal. The reason for this is that all such expenses are not inherently reasonable. Some appeals are a prudent cost of doing business and some are not. In addition, and perhaps most importantly, if the Commission took the position that any appeal taken by a utility is inherently reasonable, then utilities would be encouraged to appeal all orders as a matter of course to the ultimate detriment of the ratepayers who would be paying the bill for their lack of discrimination as to issues that truly should be appealed. As to the third question, the Commission's denial of recovery from customers of rate case expense related to some appeals or to some portion of an appeal is not a denial of a utility's right to appeal.

As to the fourth question, we have looked at various methods for reasonably judging the prudence of appeal-related rate case expenses requested by a utility. Many appeals that are not successful are clearly prudent from a business point of view. Some appeals that are successful may arguably not be prudent because they cost far too much. We believe the Commission is in the posture of finding some method by which it can objectively and fairly gauge whether an appeal or a portion of an appeal was prudent and then adjust the requested rate case expenses accordingly.

Because this is an issue of first impression for this agency, we have researched what the Courts have done with respect to awarding attorney fees. Our analysis and findings are set forth below.

How Do Courts Deal With Attorney Fees?

In a 1985 decision, the Florida Supreme Court addressed the constitutionality of a statutory provision permitting the award of attorney fees, as well as the issue of how attorney fees should be calculated when a statute authorizes their award, but does not provide any guidelines for such calculation. In the context of this decision, the Court also examined the history of attorney fees. In Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145, the Court upheld the constitutionality of Section 768.56, Florida Statutes, which directed trial courts to award a "reasonable attorney's fee" to the prevailing party in a medical malpractice action. The Court discussed the history of attorney fees, relating that:

> At the time of the American Revolution, the English courts generally awarded attorney fees to the prevailing party in all civil litigation. . . . By its decisions, however, this Court, along with the majority of other jurisdictions in this country, refused to accept the "English Rule" that attorney fees are part of the costs to be charged by a taxing master, adopting instead the "American Rule" that attorney fees may be awarded by a court only when authorized by statute or by agreement of the parties. . . .
>
> The legislature of this state has not hesitated to enact statutes providing authority to the courts to award attorney fees. . . . the Florida Legislature has enacted more than seventy statutes authorizing the courts to award attorney fees in specific types of actions. These provisions fall into two general categories. In the first, statutes direct the courts to assess attorney fees against only one side of the

> litigation in certain types of actions. . . . The second category adopts the English Rule, authorizing the prevailing party, whether plaintiff or defendant, to recover attorney fees from the opposing party. Id. at 1147, 1148.

After finding the statute constitutional, the Court discussed the calculation of "reasonable" attorney fees. The Court said that:

> Through its enactment of section 768.56, the legislature has given the courts of this state the responsibility to award "reasonable" attorney fees in medical malpractice cases. . . . Although the amount of an attorney fee award must be determined on the facts of each case, we believe that it is incumbent upon this Court to articulate specific guidelines to aid trial judges in the setting of attorney fees. We find the federal lodestar approach, explained below, provides a suitable foundation for an objective structure. Id. at 1149.

The Court also stated that the Florida courts would utilize the criteria set forth in Disciplinary Rule 2-106(b) of The Florida Bar Code of Professional Responsibility, as follows:

> (1) The time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service properly.
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
>
> (3) The fee customarily charged in the locality for similar legal services.
>
> (4) The amount involved and the results obtained.
>
> (5) The time limitations imposed by the client or by the circumstances.
>
> (6) The nature and length of the professional relationship with the client.
>
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
>
> (8) Whether the fee is fixed or contingent.

The Court at pages 1150-1152, went on to explain the lodestar approach:

> The first step in the lodestar process requires the court to determine the number of hours reasonably expended on the litigation. Florida courts have emphasized the importance of keeping accurate and current records of work done and time spent on a case, particularly when someone other than the client may pay the fee. . . . To accurately assess the labor involved, the attorney fee applicant should present records detailing the amount of work performed. Counsel is expected, of course, to claim only those hours that he could properly bill to his client. Inadequate documentation may result in a reduction in the number of hours claimed, as will a claim for hours that the court finds to be excessive or unnecessary. The novelty and difficulty of the question involved should normally be reflected by the number of hours reasonably expended on the litigation.
>
> The second half of the equation, which encompasses many aspects of the representation, requires the court to determine a reasonable hourly rate for the services of the prevailing party's attorney. In establishing this hourly rate, the court should assume the fee will be paid irrespective of the result, and take into account all of the Disciplinary Rule 2-106 factors except the time and labor required, the novelty and difficulty of the question involved, the results obtained, and [w]hether the fee is fixed or contingent. The party who seeks the fees carries the burden of establishing the prevailing "market rate," i.e., the rate charged in that community by lawyers of reasonably comparable skills, experience and reputation, for similar services.
>
> The number of hours reasonably expended, determined in the first step, multiplied by a reasonable hourly rate, determined in the second step, produces the lodestar, which is an objective basis for the award of attorney fees. Once the court arrives at the lodestar figure, it may add or subtract from the fee based upon a contingency risk factor and the results obtained.
>
> The contingency risk factor is significant in

> personal injury cases. . . . 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 trial 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.
>
> In determining the hourly rate, the number of hours reasonably expended, and the appropriateness of the reduction or enhancement factors, the trial court must set forth specific findings. If the court decides to adjust the lodestar, it must state the grounds on which it justifies the enhancement or reduction. 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. Application of the Disciplinary Rule 2-106 criteria in this manner will provide trial judges with objective guidance in the awarding of reasonable attorney fees and allow parties an opportunity for meaningful appellate review.

The Florida Supreme Court in Rowe reflected that the U. S. Supreme Court had sanctioned the use of the above factors by federal courts in calculating attorney fees in Hensley v. Eckerhart, 461 U.S. 424 (1983).

As the Rowe decision indicates, the first step is to determine the number of hours reasonably expended. The Court states that the party seeking the fee has the burden to demonstrate the hours expended. There are many decisions that have followed the Rowe case that explore the various factors and their impact on the calculation of attorney fees.

It is important to note that there must be a statute or an

agreement between the parties that will authorize attorney fees and that statute or agreement will determine the entitlement to attorney fees. Some statutes or agreements award attorney fees to prevailing parties and some award attorney fees for only one side of the litigation in certain types of cases. Once the entitlement is determined, there may be an adjustment for the "results obtained." There is extensive case law on the federal level also of the appropriate way to determine who is the "prevailing party." There is also much case law on how to make the appropriate reduction in attorney fees for partial success. The seminal point regarding adjustment for "results obtained" appears to be, as the Florida Supreme Court is quoted above, the evaluation of whether the claims (or issues) can be separated and adjusted for on an individual basis. For example, if a plaintiff wins on two claims, but loses three others, is he a "prevailing party?" If the claims he wins on are significant, he may be considered a prevailing party, in spite of failure on some claims.

The only conclusion that the cases suggest is that this determination must be made on a case by case basis. It cannot be made mechanically because one cannot look simply to the relief sought in terms of dollars or the rights sought to be vindicated or enforced. A plaintiff could file several different claims, all based on one set of facts, trying to use all possible avenues to achieve the same basic result. Obviously, it is likely that a plaintiff in such a situation would not prevail on all of the claims, but success on one such claim would certainly indicate that he is the prevailing party. It is important to recognize that the "prevailing party" determination goes to entitlement to attorney fees. The "results obtained" factor goes to an adjustment to attorney fees for which entitlement has already been determined. We will discuss this issue in relation to utility claims below.

How Do Attorney Fees Fit Into a Utility Regulatory Framework?

In terms of utility regulation, any authority to award attorney fees must come from the statute creating the utility regulatory body. For the Florida Public Service Commission, this authority must, if it exists for water and wastewater utilities, reside in Chapter 367, Florida Statutes. As previously stated, Section 367.081(7), Florida Statutes, contemplates that the Commission should allow reasonable rate case expense, but it does not address the question of whether appellate rate case expense is appropriate. This statute neither expressly authorizes nor expressly prohibits the award of appellate rate case expense. The Commission has certainly awarded reasonable rate case expenses on a regular basis for water and wastewater utilities, but such expenses have related to activities before the Commission, not appellate activities.

