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September 14, 1998

Ms. Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0870

RE: Docket No. 971663-WS

Dear Ms. Bayó:

Enclosed are an original and fifteen copies of the Citizens' Posthearing Statement for filing in the above-referenced docket.

Also enclosed is a 3.5 inch diskette containing the Posthearing Statement in WordPerfect for Windows 6.1. Please indicate receipt of filing by date-stamping the attached copy of this letter and returning it to this office. Thank you for your assistance in this matter.

Sincerely,

Harold McLean
Deputy Public Counsel

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ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Florida Cities Water Company for limited proceeding to recover environmental litigation costs for North and South Ft. Myers Divisions in Lee County and Barefoot Bay Division in Brevard County.	)	DOCKET NO. 971663-WS Filed: September 14, 1998

CITIZENS' POSTHEARING STATEMENT

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CITIZENS' POSTHEARING STATEMENT

The Citizens of the State of Florida, by and through JACK SHREVE, Public Counsel, (Citizens) file this their posthearing statement. Material which is added to the Citizens' positions taken in their pre-hearing statement begins with an asterisk (*):

Basic Position:

OPC: FCWC's petition is fatally flawed because it seeks to recover in future rates expenses associated with prior consumption. In addition:

FCWC improvidently attracted the enforcement powers of the United States Environmental Protection Agency and the enforcement powers of the United States Department of Justice, was found to have committed more than 2300 violations of the Clean Water Act, and in so doing, subjected the equity interests of its stockholders to possible forfeiture to the United States Government. Its resistance to the enforcement arm of the Government, whether a prudent measure to be taken on behalf of the owners of the utility (and irrespective of how successful) addressed no material interest of the rate paying customers of the utility. To quote one of the many descriptive expressions of the late Commissioner Gerald "Jerry" Gunter, the customers had "no dog in that hunt."

While the entire burden of persuasion rests with the utility in this case, nonetheless, the Citizens' evidence will show that FCWC's expenses incurred in trimming the fine and violations to be assessed by a Federal District Court were incurred not in the provision of water and wastewater service, but in defense of its stockholders' interests in the equity of FCWC. Moreover, the Citizens will show that the predicament in which FCWC found itself was one of its own making, was avoidable, foreseeable, and imprudent. The utility either neglected or chose not to directly challenge the

denial of an NPDES permit; instead mounted a belated and collateral challenge of the permit denial by either intentionally or negligently discharging wastewater effluent without the permit. In taking this irresponsible and imprudent course of action, FCWC incurred the justifiable wrath of the federal enforcement authorities, years after it should have simply, and perhaps cheaply, challenged the permit denial. After all, it was a denial in which FCWC now says the EPA was improvident, if not reckless, and it is entirely reasonable for the Commission to infer that it would have been easily reversed.

When the federal enforcement authorities came, their inquiry eventually included not only the offending Waterway estates site, but Barefoot Bay and Carrollwood as well. Whereas the customers were powerless to avoid this scenario, FCWC was not: it could have challenged the permit denial and very likely, if not certainly, avoided the enforcement aspects altogether.

Instead, FCWC slept on its remedies, discharged without a permit, and got caught.

The ratepayers ought not be saddled with any penalty which flowed from that behavior or in any part of the expense FCWC incurred in its narrow, self-induced brush with disaster.

VIII. ISSUES AND POSITIONS

ISSUE 1: Does the proposed recovery by FCWC of the litigation expenses constitute retroactive ratemaking?

OPC: Yes. Although the Citizens do not believe that the litigation expenses sought were incurred in the provision of water and/or wastewater service to the public, if such litigation expenses were so incurred, they were incurred for consumption delivered contemporaneously with the expenses, the last of which was booked by the utility, below the line, prior to 1997. This case is no different from any other in which a utility seeks to establish future rates designed to retroactively recover expenses or losses neglected or foregone from prior periods. The Commission has consistently ruled against retroactive ratemaking. (Larkin)

*Factual Considerations of this case regarding retroactive ratemaking

Florida Cities Water Company seeks in this docket expenses which were allegedly incurred long before the instant petition for relief was filed. As is clearly set forth in [Exhibit 11 (MM-2) pp. 5-7], the following expenses were incurred in the following years:

Year	Litigation Expense
1991-92	$ 7,569
1993	91,628
1994	922,768
1995	1,327,900
1996	1,411,817
1997	73,982

FCWC filed for relief on December 29, 1997. All of the expenses sought by FCWC in its petition were incurred prior to December 29, 1997. In fact the bulk of the expenses for which recovery is sought were incurred a matter of years before relief was sought. In some cases six years.

While the Citizens maintain that these facts alone show that FCWC's petition seeks relief which is beyond that which the Commission may provide, FCWC tenders other facts, which the Citizens say are irrelevant, but the Citizens nonetheless here address.

Two witnesses address the issue of retroactive ratemaking, Mr. Larkin, for the Citizens, and Mr. McClellen for FCWC; Mr. Larkin in direct testimony, Mr McClellan in rebuttal testimony to Mr. Larkin.

In his rebuttal testimony, Mr. McClellan tenders a definition of retroactive ratemaking with which the Citizens could agree but for the restriction to "ordinary events" whose "effects were limited to [earlier] periods".[1] Mr McClellen says:

> Retroactive ratemaking generally refers to the application of current rates to recover from current ratepayers (or return to current

[1] For a discussion of future effects, please see the City of Miami case discussed below.

> ratepayers) revenues that should have been recovered (or not recovered) in rates of prior periods to cover costs of *ordinary* events [sic] *effects were limited to those periods.* (Emphasis supplied.)

(R 353)

Mr. McClellan's definition appears to embrace all too conveniently the facts of the instant case, for Mr. McClellan cites the Commission to no authority, no case, no learned treatise, nor as will be seen, any relevant rational whatsoever to limit the prohibition against retroactive ratemaking to *ordinary* events whose effects are *limited to prior periods.*

Counsel for the Commission, Mr. Vaccaro engaged Mr. McClellan on the point:

Questioned by Mr. Vaccaro, Mr. McClellan said:

Q. What's the basis of your opinion there?

A. A lot of years of experience, in looking at the question, is about the only answer I can give you. In fact, I don't think I've ever seen a formal definition of it.

Q. So it's basically your opinion?

A. Yes.

Q. And you referred to no court orders or legal opinions of that nature?

A. That's correct.

(Exhibit 21, p. 4; 7/30/98 deposition)

It is not clear whether Mr. McClellan's opinion would be at all swayed by the many cases addressing retroactive ratemaking in this jurisdiction or those cases from any other. What is clear is that his opinion is unsubstantiated and nothing more than a bare, stand-alone conclusion. Mr. McClellan makes no attempt to distinguish or reconcile the holdings of Florida or federal courts and

of this Commission in the cases cited below by the Citizens. Mr. McClellan's unwarranted restriction of the prohibition against retroactive ratemaking to ordinary events with effects restricted to the period in which they occur, must be considered in this context. The Citizens submit that the context of Mr. McClellan's opinion is a vacuum of any basis whatsoever other than the benefit of his client, FCWC.

Even when Mr. McClellan is asked by his own counsel about these specific restrictions, he provides an off point answer. Mr. McClellan says:

> Q. Is recovery of non-recurring or extraordinary costs of prior periods considered retroactive ratemaking?
>
> A. No. Regulators have long practiced the spreading of costs incurred in one period over subsequent periods and do not consider the practice to embrace retroactive ratemaking. Generally, the spreading of costs is applied either to avoid the dramatic rate impact that would result if rates were adjusted to recover the costs currently or to recognize the longer term benefits of the costs (or both).

(R- 354)

This case (and the question put to Mr. McClellan) have nothing to do with spreading in the abstract. Both the question put, and the retroactive ratemaking issue in this case, concern whether costs not recovered in a prior period may nonetheless be recovered in a future period without violating the prohibition against retroactive rate making. Mr. McClellan's off-point rational does not support his conclusion.[2]

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[2] Spreading is a notion with which the Citizens take no issue. If there be found in the test year of any regulated utility a recurring, yet unusual expense, e.g., the painting of a water

Despite Mr. McClellan's unsubstantiated opinion that the FCWC does not seek retroactive ratemaking, he appears to tender a feeble excuse for FCWC's failure to come forward when these litigation expenses were going to be incurred.[3] Mr. McClellan's excuse: that FCWC knew neither how long the litigation was to last, and/or how much it was going to cost.[4] (R. 357) Although it is an interesting, unsubstantiated, theory that a utility must proceed only with absolute certainty as to these issues, the theory was laid to rest by Mr. McClellan himself. As questioned by the undersigned, Mr. McClellen testified:

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tower, the expense may be spread forward over a period which likely represents how often the tower must be painted. If the paint is expected to last ten years, it is entirely reasonable to reflect one tenth of the costs of painting in the test year, and in rates which will be charged on a prospective basis. There is absolutely nothing in the spreading principle which should suggest to the Commission that past expenses foregone be resurrected in the test year. Mr. McClellan's observations about spreading are off point, and irrelevant to the ratemaking considerations before the Commission in this case.

Even when spreading is permitted in the normal course of prospective ratemaking, it is specifically based upon the notion that an amortized expense is spread because of its recurring nature, that is, it is included in the test year (and recovered in every subsequent year) because the expense is expected to recur - in the water tower example - every ten years. Mr. McClellan correctly identifies the litigation expenses sought in this docket as non-recurring. (R. 354) Thus Mr. McClellan's spreading discussion has nothing to do with this case, and even if it did, the Commission has every basis to reject this litigation expense as nonrecurring.

[3] An excuse might be relevant were retroactive ratemaking a procedure into which the Commission might engage where it saw good reason to do so. The Citizens submit that the Commission's observation of the prohibition against retroactive ratemaking is not discretionary: retroactive ratemaking is outside the ratemaking jurisdiction of the Commission: it may not so engage, even where it believes there is a reason to do so.

[4] This theme recurs in FCWC's Response in opposition to OPC's motion to dismiss. Filed: 07/29/98

Q. According to your testimony, Florida Cities Water Company could not have come to the Commission and asked for recovery of these expenses because they did not know how much help they were going to need?

