IN THE SUPREME COURT OF FLORIDA

TAMARON HOMEOWNERS ASSOCIATION, INC.,

Petitioner,

v.

TAMARON UTILITIES, INC.,

Respondent.

CASE NO. 63,626

2nd DCA Case Nos. 82-1594 and 82-1744

PETITIONER'S MAIN BRIEF

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October 31, 1983

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NOTICE OF CORRECTED CITATIONS

The Petitioner hereby gives notice of the correction of citations which appear in the Petitioner's Main Brief in error.

1. State ex rel. Martigney Creek v. Public Service Commission, 357 SW2d 394 (Mo. 1976). The citation should read 357 SW2d 388 (Mo. 1976). (The citation appears in the Brief on page 15.)

2. Jacksonville Gas Corp. v. Florida RR & Public Utilities Commission, 57 So.2d 887 (Fla. 1951). The citation should read 50 So.2d 887 (Fla. 1951). The citation appears in the Brief on page 19.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing have been furnished by mail to RICHARD E. NELSON, ESQUIRE, 2070 Ringling Boulevard, Sarasota, FL 33577, and to M. JOSEPH LIEB, JR., ESQUIRE, 1900 Ringling Boulevard, Sarasota, FL 33577.

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STATEMENT OF THE CASE

TAMARON UTILITIES, INC., the Respondent, hereafter TAMARON, operates a sewer system in Sarasota County, Florida, under a franchise granted by the Board of County Commissioners of Sarasota County on July 19, 1973. (See Appendix No. 1) On May 18, 1981, TAMARON applied to the Board of County Commissioners pursuant to the requirements of Sarasota County Ordinance 80-62 for an increase in rates and charges for sewer service. (Ibid.) The Sarasota Board of County Commissioners, hereafter BOARD, held public hearings, at which time it received testimony and evidence, and on November 24, 1981, adopted Resolution No. 81-344, setting rates and charges it found to be reasonable. (See Appendix No. 1)

Within the time of thirty days thereafter, TAMARON challenged Resolution 81-344 in the Circuit Court by petitioning for a Writ of Certiorari in Case No. 81-4029-CA-01. The Circuit Court, the Honorable Grissim H. Walker, Judge of the Circuit Court, presiding, entered an Order on TAMARON's Petition for a Writ of Certiorari, stating

> Section 8(e) of Sarasota County Ordinance No. 80-62, insofar as it purports to exclude reimbursement of depreciation on contributed properties owned by a utility as an operating expense, is invalid and violative of the due process and equal protection clauses of the Florida State Constitution and the United States Constitution, based upon the holdings in Southeastern Development & Utility Company Inc. v. Board of County Commissioners of Sarasota County, 398 So.2d 882 (2DCA 1981), State v. Hawkins, 364 So.2d 723 (Fla. 1978), and Westwood Lake, Inc. v. Dade County, 264 So.2d 7 (Fla. 1972). Therefore, the words

> "excluding contributed property" contained in the fourth sentence of §8(e) are hereby stricken from the Ordinance; the Resolution No. 80-344 passed by the Sarasota Board of County Commissioners is hereby quashed, and this cause is remanded to the Sarasota Board of County Commissioners for further proceedings necessary for the passage of a new resolution establishing the rates and charges for services for Tamaron Utilities, Inc., pursuant to the provisions of Sarasota County Ordinance No. 80-62, as modified by this Order. [See Appendix No. 3]

The Order was dated April 23, 1982, and was entered by Judge Walker upon the acquiesence by a representative of the County Attorney's office who indicated that it [the County Attorney's office] would not object to the entry of the Order aforesaid. The Board of County Commissioners had not and did not authorize such a withdrawal of opposition to the challenge.

On May 3, 1982, the TAMARON HOMEOWNERS ASSOCIATION, INC., JACOB and GLADYS G. GWYNNE, and THEODORE and LULA I. WILDMAN, hereafter HOMEOWNERS, moved for an Order permitting their intervention. These persons are users of the TAMARON sewer service. The Court considered the matter on May 21, 1982, granted the motion and adjudged that the Movants (HOMEOWNERS) were to have the status as a party from May 3, 1982 forward, "so that their Motion for Rehearing of this Court's Order of April 23, 1982, may be heard." (See Appendix No. 3) That Motion was subsequently heard, and on July 2, 1982, Judge Walker denied the Intervenors' Motion for Rehearing, stating

> [T]he Court is of the opinion that if it is proper to allow depreciation of CIAC property as an operating expense in setting rates to be charged by a utility, as was held in S. E. Development & Utility Company, Inc. v. Board of County Commissioners, 398 So.2d 882, it follows that an ordinance denying such an allowance is unconstitutional.