The only instance in which a water or wastewater utility has brought the issue of appellate rate case expense to the Commission was in January 1983 in the Rolling Oaks rate case. The Commission denied the request for appellate rate case expense on the basis that the request was first raised in a motion for reconsideration. The Commission, in Order No. 11530, stated that the utility had had the opportunity to raise its entitlement to appellate rate case expense at the appropriate time, but had not and thus could not do so on reconsideration. No request for appellate rate case expense by a water and wastewater utility has been filed since. We are also not aware of any case in the electric and gas or telecommunications industries where this specific question has been addressed by the Commission.

It is important to note that this issue has not arisen in the electric and gas or communications industries. There, appellate rate case expenses are typically included in the expenses recovered by those utilities for in-house counsel or are so insignificant for those very large utilities that their recovery is not pursued.

As it is clear that Section 367.081(7), Florida Statutes, does not expressly authorize or prohibit appellate rate case expense, one must look to the underlying theory of utility regulation to see if the statute implicitly authorizes or prohibits such expenses. For further guidance, Section 367.081(2)(a), Florida Statutes, provides for the inclusion of "operating expenses incurred in the operation of all property used and useful in the public service." The underlying theory of utility regulation as expressed in these provisions of Chapter 367, Florida Statutes, is that the Commission should permit the recovery of reasonable expenses incurred in the operation of the utility. When a utility comes to the Commission for a rate increase and receives an order that denies the rate increase or grants less of an increase than that to which the utility believes it is legally entitled, the utility is then afforded by Section 350.128, Florida Statutes, the right to appeal to the First District Court of Appeal. If the First District Court of Appeal overturns the Commission's order and requires an upward adjustment in the level of rates established for the utility, it suggests rather loudly that the appeal was a prudent action by the utility and that the attorney fees related to it would be reasonable.

As stated previously, the West Ohio Gas decision by the United States Supreme Court cited by Sunshine suggests that the Court agreed. The Court found there that any expenses incurred in a successful litigation ancillary to the administrative rate proceeding must be included in the operating costs attributed to the utility's rates.

Sunshine also cites to the Mayo case in support of its request. Arguably, the Mayo case can be used only in comparison; however, we have not relied on the Mayo case in reaching our decision. We believe that the circumstances presented in that case are distinguishable since that case involved a state agency's request to receive compensation for legal work, and not a utility's request. Based on those circumstances, the Florida Supreme Court stated that:

> Moreover, since counsel for the Commission and public counsel are compensated directly from the general revenue funds of the state, and counsel fees for the utilities have historically been treated as an expense of doing business chargeable to Floridian customers in setting rates, the legal costs of appellate review are borne by the citizens of Florida. Counsel in these cases have an obligation to conduct the affairs of their clients with some regard for the fiscal impact on those Floridians who pay their fees and salaries. (emphasis supplied) Id. at 37.

Summary and Findings

Based on all of the above, we could come to any of several conclusions. One conclusion that will end any further need to discuss the matter, is that because Chapter 367 does not expressly authorize the award of appellate rate case expense, such expenses should not be entertained by the Commission. Another conclusion could be that even if Chapter 367 could be read to authorize such expenses, they are not in the public interest because they would encourage so many unnecessary and imprudent appeals and, therefore, cannot be considered reasonable expenses to which utilities are entitled. However, we have come to another conclusion. We believe that Sections 367.081(2)(b) and (7) implicitly authorize, that the Commission award reasonable appellate rate case expense. The question then becomes "What is reasonable?"

The discussion above reflects that entitlement to attorney fees must be by statute or by agreement of the parties. In some statutes, it is the "prevailing party" who will be awarded attorney fees. However, pursuant to Section 367.081(7), Florida Statutes, a utility becomes entitled to attorney fees if the Commission determines that the fees are reasonable. Thus, there is no express requirement that the utility be the prevailing party. There are two conclusions that may be drawn from this. One is that utilities should receive reasonable attorney fees related to any and all appeals taken to Commission orders because it is the utility's right to appeal. Another conclusion is that

utilities are entitled to reasonable attorney fees that are incurred in a reasonable appeal.

Clearly, utilities take appeals that are unsuccessful that were prudent appeals to pursue. Also, it is evident that utilities are sometimes successful on appeals that might not have been the most prudent appeals to take. It is our belief that we are justified in depending upon the court's determination of success in making its determination of reasonableness or prudence. In other words, if a utility succeeds in an appeal, the Commission can fairly conclude it was prudent. On the other hand, if a utility fails in its appeal, the Commission can fairly assume it was not a prudent appeal. Because it is the ratepayers that bear the burden of appellate rate case expense, the Commission is justified in denying appellate rate case expense for appeals in which utilities are unsuccessful.

Because we find that this Commission may depend on success at the appellate level as a basis for determining the reasonableness of an appeal, we also conclude that reasonable appellate rate case expense can only mean expense related to issues on which the utility prevails. This is a difficult matter in application. This difficulty in determining on which issues the utility has prevailed is the same difficulty the courts have had in separating out different claims and making adjustments that relate to those on which the appellant has been unsuccessful. The only conclusion here is that each request must be reviewed on a case by case basis. If one issue is involved and the utility prevails, the utility should receive all of the reasonable attorney fees related to that appeal. If numerous issues are involved and they can be separated, the reasonable attorney fees related to the issues on which the utility has prevailed should be awarded.

Based on the foregoing analysis, we first find that the utility is entitled to some level of appellate rate case expense. Second, we find that the loadstar method is the appropriate method to use and is consistent with the method employed by the courts. Finally, we accept the theory that reasonable attorney fees should be awarded on the number of issues on which the utility has prevailed; and we have determined that Sunshine has prevailed on at least three of the five issues appealed.

At the May 5, 1994, agenda conference, Sunshine presented a calculation which used the loadstar method. Specifically, the utility's proposal provides that the original amount requested by the utility, $36,579, should be adjusted downward based on the results obtained. We believe the utility's calculation is consistent with the Rowe decision, and is an appropriate way to calculate the level of appellate rate case expense to be granted. Therefore, since Sunshine appealed five issues and was successful

on at least three of those issues, or sixty percent of its appeal, the appropriate reduction using the loadstar method is forty percent. Forty percent of the requested amount is $14,632. Using the loadstar formula, we find it appropriate to award Sunshine additional rate case expense in the amount of $21,947 ($36,579 - $14,632).

REVENUE REQUIREMENT

After making all of the adjustments discussed above, we find that the appropriate revised revenue requirement without the PAA portion of appellate rate case expense is $559,066. The revenue requirement including appellate rate case expense is $564,893. The revenue requirements are reflected on Schedule No. 3-A attached to this Order.

NO REFUND REQUIRED

By Order No. 25722, the Commission required the utility to refund a portion of the interim and pass-through revenues collected. As a result of the adjustments made in accordance with the DCA's opinion, the final revenue requirements now exceed both the interim and pass-through revenue requirements. Therefore, we find that no refund is necessary.

RATES AND CHARGES

The adjustments relating to the mandate have the result of producing one set of rates. The portion of the revenue increase resulting from those adjustments is not subject to protest and those rates may be implemented to the extent set forth below. However, the portion of the revenue increase representing the additional rate case expense is subject to protest and must be treated as proposed agency action. Therefore, we have included two separate sets of rates in the event the appellate rate case expense portion of the increase is protested. Both sets of rates are reflected on Schedule No. 4, attached to this Order.

The rates, resulting from the adjustments made in accordance with the DCA mandate, are designed to produce revenues of $559,066 for water, using the base facility charge rate structure. The approved rates shall be effective for service rendered on or after the stamped approval date on the tariff sheets, pursuant to Rule 25-30.475(1), Florida Administrative Code. The rates may not be implemented until proper notice has been received by the customers and upon our Staff's approval of the tariff sheets. The utility shall provide proof of the date notice was given within ten days

after the date of notice.