A. That's right. You can't ask for something if you don't know what or how much you need.

Q. Could they have asked for what they expected to incur in the future on the projected costs?

A. I don't know about the projected expenditures. Now, asking for what you're going to incur as a matter of deferring the cost, I'm not sure I've ever seen anybody do that.

Q. That's not my question. In 1993, if they came in and said, "we would like to recover $300,000 a year to offset this legal expense which we are now incurring and anticipate we will incur for the next five years. We would like to have that money be held subject to bond when this case is eventually concluded," could they have done that?

A. I assume they could have.

Even if the Commission could accept a good reason to engage in retroactive ratemaking, the notion that the utility would have to know exactly how much, the ultimate conclusion of the case, etc., is not persuasive. In fact it is unequivocally rejected by Mr. McClellan's own record testimony.

This procedure accepted by Mr. McClellan is similar if not identical to the procedure suggested by Mr. Larkin, witness for the Citizens. As Mr. Larkin observes:

> If the Company had a basis to recover these expenses, it was to file a rate case at the time the expenses were being incurred and ask for the recovery as part of a rate case, or to come before the Commission and ask for an Accounting Order allowing for the deferral of the legal fees to be considered in a single issue rate case. The Company has not done so, and has merely decided to retroactively attempt to recover these expenses from ratepayers.

(R 263)

FCWC tendered no reason other than that both offered and rejected by Mr. McClellan for the several year delay in seeking the expenses, but the Citizens believe it is reasonable for the Commission to infer that the Company did not seek recovery of these expenses because they did not believe that they were recoverable. When FCWC President Allen was questioned in a 1995 deposition by a Department of Justice lawyer regarding whether the Company planned any recovery of litigation fines or expenses from its customers, he indicated that it was "highly doubtful" and that that conclusion was based upon his "past experience with the Commission." (R. 266)

Whatever the reason FCWC declined to seek timely recovery of these expenses, the undisputed facts show that recovery was not sought until well after the expenses were incurred. Worse, the facts show that even if a reason mattered, that no good reason was tendered by the company.

The expenses incurred by FCWC were incurred before it filed its petition. None of the testimony received in this case changes that discrepancy.

Lastly, both the Citizens' witness Larkin and FCWC's witness McClellan flirt with the notion that accounting standards, the NARUC system of accounts, or pronouncements of the Financial Accounting Standards Board somehow control or guide the Commission in its

consideration of this petition. None can confer jurisdiction on the Commission because the Commission is a creature of Florida statute with powers expressly conferred upon it by the Florida legislature. Mr. McClellan succinctly puts the proposition:

> Let's simplify the facts. Accounting does not set ratemaking, even if it's a uniform system of cost accounting. Accounting does not set ratemaking. Ratemaking sets accounting.

(Exhibit 21, p. 29; 7/30/98 deposition)

And with specific reference to FASB 71, Mr. McClellan said upon questioning from staff counsel, Mr. Vaccaro:

> Q. Let me take you over to FASB 71, which you reference in your testimony. Is it correct that that has no bearing, that FASB 71 has no bearing on regulatory assets relating to retroactive ratemaking or not?
>
> A. That's absolutely correct.
>
> Q. All is says is that the Commission allows the cost to be regulatory assets and they can be booked as such?
>
> A. Yes.

(Exhibit 21, p 6-7; 7/30/98 deposition)

Irrespective of whether FASB, NARUC system of accounts or any other accounting regimen provides a means by which such expenses may be booked, if approved, none of these systems speaks to the issue of whether any expense should be allowed as an expense of providing service. Put even more simply, FASB 71 says nothing about whether the litigation expenses sought by FCWC are allowable.

The facts alleged in the FCWC's petition show that the expenses for which recovery is sought were incurred well before, and in many cases, long before the petition for relief was filed. The testimony offered by company witnesses does not and could not change any of that. Moreover, even where retroactive ratemaking within Commission jurisdiction (the Citizens say it is not) FCWC has provided no rationale justifying its failure to seek recovery of the litigation expenses on a prospective basis.

The petition seeks future recovery for past expenses and should be denied.

Legal Considerations of retroactive ratemaking

Both the Commission and the courts have steadfastly observed the prohibition against retroactive rate making. Where the Commission has declined to engage in retroactive ratemaking, it has been affirmed, in those rare instances where it has ventured to set rates retroactively, it has been reversed.

The cases which concern and discuss the prohibition against retroactive ratemaking appear to fall within three categories: those in which past conditions would have been remedied in new rates, those in which past consumption would have been billed at new rates, and those which concern administrative cleanup after an erroneous Commission order on remand. For purposes of clarity, the Citizens will refer to each of the varieties as "past conditions" cases "past consumption" and "remand" cases. FCWC's petition is a "past conditions" case because it seeks recovery in new rates a remedy for past conditions.

Each category arises from the notion that the Commission's ratemaking jurisdiction is limited to prospective remedies.

The prospective nature of the Commission's ratemaking jurisdiction has been recognized by the Supreme Court. When Florida decided to tax its corporations, utilities, understandably enough, sought to have the Florida corporate income tax included as an operating expense for which it should be compensated in rates. In Gulf Power Company v. Bevis, 289 So.2d 401 (Fla. 1974) the Commission - at the equally understandable urging of the tax's principal proponents: the then Governor and the then Attorney General - crafted a test period which conveniently omitted the advent of the corporate income tax. The supreme court reversed the Commission noting that:

> Rates are fixed for the future rather than for the past and for that reason a pre-fixed earlier period cannot be arbitrarily applied, and the Commission has now done at the urging of the Governor and Attorney General.
>
> * * *
>
> This question has been settled by the U. S. Supreme Court in McCardle V. Indianapolis Water Co., 272 U. S. 400, 47 S. Ct. 144, 71 L. Ed. 316 (1926). There, the U. S. Supreme Court said that the fixing of utility rates must of necessity be related to matters which are reasonably predictable as being involved, for the process is one of making a rule for the future.

289 So.2d at 404

This Commission's ratemaking jurisdiction is limited to fashioning prospective remedies. As the cases show, the Commission cannot remedy past conditions in new rates and cannot apply new rates to past consumption.[5]

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[5] For additional authority supporting the notion that the Commission's jurisdiction is prospective in nature, see Columbia Gas Transmission Corporation v. Federal Energy Regulatory Commission, 831 F. 2d 1135 (*A basic principle of administrative procedure is that rules should operate prospectively only)*; Electrical Dist. No. 1 v. FERC, 774 F.2d 490, 493 (D.C.Cir.1985) (quoting Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577, 101 S.Ct.

On the strength of the foregoing and of the following cases, the Citizens submit that retroactive ratemaking is beyond the jurisdiction of the Commission, and consequently, FCWC's petition which seeks retroactive ratemaking should be denied.

^Ortega

Ortega is a "past conditions" case. Ortega tried to make up for a historic revenue shortfall in future rates.

The Ortega Utility Company (Ortega) case, a case very similar in principle to the instant FCWC case, presented an excellent example of an attempt to gain approval by the Commission of retroactive ratemaking. Ortega applied to the Commission for a general rate increase, one element of which was an allegation that the utility had not recovered depreciation expenses for periods well before the test year. The Commission denied this aspect of the application with the following analysis:

> We believe that the request for authority to reverse depreciation expense that has already been recognized is a request to recover past losses. Granting the request would be a form of retroactive ratemaking because it seeks to recover past losses, however the utility wishes to define which accounting terms might be affected. Whether that adjustment is titled a correction to accumulated depreciation or a correction to CIAC, the impact is the same, rate base is increased to eliminate a loss that has already been recorded.
>
> Ortega, based on the record in this case, by asking for a one-time adjustment to rate base to recover past losses, is asking us to authorize retroactive ratemaking. See City of Miami v. Florida

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2925, 2930, 69 L.Ed.2d 856 (1981)); A. J. G. Priest, Principles of Public Utility Regulation, the Michie Company (1969), Vol 1, p 75; Bonbright, Danielsen, and Kamerschen, Principles of Public Utility Rates, second Edition, Public Utilities Reports, Inc. (1988) P. 198.

> Public Service Commission, 208 So.2d 249, 259 (Fla. 1968), Gulf Power Co. v. Cresse, 410 So. 2d 492 (Fla. 1982), and Citizens of the State of Florida v. Florida Public Service Commission, 448 So.2d 1024 (Fla. 1984), for the principle that retroactive ratemaking occurs when new rates are applied to prior consumption. In this case, we believe that by making an adjustment to rate base for past losses, increased rates would apply to prior consumption, thus retroactively raising rates. Accordingly, we hereby deny the utility's request. (footnote added)

Order PSC-95-1376-FOF-WS; 95 F.P.S.C. 11:247, 258

The prohibition against retroactive ratemaking observed in Ortega should apply with even more force here: Ortega unsuccessfully tried to recover sums which the Commission recognized as *losses.* In the instant case, FCWC is attempting to recover past *expenses.* FCWC makes no attempt to elevate the litigation expenses sought to any loss or alleged loss suffered by the company, a matter further discussed in Issue 24.

In addition, Ortega at least attempted to camouflage past expenses as depreciation foregone. FCWC's approach is a bare attempt to recover expenses which reach back in time for years.

FCWC has argued that the prohibition against retroactive ratemaking is inapplicable where the 'benefit' of the past expenditures reach into future periods. The Commission should reject this notion out of hand: had FCWC collected an expense over the previous six years to which they could today be shown to have been ineligible, the Commission could not remedy the situation - even though the detriment suffered by the customers for having been deprived of their money would reach into future periods. Ortega, and the cases which follow show that the Commission's authority to set rates is prospective in nature. Just as consumers must hustle to the Commission to report and capture

overearnings, so must regulated utilities come to the Commission to report expenses allegedly not reflected in rates. In either case, the Commission may drive a stake into the ground and proceed prospectively, not retroactively.

Ortega wanted new rates to make up for a revenue shortfall in prior periods. FCWC is trying to make up for expenses which occurred in prior periods. Ortega failed and so should FCWC.

