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## Fla. Cities Water Co. v. Fla. PSC, 778 So. 2d 310 (Fla. Dist. Ct. App. 2000)

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## FLORIDA

**City of Tallahassee v. Thompson Trust, 771 So. 2d 587 (Fla. Dist. Ct. App. 2000)** (holding neither a property owner's riparian rights in, nor common boundary line with, property subject to annexation created "affected party" status and, thus, the owner lacked standing to challenge the annexation ordinance).

The City of Tallahassee ("City") annexed 109 acres of land pursuant to a petition by all owners within the annexed area. The J.R., Sr., and J.M. Thompson Trust ("Trust") challenged the annexation at issue based upon both lack of notice regarding the annexation and lack of representation at the public hearing. As a result, the circuit court granted final summary judgment in favor of the Trust. The City appealed the judgment, arguing the Trust lacked standing, as it did not constitute an "affected party" under Florida law. The Trust, however, claimed standing as an "affected party" due to its riparian rights in the annexed lake and common boundary line with the annexed area.

The First District Florida Court of Appeal considered whether riparian rights in a lake created standing to challenge annexation of property with sixty-six feet of water frontage on the lake. The court viewed riparian rights not as proprietary in nature, but rather as a benefit to the riparian owner. Thus, the Trust's benefit remained intact in light of the annexation. Therefore, the court found that annexation of the lake did not constitute a taking of the Trust's riparian rights and, thus, the Trust did not establish itself as an "affected party."

The Trust also argued that since it shared a common boundary line with the annexed area, it was within the annexed area. However, the court rejected this line of reasoning due to lack of authority.

In conclusion, the court held that the Trust was not an "affected party" under Florida law and lacked standing to challenge the annexation ordinance. Accordingly, the court reversed the circuit court and remanded with instructions to enter judgment for the City.

*Kimberley E. Montanaro*

**Fla. Cities Water Co. v. Fla. PSC, 778 So. 2d 310 (Fla. Dist. Ct. App. 2000)** (holding the Florida Public Service Commission's use of average annual daily flow in calculating the "used and useful" portion of company's wastewater treatment plant for inclusion in the utility's rate base was proper based on competent and substantial evidence, even though the calculation was inconsistent with prior agency policies).

In an appeal from an order of the Florida Public Service

Commission (“FPSC”), the Florida Court of Appeal heard arguments regarding rate-making criteria implemented by FPSC in connection with Florida Cities Water Co.’s (“FC”) wastewater treatment operations. At issue was the proper means of calculating which portions of the utility’s operations were “used and useful” as public services and entitled to inclusion in the utility’s rate base. Construction costs incurred by private utilities were subject to reimbursement under a rate structure based on the percentage of a utility’s total operations that were “used and useful” in a public service capacity. FPSC and FC agreed to calculate the “used and useful” portion of FC’s wastewater treatment operation by comparing customer demand with plant treatment capacity, dividing actual demand by the plant’s permitted design capacity. Both parties also agreed plant capacity was 1.25 million gallons per day based on average annual daily flow. FPSC calculated customer demand based on average annual daily flow, yielding a seventy-nine percent “used and useful” figure for FC’s facility.

FC further argued FPSC should use the average daily flows in a maximum month in the numerator, in accord with FPSC’s past practice and contended this method accounted for the plant’s capacity to handle peak flows. Under this method, FC’s facility achieved a 100 percent “used and useful” capacity. FC argued FPSC’s method of calculation would prevent it from recovering its investment costs in the facility. The court found FPSC’s calculation inconsistent with prior agency policy and remanded, and required FPSC to provide evidentiary support for the policy shift.

FPSC conducted evidentiary hearings and heard testimony from three professional engineers. All three experts suggested time periods representing customer demand should be the same as those used to determine maximum plant capacity. FC calculated plant capacity based on annual, rather than monthly terms. Thus, FPSC concluded annual average daily flows were the appropriate means of ascertaining the “used and useful” portion of FC’s wastewater operations.

The court found FPSC’s evidentiary record supported use of the annual daily flow in making the “used and useful” computation. The court rejected FC’s claims, and noted average daily flow calculations did not ignore average daily flow during the peak month, but included the peak month along with average daily flows from the other eleven months. Further, FC’s plant had the ability to handle peak flows of up to 2.5 million gallons per day, twice the agreed annual average daily flow. Therefore, using average daily flow in the peak month would overstate the percentage of FC’s yearly plant operations for rate-making purposes.

Finally, the court noted its role was not to evaluate evidence submitted in support of FPSC’s decision, but to consider whether substantial and competent evidence supported FPSC’s decision. As such evidence was present, the court affirmed FPSC’s order.