The rates, which include the appellate rate case expense, are designed to produce revenues of $564,893 for water, using the base facility charge rate structure. The approved rates shall be effective for service rendered on or after the stamped approval date on the tariff sheets, pursuant to Rule 25-30.475(1), Florida Administrative Code. The rates may not be implemented until proper notice has been received by the customers, upon expiration of the protest period, and upon our Staff's approval of the tariff sheets. The utility shall provide proof of the date notice was given within 10 days after the date of notice.

Statutory Rate Reduction

The amount of the four year rate reduction that was approved by the Commission in Order No. 25722 has been adjusted to reflect the appellate rate case expense. The water rates shall be reduced by $31,864 as shown in Schedule No. 5. The revenue reduction reflects the annual rate case amounts amortized (expensed) plus the gross-up for regulatory assessment fees.

The utility shall file revised tariff sheets no later than one month prior to the actual date of the required rate reduction. The utility shall also file a proposed "customer letter" setting forth the lower rates and the reason for the reduction. If the utility files this reduction in conjunction with a price index or pass-through rate adjustment, separate data shall be filed for the price index and/or pass-through increase or decrease and the reduction in the rates due to the amortized rate case expense.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that each of the findings made in the body of this Order is hereby approved in every respect. It is further

ORDERED that all matters contained in the schedules attached hereto are by reference incorporated herein. It is further

ORDERED that the provisions of this Order, except those related to the First District Court of Appeal's mandate, are issued as proposed agency action, and shall become final and effective unless an appropriate petition, in the form provided by Rule 25-22.036, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on the date set forth in the "Notice of Further Proceedings or Judicial Review" attached hereto. It is further

ORDERED that Sunshine Utilities of Central Florida, Inc.'s Motion for Recovery of Additional Rate Case Expense is granted to the extent set forth herein. It is further

ORDERED that Sunshine Utilities of Central Florida, Inc., is authorized to charge the new rates as set forth in the body of this Order. It is further

ORDERED that each set of rates shall be effective for service rendered on or after the stamped approval date on the tariff sheets pursuant to Rule 25-30.475(1), Florida Administrative Code. It is further

ORDERED that prior to its implementation of the rates approved herein, Sunshine Utilities of Central Florida, Inc. shall submit and have approved proposed customer notices of the increased rates and charges, and revised tariff sheets. It is further

ORDERED that Sunshine Utilities of Central Florida, Inc., may not implement the rates until proper notice has been received by the customers. It is further

ORDERED that prior to its implementation of the rates approved herein, Sunshine Utilities of Central Florida, Inc., shall provide proof of the date notice was given within 10 days of the date of notice. It is further

ORDERED that Sunshine Utilities of Central Florida, Inc.'s irrevocable letter of credit may be released. It is further

ORDERED that in the event the proposed agency action portion of this Order becomes final, this Docket shall be closed.

By ORDER of the Florida Public Service Commission, this 15th day of June, 1994.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

SFS/LAJ

Chairman J. Terry Deason dissents from the Commission's decision to allow the recovery of appellate or post-decision legal

fees and costs under the circumstances of this case. His dissent is set forth below.

As far as I know, this is a case of first impression before the Commission. I am not aware of these costs ever having been directly included by the Commission in customer rates. I dissent because of the lack of any policy that contemplates that expenses incurred on appeal will be allowed and the concerns that are discussed below.

The fact that this issue has been raised means that some forum for resolution of the issue needs to be provided. Setting this issue straight for hearing of course would almost certainly guarantee the incurrence of additional legal fees -- the recoverability of which would then become an issue before the Commission. On the other hand, I am uncomfortable with developing any policy in this area through a Proposed Agency Action process. Any party that might be adversely affected by the Commission's PAA order will have to risk incurring even higher rates through the incurrence of additional legal fees in order to decide whether additional legal fees should be allowed. That circumstance could have a chilling effect on a party's decision to protest the PAA and
allow full development of the issues and ramifications of the proposed policy. Certainly that is a consideration with any rate case PAA order. However, this is not a rate case PAA. The process adopted here virtually guarantees that a potentially protesting party would have to consider the possibility of several rounds of hearings on the issue of rate case expense. I believe that a rulemaking would provide a better forum for the development of policy in this area because of the legal fee problem.

I have a further concern that allowing post-decision cost recovery under these circumstances will send an incorrect signal and create an incentive for parties to take appeals that they might not otherwise take. More of a concern is that the incentive may be unfairly skewed since only one party -- the utility -- will be entitled to post-decision cost recovery. Any intervenor would be hesitant to take an appeal for which he would not only have to directly bear his own cost but also the utility's costs of responding to his appeal. (I do not assume that the Commission's decision distinguishes between costs incurred because the utility initiates an appeal or because it responds to an appeal. In fact I would assume that costs of defending against an appeal would be even more "recoverable" than those incurred by a utility initiated appeal.) Certainly the risk would also exist that an intervenor appeal would trigger a cross-appeal that would not have been filed absent the intervenor appeal. The bottom line is that the utility's appellate risk is virtually eliminated while the intervenor's risk is greatly increased.

This discussion of risk minimization brings me to my final point. I believe that because appeal costs have not overtly been included the rate case expense allowance in the past that they have historically been implicitly a risk component of the return on equity (ROE) allowed a utility. Even if that has not been the case, perhaps as a policy matter it would be better addressed there as a part of a rulemaking. Since these costs have not been traditionally included in the rate case expense allowance, it would be reasonable to assume that the marketplace does or should factor the traditional nonrecovery of appellate costs -- not unlike any other post decision cost -- into the risk assessment of a utility's operations. Regardless, I believe it would be a better policy to recognize these costs, if at all, in the allowed ROE. Whether the ROE yielded by the leverage graph does (or could be adjusted to) recognize that risk component, is -- like this issue generally -- probably a matter better explored in a rulemaking proceeding.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

As identified in the body of this order, our action with respect to granting the utility's request for additional rate case expense, is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting at his office at 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on July 6, 1994. In the absence of such a petition, this order shall become effective on the date subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If the relevant portion of this order becomes final and effective on the date described above, any party adversely affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

Any party adversely affected by the Commission's final action in this matter may request: (1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida

Administrative Code; or (2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

SUNSHINE UTILITIES OF CENTRAL FL
SCHEDULE OF WATER RATE BASE
TEST YEAR ENDED MAY 31, 1990

SCHEDULE NO. 1-A
DOCKET NO. 900386-WU

COMPONENT	UTILITY ADJUSTED TEST YEAR	ADJUSTMENTS	1990 TY PER ORDER NO. 25722	COMMISSION ADJUSTMENTS	COMMISSION ADJUSTED TEST YEAR
UTILITY PLANT IN SERVICE	$ 1,705,462	$ (405,071)	$ 1,300,391	$ 187,379	$ 1,487,770
LAND	61,474	0	61,474	0	61,474
NON-USED & USEFUL COMPONENT	(248,633)	80,356	(168,277)	(24,152)	(192,429)
ACCUM DEPRECIATION	(353,087)	72,902	(280,185)	(48,640)	(328,825)
C.I.A.C.	(652,522)	(280,753)	(933,275)	0	(933,275)
AMORTIZATION OF C.I.A.C.	71,694	49,279	120,973	0	120,973
ADVANCES FOR CONSTRUCTION	0	0	0	0	0
WORKING CAPITAL ALLOWANCE	59,969	(7,341)	52,628	4,199	56,827
RATE BASE	$ 644,357	$ (490,628)	$ 153,729	$ 118,786	$ 272,515

SUNSHINE UTILITIES OF CENTRAL FL
ADJUSTMENTS TO RATE BASE
TEST YEAR ENDED MAY 31, 1990

SCHEDULE NO. 1-B
DOCKET NO. 900386-WU

EXPLANATION	ADJUSTMENTS
UTILITY PLANT IN SERVICE	
To adjust for inclusion of profit and mark-up on labor and materials. 1983-1987	$ 187,379
NON-USED & USEFUL COMPONENTS	
To adjust for inclusion of plant 1983-1987	$ (24,152)
ACCUMULATED DEPRECIATION	
To adjust for inclusion of plant 1983-87.	$ (48,640)
WORKING CAPITAL	
To reflect adjustment for Working Capital	$ 4,199