^Meadowbrook

Meadowbrook is a "past conditions" case. Meadowbrook tried to get future rates based on a return on equity boosted by alleged losses supposedly caused by an inadequate rate of return in a prior rate case. The Commission blocked the effort.

In Meadowbrook, the Commission relied heavily on a North Carolina Case, Utilities Comm. V. Edmisten, 232 S. E. 2nd 184 (S.C.S. Ct. 1977) quoting from that case as follows:

> Technically, retroactive rate making occurs when an additional charge is made for past use of utility service, or the utility is required to refund revenues collected, pursuant to then lawfully established rates, for such past use. A rate is fixed or allowed when it becomes effective . . . and rates must be fixed prospectively from their effective date. G. S. 62-136(a) provides that the Commission shall determine rates 'to be thereafter observed and in force'. The Commission may not fix rates retroactively so as to make them collectible for past services . . .

In re Application of Meadowbrook Utility Systems, Inc 87 F.P.S.C. 3:209 (1987) at 216

Drawing further from the Edmisten case, the Commission said:

> Florida law (see Westwood Lake, Inc. V. Dade County. 264 So.2d 7, 12 (Fla. 1972) and Pinellas County v. Mayo, 218 So.2d 749, 751 (Fla. 1969)) also prohibits retroactive ratemaking, and therefore, the case noted above is relevant to this situation. Clearly, to allow the

> recovery of revenues based on past service is exactly what the court was talking about. Therefore, upon consideration, we find that the utility's request to be allowed to recover the "lost" revenue would constitute retroactive ratemaking and is therefore denied.
>
> * * *
>
> However, the utility now requests that common equity be increased by $54,243 due to the loss of that amount of revenues during the time that the interim rates [from the prior rate case] were in effect. This would give the equity portion of the capital structure a higher weighted cost, and if allowed, would increase the required rates. These increased rates would be brought about solely because the utility perceived that it had inadequate rates in 1983 (interim rate period) which brought about a revenue deficiency. Therefore, there would be an ". . . additional charge . . Made for past use of utility service . . ." and this is in direct violation of the principles set out in Utilities Comm. V. Edmisten.

87 F.P.S.C. 3:209 (1987) at 216-217

The surcharge sought here (which irrespective of what it is called, is an increased rate) is brought about solely because of the conditions which prevailed before the case was filed. In Meadowbrook, the past condition which could not be remedied arose from allegedly inadequate interim rates. In the instant FCWC petition, the past condition which cannot be remedied is inadequate recovery of litigation expenses. Unlike Meadowbrook, it wasn't higher rates through boosted ROE, it is a surcharge. In principle, the FCWC's case is virtually identical to Meadowbrook, and should be denied.[6]

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[6] Meadowbrook differs from the case of Betmar (In Re application of Betmar Utilities, Inc) 97 F.P.S.C. 144 (1997) in which Betmar applied in a limited proceedings case for higher rates which, according to Betmar's petition, should be slightly lessened because of a calculation error in a prior rate case. This aspect of the Betmar case is clearly "past conditions" in nature, and in the Citizens' view, beyond the jurisdiction of the Commission. However, utilities can volunteer for lesser rates of return than they are other wise entitled for

^GTE

GTE is a "remand" case. The Commission was ordered by the court to cure the effects of its erroneous order back to the point at which it began to have erroneous effect.

The rate application of a telecommunications company, GTE Florida, Inc., resulted in a Commission order which was later found, on appeal, erroneous in some respects by the court, although it was effective as a stake in the gound. The court remanded the order to the Commission for further action.[7] The Commission, apparently overly cautious of the prohibition against retroactive ratemaking, attempted to make the Company only partially whole, as it corrected rates from the court opinion forward, as opposed to the earlier erroneous Commission order forward. Upon appeal, the court ordered surcharges *distinguishing* the GTE case from a case of retroactive ratemaking. In GTE Florida, Inc. v. Clark, 668 So.2d 971 (Fla. 1996) the court said:

> We also reject the contention that GTE's requested surcharge constitutes retroactive ratemaking. This is not a case where a new rate is requested and then applied retroactively. The surcharge we sanction is implemented to allow GTE to recover costs already expended *that should have been lawfully recoverable in the PSC's first order.* (emphasis supplied)

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whatever reason they see fit - including altruism, softening Commission resistance for the other aspects of their application, or even for reasons to which the Commission could give no effect were the matter contested. That is to say, a utility could forego its president's salary should it wish to do so, even where the Commission would be compelled to allow the same salary were the utility seeking recovery thereof. The Citizens submit that Betmar is a anomaly in that the utility agreed to accept a lesser rate of return that that to which it was entitled for reasons of its own, and that Betmar's volunteering to do so says nothing about Commission jurisdiction in cases of retroactive ratemaking.

[7] GTE Florida, Inc. v. Deason, 642 So.2d 545 (Fla. 1994)

668 So.2d at 781

GTE is easily understood as the court's ensuring that the remedy it afforded GTE Florida, Inc. under its original order, was given full effect by the Commission. That is, GTE Florida, Inc. was to recover the contested expense just as if the Commission had correctly resolved the underlying issue in the first place.

In GTE the court cited a similar situation where an erroneous order of the Commission was corrected back to the time of the original order, this time by the Commission itself. In re Application of Holiday Lake Water System for authority to Increase its rates In Pasco County, Florida, 5 F.P.S.C. 620 (1979) the court reversed a Commission order. The Commission then gave full effect to the Court's mandate by ordering a refund to customers based upon consumption from the time of the Commission order.[8]

The instant case is dissimilar from GTE and Holiday: in both GTE and Holiday, a Commission order was found to be erroneous. The Commission upon remand, was then required to enter an order which gave full effect to the court's reversal of the Commission order, effective from the date that the Commission's erroneous order began to have consequences. In GTE, it was the company which deserved to be made whole back to the stake in the ground, not before; in Holiday, the customers.

[8] The reversal of the Commission's original Holiday order appears In Citizens v. Hawkins, 364 So.2d 723 (Fla. 1978). The Commission's second Holiday order, which is cited by the supreme court, was not challenged. The entire Holiday episode, i.e., appeal, remand, and commission implementation of the remand is a "remand case".

The instant case presents no such factual or legal scenario. There is no Commission order, no challenge, no reversal, and no remand. There is only a reach back before the stake for expenses previously and allegedly incurred.

Far from administrative mop up after a successful appeal - as was the case in GTE and Holiday - this case presents FCWC's bare attempt to now recover in future rates expenses which it says it incurred years ago, a practice explicitly disapproved by this Commission in Ortega, and rejected by the courts in the cases cited in Ortega.

GTE did no violence whatsoever to the prohibition against retroactive ratemaking. In fact, the Citizens submit that the court gave the prohibition explicit approval by distinguishing it.

FCWC has seized upon the language regarding surcharges in GTE as if FCWC's petition could avoid the prohibition against retroactive ratemaking because FCWC seeks a surcharge rather than rates geared to consumption of water and sewer services. The Citizens advance as a matter of common sense that if the relief sought by FCWC is barred by the prohibition against retroactive ratemaking (and the Citizens say it is) that the device by which it is collected, whether it be by lump sum, surcharge, base facility charge, gallonage charge, or enhanced return on equity is absolutely irrelevant. GTE wasn't a case about nomenclature - it was about how to make parties whole after an erroneous Commission order. The surcharge didn't enable the remedy, the remedy enabled the surcharge. Collecting money by surcharge clearly does not transfigure retroactive ratemaking into permissible ratemaking. Because FCWC's proposed surcharge does not rescue its petition from the

prohibition against retroactive ratemaking articulated by the Commission in Ortega and by the court in GTE, it should be denied.[9]

^City of Miami v. FP&L and Southern Bell

The City of Miami case is a "past conditions" case. The City of Miami tried to get the Commission to order a refund to customers based upon past overearnings, but the Commission declined, and ordered only a prospective reduction of rates to avoid future overearnings. The Florida Supreme Court approved the Commission's action, finding that retroactive ratemaking is prohibited.

Florida Power and Light Company and Southern Bell Telegraph and Telephone Company, came to the attention of the City of Miami and, upon petition, to the attention of the Commission. In City of Miami v. Florida Public Service Commission, 208 So.2d 249, 259 (Fla. 1968), (cited by the Commission in Ortega) the City of Miami petitioned the Commission to hold hearings so as to determine the reasonableness of both FP&L's and Bell's rates then charged. In late 1964 the Commission established 1963-64 test years for both companies and ordered January hearings in both cases. After hearing, the Commission found that the past rates were excessive, and ordered the rates

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[9] The Citizens also note an attempt by FCWC to contrast past expenses with past underearnings, which in other contexts, may be persuasive. However, whether the FCWC seeks recovery of past underearnings or past unrecognized expenses is a distinction without a difference. As will be seen, the Citizens submit that an allegation of earnings outside the range of the last authorized rate of return is a virtual key to the courthouse, without which FCWC should not be admitted. But that matter aside, it is obvious that foregone expenses are the constituents of foregone or underearnings. FCWC would have the Commission reach back in time to capture costs, while apparently acknowledging that the Commission could not do the same for underearnings. Were that so, a utility which found itself in a historical underearnings posture need only file a petition seeking new rates, not to compensate it for earlier underearnings, but to compensate it for the individual expenses which, having been foregone, brought about the underearnings condition. If the recovery of past underearnings is barred by the prohibition against retroactive ratemaking, than the recovery of past foregone expenses is barred as well.

reduced on a prospective basis only. The City of Miami petitioned the Florida Supreme Court to require the Commission to not only reduce rates on a going forward basis, but to reduce rates retrospectively and cause a refund to be made. After consideration of cited cases from the federal system and of the governing Florida Statutes, the Court rejected retroactive ratemaking as contrary to Florida law - a position from which they have never receded.