(See Appendix No. 5)

On July 7, 1982, the HOMEOWNERS noticed their appeal of Judge Walker's Orders dated April 23, 1982 and July 2, 1982. On July 26, 1982, the BOARD gave notice of its appeal of the Order rendered on July 2, 1982, denying the HOMEOWNERS' Motion for Rehearing. The two appeals were consolidated by the Second District Court of Appeal in its Order dated September 3, 1982, wherein it further ordered that the notices were to be treated as Petitions for Writs of Certiorari.

Following the filing of briefs and oral argument, the Second District Court of Appeal, in Cases No. 82-1594 and 82-1744, rendered its Opinion on February 23, 1983. The Court stated

> [T]here is no constitutional requirement that a utility be allowed to build up a reserve fund from depreciation expenses. [See Appendix No. 6, p. 11] [Emphasis in original]

It then ruled that

> Section 8(e) of County Ordinance No. 80-62 clearly does not allow CIAC depreciation to be treated as an operating expense. Neither does the Ordinance permit consideration of CIAC depreciation in the rate base calculation. Our reading of the Ordinance leads us to the

> conclusion that it does not provide for the inclusion of CIAC depreciation in the rate base calculation by way of an add-back. If it did so, then we would be required to grant certiorari and quash the decision of the Circuit Court on this point. If it is improper to allow a utility to double-dip in its use of CIAC depreciation, it is equally improper to allow a regulatory body to completely prohibit or eliminate the use of CIAC depreciation in the ratemaking process.
>
> The Circuit Court struck only a portion of the Ordinance. We, however, conclude that that is not sufficient and accordingly hold the entire Ordinance confiscatory and violative of the due process clauses of both the Florida and United States Constitutions.
>
> We, therefore, affirm the Circuit Court, however, we do so not because the exclusion by a regulatory body of the CIAC depreciation as an operating expense is unconstitutional per se, we do so because it is improper to completely exclude the consideration of CIAC depreciation in the ratemaking process as we interpret Ordinance No. 80-62 as doing here. [Ibid., pp. 13-14] [emphasis added]

Both Petitioners moved for a rehearing and clarification. On April 6, 1983, the District Court rendered its Order denying the HOMEOWNERS' Motion, but granting, in part, the BOARD's. The Second District Court deleted the first full paragraph on page 14, (the second of the paragraphs set out above), and inserted in lieu thereof the following:

> The Circuit Court struck only certain words of Section 8(e) of the Ordinance. We, however, conclude that that is not sufficient and accordingly hold the entire section 8(e) confiscatory and violative of the due process clauses of both the Florida and United States Constitutions, and accordingly strike the entire section. [See Appendix No. 7] [emphasis added]

The HOMEOWNERS, in Case No. 63,626, and the County, in Case No. 63,646, petitioned this Court to accept jurisdiction. On October 10, 1983, this Court accepted jurisdiction.

STATEMENT OF THE FACTS

TAMARON applied to the BOARD for and was awarded a rate increase. The ordinance under which the application was made was Sarasota County Ordinance 80-62. Section 8(e) of that Ordinance provides in principal part:

> The Board has the duty and authority to determine and fix reasonable rates and charges that may be charged by any public utility for its services. The Board shall determine and investigate the actual original cost of the property of each public utility actually used and useful in public service, and shall keep a current record of the net investment of each utility in such property. The value as so determined by the Board [the Rate Base] shall be used for ratemaking purposes, less accrued depreciation, and shall not include any contributions in aid of construction or any goodwill or going concern value. The Board shall fix and determine a rate which allows for reimbursement of operating costs including depreciation on all properties, excluding contributed properties, and a fair and reasonable net return on the original cost of a system incurred by the person first dedicating it to public service, which shall not include contributions in aid of construction or customer contributions. [emphasis added] (See Appendix No. 2)

The Ordinance to the contrary notwithstanding, TAMARON sought to have included as a reimbursable expense a depreciation allowance attributable to the amortization of assets contributed to it by developers and/or homeowners. Since TAMARON's inception to the date of the application for a rate increase, the utility had received in contributions $575,727 in assets, principally of land, a collection system, pumping stations, and a treatment

plant. (See Appendix No. 8, p. 1) TAMARON's total assets equaled $594,331. The investment, the origin of which is traceable to the owners of TAMARON, amounted to $18,604. (Ibid.)