SUNSHINE UTILITIES OF CENTRAL FL
CAPITAL STRUCTURE
TEST YEAR ENDED MAY 31, 1990

SCHEDULE NO. 2
DOCKET NO. 900386-WU

DESCRIPTION	ADJUSTED TEST YEAR PER UTILITY	WEIGHT	COST	WEIGHTED COST	ADJUSTMENTS TO UTILITY EXHIBIT	BALANCE PER COMMISSION	WEIGHT	COST	WEIGHTED COST
LONG TERM DEBT	$ 59,539	9.24%	11.00%	1.02%	$ (20,242)	$ 39,297	14.42%	11.00%	1.59%
SHORT TERM DEBT	81,704	12.68%	10.52%	1.33%	(27,777)	53,927	19.79%	10.52%	2.08%
CUSTOMER DEPOSITS	5,155	0.80%	8.00%	0.06%	(1,753)	3,402	1.25%	8.00%	0.10%
PREFERRED STOCK	0	0.00%	0.00%	0.00%	0	0	0.00%	0.00%	0.00%
COMMON EQUITY	497,959	77.28%	11.89%	9.19%	(322,071)	175,888	64.54%	11.89%	7.67%
INVESTMENT TAX CREDITS	0	0.00%	0.00%	0.00%	0	0	0.00%	0.00%	0.00%
DEFERRED INCOME TAXES	0	0.00%	0.00%	0.00%	0	0	0.00%	0.00%	0.00%
OTHER CAPITAL	0	0.00%	0.00%	0.00%	0	0	0.00%	0.00%	0.00%
TOTAL CAPITAL	$ 644,357	100.00%		11.60%	$ (371,842)	$ 272,515	100.00%		11.44%

RANGE OF REASONABLENESS	LOW	HIGH
EQUITY	10.89%	12.89%
OVERALL RATE OF RETURN	10.80%	12.09%

SUNSHINE UTILITIES OF CENTRAL FL
STATEMENT OF WATER OPERATIONS
TEST YEAR ENDED MAY 31, 1990

SCHEDULE NO. 3-A
DOCKET NO. 900386-WU

DESCRIPTION	UTILITY ADJUSTED TEST YEAR	COMMISSION ADJUSTMENTS	1990 TY PER ORDER NO. 25722	ADJUSTMENTS PER DCA OPINION	ADJUSTED 1990 TEST YEAR	REVENUE INCREASE OR (DECREASE)	REVENUE REQUIREMENT
OPERATING REVENUES	$ 849,235	$ (184,563)	$ 464,672	$ 0	$ 464,672	$ 100,221	$ 564,893
OPERATING EXPENSES						21.57%	
OPERATION AND MAINTENANCE	$ 479,753	$ (58,727)	$ 421,026	$ 33,587	$ 454,613	$	$ 454,613
DEPRECIATION	39,516	(17,618)	21,899	6,558	28,457		28,457
AMORTIZATION	0	0	0	0	0		0
TAXES OTHER THAN INCOME	55,219	(11,478)	43,741	2,388	46,129	4,510	50,639
INCOME TAXES	0	0	0	0	0	0	0
TOTAL OPERATING EXPENSES	$ 574,490	$ (87,824)	$ 486,666	$ 42,533	$ 529,199	$ 4,510	$ 533,709
OPERATING INCOME	$ 74,745	$ (96,739)	$ (21,994)	$ (42,533)	$ (64,527)	$ 95,712	$ 31,185
RATE BASE	$ 844,357		$ 153,729		$ 272,515		$ 272,515
RATE OF RETURN	11.60%		-14.31%		-8.27%		11.44%

SUNSHINE UTILITIES OF CENTRAL FL
ADJUSTMENTS TO OPERATING STATEMENT
TEST YEAR ENDED MAY 31, 1990

SCHEDULE NO. 3-B
DOCKET NO. 900386-WU

EXPLANATION		ADJUSTMENTS
OPERATIONS & MAINTENANCE EXPENSE		
A. To adjust officers salaries.		25,683
B. To adjust employee salaries for related company		2,417
C. Adjustment to increase rate case expense		5,487
NET ADJUSTMENT	$	33,587
DEPRECIATION EXPENSE		
To add back expense associated with disallowance of plant 1983-1987.	$	6,558
TAXES OTHER THAN INCOME		
To reflect payroll taxes of 8.5% related to the above adjustment to salaries.	$	2,388
OPERATING REVENUES		
To adjust revenues to reflect an allowance of a fair rate of return.	$	100,221
TAXES OTHER THAN INCOME		
To reflect regulatory assessment fees related to adjustment to revenues.	$	4,510

SCHEDULE NO. 4
Page 1 of 2

RATE SCHEDULE
WATER

UTILITY: Sunshine Utilities of Central Florida
COUNTY: Marion
TEST YEAR ENDED: May 31, 1990

MONTHLY RATES

ALL SYSTEMS EXCEPT LAKEVIEW HILLS AND WHISPERING SANDS

	Utility Prior to Filing	Commission Approved Interim	(1) Commission Approved Pass-Through	Commission Approved Final Per Order No. 25722	(2) Commission Approved Final per DCA Opinion	(3) Commission Approved Final per DCA plus Rate Case Expense
Residential and General Service						
Base Facility Charge:						
Meter Size:						
5/8"x3/4"	$6.96	$8.12	$8.29	$7.24	$8.02	$8.23
1"	$17.43	$20.34	$20.77	$18.10	$20.05	$20.58
1-1/4"	$26.15	$30.51	$31.15	$27.15	$30.08	$30.86
1-1/2"	$34.84	$40.65	$41.50	$36.20	$40.10	$41.15
2"	$55.76	$65.06	$66.42	$57.92	$64.16	$65.84
3"	$111.32	$129.89	$132.60	$115.84	$128.32	$131.68
4"	$174.26	$203.33	$207.58	$181.00	$200.50	$205.75
6"	$389.77	$454.78	$464.28	$362.00	$401.00	$411.50
Gallonage Charge per 1,000 Gallons	$1.78	$2.08	$2.12	$1.82	$2.01	$2.01
			Typical Residential Bills			
5/8" x 3/4" meter						
3 M	$12.30	$14.36	$14.65	$12.70	$14.05	$14.26
5 M	$15.86	$18.52	$18.89	$16.34	$18.07	$18.28
10 M	$24.76	$28.92	$29.49	$25.44	$28.12	$28.33

LAKEVIEW HILLS (4)

	Utility Prior to Filing	Commission Approved Interim	(1) Commission Approved Pass-Through	Commission Approved Final Per Order No. 25722	(2) Commission Approved Final per DCA Opinion	(3) Commission Approved Final per DCA plus Rate Case Expense
Residential and General Service						
Base Facility Charge:						
Meter Size:						
5/8"x3/4"	$6.29	$7.34	$7.49	$7.24	$8.02	$8.23
1"	$15.73	$18.35	$18.73	$18.10	$20.05	$20.58
1-1/2"	$31.46	$36.71	$37.48	$36.20	$40.10	$41.15
2"	$50.34	$58.74	$59.97	$57.92	$64.16	$65.84
Gallonage Charge per 1,000 Gallons	$0.89	$1.04	$1.06	$1.82	$2.01	$2.01
			Typical Residential Bills			
5/8" x 3/4" meter						
3 M	$8.96	$10.46	$10.67	$12.70	$14.05	$14.26
5 M	$10.74	$12.54	$12.79	$16.34	$18.07	$18.28
10 M	$15.	$17.74	$18.09	$25.[illegible]	$28.12	$28.33

RATE SCHEDULE
WATER

UTILITY: Sunshine Utilities of Central Florida
COUNTY: Marion
TEST YEAR ENDED: May 31, 1990