One of the obvious effects of the City of Miami case, was to deprive customers of the use of their money, not only for the period over which it was improperly collected, but for all future periods as well. The detriment occasioned by over collection extended into future periods, but could not, according to the holding, be remedied by retroactive ratemaking. Similarly, the benefit (if any) occasioned the expenses sought by in FCWC in this case may extend into future periods; but as in City of Miami, the prohibition against retroactive ratemaking should control.[10]

^Southern Bell v. Gentel

The Bell case is a "past conditions" case. The Commission, upon the petition of Gentel, changed the methodology by which the two companies share toll revenues. When the Commission came up with a new way, it tried to apply it retroactively to earlier times in which a different

[10] Another distinction without a difference: where it suggested that past underearnings/expenses be recovered, there is no economic difference between recovering by means of lump sum payment from each customer or gradual recovery by means of surcharge or increase in BFC, etc. Similarly lacking in difference is the case in which past overearnings are perceived, in which it might be suggested that a refund (lump sum) be paid to customers (as in Bell/FPL, or periodic refund - the mirror image of surcharges. FCWC's seeking to recover a surcharge from customers in the future is not different from seeking a lump sum payment from each customer, aside from the time value of money. Prohibited retroactive ratemaking by means of a monthly surcharge is still prohibited retroactive ratemaking.

methodology was used. The Court rejected the Commission's effort to remedy the past methodology.

In Southern Bell Telephone and Telegraph Company v. Florida Public Service Commission, 453 So.2d 780 (Fla. 1984) the means of distributing toll revenues between Bell and Gentel arose as a dispute which Gentel believed was within the jurisdiction of the Commission, Bell believed it was not. The Commission asserted jurisdiction over the dispute, adopted a new methodology, applied the methodology prospectively, *and retroactively*, and ordered a $3,000,000 refund from Bell to Gentel. On appeal by Bell, the Florida Supreme Court, citing City of Miami, noted the lack of retroactive ratemaking authority of the Commission:

> We believe that the statutory authority to adjudicate such disputes is properly related to the Commission's essential function as regulator of the rates and service of utilities. *However, we believe that any such adjudication must be given prospective effect only. To hold otherwise would violate the principle against retroactive ratemaking.* See City of Miami v. Florida Public Service Commission, 208 So.2d 249 (Fla. 1968) (emphasis supplied)

453 So.2d at 784

The court affirmed the portions of the order dealing with the structure of the separations and settlements process, but reversed the Commission's $3,000,000 retroactive application thereof. The Commission was not permitted to remedy past conditions because its ratemaking jurisdiction provides for prospective remedies.

While it must have been obvious that Gentel would be permanently deprived of the $3,000,000 that the Commission said it had coming, and it must have been obvious that the

detriment of having lost that $3,000,000 would be felt well into the future, the prohibition against retroactive ratemaking was enforced by the court over the Commission order, and the Commission ordered to restrict its ratemaking to prospective application. That the detriment to Gentel, and that the benefit to Bell would not be limited to prior periods, notwithstanding.

^United Telephone

United is a "past conditions" case. In a reverse make-whole proceeding, the Commission found overearnings in United and ordered a refund back to the day upon which the Commission had ordered certain revenues subject to bond. United claimed that the Commission could not order a remedy of conditions which prevailed before the final Commission order; the Commission, with approval of the court, ordered a remedy back to the time that it took jurisdiction over the interim revenue.

On May 1, 1979, after an interim rate hearing, the Commission set certain revenue of United Telephone Company of Florida (United) subject to refund, pending further regulatory proceedings. That is, the Commission drove the proverbial stake into the ground on that day, May 1, 1979. After a comprehensive ratemaking proceeding, the Commission increased United's authorized rate of return, but nonetheless found that the Company's revenue provided a return in excess of its newly authorized rate, and ordered United to make a refund effective from May 1, 1979. Over United's (and intervenor Southern Bell's) retroactive ratemaking objections, the Court in United Telephone Company of Florida v Mann, 403 So.2d 962 (Fla 1981) found that the interim statute which permitted the Commission to establish interim rates contingent upon the outcome of the full hearing, permitted it to do so irrespective of whether the comprehensive proceeding resulted in an increased

revenue or decreased revenue requirement for the applicant. The court implicitly recognized the prohibition against retroactive rate making when it held:

> We therefore hold that the commission has the discretion to determine that amount of revenues collected during the interim period which are excessive *so long as that amount does not exceed the amount ordered subject to refund at the interim hearing.* (emphasis supplied)

403 So.2d at 968

It is reasonable to infer that the court would have declined to permit any finding by the Commission that a refund should exceed the sums held subject to refund because of the resulting retroactive effect. Thus the United case recognizes the prohibition against retroactive ratemaking, even though the prohibition did not work to overturn a Commission order which provided for an interim refund.

It is critical to notice that the rate reduction measure taken by the Commission, which passed retroactive ratemaking muster, affected periods *after* the Commission drove the stake in the ground on May 1, 1979. FCWC's theory of recovery in this case would require the Commission to reach back to conditions - specifically, foregone expenses - which occurred *before* the stake was in the ground.

The United court provided other language relevant to FCWC's case:

> We specifically stated [in Southern Bell Telephone and Telegraph Co. v. Bevis, 279 So.2d 285 (Fla. 1973)] that our decision in City of Miami was never meant to preclude the commission from making interim increases contingent on the outcome of a full hearing. By the same token that decision does not preclude the commission from making interim decreases contingent upon the outcome of a full haring. *Since there is no logical reason for distinguishing between*

> *rate increase proceedings and rate decrease proceedings*, we find that the commission is authorized to order interim rate decreases upon finding that a company is earning revenues in excess of its maximum allowable rate of return. (Emphasis supplied)

403 So.2d at 966

The Citzens submit that the Commisson should find this language persuasive with respect to whether the Commission should treat discovered underearnings (or foregone expenses) any differently than overearnings or foregone expenses.[11]

That the Commission declines to effect any sort of remedy for overearnings which occur prior to the Commissions inquiry (stake in the ground) may be seen in a current case before the Commission. In Investigation of Possible Overearnings by Sanlando Utilities Corporation in Seminole County, Docket No. 980670-WS, the Commission found in Order No. PSC-98-0892-PCO-WS that an overearnings condition prevailed at Sanlando for the entire year of 1997, yet the Commission has ordered Sanlando to place revenues based upon this overearning condition prospectively beginning on July 6, 1998 (the stake in the ground). The aggregate of the overearnings enjoyed by Sanlando for the year 1997, and for the first half of 1998 are lost to the customers forever, causing detriment which is, certainly not, in Mr. McClellan's words, "restricted to a prior

[11] The hypothetical question which Commissioner Deason put at the August 4th, 1998 discussion of the Citizens' Motion to Dismiss is answered by this language. The Commission could not reach back in time to capture once-authorized expenses, were they shown not to have been incurred over a past period of time. This even though the Citizens' being deprived of their money would have lasting, detrimental effect, long after the Commission order.

period." Parties to Sanlando neither have nor could they credibly suggest that the overearnings achieved by Sanlando during 1997 or 1998 be returned to customers.[12]

To add insult to injury, Sanlando has effectively moved the stake in the ground from July 6th to a later date in time by filing for reconsideration. Even if Order No. PSC-98-0892-PCO-WS is affirmed in all respects, the stake in the ground - the date upon which Sanlando must actually begin to collect money subject to refund - will be delayed until the final Commission order issues. The petition for reconsideration, standing by itself, will place additional overearnings beyond the reach of the Commission, because of the prohibition against retroactive ratemaking.

^Century Utilities, Inc.

Century is a "past conditions" case. Century tried to persuade the hearing examiner that it should be permitted to establish new rates which would, among other things, make up for incorrect depreciation rates which were in effect long before their case was filed.

Century is unusual in having been heard by a DOAH hearing examiner. The hearing examiner applied the prohibition against retroactive ratemaking in his consideration of Century's petition. In re Application of Century Utilities, Inc., 82 F.P.S.C. 3:54 (1982) the utility determined that it had used an incorrect depreciation rate in the past, and attempted to retroactively apply the 'correct' depreciation rate. The DOAH hearing examiner rejected the attempt and the Commission adopted the DOAH order on the point. The Commission order provides:

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[12] Actually, because of statute of exceedingly narrow scope, part of it can be. Sanlando was the recipient of index adjustments during the relevant time periods. Subsection 367.081(4)(d) provides the Commission with the authority to reach back for fifteen months if it finds that the utility has filed a false affidavit regarding overearnings. The statute, of course, has no application to FCWC's petition.

> The petitioner contends that the 2.5% annual depreciation rate should be retroactively applied because the change is the result of a "correction of an error" rather than a "change in accounting estimate"
>
> * * *
>
> The examples given in APB Opinion No. 20, paragraphs .10 and .13, to distinguish an error from a change in estimate lead the undersigned to conclude that a change in projected lifespan of an asset, for depreciation purposes, *is a change in estimate requiring prospective application only.*
>
> * * *
>
> It is concluded that the 6% deprecation rate should apply from 1969 through the 1979 test year and that the 2.5% rate should apply from that date forward. (emphasis supplied)

82 F.P.S.C. 3: at p. 59

The hearing officer's conclusions were expressly adopted by the Commission.

Summarizing these "past conditions" cases it is easily seen that in the final analysis, i.e., after court review, no utility, no consumer, and not even one telephone company having been short changed by another telephone company, has ever been permitted to collect new rates which reach back in time to some perceived shortfall, whether the shortfall be perceived as low earnings, over earnings, or just expenses. That is simply because the Commission has jurisdiction to engage only in prospective ratemaking, past conditions notwithstanding.

At first blush, it may appear a harsh doctrine; yet in each case above, a party could have acted sooner to lessen their detriment. Ortega could have filed for new rates during the time of their alleged depreciation shortfall; Meadowbrook could have addressed its allegedly inadequate interim rates in the docket in which they arose; the City of Miami could have filed its petition sooner, or persuaded to the Commission to hold some revenue subject to refund during the pendency of the

case in order to have captured the overearnings achieved by FP&L and Bell in 1963 and thereafter; Gentel might have filed its petition $3,000,000 earlier against Bell alleging a problem with seperations and settlements; Century might have filed earlier to set its depreciation schedules right, and lastly, FCWC might have filed its petition back when it began to incur these litigation expenses: it's lead witness on regulatory policy certainly saw no reason why it couldn't have done so. If there be any harshness, it is harshness which could have been avoided by earlier action - in this case, on the part of FCWC.