The BOARD determined that the gross revenue sufficient to reimburse the Utility for its reasonable operating costs plus permit it to earn a reasonable net return on the original cost of the system incurred by the entity first dedicating it to public service was $90,583. TAMARON would have included in the required revenue an additional $23,530 of "annual expense" attributable to the amortized depreciation of the $575,727 of contributed assets. The BOARD refused to include that amount in the required revenue, but authorized TAMARON to include within the required revenue figure $14,323 per year of expense money for repairs and maintenance of its assets. TAMARON's rate base is presently zero.

ARGUMENT

TAMARON UTILITIES IS NOT DEPRIVED OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW WHEN IT IS AT ONCE PRECLUDED BY LAW FROM COLLECTING A DEPRECIATION EXPENSE ATTRIBUTABLE TO THE AMORTIZATION OF CONTRIBUTED ASSETS WHEREIN IT [THE UTILITY] DOES NOT HAVE ACQUISITION COSTS AND SIMULTANEOUSLY PRECLUDED FROM INCLUDING ANY PORTION OF THE VALUE OF THOSE ASSETS IN THE RATE BASE ON WHICH IT IS ENTITLED TO EARN A REASONABLE RETURN.

The Second District Court of Appeal concluded that it is constitutionally improper to allow a regulatory body to prohibit or eliminate the use of CIAC depreciation in the ratemaking process. The only reason offered for the conclusion is that to do so results in the confiscation of the utility's assets. Your Appellants believe that the Lower Court erred by departing from the essential requirements of constitutional law as settled by the Supreme Court of the United States, by failing to properly apprehend the limited nature of the property interest a regulated utility has in property contributed to it for use in the operation of the utility.

The National Association of Regulatory Utility Commissioners (NARUC), through its Uniform System Accounts for Class A and B Water Utilities 1976 classifies contributions in aid of construction as a liability (Account No. 271), utilized for investor-owned water utilities, as credits for donations or contributions in cash, services or property from states, municipalities or other government agencies, individuals, and others for construction

purposes.[1]

Simply stated, contributed assets or CIAC are assets conveyed to a regulated utility by developers or utility patrons as a condition to access the utility's service, for which the utility does not have any acquisition costs. In the case of TAMARON, contributed assets represent 97% of all assets devoted to public service and providing sewer utility.

Applying the Lower Court's stated constitutional requirement to this class of assets, the Lower Court has enunciated a constitutional rule to the effect that a regulated utility is deprived of its property without due process of law when the enabling law, in this case Sarasota County Ordinance 80-62, prohibits the utility from at once including within its rate the annual amortization of the depreciation expense attributable to this class of properties, or in the alternative, permitting the utility to include contributed asset depreciation in its rate base.

While there has been a long line of cases dealing with the nature of the utility's interest in property dedicated to public service, there are only a few cases, to this writer's knowledge, which have considered in its narrowest terms the nature of a utility's property interest in contributions made by developers and/or utility users.

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[1] See National Association of Regulatory Utility Commissioners. Uniform System of Accounts for Class A and B Water Utilities, 1976. National Association of Regulatory Utility Commissioners, Washington, D. C. (1977) p. 62.

The Supreme Court of the United States, as early as 1908, wrestled with the issue of whether the Constitution of the United States requires that a utility be permitted to earn a return on the present market value of its assets. The constitutional issue concerned the nature of a utility's interest in property, which at base is the question in this case. In Knoxville v. Knoxville Water Company, 121 U.S. 1, 29 S.Ct. 148, 53 L.Ed. 731 (1908), and in United Railways & Electric Company v. West, 280 U.S. 234, 50 S.Ct. 123, 74 L.Ed. 390 (1930), the Court ruled that a utility had a constitutional right to have the value of the asset at the time the asset first became subject to regulation determined to be its property interest, irrespective of the utility's cost in the asset. By 1942, however, the Supreme Court reversed itself, rejecting the earlier decisions made in Knoxville and United Railways. In Federal Power Commission v. Natural Gas Pipeline Company of America, 315 U.S. 575, 62 S.Ct. 736, 86 L.Ed. 1037 (1942), the Supreme Court held that a utility is not unconstitutionally deprived of its property when it is refused the right to include within its rate base any amounts in excess of the utility's original cost in the assets. The Court held that the Constitution of the United States in general, and the due process provisions in particular, do not require that a utility be permitted to earn a return on the value of assets to which it has title when those assets first become subject to utility rate regulation. Only if a utility were denied the right to recoup actual costs would one be confronted with the deprivation or confiscation issue.