WHISPERING SANDS

	(5) Utility Prior to Filing	(5) Commission Approved Interim	(1,5) Commission Approved Pass-Through	(6) Commission Approved Final Per Order No. 25722	(2,6) Commission Approved Final per DCA Opinion	(3,6) Commission Approved Final per DCA plus Rate Case Expense
Multi-Residential (Quadruplexes only)						
Base Facility Charge:						
Meter Size:						
Per Unit (Flat Rate)	$6.30	$7.35	$7.50	---	---	---
Per Quad (Flat Rate)	$25.20	$29.40	$30.01	---	---	---
5/8"x3/4"	---	---	---	$7.24	$8.02	$8.23
1"	---	---	---	$18.10	$20.05	$20.58
1-1/4"	---	---	---	$27.15	$30.08	$30.86
1-1/2"	---	---	---	$36.20	$40.10	$41.15
2"	---	---	---	$57.92	$64.16	$65.84
3"	---	---	---	$115.84	$128.32	$131.68
4"	---	---	---	$181.00	$200.50	$205.75
6"	---	---	---	$362.00	$401.00	$411.50
Gallonage Charge per 1,000 Gallons	---	---	---	$1.82	$2.01	$2.01
			Typical Residential Bills			
5/8" x 3/4" meter						
3 M	$6.30	$7.35	$7.50	$12.70	$14.05	$14.26
5 M	$6.30	$7.35	$7.50	$16.34	$18.07	$18.28
10 M	$6.30	$7.35	$7.50	$25.44	$28.12	$28.33

SCHEDULE NO. 5
Page 1 of 2

UTILITY: Sunshine Utilities of Central Florida
COUNTY: Marion
TEST YEAR ENDED: May 31, 1990

SCHEDULE OF COMMISSION APPROVED RATES
AND RATE DECREASE IN FOUR YEARS

WATER

Monthly Rates

ALL SYSTEMS EXCEPT LAKEVIEW HILLS AND WHISPERING SANDS

	Commission Approved Final Rates	Rate Decrease
Residential and General Service		
Base Facility Charge:		
Meter Size:		
5/8"x3/4"	$8.23	$0.46
1"	$20.58	$1.16
1-1/4"	$30.86	$1.74
1-1/2"	$41.15	$2.32
2"	$65.84	$3.71
3"	$131.68	$7.43
4"	$205.75	$11.61
6"	$411.50	$23.21
Gallonage Charge per 1,000 Gallons	$2.01	$0.11

LAKEVIEW HILLS

	Commission Approved Final Rates	Rate Decrease
Residential and General Service		
Base Facility Charge:		
Meter Size:		
5/8"x3/4"	$8.23	$0.46
1"	$20.58	$1.16
1-1/2"	$41.15	$2.32
2"	$65.84	$3.71
Gallonage Charge per 1,000 Gallons	$2.01	$0.11

UTILITY: Sunshine Utilities of Central Florida
COUNTY: Marion
TEST YEAR ENDED: May 31, 1990

SCHEDULE OF COMMISSION APPROVED RATES
AND RATE DECREASE IN FOUR YEARS

WATER

Monthly Rates

WHISPERING SANDS

	Commission Approved Final Rates	Rate Decrease
Multi-Residential (Quadruplexes only)		
Base Facility Charge:		
Meter Size:		
5/8"x3/4"	$8.23	$0.46
1"	$20.58	$1.16
1-1/4"	$30.86	$1.74
1-1/2"	$41.15	$2.32
2"	$65.84	$3.71
3"	$131.68	$7.43
4"	$205.75	$11.61
6"	$411.50	$23.21
Gallonage Charge per 1,000 Gallons	$2.01	$0.11

It is ordered that this matter is remanded to the trial court to review the evidence and testimony presented at the evidentiary hearing conducted on December 11 and 12, 1990, pursuant to the standard of review announced in *Jones*. *See Stone v. State*, 616 So.2d 1041 (Fla. 4th DCA 1993).

DANAHY, A.C.J., and ALTENBERND and BLUE, JJ., concur.

SUNSHINE UTILITIES OF CENTRAL FLORIDA, INC., Appellant,

v.

FLORIDA PUBLIC SERVICE COMMISSION, Appellee.

No. 92–631.

District Court of Appeal of Florida, First District.

Aug. 30, 1993.

Water utility sought review of final order of Public Service Commission (PSC), approving application for lower rate increase than requested. The District Court of Appeal, Ervin, J., held that: (1) evidence supported imputation of sum to "contributions in aid of construction" (CIAC) and subsequent deduction of sum from rate base; (2) evidence, though conflicting, supported finding that related construction company was not legitimate, separate business from water utility, which supported deduction from rate base for markup and profit paid for construction of plants; (3) evidence did not support reduction of proposed increase in salary of water utility's president; and (4) failure to allocate any administrative costs to related water utility supported rejection of proposed allocation of employee salaries.

Affirmed in part, reversed in part, and remanded.

Zehmer, C.J., concurred and dissented with written opinion.

Webster, J., specially concurred with written opinion.

1. Waters and Water Courses ⇐203(6)

Evidence supported imputation of sum to "contributions in aid of construction" (CIAC) and subsequent deduction of sum from water utility's rate base, in light of water utility's inability to establish investment of imputed amount due to inadequate or incomplete records; checks and invoices only proved original value of plant in question, but did not indicate source of funds, and tax returns did not indicate that CIAC had been considered. West's F.S.A. § 367.081(2)(a).

2. Waters and Water Courses ⇐203(11)

Public Service Commission (PSC) had prerogative to evaluate conflicting evidence and to assign whatever weight to evidence that it deemed necessary in proceedings for water utility rate increase.

3. Waters and Water Courses ⇐203(6)

Public Service Commission (PSC) imputed sum to "contributions in aid of construction" (CIAC), and subsequently deducted sum from water utility's rate base, due to utility's failure to prove investment of sum, rather than as unauthorized sanction for utility's failure to maintain necessary records. West's F.S.A. § 367.081(2)(a).

4. Waters and Water Courses ⇐203(6)

Evidence, though conflicting, supported finding that related construction company was not legitimate, separate business from water utility, which supported deduction from utility's rate base for markup and profit paid for construction of plants; related construction company built plants solely for water utility, used utility company's employees without paying salaries, paid no taxes or insurance, and reported no salaries, overhead or substantial depreciable assets.

5. Stipulations ⇐14(10)

Public Service Commission (PSC) was bound in water utility rate proceedings by

prior stipulation between PSC and utility company on reasonableness of amount of original cost of plant additions included in rate base; PSC's failure to determine that construction company was not legitimate, separate company from water utility was result of lack of due diligence rather than mistake of fact.

6. Stipulations ⇐13

Party generally will be relieved from stipulation entered into under mistake of material fact, if there has been reasonable diligence exercised to ascertain that fact, but not if party entered agreement merely due to lack of full knowledge of facts out of failure to exercise due diligence to ascertain them.

7. Waters and Water Courses ⇐203(11)

Evidence did not support reduction of proposed increase in salary of water utility's president during proceedings for utility rate increase, absent consideration of fact that president's prior income had been derived in part from another source, and absent discussion of duties and responsibilities of other executives whose salaries were used by Public Service Commission (PSC) to compare with proposed increase for utility's president.

8. Waters and Water Courses ⇐203(6)

Reasonableness of salary of water utility's executive compared to salaries paid to other company executives must be based at minimum on showing of similar duties, activities, and responsibilities.

9. Waters and Water Courses ⇐203(11)

Water utility's failure to allocate any administrative costs to related water utility supported rejection of proposed allocation of employee salaries for purposes of proposed rate increase.

10. Waters and Water Courses ⇐203(6)

Best method for allocation of employee expenses between related water utilities was to base allocation on actual time expended in work done for each utility.

11. Waters and Water Courses ⇐203(6)

Allocation of amount of employee salaries between related water utilities for administrative work could be based on total number of customer connections or equivalent residential connections (ERCs) for each utility, if evidence was lacking on actual time expended in work done for each utility.

Michael L. Rosen and D. Bruce May of Holland & Knight, Tallahassee, for appellant.

Robert D. Vandiver, General Counsel, Richard C. Bellak, Associate Gen. Counsel, Florida Public Service Com'n, Tallahassee, for appellee.