Neither "consumption" nor "remand" cases provide much to guide the Commission's consideration of FCWC's petition. Each deals with the mechanical, ministerial implementation of a Commission or court ordered rate change. Nonetheless, two consumption cases warrant discussion:

^Gulf Power Company.[13]

Gulf has the distinction of being both a "past consumption" case and a "past conditions case."[14] In an order dated November 3, 1980, (the stake in the ground) the Commission established new rates and authorized Gulf to begin collecting the new rates based upon meter readings obtained on November 10, 1980 and thereafter. Upon its own motion, the Commission recognized that where that regimen followed, some of the consumption indicated by the November 10 readings could well include consumption which took place before November 3, 1980. This is the "past consumption" portion of the case. In an attempt to cure this problem, the Commission on its own motion re-

[13] This Gulf case (410 So.2d 492) is cited by the Commission in its Ortega case. It is not the same Gulf case (289 So.2d 401) earlier cited in this brief.

[14] Gulf Power Co. V. Cresse, 410 So. 2d 492 (Fla. 1982)

established, by a second order, an effective date for the new rates of December 3, 1980, which would ensure that all consumption at the new rates would have taken place after the Commission approved new rates. The Commission also ordered a $2.2 million refund to customers which represented the extent to which new rates were applied to past consumption. Gulf's appeal of the second order to the Supreme Court is the "past conditions" portion of the case. It was Gulf's theory that the Commission could not remedy the conditions which prevailed before the December 3 order, that is, the collection of new revenue from November 3 to December 3, 1980.

In Gulf, the Commission through reconsideration of its first order on its own motion, created a scenario very similar to that set forth in Holiday Lake, cited in the GTE case. In Gulf, the Commission itself reconsidered and reversed an earlier erroneous Commission order as opposed to court reversal.

Gulf contested this second order in the Supreme Court on the basis that the corrected order constituted retroactive ratemaking. The Supreme Court rejected Gulf's position, cited to City of Miami as authority for a prohibition against retroactive ratemaking, but found that the Commission's correction of its own order did not violate the prohibition. In fact, the court approved the Commission's order on the basis that the order must have only prospective effect.

^Seminole Utility Co.

Seminole is a "past consumption" case. The utility innocently jumped the gun on implementing its interim rates, such that some new bills were applied to past consumption.

Unusual in that the case was heard by the Department of Administrative Hearings, Division of Administrative Hearings (DOAH), the utility asserted its good faith application of the interim rates. The good faith application notwithstanding, the DOAH hearing officer said:

> However innocently imposed, the Utility's action constitutes improper retroactive ratemaking. The utility should refund to customers of record during the period in question their pro-rata share of revenues collected by the retroactive rate increase.

The recommended order was accepted by the Commission in all relevant part. See In Re Application of Seminole Utility Co. 81 F.P.S.C. 1:221 (1980). As with other "past consumption" cases, Seminole provides scant guidance in this case because FCWC seeks to remedy past conditions; whereas, no party seeks to correct a misbilling for consumption. The Citizens submit, however, that the case does stand for the proposition that irrespective of how retroactive ratemaking comes about - good faith or otherwise - it remains impermissible.

The Citizens again submit that cases which deal with the ministerial application of new rates by utilities have little if anything to say about whether this Commission can provide a remedy which past conditions are to be remedied with new rates.

Escape from the prohibition against retroactive ratemaking is found in neither "past conditions" cases, nor in "past consumption" nor in "remand" cases. In no case can the Commission establish rates which remedy conditions or to consumption which occurred before the stake in the ground.

There is one case in which a represcription of depreciation is permitted even though the effect of the represcription is clearly retroactive in application. The case which apparently attracted the attention of Ortega Utility Company in its attempt to convert alleged depreciation, allegedly forgone, to a regulatory asset is Citizens of the State of Florida v. Florida Public Service Commission, 415 So.2d 1268 (Fla 1982). (A case which involved the petition of Southern Bell Telephone and Telegraph Company) While the Supreme Court expressly recognized the prohibition against

retroactive ratemaking, it summarily contrasted represcription of deprecation on the one hand with ratemaking on the other. It said:

> We find that public counsel's reliance on section 364.14 and City of Miami is misplaced because that section and case concern rate-making. *Under the present facts, the PSC was not ratemaking but rather, was considering depreciation represcription.* (emphasis supplied)

415 So.2d at 1270

FCWC's petition makes no claim regarding represcription of depreciation: the Commission is being asked to engage in ordinary ratemaking, not represcription of depreciation, in which the prohibition against retroactive ratemaking is applicable.

The "stake in the ground" further explained:

The Citizens submit that in every retroactive ratemaking case, there is a point of demarcation before which Commission ratemaking jurisdiction does not extend. The Citizens have referred to this point as a "stake in the ground" for clarity's sake. It may be established by a variety of means. In the instant FCWC case, it was established by the filing of the petition on December 29, 1997. In Ortega, Meadowbrook it was established by the utility's petition seeking rate relief; for purposes of the GTE remand, it was the date of the erroneous Commission order; In City of Miami, it was the date of the final Commission order; Southern Bell v. Gentel, it was the date of the Gentel petition; in United, it was the point at which the Commission ordered some of United's revenue subject to refund; in Century, it was the day on which Century filed for rate relief, and so forth.[15]

[15] There is minor variation in file and suspend cases because the suspending of tariffs is the point at which Commisison jurisdiction attaches, as opposed to the filing of the petition.

Once established, the point of demarcation, or the stake in the ground can be preserved for future action by the Commission without retroactive ratemaking consequence. The 1970 rate application of Southern Gulf Utilities is a case in point.[16] Southern Gulf obtained all of the water it sold in its service area from the City of Ormond Beach. Ormond Beach increased its rates, which caused Southern Gulf to apply to the Commission for authority to increase rates to Southern Gulf's customers. However, the Commission took note of the litigation between Southern Gulf and the City over the issue of the increased rates to Southern Gulf, and recognized that were the contested city-to-utility rates upheld in the litigation, Southern Gulf's earnings would be erroded. The Commission said:

> The applicant utility and the City are now involved in litigation over the matter and should the Court decide that some rate other than that presently imposed by Ordinance 69-12 applies, this Commission will re-examine the operating expenses and will make appropriate adjustments to authorized rates.

Order 5044 at 4

Perhaps a more modern Commission would have collected some additional revenue, subject it to bond, and refund only if necessary, but the effect is the same: in Southern Gulf: the Commission retained jurisdiction over the matter, and retained the stake in the ground. When an adverse ruling was issued in the Utility v. City case, the Commission was able to make the utility whole from the 'stake' forward, while expressly honoring the prohibition against retroactive ratemaking, never having to retrieve money from periods which preceded the stake.

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[16] In re Application of Southern Gulf Utiltiies, Division of Ecological Science Corporation, Commission docket No. 70214-W

The work of a more modern commission in similar circumstances may be seen in a General Telephone Case (GTE) in which an issue arose as to the disposition of litigation expenses incurred by GTE in litigation with the Home Shopping Network (HSN). In the tangled and procedurally tortured cases of Dockets 870171-TL and 890216 the Commission was considering the issues of overearnings and of the consequence of a lessening of the federal corporate income tax rate. Mixed into the fray were the expenses suffered by GTE in litigation with HSN. Considerable doubt existed as to the recoverability for several reasons not important here, but it was clear that the issue might survive beyond the tax and overearnings docket. Cautious of the prohibition against retroactive ratemaking, the Commission obtained a letter from GTE, in lieu of setting certain revenue subject to refund, committing to an effective date after which GTE agreed to give effect to the Commission resolution of the HSN litigation expense matter.[17]

Once the point of demarcation - stake in the ground - is established, it can be preserved. What cannot happen, and no case permits it, is to establish the stake in the ground retrospectively, whether the case be one characterized as one of remand, past consumption, or past conditions.

These two cases, and perhaps others, strongly suggest what FCWC should have done when these litigation expenses began to arise: it should have come forward, filed a petition - a stake in the ground - and asked the Commission to fashion a prospective remedy which could have afforded all

[17] GTE collected rates as if the litigation expenses were allowed. A refund would be effected back to the date of the letter, were the expenses ultimately disallowed - as indeed much of which were. This legal scenario is presented in three orders of the Commission: Order 22353, order 22733, and order 2703, each issued in Docket 890216-TL and in the first two instances, 870171-TL as well.

parties with notice, and the company with some assurance of recovery. It is a procedure to which FCWC's principal witness on regulatory policy raised no objection.

Summary, Issue 1, retroactive rate making

FCWC's petition seeks to establish rates for the future which will provide recovery of expenses which were allegedly incurred well before FCWC's petition for relief was filed. The petition is barred by the prohibition against retroactive ratemaking, which arises from the Commission's ratemaking jurisdiction's being exclusively prospective in nature. FCWC's attempts to avoid the prohibition are ineffective:

- FCWC, according to its own witness, could have filed when these expenses began to arise, that it did not know exactly how much the expenses would be notwithstanding;
- Neither the benefit nor the detriment which flows into future periods from expenses incurred in the past or from overearnings of the past justify retroactive ratemaking.
- There is no case nor law which restricts the prohibition against retroactive ratemaking to ordinary events. To the contrary, the law of regulation disallows non recurring expenses on that basis alone.

When customers ignore overearnings, they do so at their own peril; when utilities endure underearnings, they do so at their own peril. FCWC knew of expenses and did nothing for years. The Commission cannot, and should not provide a remedy. FCWC comes too late.

To hold out the promise of correcting past perceived inequities in future rates is to open vast floodgates to all who perceive past injury, customer against utility, utility against customer, and utility against utility. Those who perceive past, present, or future injury would come to the

Commission with petition in hand. Retroactive ratemaking is not only against the law, it's bad policy.

FCWC's petition should be denied.

ISSUE 2: Is there any requirement that this utility should have obtained an accounting order prior to filing this petition?

