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ORIGINAL
FILE COPY

July 26, 1995

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

Re: Docket No. 940109-WU

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket are the original and 15 copies of Citizens' Response to SGU Motion for Clarification, or in the Alternative, for Relief from Final Order.

ACK ✓ Please indicate the time and date of receipt on the enclosed
AFA 1 duplicate of this letter and return it to our office.

APP _____

CAF _____

CMU _____

CTR _____

ENG _____

LEG 1 _____

LIN 3 _____

CPC _____

ROH _____

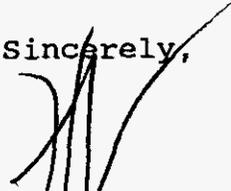
SEC 1 _____

WAS _____

OTH _____

HM:bsr
Enclosures

Sincerely,


Harold McLean
Associate Public Counsel

RECEIVED & FILED


FPSC DIVISION OF RECORDS

DOCUMENT NUMBER-DATE

07136 JUL 26 95

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Interim and)
Permanent Rate Increase in)
Franklin County, Florida by)
ST. GEORGE ISLAND UTILITY)
COMPANY, LTD.)
_____ /

DOCKET NO. 940109-WU

JULY 26, 1995

**ORIGINAL
FILE COPY**

RESPONSE TO SGU MOTION FOR CLARIFICATION, OR IN THE
ALTERNATIVE, FOR RELIEF FROM FINAL ORDER

The Citizens of the State of Florida (Citizens), by and through JACK SHREVE,
Public Counsel, respond to the above-referenced Motion and say as follows:

SUMMARY

The order for which clarification or relief is sought is the subject of an appeal before the First District Court of Appeal, the record has been transferred to that court, the commission has no jurisdiction, concurrent or otherwise, to entertain any petition or motion with respect to the subject matter of the order. Moreover, the specific subject matter for which clarification is sought is squarely before the appellate court. Even before SGU's opportunity to seek clarification of the commission's order by way of reconsideration had expired, it failed to do so. The instant motion provides neither allegation nor proof of changed circumstances necessary to justify any relief from the order of the commission.

SGU's motion for clarification or relief must be denied.

ARGUMENT

1. SGU filed a notice of appeal to the District Court of Appeal, First District on March 30, 1995;

2. On June 28, 1995, SGU filed an initial brief in that court seeking review of several issues, including the following point:

The Commission erred by ordering the utility to escrow service availability charges, where the commission's order noted the utility's "heavy reliance" on such charges, and uncontradicted testimony showed that such escrowing could not practically be implemented and still allow the utility to continue operating

3. Both the commission order and the specific subject matter with which the instant motion deals are before the District Court of Appeals;

4. Rule 9.600, Florida Rules of Appellate Procedure provides:

(a) **Concurrent Jurisdiction.** Only the court may grant an extension of time for any act required by these rules. Before the record is transmitted, the lower tribunal shall have concurrent jurisdiction with the court to render orders on any other procedural matter relating to the cause, subject to the control of the court.

(b) **Further Proceedings.** If the jurisdiction of the lower tribunal has been divested by an appeal from a final order, the court by order may permit the lower tribunal to proceed with specifically stated matters during the pendency of the appeal.

(emphasis provided)

Since the record has already been transmitted to the District Court of Appeals and since the District Court has not issued any order permitting the commission to act on any matter during this appeal, the commission has jurisdiction over neither procedural

nor substantive issues in this case.

The appellate courts of Florida jealously guard their appellate jurisdiction to the point of finding trial judges in criminal contempt for interfering therewith by any material modification of a judgment while that judgment is on appeal. In Department of Environmental Regulation v. Apelgren, 611, So. 2d 72, 73 (Fla. 4th DCA, 1992) the court held:

the elimination of a defendant from liability is a material change in the final judgement while it was on appeal and is therefore reversible error.

As to contempt, in State of Florida ex. rel. Lantz, 440 So. 2d 446 (Fla. 3rd DCA 1983) the court held that it had jurisdiction to hold a circuit judge in contempt for taking substantive action in a case which was on appeal. A specific stay of the trial court's judgement was in effect in Lantz before the trial court acted, but the principal that a lower tribunal is not to amend the substance of a judgment or order on appeal is made.

Even though there is no claim by SGU, that the "clarification" sought falls under Florida Rule 1.540(a), Florida Rules of Civil Procedure, it is worth noting that the rule provides no opportunity for the commission to clarify or change its order, even as to clerical errors under that rule. The Rule provides that once the record is docketed by the appellate court even clerical mistakes may be cured only upon leave of the appellate court.

5. Even if jurisdiction over this order remained with the commission, it is too late to change it. Order no. PSC-1383-FOF-WU, was issued on November 14th, 1994;

6. St. George Island Utility Company, Ltd. (SGU) filed a motion for

reconsideration of order no. PSC-1383-FOF-WU on November 29, 1994, no reconsideration of the escrow of service availability fees was sought in that motion and no confusion as to any aspect of the escrow matter was alleged;

7. Rule 25-22.060(3)(a), Florida Administrative Code provides in relevant part:

A motion for reconsideration of a final order shall be filed within fifteen (15) days after issuance of the order.

Rule 25-22.060(2)(d), F. A. C., provides in relevant part:

Failure to file a timely motion for reconsideration, cross motion for reconsideration, or response, shall constitute waiver of the right to do so.

SGU has waived its right to seek reconsideration of order no. PSC-1383-FOF-WU under the rules of the commission;

8. The alleged confusion which SGU alleges in its instant motion is noticeably missing from its point on appeal before the First District Court of Appeal and from the supporting argument;

9. The prayer for relief from the order is devoid of any allegation or proof of any change of circumstance which would justify any relief from the commission order requiring the escrow of service availability fees. It is a mere invitation to the commission to revisit all of the matters the commission knew before its final order; it is an invitation to the commission to go behind its order, in the total absence of any reservation of jurisdiction by the commission over the point. The time to make the argument of the instant motion is long past;

10. The Citizens doubt that the staff advised SGU to seek clarification or relief

from the order of the commission, as is implied on page 2 of the instant motion. It is clear, however, that neither the staff nor the commission can by invitation waive or otherwise suspend the application of the appellate rules or case law on the subject of the jurisdiction of the commission over an order pending appeal of that order to an appellate court.

11. The instant motion is but another attempt by SGU to frustrate the will of a regulatory agency by the exploitation of imagined ambiguity. The motion should be summarily denied and an immediate enforcement order entered to SGU to show cause why it should not be fined for yet another violation of another commission order.

Respectfully submitted,



Harold McLean
Associate Public Counsel

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111 West Madison Street
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Attorney for the Citizens
of the State of Florida

**CERTIFICATE OF SERVICE
DOCKET NO. 940109-WU**

I HEREBY CERTIFY that a correct copy of the foregoing has been furnished by U.S. Mail or hand-delivery to the following parties on this 26th day of July, 1995.

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