ERVIN, Judge.

Appellant, Sunshine Utilities of Central Florida, Inc., seeks review of a final order of the Florida Public Service Commission (PSC or Commission), approving appellant's application for a rate increase, but at a rate less than that requested. Appellant specifically challenges certain reductions to its rate base, including a deduction of $280,753 which was imputed to contributions-in-aid-of-construction (CIAC); deletions for disallowance of markup and profit on construction of plants for appellant by a related company, Water Utilities, Inc. (WUI), from 1983 to 1990; a decrease in the president's proposed salary from $69,055 to $43,372; and a disallowance for an increased allocation of employee salaries to a related utility, Heights Water Company (Heights). We affirm in part, and reverse and remand in part.

Sunshine is a "Class B" water utility company which operates more than 20 separate water plants and serves customers in Marion County. The company is wholly owned by James Hodges, Jr., and his wife, Clarise. They also own Heights, a water utility operating two plants in Citrus County, and WUI, a construction company that builds water plants and distribution systems solely for Sunshine. Before May 5, 1981, the date the PSC assumed jurisdiction over Marion County water utilities, the Hodges operated the water systems under separate names, all of which were regulated by Marion County. In September 1981, the Hodges applied for certification of the water systems with the PSC.

In attempting to determine the utility's initial rate base, the PSC found Sunshine's records to be incomplete, and the PSC staff

decided to ascertain the base by conducting an "original cost study," a procedure the PSC customarily employs whenever it is necessary to establish the initial rates for a utility that has maintained incomplete or inadequate records. In performing its study, the PSC staff audits the available records, and, in situations wherein specific proof of investment is nonexistent, it uses adjusted estimates of plant values in order to fix the rate base, including the owner's capital investment (equity or debt) and CIAC. The PSC's study culminated in the issuance of Order No. 13014 on February 20, 1984, setting the original rate base at $322,924. This figure was arrived at in part by appraising the total value of Sunshine's facilities as of December 31, 1982 in the amount of $615,858, a sum $280,753 more than the amount reflected in the company's records ($335,105).

In reviewing Sunshine's 1987 annual report, the PSC staff later discovered an error in Order No. 13014 in regard to the $280,753 difference between book and PSC value of the facilities. The error was apparently uncovered when Sunshine changed accountants, and the new accountant reported the $280,753 difference in a manner different from previous reports. As the utility had failed to prove any investment in the $280,753 figure during the original cost study, the staff concluded that it was CIAC, and that this amount had been erroneously omitted from CIAC in the PSC's original cost study order. *See Sunshine Utils. v. Florida Pub. Serv. Comm'n*, 577 So.2d 663, 664–65 & nn. 2 & 3 (Fla. 1st DCA 1991) (*Sunshine I*).

As a result of the above error, the Commission initiated an overearnings investigation on August 30, 1988. That investigation culminated in Order No. 22969, issued on May 23, 1990, which found overearnings from August 30, 1988 through December 31, 1989, and required Sunshine to refund those overearnings. *Id.* In so ordering, the PSC adopted the staff's position regarding the $280,753 CIAC adjustment error. The PSC decided that Sunshine had the burden of proving actual investment (equity or debt) in the $280,753 amount, and that Sunshine had failed to meet its burden, both during the original cost study and the overearnings proceeding. *Id.* at 665 n. 3. This court affirmed the above order on appeal, and the supreme court denied certiorari review. *Sunshine I; Sunshine Utils. v. Public Serv. Comm'n*, 589 So.2d 293 (Fla.1991).

While the overearnings/refund appeal was pending, Sunshine filed an application for a rate increase on October 1, 1990. In Order No. 24484, filed on May 7, 1991, the PSC gave notice of its proposed action, namely, that it would grant an increase, but in an amount less than that requested. In reaching its preliminary decision, the PSC indicated that the following items would be excluded from rate base: $280,753 in adjusted CIAC; profit and markup paid to WUI on plant additions; a reduction in the requested president's salary; and a reduction for the expense of employee salaries, because Sunshine's employees were shared with the related utility, Heights. Following an administrative hearing, the PSC issued Order No. 25722, adopting the recommended reductions, which is the subject of the current appeal. We address separately each of the points raised.

A. *Deduction for $280,753 in Imputed CIAC.*

[1] The Commission determined in the rate-increase case that the utility had again been unsuccessful in attempting to establish investment in the $280,753 figure, and therefore classified the sum as CIAC, causing it to be deducted from rate base.[1] We conclude

1. Section 367.081(2)(a), Florida Statutes (1989), requires the commission to fix rates which are "just, reasonable, compensatory, and not unfairly discriminatory." In so doing, "the commission shall not allow the inclusion of contributions-in-aid-of-construction [CIAC] in the rate base of any utility during a rate proceeding." It has been the PSC's policy to impute CIAC in those situations where the actual amount of CIAC has not been recorded on the utility's books, and the utility fails to submit evidence of the actual amount of CIAC it has received. *Florida Waterworks Ass'n v. Florida Pub. Serv. Comm'n*, 473 So.2d 237, 243 (Fla. 1st DCA 1985) (affirmance of order upholding rules relating to imputing of CIAC), *review denied*, 486 So.2d 596 (Fla.1986). *See also Rolling Oaks Utils., Inc. v. Public Serv. Comm'n*, 418 So.2d 356, 357–58 (Fla. 1st DCA 1982) (where record showed that utility collected $500 for each lot sold in a subdivision it serviced,

that there is competent, substantial evidence (CSE) in the record to support the PSC's determination and therefore affirm on this point. PSC witness Willis testified that the Commission had erred in its original cost study by not designating the $280,753 difference between the determined value and book value of the plants as CIAC. It was, moreover, the utility's burden to prove investment in that sum, or the PSC could impute it as CIAC. Because the utility was unable to prove investment due to the condition of its books and records, the PSC imputed the sum as CIAC in the earlier overearnings case. Willis testified that the utility had presented nothing during the later rate-increase case which should cause the Commission to change its imputation of that amount to CIAC.

[2] As it had done in the prior proceeding, Sunshine presented checks and invoices for expenses, but, as Willis explained, these documents only proved the original value of the plant; they did not show the source from which the funds were received to pay the invoices and checks. As for the tax returns Mr. Hodges submitted, Willis reviewed them and stated that he did not know whether they had included CIAC. Nothing in the returns indicated that CIAC had been considered, and Sunshine's accountant, Robert Nixon, presented no underlying documents to show the contrary. Admittedly, utility witness Nixon gave conflicting testimony, but it was the PSC's prerogative to evaluate the conflicting evidence and assign whatever weight it deemed necessary. *United Tel. Co. v. Mayo*, 345 So.2d 648 (Fla.1977); *Gulf Power Co. v. Florida Pub. Serv. Comm'n*, 453 So.2d 799 (Fla.1984).

[3] We reject appellant's arguments regarding the impossibility of its burden, the imposition of a penalty for not complying with PSC record-keeping requirements, and the retroactive application of a new CIAC standard. When a utility falls within PSC's jurisdiction, an original rate base must be set. The law clearly establishes that the utility has the burden of proving its investment. *Florida Waterworks Ass'n v. Florida Pub. Serv. Comm'n*, 473 So.2d 237, 243 (Fla. 1st DCA 1985) (burden is on utility to prove CIAC), *review denied*, 486 So.2d 596 (Fla. 1986). Here, CIAC was imputed not as a sanction for the utility's failure to maintain records in accordance with PSC standards, but simply because Sunshine was unable to prove its investment. Thus, the substantial obstacle which Sunshine encountered in seeking to satisfy its burden was the result of its own inadequate record keeping. Finally, because this is a *new* proceeding which was commenced by the filing of Sunshine's application for a rate increase, effective October 1, 1990, the application of CIAC standards existing at that time cannot be said to be retroactive.

B. *Deduction of Markup and Profit Paid to WUI.*

In its final order, the PSC found that the $206,790 paid to WUI for markup and profit on construction of plant additions from 1988 through 1990 was unreasonable, and reduced the utility's rate base by such amount. In addition, the PSC similarly concluded that $187,379 should be deducted from the utility's rate base for markup and profit paid to WUI during the years 1983–87. These deductions were supported by findings that WUI was not a legitimate, separate business.