OPC: Yes. (Larkin)

*Mr. Larkin suggested this method as a means by which the company might have avoided the prohibition against retroactive ratemaking. (R. 263) Although FCWC takes grave exception to it, FCWC's witness McClellan "assume[s] they could have." (Exhibit 21, p 33; 7/30/98 deposition) Moreover it is essentially the procedure followed in the Southern Gulf and the GTE cases, *supra.*[18] The Citizens believe that the Issue 2 is nonsensically worded: the accounting order is obviously not a prerequisite to the filing of the peititon, because the petition is filed, despite the absence of an accounting order. The Citizens, through the testimony of Mr. Larkin submit that a timely obtained accounting order might have avoided the specter of engaging in retroactive ratemaking.

ISSUE 3: Did FCWC act prudently and reasonably in defending the legal action brought by the United States Department of Justice on behalf of the Environmental Protection Agency?

OPC: The Citizens have no position as to whether FCWC defended itself in a reasonable and prudent manner from the charges levied by the Federal environmental authorities. However, the Citizens urge that FCWC acted unreasonably and imprudently by violating the Clean Water Act more than 2300 times and acted unreasonably and imprudently by incurring the enforcement action of the federal authorities. (Larkin)

ISSUE 4: Was FCWC's failure to challenge the EPA's 1986 NPDES permit denial a prudent decision?

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[18] The GTE case which dealt with the Home Shopping Network litigation expenses.

OPC: Agree with staff.

*EPA's 1986 denial of the NPDES permit at Waterway Estates got no respect from the Utility. From the utility's petition initiating this action, the Commission is advised that FCWC was "baffled" at the denial.[19] Mr. Acosta, engineering witness for FCWC opined that the permit was erroneously denied because of a false assumption that a 201 facilities plan was to be implemented, which provided no wasteload allocation for Waterway Estates because it was to be phased out, and that the EPA failed to check with the state DER to see whether Waterway had a wasteload allocation. (R. 204-206) Dr. Ahmadi, FDEP employee and witness for FCWC, opined that the articulated basis upon which the permit renewal denial was based incorrect. [Exhibit 14, (ABA 2, p. 152)]; Mr. Baise, FCWC's principal counsel - who came on the scene far too late to challenge the denial of the permit - accorded the denial even less respect: he noted that the permit denial was based upon a mere planning document (R. 111); that a denial of a permit in the absence of Florida's water quality standard being violated, or no effluent limitations violations was a rare event (R. 111); his deposition of EPA's employee McGarry disclosed other infirmities of the permit denial (R. 112); that the permit was denied by a Ms. Kagey upon "little or no" investigation (R. 117); that the file supporting the denial contained only two pages, which themselves were the referenced planning document, from which Mr. Baise opines that the permit was "improperly denied" (R. 117) that Ms. Kagey's failure to look beyond the two pages "created havoc and substantial costs for FCWC; that Ms. Kagey had a "limited understanding" of EPA's rules regarding permit writing; that she neglected her "best professional judgment"; that her decision was not reviewed by her supervisors; that she could not

[19] FCWC petition for Limited Proceeding, filed December 29, 1997, page 4.

recall a single instance where EPA had denied an NPDES permit to a permit holder who was in compliance with state regulations; and that Ms. Kagey admitted that she considered none of the "four reasons EPA can use to deny renewal of an NPDES permit." (R. 118-119) Mr. Baise further impeached the denial of the permit renewal through deposition of Mr. Barrett, Ms. Kagey's supervisor, who said among other things, "I don't see the basis for the federal action denying the permit based on the correspondence." Mr Barrett's deposition also disclosed that the denial of the permit renewal was an "unusual event" and opined that the denial appeared to present "some inconsistences" (R. 119) Mr. Baise's deposition of EPA's Mr. Childress showed that he (Mr. Childress) believed that Ms. Kagey did not follow EPA procedures in the denial of the permit. (R. 134) Finally, FCWC asserted an affirmative defense in the principal litigation that the permit was "illegally, wrongfully, and improperly denied." (Exhibit 7, p. 68; 5/20/98 deposition)

Despite the compelling evidence belatedly adduced by FCWC that the permit renewal was improvidently denied, FCWC either declined or neglected to mount a timely administrative challenge to the denial.

Some of FCWC's evidence says that to have successfully challenged the permit denial would have yielded the same result as came about anyway, and implicitly, their failure to challenge the permit when they could legally do so was no big deal. (Basie: Exhibit 7, p. 69; 5/20/98 deposition) (Allen: R. 329). Yet that does not explain why FCWC was willing to spend very substantial resources and time belatedly challenging the permit during the federal case. The importance of the belated challenge was so great as to inspire FCWC to assert the wrongful denial as an affirmative defense against the government's case; to vigorously conduct discovery relative to the point, and to litigate the matter to conclusion in the federal trail. FCWC's considerable and expensive efforts

notwithstanding, the court found that FCWC had waived its right to challenge the permit 90 days after its denial - back in 1986. (Exhibit 7, p. 69; 5/20/98 deposition)

To the issue of whether the administrative challenge would have been cheaper, it should be noted that the Department of Justice came to this case because enforcement action against FCWC had been undertaken, years after the time for the challenge to the permit denial had run. According to Mr. Baise, "serious money" began to be involved in the case when the DOJ became involved (Exhibit 7, pp. 72-75; 5/20/98 deposition)

Mr. Baise and Mr. Allen both allege that the administrative challenge course - even if successful - would have brought about the same financial impact as the course actually undertaken, which was to either decline or neglect to challenge the permit denial. Yet Mr. Baise doesn't even know, or wouldn't say, whether the DOJ would have become involved in an administrative permit challenge, had one ever been undertaken. (Exhibit 7, p. 74; 5/20/98 deposition) It was the involvement of the DOJ which brought about the expenditure of "serious money." It must be noted that the challenge of the "illegally, wrongfully, and improperly" denied permit was important enough to litigate in vain in 1995 before the Federal District Court, but alleged to be unimportant when the challenge was appropriate in 1986.

Mr. Allen also speculates - without identified or otherwise apparent credentials in EPA litigation - that a successful challenge would have not altered the outcome of this case, and implicitly, not altered the expenses associated with it. (R. 329)

Mr. Allen is compelled, of course to take this position since a reading of his testimony shows that there was no affirmative decision not to challenge the denial - FCWC declined to challenge the permit not by design, but by default. One might even reasonably conclude that the

failure was borne of negligence: FCWC hints that they were under a mistaken impression that they had authority to discharge under the auspices of the Florida DEP, which if not apparently false at the time, certainly became so later.[20] (R. 52)

Given the overwhelming evidence adduced by the company in this record that the permit renewal denial was on extremely infirm grounds, the Citizens submit that the Commission should conclude that FCWC's failure to mount an administrative challenge was at least imprudent, if not negligent as well. It is the utility's burden to bring forth evidence that the lack of a challenge was prudent and the result financially insignificant, yet all of their evidence - and their behavior in the federal case - points to the opposite conclusion, namely, that the challenge was important, should have been timely undertaken, and that it might have saved FCWC a great deal of money.[21]

The Citizens submit that the prohibition against retroactive ratemaking prevents any recovery of the litigation expenses incurred by FCWC; but even if the expenses were permissible, the company has failed to sustain its burden to show that declining, (if not neglecting) to challenge the permit was a prudent course without significant financial import.

The litigation expenses thus sought should be denied on this basis *with* prejudice to FCWC's attempting to supplement the record at any later proceeding.

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[20] FCWC's hint that they might have been relying on supposed authority from the FDEP (then DER) presents an interesting dilemma: If, on the one had, FCWC thought that the state provided them with authority to discharge, then why did they apply for renewal of a federal permit? On the other hand, shouldn't receiving the denial of their federal permit application upset their purported confidence that the matter was in state hands?

[21] As may be seen from Mr. Baise's narrative regarding the litigation activities, a significant share of the litigation expenses sought in this docket were incurred in the belated and rejected court challenge of the denial. The challenge was expensive and years too late.

ISSUE 5: **Is the amount of litigation expenses incurred by FCWC in defending the complaint of DOJ fair and reasonable?**

OPC: No position.

ISSUE 6: **Does the potential recovery of litigation costs by FCWC provide a disincentive to comply with the Clean Water Act?**

OPC: Yes.

*Mr. Larkin's concerns with regard to recovery of the litigation expense includes the notion that passing the costs of violation of the CWA on to consumers makes it less likely that the company will voluntarily comply with the CWA. (R. 265) FCWC's rebuttal to Mr. Larkin would be persuasive had Mr. Larkin said that the company would be immune from compliance - in fact, Mr. Larkin's concern, as stated is to ensure that the Commission acts in such a way as not to frustrate federal authorities' enforcement of the CWA. To leave all the costs of CWA violations with the violator serves that end.

ISSUE 7: **Stricken.**

ISSUE 8: **Stricken.**

ISSUE 9: **Would bankruptcy have seriously affected the quality of service provided to FCWC's customers?**

OPC: No. While bankruptcy is normally not a desirable course for any entity to take, the provision of water services and of wastewater disposal is an industry pervasively regulated by a host of governmental authorities. Even criminal exposure may be had for those who might illegally pollute, or provide unhealthy water. While FCWC urges calamitous failure of service in the event of a large fine, it is far more reasonable to assume that service would continue, much as before, under government

stewardship, likely under the auspices of a federal bankruptcy court. A receiver or trustee in bankruptcy would be as accountable to regulatory authorities as FCWC is now.

As FCWC sees disaster in the bankruptcy scenario, it justifiably sees elimination of its shareholders' equity interest in the firm and a probable transfer to government or, eventually, other private interests. While a forced, wholesale change in ownership of this utility may be calamitous to FCWC and its developer parent, it may well be of no consequence to ratepayers. In fact, given the elimination of the obligation to service equity capital and the discharge or elimination of debt, the customers may have emerged with lower rates, in lieu of lesser services. (Larkin)

*While several FCWC witnesses were anxious to claim that the proposed federal fine would have "created severe problems" for FCWC (R. 361); and have "deep financial impact" (Exhibit 21, p. 16; 7/30/98 deposition) none ventured to quantify this alleged harm, and Mr. McClellen specifically declined to do so. (Exhibit 21, p. 47) Mr. Allen testified as to the availability of several interested buyers in the several FCWC systems. (Ex 18, p. 40; 7/30/98 deposition) It is reasonable for the Commission to infer that these buyers, and others would have been standing by should a distress sale of FCWC assets taken place. The parade of horrors presented by FCWC at the prospect of a huge fine levy is one which reaches the interests of equity holders and perhaps debt holders, but its effect on customers is extremely speculative. It makes much more sense to speculate that the value of a utility system to creditors - private and government alike - is preserved by a utility which is a going concern.