The Supreme Court broadened its Natural Gas Pipeline decision in the landmark decision, Federal Power Commission v. Hope Natural Gas Company, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1954). In both Hope Natural Gas and Natural Gas Pipeline, the utilities argued that the refusal by the Federal Power Commission to permit it to include within its rate base the assets on the basis of either its replacement costs or actual present value deprived the utility of property without due process of law. The Court rejected both arguments, stating that the purpose of an amortization allowance is to restore from current earnings the amount of service capacity of the utility consumed each year. The Court reasoned that even though the replacement costs, or the present value of the property, may be more than its actual cost to the utility, this theoretical accretive value does not represent a profit to the utility or a constitutionally protected property interest, since the property dedicated to the business, save for its salvage value, is destined by law or contract to be fully and exclusively devoted to public service. The Court concluded that to require that assets be calculated into ratemaking procedures in excess of the utility's actual, legitimate costs would be to permit or require the inclusion of an improper expense, and would contribute to additional profit over and above a fair and reasonable return. This, the Court concluded, would unjustly penalize consumers and result in a windfall to the utility. From Hope Natural Gas Company, supra.:

> Only a word need be added respecting depletion and depreciation. We held in the Natural Gas Pipeline Company case that there was no constitutional requirement "that the owner who embarks in a wasting-asset business of limited life shall receive at the end more than he has put into it." 315 U.S., p. 593, 86 L.Ed. 1053, 62 S.Ct. 736. The Circuit Court of Appeals did not think that that rule was applicable here because Hope was a utility required to continue its service to the public, and not scheduled to end its business on a date certain, as was stipulated to be true of the Natural Gas Pipeline Company. But that distinction is quite immaterial. The ultimate exhaustion of the supply is inevitable in the case of all natural gas companies. Moreover, this Court recognized in Lindheimer v. Illinois Bell Telephone Company, 292 U.S. 151, 78 L.Ed. 1182, 54 S.Ct. 658, supra, the propriety of basing annual depreciation on costs. By such a procedure the utility is made whole and the integrity of its investment maintained. No more is required. We cannot approve the contrary holding of United Railway & Electric Company v. West, 280 U.S. 234, 253, 254, 74 L.Ed. 390, 410, 411, 50 S.Ct. 123. Since there are no constitutional requirements more exacting than the standards of the act, a rate order which conforms to the latter does not run afoul of the former. [320 U.S. at p. 606-607] [emphasis added]

What makes a natural gas regulation case analogous to a regulated sewer utility case is that by law or contract the contributed assets are dedicated to public service for so long as said assets are functional.

The Lower Court determined a constitutionally protected property interest in contributed assets. This conclusion is directly contrary to the rule enunciated by the Supreme Court of the United States which limited constitutional protection to actual cost. That rule notwithstanding, the Lower Court mandated

that a utility be authorized to collect a depreciation expense on the contributed assets, or to permit it to include contributed property in the rate base by way of an add-back, without regard to costs. (See Appendix No. 6, pp. 13-14).[2] Unfortunately, the Lower Court failed to state any reasons why the value of contributed assets are constitutionally protected, or why the rule articulated in Hope Natural Gas is not satisfied when actual costs are zero. Under the facts here, TAMARON is not free to cart off the contributed assets or divert them from dedicated use. Therefore, it is quite impossible to conceptualize the property interest of the utility which the Lower Court concludes is constitutionally protectable. Similarly, it is difficult to ascertain just what utility property is being taken when constitutional protection is limited to actual legitimate costs and there were not any costs associated with acquisition.