[4] As for the deduction for payments made to WUI during 1988–90, there is CSE to support the Commission's action. PSC witness Forbes testified that Sunshine's books could not readily support plant additions. His review of the audit showed that WUI built the bulk of the plant and distribution system additions. WUI added overhead markup and profit markup to material costs, and added as well an allowance for labor charges. These costs were calculated by taking the cost of materials, plus 20 percent markup for overhead, and increasing the amount by 20 percent for profit. The labor allowance was calculated based on how many linear feet of water line were installed. Forbes considered this procedure suspect for several reasons. First, WUI uses Sunshine

PSC held such to be CIAC based on utility's failure to adduce evidence that fees were collected for some reason other than to finance construction).

employees to perform the construction without paying salaries. Second, WUI does not perform construction for any other entities; Sunshine is its only customer. WUI reports no officers' salaries, rents, interest expense, employee benefits, or miscellaneous expenses. It paid no taxes or insurance in 1988 or 1990. In having no salaries, overhead, or any substantial depreciable assets, WUI obviously does not operate in a manner similar to a full-time construction company. Forbes testified that it appears that WUI does not do anything for Sunshine that Sunshine could not do for itself, and that it was questionable whether Sunshine could justify the overstated amounts included on plant additions. He therefore concluded that there appeared to be no reason for Sunshine to engage in operations with WUI except to provide the owner with a profit, and that the Commission should consider deducting $206,790 in plant-in-service for the period 1988–90.

Although there is evidence in the record which conflicts with the above evidence, namely, the testimony from utility witnesses Hodges, Schneider, and Nixon, who all stated that the costs were reasonable and that the use of WUI saved Sunshine substantial expense, as well as evidence from after-the-fact bids received from outside contractors, the PSC has the prerogative to evaluate conflicting testimony and accord it whatever weight it deems appropriate. *Mayo, Gulf Power Co.* Based upon the foregoing evidence, the order is affirmed as to the deduction for this period.

[5] In regard to the PSC's deduction of $187,379 from Sunshine's rate base due to markup and profit paid to WUI during the years 1983–87, we reverse. Although there was evidence before the Commission from which it could lawfully conclude, as it had for the years 1988–90, that WUI was not a legitimate, separate business, we consider that the PSC is bound by the stipulation it made during the earlier 1988 overearnings case in regard to the period from 1983–87. There the Commission agreed that "[n]o adjustment is necessary to reflect the original cost of plant additions booked from 1983 to 1987. Based upon the information submitted by the Utility, the amount of plant additions booked during that time appear reasonable."

[6] The only reason the PSC offered to disregard the parties' stipulation was Willis's statement that the issue had not been fully explored during the overearnings case, because staff believed WUI was a legitimate construction company which performed construction for other companies besides Sunshine. The general rule is that a party will be relieved from a stipulation entered into under a mistake as to a material fact, if there has been reasonable diligence exercised to ascertain such fact. On the other hand, if a party enters into an agreement, not as a result of a mistake of fact, but merely due to a lack of *full* knowledge of the facts, caused by the party's failure to exercise due diligence to ascertain them, there is no proper ground for relief. *See Fawaz v. Florida Polymers*, 622 So.2d 492, 495 (Fla. 1st DCA 1993).

In the case at bar, we find no basis to relieve the Commission of its stipulation based upon its mistake, because we conclude that the Commission failed to exercise due diligence prior to entering into the stipulation. In 1981, the PSC staff initiated an original cost study to determine Sunshine's initial rate base, which took two years. The overearnings investigation launched on August 30, 1988, culminated in the PSC's imputation of $280,753 to CIAC. The Commission had ample time during the above investigations to ascertain whether WUI was a legitimate construction company. Yet it did not, and we consider that its failure to do so is attributable to lack of due diligence in ascertaining the true extent of WUI's operations. We therefore conclude that the PSC must be bound by its stipulation that the cost of plant additions for the 1983–87 period was reasonable; consequently, we reverse the Commission's deduction of $187,379 for that period.

C. *Reduction of Requested Salary for President.*

[7] In its final order, the PSC rejected Sunshine's proposed $69,055 salary for its president, approving a salary of $43,372 instead. In so doing, the Commission found that the utility had failed to present any

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evidence supporting the substantial increase in salary, nor had Sunshine established that the president's duties had so expanded as to justify the requested addition.

The Commission's decision is based on PSC witness Willis's testimony, who stated that the president's salary had increased dramatically, from $41,704 to $64,386, for the years 1989–90, revealing a 54.38 percent increase.[2] Moreover, the proposed salary of $69,055 displayed a 65.58 increase from 1989. He stated that no reason had been given for such a substantial amount. In considering the reasonableness of the proposed salary, Willis compiled a study of various presidents of other utilities in the area, which showed the average president's salary to be $35,396. He asserted that the average was not comparable to the proposed salary at bar, thus "competitive salaries" could not be used to justify the increase. He consequently recommended a five percent increase of the 1989 salary from $41,704 to $43,474.

[8] We do not consider the above testimony to constitute CSE to reduce the proposed salary. Willis's calculation of the president's salary for 1989 is flawed, because he did not consider that portion of Hodges' 1989 income derived from draws taken prior to Sunshine's incorporation; yet, Hodges' income in 1989 was, in fact, derived in part from a draw and in part from salary. There was also a flaw in Willis's comparison of Hodges' salary with the salaries of other presidents. In determining whether an executive's salary is reasonable compared to salaries paid to other company executives, the comparison must, at the minimum, be based on a showing of *similar* duties, activities, and responsibilities in the person receiving the salary. *Metropolitan Dade County Water & Sewer Bd. v. Community Utils. Corp.*, 200 So.2d 831, 833 (Fla. 3d DCA 1967). There is no discussion regarding the duties and responsibilities of the other executives contained on Willis's comparison list. Moreover, Willis admitted that some of the executives included on his comparison list do not work full time, as does Hodges, and that he did not account for this in his comparison. Nixon and Hodges each testified that many of the presidents listed do not work full time, and that many of the itemized utilities are not comparable in size to Sunshine. In fact, Hodges testified that only Marion Utilities, which operates 24 plants, was comparable to Sunshine, which operates 23 plants in Marion County, and it paid its president $67,334. The largest number of plants any of the remaining utilities had was six.

In conclusion, we reverse on this point because the reduction in the president's salary is not supported by CSE. *See, e.g., Florida Crown Util. Servs., Inc. v. Utility Reg. Bd. of City of Jacksonville*, 274 So.2d 597 (Fla. 1st DCA 1973) (error to reduce management fee from $12,500 to $5,400); *Westwood Lake, Inc. v. Metropolitan Dade County Water & Sewer Bd.*, 203 So.2d 363 (Fla. 3d DCA 1967) (no CSE to support order reducing salaries of utility executives from $18,000 to $12,000).

D. *Allocation of Employee Salaries.*

[9] In its final order, the PSC rejected Sunshine's allocation of employee salaries between Sunshine and Heights, because it failed to include any allocation for administrative costs to Heights, and reduced the rate base by $6,692 for salaries and $572 for payroll taxes attributable to Heights. In so doing, the Commission calculated allocation of employee salaries between Sunshine and Heights by using the total number of customer connections or equivalent residential connections (ERCs) for each utility.

Initially, there is CSE to support the Commission's decision to reject Sunshine's allocation of employee salaries. The evidence discloses that Heights did not have its own offices and that Sunshine's employees were used to work for Heights. Sunshine allocated $770 for employee salaries to Heights, which represented actual time Sunshine maintenance employees spent doing Heights work, yet no allocation was made concerning administrative time. This flaw in Sunshine's calculations, which utility witnesses Schneid-

2. PSC witness Forbes similarly testified that Mr. Hodges' salary had increased 77.79 percent between 1989 and 1990.

er and Nixon admitted and PSC witness Willis confirmed, supports the PSC's decision rejecting Sunshine's allocation.