ISSUE 10: Should recovery of litigation expenses from the ratepayers depend on whether the utility or the ratepayers benefitted from the litigation?

OPC: Yes.

ISSUE 11: **Are the litigation expenses sought in this case reasonably characterized as normal, recurring costs of doing business?**

OPC: No. The expenses in question occasioned a limited proceeding addressing millions of dollars. That matter alone suggests something atypical is going on. An occasional brush with the USEPA, (although certainly not the USDOJ) may well be routine, but this case is a far cry from the inevitable disagreement which crops up between a regulated entity and its regulator.

This case, according to FCWC itself, placed the current ownership of the utility at risk.

The notion that it represents an episode of business as usual is quite fortunately false. (Larkin)

ISSUE 12: **Should any portion of FCWC's litigation costs be recovered through a surcharge, and if so, how much?**

OPC: None. The petition is a plain attempt to gain a surcharge by means of retroactive ratemaking. Moreover, the Commission has consistently held that fines and penalties are not recoverable from ratepayers. Upon identical rationale, the expenses associated with resisting fines and penalties should similarly be disallowed. The customers of this utility have absolutely no control over the management policies of the utility. When management runs afoul of enforcement authority, is found to have violated statutes such as the Clean Water Act on more than 2300 instances, the stockholders of the company, not its captive customers, should be held responsible for all of the consequences thereof. (Larkin)

ISSUE 13: **Did the DOJ litigation involve all of FCWC's wastewater systems?**

OPC: No position.

ISSUE 14: **Should FCWC's request to allocate the costs among all of its customers be approved?**

OPC: No position as to any allocation issue. No recovery of the expenses which were incurred several years ago, and for purposes which don't serve the ratepayers should be permitted.

ISSUE 15: **What is the appropriate amount of rate case expense?**

OPC: No recovery of rate case expense is appropriate irrespective of whether FCWC recovers anything on its petition. Recovery of rate case expense (like the litigation

expense) has not been shown to yield earnings outside the range of the last authorized rate of return, and for all the Commission knows, may cause the utility to overearn.

*The Citizens do not contest whether rate case expense was incurred in this case, but the Citizens do oppose the award of any rates, whether surcharge, BFC, gallonage, or any other charge, which reflect(s) the rate case expense of this case.

As is the case with the litigation expenses, (the case in chief) the utility brings forward no allegation that its rate case expense, if paid by the company, will cause the utility to earn outside its last authorized rate of return. As set forth in the latter part of this posthearing statement, the Citizens submit that the utility must demonstrate that its present rates are unreasonable,[22] which is to say that the expenses it is incurring are presenting it with no need for relief. As with the FCWC's case in chief, no harm is alleged; no relief is appropriate.

However, even had FCWC alleged that the denial of rate case expense would cause it to earn outside the range of its last authorized rate of return, rate case should be denied.

The Commission and the courts have long recognized that rate case expense is recoverable by a regulated utility as an operating expense, if prudently incurred;[23] Florida law provides the Commission with broad discretion in any award of rate case expense.[24] The Commission's discretion is not without limitation: the Commission must inquire into the prudence of the expense.[25]

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[22] South Florida Natural Gas v. Public Service Commission, 534 So.2d 695 (Fla. 1988)

[23] . Westwood Lake, Inc v. Metropolitan Dade County Water and Sewer Board, 203 So.2d 363 (Fla. 3rd DCA, 1967)

[24] Florida Crown Utility Services, Inc. v. Utility Regulatory Board of the City of Jacksonville, 274 So.2d 597 (Fla. 1st DCA 1973)

[25] Meadowbrook Utility Systems, Inc. V. The Florida Public Service Commission, 518 So.2d 326 (Fla. 1st DCA, 1987))

The Citizens suggest that such an inquiry in the instant case yields the inescapable result that the expenses should be denied as imprudently incurred.

The Commission principal pronouncement on the issue of rate case expense is to be found in the Sunshine case.[26]

In Sunshine, the Commission was faced for the first time with a utility which has pressed an appeal, and sought to recover the increment of rate case expense occasioned by the appeal. After considerable discussion of the history of rate case expense, the Commission opted to award 60% of the appellate rate case expenses on the rationale that the utility prevailed on three of its five points on appeal. The Commission took the appellate result as an indicator of the prudence of the appellate effort and expenses, noting

> 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.

94 F.P.S.C. 6:232

Thus implicitly, the Commission found that the 40%, or the two issues upon which the appeal did not prevail, were imprudently brought.

However the Citizens submit that there is a far more persuasive test of prudence available in this case. More than two years before this case was filed, Mr Allen, the president of FCWC voiced his doubt as to whether the Commission would permit a recovery of the litigation expenses. Under oath, Mr. Allen testified that recovery of the expenses was "highly doubtful" and that the

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[26] In re Application of Sunshine Utilities of Centra Florida, Inc, Docket No. 900386

conclusion was based upon his "past experience with the Commission." (R. 266) While Mr. Allen went on to hedge on the issue of whether the Company has any plan to seek recovery, his testimony clearly shows that the FCWC had adequate notice that recovery of these expenses was highly doubtful, and that it proceeded knowing full well that there was considerable risk - high risk - that the recovery would not be successful.

The entirety of rate case expense should be denied because FCWC fails to allege or prove that present rates are inadequate and because the petition for recovery of litigation expenses was imprudently undertaken and the expenses associated therewith imprudently incurred.

ISSUE 16: Should FCWC be required to pay regulatory assessment fees on any revenues that may be approved in this docket?

OPC: No position.

ISSUE 17: What is the appropriate amount of revenue, if any, to be collected through the surcharge?

OPC: No surcharge should be approved.

ISSUE 18: Should FCWC's requested recovery period for litigation costs be approved?

OPC: The Citizens oppose any surcharge. However, if a surcharge is approved, it should be sized so as to be recovered over a period of ten years.

ISSUE 19: What are the appropriate surcharges?

OPC: Zero.

ISSUE 20: If the Commission issues an order that provides for the recovery of litigation costs, what is the appropriate accounting treatment?

OPC: No position.

ISSUE 21: **Should FCWC be allowed to include any unrecovered litigation expenses being amortized in its next rate case in order to earn a rate of return on the unrecovered balance?**

OPC: No. Since the Citizens oppose the recovery of any of the litigation expense as a legitimate expense chargeable to ratepayers, any return should also be denied. Additionally, should the Commission find some amount is recoverable from ratepayers only that amount should be recovered without return. (Larkin)

LEGAL ISSUES

ISSUE 22: Proposed stipulation.

ISSUE 23: Stricken.

ISSUE 24: **Must FCWC allege and prove, as a prerequisite to the relief it seeks, that present rates cause it to earn below its last authorized rate of return?**

OPC: Yes.

*FCWC has filed a petition which seeks recovery of expenses it alleges it incurred in several years past in litigation with federal authorities. The utility does not allege that the payment of these various costs ever rendered the earnings of the utility to be other than fair and reasonable; the petition contains absolutely no allegation that the expenditures, if made, ever placed the utility outside the range of its last authorized rate of return. The Citizens submit that the Commission can provide no relief to any utility which omits such an issue from its pleading and proof, with certain exceptions not applicable here.

The Florida Supreme Court has been unusually specific in its views on the point. In Gulf Power Co. v. Public Serv. Comm'n, 453 So.2d 799 (Fla.1984) the Court said:

> We find that, under the commission's rate-setting authority, a utility seeking a change must demonstrate that the present rates are unreasonable, see section 366.06(1), Florida Statutes (1985), and show by a preponderance of the evidence that the rates fail to compensate the utility for its prudently incurred expenses *and* fail to produce a reasonable return on its investment. (emphasis supplied)

534 So. 2d at 697

The use of "and" in the Supreme Court's holding is critical: this is a discussion of Commission jurisdiction - to which the limited proceedings statute by its own terms does not add. It describes a two pronged test which a utility must meet in order to have its rates changed by the Commission: It must show that present rates have failed to compensate the utility for its prudently incurred expenses AND that present rates fail to produce a reasonable return on investment. Far from showing as the Supreme Court requires, FCWC didn't even allege it.

The limited proceedings statute merely relieves the utility from having to allege and prove a presently fair rate of return; it permits the utility to rely on the last established one.

The principle holds irrespective of whether it is the utility seeking to increase rates or whether it is the Commission seeking to lower rates.[27] The prerequisite to Commission action is whether the utility is earning outside its last authorized rate of return.[28]

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[27] As the Supreme Court said in United, supra, "Since there is no logical reason for distinguishing between rate increase proceedings and rate decrease proceedings..." 403 So.2d at 966

[28] In the pending Sanlando case (Docket No. 980670-WS - INVESTIGATION OF POSSIBLE OVEREARNINGS BY SANLANDO UTILITIES CORPORATION IN SEMINOLE COUNTY) Order No. PSC-98-0892-PCO-WS addresses the prerequisite finding which justifies the Commission's taking action in an overearning case. It provides in part:

> REVENUES SUBJECT TO REFUND
>
> Based on a desk audit of the utility s 1997 annual report, along with a limited scope audit completed in Docket No. 971186-SU, we find it appropriate to initiate a full investigation of earnings of Sanlando's water and wastewater systems. A review of the utility's 1997 annual report indicates that Sanlando s water system earned an achieved rate of return on equity of 18.76% and its wastewater system earned an achieved rate of return on equity of 48.25% in 1997. Therefore, we find it appropriate to conduct a full audit of the utility s books for the test year ending December 31, 1997. We also find it appropriate to establish water and wastewater rate base, since both were last set by the Commission as of December 31, 1991.
>
> Furthermore, based upon the foregoing, we find it appropriate to require Sanlando to hold annual water revenues of $106,536 and annual wastewater revenues of $289,267 subject to refund.
>
> In the utility s last rate proceeding, by Order No. 23809, issued November 27, 1990, in Docket No. 900338-WS, the Commission approved an overall rate of return of 11.51% with a range of 11.27% to 11.75%, and established a rate of return on equity of 13.51% with a range of 12.51% to 14.51%.
>
> Using the upper boundary of 14.51% for equity, and appropriate interest rates for other components in the capital structure, a

Commission action in a rate case is judged by appellate courts on the basis of whether the Commission has provided the utility rates which will produce a reasonable rate of return, because failure of the Commission to do so is to take the utility's property in a constitutional sense.[29]

The principle that a utility must allege underearnings as a prerequisite to rate relief has been afforded full approval by this Commission. In the very early days of the Environmental Cost Recovery Clause, (ECRC) Gulf Power Company petitioned the Commission for a recovery of certain costs to which it believed the ECRC applied. The Office of Public Counsel argued before the Commission, as it argues here, that there should be no recovery unless it be shown that the utility

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> 9.05% overall cost of capital is indicated. Additionally, our preliminary review suggests that the utility achieved an overall 38.54% return on equity in 1997.