The Supreme Courts of at least three states have dealt specifically with the issue of the nature of a regulated utility's property interest in and to contributed assets. The highest courts of Missouri, North Carolina and Virginia have each rejected the conclusion reached by the Lower Court. The case most analogous to the one sub judice is Princess Anne Utilities Corporation v. Commonwealth of Virginia, ex rel. State Corporation Commission,

[2]The Lower Court allowed in a footnote that, "We do not mean to suggest that an add-back is the only manner in which CIAC depreciation may be considered in the rate base calculation." The Lower Court did not, however, offer any other specific alternatives which would satisfy the mandate.

179 SE2d 714 (Va. 1971). In that case, the SCC denied the utility's application for a rate increase. The utility appealed, claiming that the rates fixed by the Commission were unreasonable and confiscatory. The grounds for so claiming were that the SCC, under Virginia Statutes, rejected the utility's position that contributions in aid of construction should be included in the rate base and depreciation thereof allowed. The Virginia Court rejected the utility's position, and found that the rate awarded to the utility was not confiscatory.

As TAMARON has in this case, Princess Anne argued that because the facilities are owned by the utility, it can make no difference from where the facilities or the money to construct them comes. The Supreme Court of the Commonwealth of Virginia stated at p. 716:

> In excluding contributions in aid of construction from the rate base, the Commission followed, and we think properly so, what is the near universal rule in public utility rate cases. As Professor Priest says in his work, Principles of Public Utility Regulation, Volume I, Ch. 4, p. 177, "Court and Commission decisions holding that contributions in aid of utility construction must be excluded from the rate base have been so uniform as probably not to require detailed citation."
>
> But aside from the fact that the just cited rule is one generally followed, there is another consideration prompting its adoption. The rule is based on principles of fairness. It is inequitable to require utility customers to pay a return on property for which they, and not the utility, have paid. City of Hagerstown v. Public Service Commission. 217 Md. 101, 112, 141 A.2d 699, 704 (1958).

The Court determined that it did not make any difference whether the contributions were made directly by the patrons or by the developer.

> It makes no difference, however, in the view we take of the case, whether the contributions to the utility company were made initially by the customers or by the land development companies or whether some of the latter were closely related to the utility company. The controlling factor is whether the utility company's customers ultimately bore the cost of such contribution. p. 716.

The Court described as "wholly unrealistic" the idea that the utility costs borne by the land development companies were not passed on to the lot purchasers.

In a second closely analogous case the Supreme Court of the State of Missouri passed upon the issue of whether a regulated utility has a vested, and therefore constitutionally protected interest, in contributed assets. In State ex rel. Martigney Creek v. Public Service Commission, 357 SW2d 394 (Mo. 1976), intervenors challenged that State's PSC's inclusion in the rate base of contributions in aid of construction. Depreciation of contributed assets was also an issue. The Court ruled that prohibiting a utility from collecting an annual depreciation allowance attributable to the amortization of contributed assets, and simultaneously excluding any contributed property factor from the rate base did not result in a confiscatory rate. The Court stated,

> Since the utility customers have donated or paid for a substantial portion of the plant, Martigney has no vested interest so far as rate-making is concerned. (p. 394)

The North Carolina Supreme Court in State of North Carolina ex rel. Utilities Commission, et al. v. Heater Utilities, Inc., 219 SE2d 56 (N.C., 1975), heard a challenge by the utility to a rate award which excluded both CIAC from the rate base and prohibited a depreciation allowance for the contributed assets. Again, as in Virginia and Missouri, the Court approved the rate and rejected the argument that such a rate would be confiscatory.

Finally, the Maryland Court of Appeals in dealing with the same issue stated

> . . . in spite of the fact that the utility holds legal title to the contributed property, on the ground that the contributed property is subject to contractual rights in favor of those who furnished it [treating a developer as if he were the agent of those who buy lots served by contributed facilities], which places the beneficial use of the property in those who, from time to time, own the lots, houses or factories or lands which the water company . . . has agreed to serve, so that the value of the water company's bare legal title to the property is nothing. In other words, the water company . . . is simply in the position of a trustee, holding legal title to the contributed property for the benefit of those with whom it has contracted, or their successors in interest. City of Hagerstown v. Public Service Commission, 141 A2d 699, 705 (Md. 1958). [emphasis added]

As a practical matter, the operation of what the Lower Court stated is required produces a windfall for the utility. TAMARON has custody to $575,727 of contributed assets which it accepted subject to the burdens imposed upon it by the sewer franchise from the BOARD. If TAMARON is permitted to depreciate the contributed assets, it will collect $23,530 more per year than the

$90,583 to which the BOARD concluded it was entitled.