[10] We reverse, however, based on the manner in which the PSC computed the allocation. PSC witness Willis agreed with utility witness Nixon that the best way to allocate employee expense was actual time expended, and, as indicated by Schneider and Nixon's testimony, actual time sheets were submitted to support the allocation of $770 to Heights for maintenance work.[3] Thus, there is no CSE to support the allocation of employee salaries based on ERCs as to the maintenance work done by Sunshine employees for Heights. *See General Tel. Co. of Fla. v. Florida Pub. Serv. Comm'n*, 446 So.2d 1063, 1068 (Fla.1984) (when determining amount of income tax expense to be allocated to a utility during ratemaking, PSC attempts to ascertain a pragmatic figure which reflects actual cost to the utility); *Citizens of Fla. v. Hawkins*, 356 So.2d 254, 260 n. 18 (Fla.1978) (in determining allocation of income tax from parent utility to subsidiary, PSC noted that actualities are preferred over hypotheticals).

[11] As to the amount of salaries allocated for administrative work performed for Heights, however, the record is uncontradicted that Sunshine did not provide evidence of same, and Willis testified that the PSC's standard procedure in such instances is to calculate an allocation based on ERCs. Thus, the record supports the PSC's decision to allocate administrative employees' salaries based on ERCs. We therefore reverse the order as to the adjustment for employee salaries and remand with directions to calculate field work by actual time and administrative work by ERCs.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

ZEHMER, C.J., concurs and dissents with written opinion.

WEBSTER, J., specially concurs with written opinion.

3. PSC witness Forbes also testified that actual time was documented when Sunshine employees worked at Heights.

ZEHMER, Chief Judge (concurring and dissenting).

I concur in parts C and D of the majority opinion reversing the reduction of the president's salary and reversing the allocation of employee's salaries.

I dissent, however, from the affirmance in parts A and B of that opinion. I would reverse the imputed CIAC discussed in part A because the Commission's decision placed an impossible burden on Sunshine Utilities to prove a negative, i.e., that the expenditures for construction of the facilities, although shown to be from Sunshine's owner's assets, did not derive from indirect contributions by others that might be characterized as CIAC. I would likewise reverse on the disallowance of markup and profit for the period 1988 through 1990 paid to WUI, as discussed in part B of the opinion. There is no question that WUI constructed portions of Sunshine's plant facilities, yet the Commission's order disallows overhead and profit markup on these items. There is no basis for finding that the disallowed markups were unreasonable for this type of construction business. I see no rational basis for witness Forbes's testimony, on which the Commission relied in reaching its conclusion.

WEBSTER, Judge, specially concurring.

I concur in Judge Ervin's analyses and conclusions in all respects, save one. I am unable to agree with the analysis, contained in part B of the opinion, which addresses deduction by the Public Service Commission of $187,379.00 from Sunshine's rate base due to markup and profit paid to Water Utilities, Inc., during the years 1983–1987. In my opinion, the discussion at that point incorrectly states the law relating to the circumstances which will permit relief from a stipulation. *See Fawaz v. Florida Polymers*, 622 So.2d 492, 496 (Fla. 1st DCA 1993) (Webster, J., dissenting). However, I am, nevertheless, able to concur in Judge Ervin's conclusion as to that issue because, in my opinion, the record does not contain competent substan-

tial evidence to support the Commission's decision.

JACKSONVILLE PORT AUTHORITY, CITY OF JACKSONVILLE, Appellant,

v.

W.R. JOHNSON ENTERPRISES, INC., d/b/a Johnson/American, Appellee.

No. 92-2288.

District Court of Appeal of Florida, First District.

Aug. 30, 1993.

Rehearing Denied Oct. 14, 1993.

Machinery contractor brought action against port authority for breach of contract to provide installation services on project. The Circuit Court for Duval County, Michael Weatherby, J., entered judgment on jury verdict finding that authority breached contract, and authority appealed. The District Court of Appeal, Wolf, J., held that evidence did not establish existence of binding agreement between parties as to installation phase of project.

Reversed.

Contracts ⇐9(1)

While it is not necessary that all details of agreement be fixed in order to have binding agreement between parties, if there has been no agreement as to essential terms, enforceable contract does not exist.

Contracts ⇐9(1)

Failure to sufficiently determine quality, quantity, or price may preclude finding of enforceable agreement.

3. Contracts ⇐15

Where parties are continuing to negotiate as to essential terms of quality, quantity, or price, there can be no meeting of minds.

4. Navigable Waters ⇐14(2)

Evidence did not establish existence of binding agreement between port authority and machinery contractor for installation of machinery even though parties initially agreed that contractor was to perform both initial work on project as well as installation work and even though contractor in fact performed initial work; scope of work for installation phase of project was not presented until after parties established relationship, and changes continued to be made after that time; moreover, there was never agreed-upon price for work on installation phase, and correspondence between parties indicated that negotiations were ongoing.

Charles W. Arnold, Jr., Gen. Counsel, Bruce Page, Asst. Gen. Counsel, Jacksonville, for appellant.

Stephen C. Bullock and Alan K. Ragan of Marks, Gray, Conroy & Gibbs, P.A., Jacksonville, for appellee.

WOLF, Judge.

Jacksonville Port Authority (JPA) challenges a final judgment based on a jury verdict, finding that JPA breached its contract with W.R. Johnson Enterprises, Inc. (appellee). JPA asserts a number of issues on appeal, one of which we find dispositive: whether the trial court erred in failing to grant JPA's motion for directed verdict where the evidence failed to demonstrate mutual agreement on essential elements of the purported agreement. We find merit as to this point and reverse.

The dispute arises in connection with a project to inspect and repair one of JPA's container cranes used to off-load ships.

The project was considered to be an emergency and, thus, JPA did not go through a formal bidding process, but instead authorized its purchasing agents to spend up to $1,250,000 in order to complete the project. The fourteen-month project, begun in April

UTILITY NAME: Sunshine Utilities of Central Florida, Inc.

YEAR OF REPORT
December 31, 2001

COMPENSATION OF OFFICERS

For each officer, list the time spent on respondent as an officer compared to time spent on total business activities and the compensation received as an officer from the respondent.

NAME (a)	TITLE (b)	% OF TIME SPENT AS OFFICER OF THE UTILITY (c)	OFFICERS' COMPENSATION (d)
James H. Hodges	PRESIDENT	(See Attachment E-6A)	$ 97,731
Clarise G. Hodges	VICE PRESIDENT	(See Attachment E-6A)	50,962
James H. Hodges, Jr.	SEC./TREAS.	(See Attachment E-6A)	NONE

COMPENSATION OF DIRECTORS

For each director, list the number of director meetings attended by each director and the compensation received as a director from the respondent.

NAME (a)	TITLE (b)	NUMBER OF DIRECTORS' MEETINGS ATTENDED (c)	DIRECTORS' COMPENSATION (d)
James H. Hodges	PRESIDENT	1	$ NONE
Clarise G. Hodges	VICE PRESIDENT	1	NONE

YEAR OF REPORT
December 31, 2001

UTILITY NAME: Sunshine Utilities of Central Florida, Inc.

COMPENSATION OF OFFICERS

Because Sunshine is a small business with only nine employees, three of which are officers, it is impossible for Sunshine to estimate the percentage of time that its officers spend in their roles as officers compared to their time spent on total business activities for the utility. For example, Mr. Hodges, who is a full-time employee of Sunshine, performs a variety of functions for the utility that include managing the day-to-day decisions in the normal operation of the utility, conducting the annual meeting of the shareholders, making all major management decisions that affect the utility, managing the utility's finances, overseeing Sunshine's profit sharing plan, addressing environmental compliance matters, planning for future growth and direction of the utility, and addressing customer service and employment issues as they arise. Not all of these activities are performed by Mr. Hodges in his role as president, but may be performed in his role as a director, or as an owner or employee of the utility. Moreover, although the compensation provided by Sunshine to its president and vice-president is classified as officers salaries, this compensation is for all of the work that the president and vice-president perform for the utility, which includes work performed in roles other than the role of an officer of a utility.