

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

FILE COPY

In Re: Application by Southern)
States Utilities, Inc. for rate)
increase and increase in service)
availability charges for Osceola)
Utilities, Inc., in Osceola)
County, and in Bradford, Brevard,)
Charlotte, Citrus, Clay, Collier,)
Duval, Highlands, Lake, Lee,)
Marion Martin, Nassau, Orange,)
Osceola, Pasco, Putnam, Seminole,)
St. Johns, St. Lucie, Volusia,)
and Washington Counties.)

Docket No. 950495-WS

Filed: November 9, 1995

SSU'S RESPONSE TO OPC'S MOTION FOR
RECONSIDERATION AND OPC'S REQUEST
FOR ORAL ARGUMENT

SOUTHERN STATES UTILITIES, INC., ("SSU") by and through its undersigned counsel, and pursuant to Rules 25-22.037(2)(b) and 25-22.060(1)(c), Florida Administrative Code, hereby files this Response to the Citizens' Motion for Reconsideration (the "Motion") and the Citizens' Request for Oral Argument filed by the Office of Public Counsel ("OPC") on November 2, 1995. In its Motion, OPC requests that the full Commission reconsider Order No. PSC-95-1327-FOF-WS, issued November 1, 1995, whereby the Commission denied SSU's request for interim rates. In support of this Response, SSU states as follows:

1. OPC's Motion and Request for Oral Argument should be stricken as improper pleadings. In these pleadings, OPC asks that the Commission reconsider only that portion of the Order which "establishes the principle that a water or wastewater utility may file a request for interim rates using a forecasted income statement." Motion at 1-2. Yet, by Order No. PSC-95-1327-FOF-WS,

DOCUMENT NUMBER-DATE

11182 NOV-95

Fpsc-RECORDS/REPORTING

3500

the very order OPC now requests the Commission reconsider, the Commission agreed with the arguments SSU made in SSU's September 6 Response to OPC's Motion to Dismiss Request for Interim Rate Increase ("OPC's Motion to Dismiss Interim") that OPC has no standing to participate in interim rate determinations. The Commission specifically ruled as follows:

Section 367.082, Florida Statutes, and our procedures do not contemplate parties filing a response or motion regarding a utility's request for interim rates.

. . . . [W]e find that OPC's motion to dismiss the interim rate request is an inappropriate motion and shall be denied.

Order No. PSC-95-1327-FOF-WS at pp. 7, 8.¹ OPC's Motion does not ask the Commission to reconsider the above-quoted aspect of the Order. SSU maintains that OPC does not have standing to participate in Commission interim rate determinations for the reasons explained in SSU's September 6 Response to OPC's Motion to Dismiss Interim, which is by reference incorporated herein. OPC does not somehow gain the standing it lacks to participate in the initial interim rates determination by filing a motion for reconsideration to an order reflecting said determination. Moreover, OPC makes no effort in the instant Motion to meet the test for reconsideration established in Diamond Cab Co. of Miami v.

¹ While parties are not allowed to participate in the interim rate determination, the Commission has allowed a **utility** to file a suggestion of error to a staff recommendation, provided that suggestion addresses only mathematical errors in the staff recommendation, and a motion for reconsideration if the Commission made a mistake of fact or law in its order. 95 FPSC 5:144, In re: Application for a Rate Increase in Duval County by Ortega Utility Company; 94 FPSC 12:157, In re: Application for a Rate Increase by Florida Public Utilities Company.

King, 146 So.2d 889 (Fla. 1962), as to the Commission's decision that OPC lacks standing. For the foregoing reasons, OPC's Motion and Request for Oral Argument should be stricken as improper pleadings by a person lacking standing.

2. If the Commission considers the substance of OPC's Motion, SSU asserts that the Motion should be denied for two principle reasons: (1) OPC does not meet the standard for reconsideration established in Diamond Cab Co. of Miami v. King, supra and (2) OPC's interpretation of Section 367.082, Florida Statutes, is incorrect.

3. As stated above, OPC maintains that the Order in question "establishes the principle that a water or wastewater utility may file a request for interim rates using a forecasted income statement." Motion at 1-2. What OPC claims the Commission has established is not so clearly established in the Order. Although the Commission examined SSU's projected expenses, the Order states,

We are concerned that to broaden a projected test year to include more than the rate base would exceed the clear meaning of Section 367.082(1).

Order PSC-95-1327-FOF-WS at p. 5. Significantly, the Commission rejected SSU's projected interim test year as a whole, the Commission did not specifically hold that the use of projected expenses was sanctioned, and the Commission cited rate structure as an independent reason² for its decision. Thus, it appears that OPC is asking the Commission to reconsider an issue the Commission did not directly confront. Moreover, OPC makes no attempt to raise any

² Order No. PSC-95-1327-FOF-WS at pp. 4-5.

point of law which was not previously argued in OPC's Motion to Dismiss Interim. The Commission should note that the salient language in the instant Motion appears to have been copied verbatim from OPC's Motion to Dismiss Interim. OPC offers only unpersuasive additional support (which SSU addresses in the following paragraph) for the arguments it has already made.³ In consideration of the foregoing, the Commission should find that OPC's Motion does not meet the standard for granting reconsideration. OPC has merely reargued that which it has argued previously and has failed to call to the Commission's attention a mistake of fact or law made in the Order which is the subject of the Motion. Diamond Cab Co. of Miami v. King, supra