The function of depreciation is to restore to the investor the capital expended for an asset, the useful life of which is in excess of one year. The $23,530 which would be allowed TAMARON under the contributed asset depreciation option for protecting its alleged property interest functionally results in the utility realizing additional annual profit in that amount, as it does not have any investment to be restored. If TAMARON is permitted to collect the annual amount for the life of the contributed assets, TAMARON will have collected a fund equal to $575,727, the total original book value of the contributed assets. The Lower Court has stated that the utility is constitutionally entitled to that fund or to some functional equivalent. If TAMARON does have such a constitutional entitlement it cannot be deprived of the fund or the use of the fund without being further compensated. What started as a donation and a liability incurred by the utility when it accepted the donation has become by judicial interpretation a grant of money equal to the original book value of the donation. Clearly, such is a windfall and rather strongly suggests that the Lower Court's determination cannot be reasonably sustained.

The second option offered by the Lower Court to constitutionally protect TAMARON's "property interest" in contributed assets is to include CIAC depreciation in the rate base by way of so-called add-back. This procedure results in an even greater windfall to the utility than does the authorization of annual depreciation expenses. This Court explained in detail the

so-called add-back calculation in State v. Hawkins, 364 So.2d 723 (Fla. 1978). The procedure is implemented by periodically adjusting the rate base upward by an amount equal to the then accumulated depreciation attributable to the contributed assets. In the case of TAMARON, $23,530 would be "added back" annually into the rate base. By the time the procedure has run its course, and the contributed assets fully depreciated, the "add-back" to the rate base would equal $575,727. Being part of the rate base, the Board would be compelled to allow the utility to earn a reasonable return on that amount, notwithstanding the fact that TAMARON did not buy the assets or otherwise acquire them other than by donation. The rate base would fix at $575,727 and remain there, the consequence of which is that the patrons would wind up paying the utility an annual return on assets they, themselves, contributed. "Add-back" results in turning the procedure to set a rate base on its head. When the assets are fully used up, the utility continues to be constitutionally entitled to earn a return on the value of assets previously given to them. Quite apparently, it is for this policy reason that both Ordinance 80-62 and Florida Statutes §367.081 prohibits its regulatory agency from including contributions in aid of construction in the rate base. As Professor Priest says, virtually all known authorities prohibit the inclusion of contributed assets in the rate base. Such a windfall circumstance cannot reasonably be a requirement of constitutional law.

Florida, the Federal jurisdiction, and most other states long ago committed to the "end result" doctrine. Pursuant thereto,

the criterion by which deprivation and confiscation of utility property questions are judged is whether the end result is reasonable, all things considered. Jacksonville Gas. Corp. v. Florida RR & Public Utilities Commission, 57 So.2d 887 (Fla. 1951). If a rate order produces sufficient revenue to reimburse a utility for its reasonably necessary expenses and produces a reasonable return on the utility's net investment, then the rate is reasonable, and not confiscatory. Gulf Power Company v. Bevis, 289 So.2d 401 (Fla. 1974). Confiscation of utility property results only when there is a shortfall of revenue which leaves the utility with less than the amount to which it is entitled to be reimbursed for the expenses plus earn a return on its investment, if any.

The Lower Court did not find that TAMARON was not being reimbursed for its expenses or earning an unreasonable return on its rate base. Instead, the Lower Court determined that the Constitution mandates that contributed property be included in a rate award as either an annual depreciation expense allowance or made part of the rate base, although TAMARON did not and cannot show that it made expenditures related to the contributed assets for which reimbursement has been denied. TAMARON has, however, previously argued that it must have the depreciation allowance included in the rate in order that it will not be deprived of property in the future. It argued that it has a legal duty to maintain contributed assets. This point, however, has already been acknowledged, accepted and satisfied by the BOARD when it authorized $14,323 of annual revenue for repair and maintenance

of TAMARON's assets. In that 97 percent of all assets are contributed, the BOARD has quite properly and adequately provided TAMARON revenues sufficient to fulfill that duty. In fact, TAMARON has not suggested nor does the record show that amount insufficient to maintain or repair the assets. TAMARON has suggested that future developments might give rise to circumstances which could require expenditures greater than the amount allowed. In other words, TAMARON might be required to undertake future repairs for which there was not an historical precedent. It would represent a remarkable departure from generally accepted ratemaking principles if a utility was constitutionally entitled to be "reimbursed" for expenses which are admittedly speculative. Gulf Power Company v. Bevis, supra.