Thus upon a recommendation that Sandlando was earning outside its authorized rate of return, the Commission acted. Had the staff investigation shown that the utility was within its last authorized rate of return, no further action would have been necessary or possible, unless the Commission found that the last authorized rate of return itself was excessive.

[29] in Southern States Utilities v. Duval Co., 82 P.U.R. 3d 452 (4th Cir. 1969), the court observed that where the effect of a rate order would be a rate of return of some 2.8%, and there was no evidence in the record that supported setting rates at that level, "[t]he conclusion is inescapable that such [order] constitutes an unlawful confiscation of the utility's property." If an agency rate order does not provide sufficient compensation to the utility, then that agency has taken utility property without paying "just compensation" in contravention of the United States Constitution. Duquesne Light Co. v. Barasch, 488 U.S. 299, 308 (1989). A utility is entitled to an opportunity to earn a reasonable rate of return on its invested capital. City of Miami v. Florida Pub. Serv. Comm'n, 208 So. 2d 249 (Fla. 1968). "The rate of return which public utility companies may be allowed to earn is a question of vital importance to both rate payers and investors. An inadequate return may prevent satisfactory services to the public and concomitantly disappoint investors who will look for alternative sources of investment." United Tel. Co. v. Mayo, 345 So. 2d 648, 653-54 (Fla. 1977).

is outside the range of its last authorized rate of return. The Commission accepted this argument in principle when, in order No. PSC-94-0044 FOF-EI; 94 F.P.S.C. 1:76, it said:

> Public Counsel argued that if a utility is earning within its allowed return on equity range, it is already being compensated for all environmental expenses, and it should not be allowed to recover any costs through the environmental cost recovery clause. Public Counsel maintains that it does not matter whether the environmental activity was included in the test year of the utility's last rate case. The utility should only be allowed to recover costs through the clause if the utility is under-earning. OPC argued that to allow any recovery through the clause if the utility is not under-earning would amount to double recovery.
>
> *Although regulatory philosophy indicates that OPC is theoretically correct,* we must consider the legislation establishing the environmental cost recovery cost. (Italics supplied)

Order at 4:78

Although the Commission then considered the special provisions of Section 366.8255(1)(d) (Florida Statutes 1991) which permitted a recovery of conservation expenses outside the normal ratemaking process, it accepted the rate making principle that rate relief must be predicated on the utility's earning outside its authorized range, in the absence of a special statutory route. (Section 366.8255(1)(d), F.S, of course, has no application here.) The principle is consistent with a fundamental tenant of American Jurisprudence: relief is inappropriate where no harm is shown.

The principal rate-making statute by which the Commission is bound in water and wastewater cases is Section 367.081, which provides that the Commission shall establish rates which provide for a fair return on the investment of the utility in its property used and useful in the

provision of utility service to the public. There is absolutely no allegation before the Commission that the existing rates approved for FCWC do not provide for that fair return.

The Citizens submit that it is the Utility's burden to appear before the Commission with allegation and proof that the existing rates of the utility are not compensatory, are thus confiscatory, and ought to be increased such that a fair return may be earned. The utility has failed to meet that burden.

The Citizens note that there are exceptions to this principle, as the Commission found in Gulf Power concerning Environmental Cost Recovery Clause. In that case, the Commission found that the Legislature intended for utilities, such as Gulf, to recover these special costs, their earnings posture notwithstanding.

> Accordingly we find that if the utility is currently earning a fair rate of return that it should be able to recover, upon petition, prudently incurred environmental compliance costs through the ECRC. If such costs were incurred after the effective date of the environmental compliance cost legislation, and if such costs are not being recovered through any other cost recovery mechanism.

Order at 94:79

Thus the Commission implicitly, if not explicitly, recognized that in the absence of the ECRC, that were the utility earning within its range, it would not recover these expenses.

Water and wastewater has its own partial exceptions, but the exceptions are carefully crafted by the legislature to include the test of earnings the Citizens urge here.

Section 367.081(4)(b) and © Florida Statutes, (1997) taken together provide for a yearly indexing and pass through by utilities which qualify under those sections. Yet subsection © provides that a utility must by affidavit certify that neither the index nor the pass through will cause the utility

to earn outside its previously authorized rate of return. The penalty for violation of this section is a third degree felony and a refund of rates with interest.

Thus even in the sections establishing automatic pass through and indexing, strict attention is paid to the earnings posture of the utility. It is, of course, apparent that the index and pass through exceptions attempt to ensure that the utility is not earning *in excess* of its last authorized range, rather than a requirement that the utility show as a prerequisite that the utility is underearning before the pass through and index is had. But it is incumbent on the utility to assure, and on the Commission to ensure, that the utility's earnings are considered even in automatic index and pass through cases.

Lastly, the limited proceeding under which FCWC has filed the instant case does not provide any statutory exception to the necessity that the utility show that it is earning outside the range of its last rate of return, and FCWC does not so allege.

The limited proceeding statute is restricted, by its own terms, to matters within the jurisdiction of the Commission. The statute provides no license for petitions seeking retroactive ratemaking; it provides no license for petitions which fail to allege harm. Were the utility to file a full blown rate case lacking allegation and proof that the utility is underearning, the petition would fail to suggest that any relief is due; denial would surely follow. That the instant petition focuses on one expense in lieu of the myriad of expenses in a full rate case doesn't relieve the petitioner of alleging some harm or injury.

The limited proceeding statute was designed to enable an interested party to bring a single issue to the Commission, but clearly does not excuse the petitioner from alleging and proving that the single issue has done it injury or harm which necessitates Commission action.

Far from providing an exception, the Citizens submit that the limited proceedings statute is a *coup de grace* to FCWC's petition. Section 367.0822 Florida Statutes (1997) provides in relevant part:

> The Commission shall determine the issues to be considered during such a proceeding and may grant or deny any request to expand the scope of the proceeding to include other related matters. However, unless the issue of rate of return is specifically addressed in the limited proceeding, the commission ***shall not adjust rates*** if the ***effect*** of the adjustment would be to change the last rate of return. (Italics added)

Thus the Commission is under a unequivocal statutory mandate not to approve rates the *effect* of which (not necessarily the *intent* of which) would be to change the last rate of return. Yet no party in this proceeding can provide any assurance whatsoever to the Commission that the rates sought by FCWC would not have the *effect* or increasing its last rate of return. FCWC's petition seeks higher rates, but provides the Commission with no assurance that approval of the surcharges sought will not directly violate the limited proceeding statute.

If the Commission were to permit FCWC to recover money now, that it failed to collect in the years from 1992 through 1997, FCWC's profits will either increase in those years or for the years when the money is being collected. Either one of the two scenarios would have the effect of raising the last authorized rate of return, either then or now: both are prohibited by the limited proceedings statute. It has been argued that were FCWC permitted to book the expenses sought here, that a recovery of the same expenses wouldn't effect the rate of return. However, in the words of FCWC's own witness, "[A]ccounting does not set ratemaking. Ratemaking sets accounting." It doesn't

matter how the money sought by this petition is booked: if FCWC gets it, return on investment goes up.[30]

The instant petition of FCWC enjoys no statutory fast track to supposed relief. FCWC brings neither allegation nor evidence before the Commission that its existing rates are less than fully compensatory. The Commission and affected parties are left only to wonder whether the alleged expenses have already been recovered through its existing rates, and /or whether the relief sought by the instant petition would provide a double recovery thereof. The matter is not the least bit academic: The Lee County Division (South Ft. Myers Wastewater System) is currently before the Commission based upon the Commission's finding that the wastewater system - potential recipient of the surcharge addressed in the FCWC petition - is "almost certainly" overearning.[31] FCWC's petition, if granted would exacerbate that overearnings condition, and perhaps others as well.

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[30] This notion does no violence to the limited proceedings statute. The underlying problem here is FCWC's attempt to retroactively recover foregone expenses in future periods. In order to make this work, the Commission would have to allow FCWC to book past expenses in the future, which the Commission cannot do. In a conventional, permissible limited proceedings case, test year expenses are recovered in future periods, and there is no alteration - intentional or otherwise - of the utility's rate of return.

[31] ORDER NO. PSC-97-1125-PCO-SU, in which the Commission drove the stake in the ground on September 25, 1997. There is no discussion of capturing any of the overearnings which may have taken place before that date, for good reason: it would be outside the jurisdiction of the Commission to do so.

Because FCWC alleges no harm, it is entitled to no relief.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Citizens' Posthearing Statement was served by United States Mail, or where the party is denoted by an asterisk (*) by hand delivery upon representatives of the following parties on this the 14th day of September, 1998.

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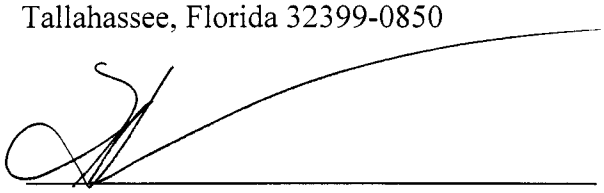

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