4. For the reasons stated in SSU's September 6 Response to OPC's Motion to Dismiss Interim, OPC's argument that the Commission cannot use projected expenses to calculate an interim revenue requirement should be rejected. The only new support OPC now offers concerns the interim statutes for other industries. OPC alleges that interim revenue deficiencies in the other industries are calculated on a historical basis, always using a twelve month average rate base, and if a year-end rate base for interim is allowed, the revenue deficiency, calculated using the average rate base, is then applied to the year-end rate base even though this procedure results in an accounting mismatch. OPC then asserts that the accounting mismatch resulting from the use of a projected rate

³ As stated below, this embellishment was apparently important enough to call to the Commission's attention, yet OPC has not seen fit to cite to so much as one illustrative case.

base and historical expenses would follow this same mismatch pattern and was therefore contemplated by the Legislature. SSU responds to this argument as follows:

a. OPC has not seen fit to cite any cases supporting its assertion.⁴ In at least one electric utility case decided under a prior but similar version of Section 366.071, Florida Statutes, OPC's premise did not hold true. By Order No. 9941, issued April 9, 1981,⁵ the Commission determined an interim revenue requirement for Florida Power and Light by simply applying the floor of the last authorized rate of return to a year-end rate base. In at least two recent water and wastewater cases where a year-end rate base was allowed for interim purposes, the Commission followed the same methodology employed in the Florida Power and Light case, i.e., determined an interim revenue requirement by simply applying the floor of the last authorized rate of return to a year-end rate base. Order No. PSC-94-1044-FOF-WS, issued August 25, 1994,⁶ and

⁴ SSU maintains that it should not be SSU's duty or the Commission's duty to perform OPC's legal research. The movant has the burden of justifying the relief sought in its motion. By placing SSU and the Commission in a position of researching the validity or invalidity of OPC's assertions, OPC evades its responsibility as the moving party. In instances such as this, OPC should not be granted the relief sought by reason of its failure to carry its burden as movant.

⁵ 81 FPSC 4:57, In re: Petition of Florida Power and Light Company for an Increase in Rates and Charges.

⁶ 93 FPSC 8:219, In re: Application for a Rate Increase in Pinellas County by Mid-County Services, Inc.

Order No. PSC-93-1174-FOF-SU, issued August 10, 1993.⁷ Therefore, as best as SSU is able to determine at this time, OPC's premise is faulty.

b. Moreover, in the mismatch scenario which OPC claims the Commission has sanctioned, a return is calculated first as to an average rate base to determine a revenue deficiency and then to a year-end rate base to determine a revenue requirement. This type of mismatch, even if it did exist and was sanctioned by the Commission, neither presents the host of inconsistencies nor is so clearly antithetical to traditional rate-making practice as the mismatch of rate base from one year and expenses from another which OPC advocates in its Motion.

c. SSU reiterates that using a projected test year (expenses and rate base) for interim rate purposes under Section 367.082 is no different than the Commission's use of projected test years (expenses and rate base) for final rate purposes. Indeed, given that interim rates are collected subject to and the clear legislative intent to afford utilities some relief from inherent regulatory lag by authorizing interim rates, the Commission's distress concerning the use of projected test years for interim rate purposes seems unfounded.

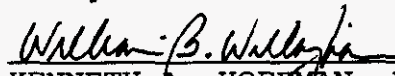
5. OPC's Request for Oral Argument should be rejected. As

⁷ 94 FPSC 8:454, In re: Application for Rate Increase in Martin County by Hobe Sound Water Company.

stated above, OPC has no standing to participate in interim rate determinations and cannot be extended standing simply by filing a request for reconsideration of an interim rate order. Therefore, oral argument is wholly improper. Furthermore, OPC's Request for Oral Argument merely reiterates the arguments of its Motion, which SSU submits is insufficient justification for oral argument. OPC's Request for Oral Argument also plainly indicates that OPC would like to use the opportunity of oral argument to complete and to present the legal research it apparently has not yet performed. If parties are to be encouraged to present their best case in their written pleadings, requests of this nature must be rejected.

WHEREFORE, in consideration of the foregoing, the Commission should strike OPC's Motion for Reconsideration and Request for Oral Argument or, alternatively, deny both.

Respectfully submitted,



KENNETH A. HOFFMAN, ESQ.
WILLIAM B. WILLINGHAM, ESQ.
Rutledge, Ecenia, Underwood,
Purnell & Hoffman, P.A.
P. O. Box 551
Tallahassee, FL 32302-0551
(904) 681-6788

and

BRIAN P. ARMSTRONG, ESQ.
MATTHEW FEIL, ESQ.
Southern States Utilities, Inc.
1000 Color Place
Apopka, FL 32703
(407) 880-0058

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing SSU's Response to OPC's Motion for Reconsideration and OPC's Request for Oral Argument was furnished by U.S. Mail to the following this 9th day of November, 1995:

Lila Jaber, Esq.
Division of Legal Services
2540 Shumard Oak Boulevard
Gerald L. Gunter Building
Room 370
Tallahassee, FL 32399-0850

W. Allen Case, President
Sugarmill Woods Civic Assoc.
91 Cypress Boulevard West
Homosassa, FL 34446

Charles J. Beck, Esq.
Office of Public Counsel
111 W. Madison Street
Room 812
Tallahassee, FL 32314-5256

Kjell W. Pettersen
Chairman, MIFWRDFC
P.O. Box 712
Marco Island, FL 33969

Michael B. Twomey, Esq.
P. O. Box 5256
Tallahassee, FL 32314-5256

Robert Bruce Snow
20 N. Main St.
Brooksville, FL 34601-2850

Donald R. Odom
Chief Asst. County Atty.
Hillsborough County
P.O. Box 1110
Tampa, FL 33601

Arthur I. Jacobs, Esq.
Jacobs & Peters
P.O. Box 1110
Fernandina Beach, FL
32305-1110



WILLIAM B. WILLINGHAM, ESQ.