A close reading of the Lower Court's Opinion discloses the importance to which the Lower Court assigned federal income tax treatment of contributed assets.

> The Internal Revenue Code accomplishes this by assigning a basis for costs that can be used as a starting point for depreciating deductions. For example, if one acquires an asset by gift, §1015 of the Internal Revenue Code determines the basis for the property. J. Freeland, S. Lind and R. Stevens, Fundamentals of Federal Income Taxation, (3rd Ed. 1981). It seems reasonable to us that if contributed property can be depreciated annually for federal income tax purposes, this depreciation ought also to be considered at some point in the ratemaking process. (See Appendix No. 6, pp. 8-9)

In the development of its rationale, the Lower Court at that point appears to have committed itself to the position that

because the IRS "recognizes" depreciation of contributed assets in this manner, then ratemaking procedures should similarly acknowledge its importance. Unfortunately, the Lower Court relied on the wrong section of the Internal Revenue Code on which to set its premise. Had the Court referred to Section 118(b)(4) of the Internal Revenue Code and Internal Revenue Regulation Section 1.118(2)[3] it would have determined that the Congress of the United States provided special treatment for depreciation of contributed assets. The regulation aforesaid provides in principal part

> No deductions for depreciation shall be taken and no investment credit shall be allowed for a water or sewer disposal facility acquired by a regulated public utility which provides water or sewer disposal services, to the extent that (i) the facility is acquired as a non-taxable contribution in aid of construction, (ii) the facility is purchased with amounts received as non-taxable contributions in aid of construction, or (iii) the facility is constructed with amounts received as non-taxable contributions in aid of construction.

Ironically, the Lower Court's ruling as it presently stands constitutes a fundamental challenge to the premise of the Internal Revenue Code, which is that a utility does not have a sufficient property interest in contributed assets to justify recognition for tax purposes of a depreciation expense.

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[3]Proposed May 30, 1978.

CONCLUSION

Fair results, equitable treatment, sound ratemaking, and the requirements of constitutional law, mandate that the Lower Court's Opinion be vacated. The issue is, after all, whether a regulatory body may adopt rules, regulations and rates which as a matter of policy exclude a depreciation allowance for contributed assets, while also precluding the inclusion of some CIAC factor in the rate base. Sarasota County adopted this position in Ordinance 80-62. The State of Florida also did so in Section 367.081(2) Florida Statutes (1981). The Lower Court, however, says the regulatory body may not adopt that policy without infringing upon the requirements of constitutional law. In so stating, the Lower Court has inserted itself, in the name of due process, into what are and should be policy issues more appropriately left to the Legislature or the regulatory body, as the case may be. The issue is not whether the regulatory body may include a depreciation allowance attributable to contributed assets. The legal appropriateness of such a policy was recognized in Southeastern Development & Utility Company, Inc. v. Board of County Commissioners of Sarasota County, 398 So.2d 882 (Fla. 2nd DCA 1981), and certainly is not challenged here.

The HOMEOWNERS respectfully suggest that the Constitutions of the United States and the State of Florida do not require that depreciation of contributed assets be included in some way in the operating rate granted a regulated utility. The HOMEOWNERS would

request that this Court reject the rule of constitutional law adopted by the Lower Court, and at the same time, reaffirm its commitment to both the constitutional requirements articulated in the Hope Natural Gas Company case, supra., and to the end results doctrine which limits judicial review of any given rate to whether the utility is compensated for its expenses and allowed to earn a reasonable return on its investment. All other issues and questions are appropriately reserved as policy issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing have been furnished, by mail, to RICHARD E. NELSON, ESQUIRE, Nelson, Hesse, Cyril, Smith, Widman & Herb, 2070 Ringling Boulevard, Sarasota, Florida 33577, Attorney for Sarasota County, and to M. JOSEPH LIEB, ESQUIRE, Syprett, Meshad, Resnick & Lieb, 1900 Ringling Boulevard, Sarasota, Florida 33577, Attorney for Tamaron Utilities, this 31st day of October, 1983.

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