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ORIGINAL
FILE COPY

November 15, 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. 920199-WS

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket are the original and 15 copies of Citizens' Response in Opposition to Southern States' Motion for Reconsideration. A diskette in IBM-compatible WordPerfect 5.1 is also submitted.

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

Sincerely,

John Roger Howe
Deputy Public Counsel

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application of Southern States Utilities, Inc. and Deltona Utilities, Inc. for Increased Water and Wastewater Rates in Citrus, Nassau, Seminole, Osceola, Duval, Putnam, Charolotte, Lee, Lake, Orange, Marion, Volusia, Martin, Clay, Brevard, Highlands, Collier, Pasco, Hernando, and Washington Counties.	Docket No. 920199-WS Filed: November 15, 1995

CITIZENS' RESPONSE IN OPPOSITION TO
SOUTHERN STATES' MOTION FOR RECONSIDERATION

The Citizens of the State of Florida, through the Office of Public Counsel, pursuant to Rule 25-22.060(3)(c), Florida Administrative Code, respond in opposition to the motion for reconsideration filed by Southern States Utilities, Inc., on November 3, 1995, which should be denied for the following reasons:

1. SSU's filing is not a valid motion for reconsideration. In spite of the citations to cases such as Diamond Cab Company of Miami v. King, 146 So. 2d 889, 891 (Fla. 1962), Motion, at 4, SSU does not really attempt to identify mistakes or misapprehensions of law or fact which, if corrected, would necessarily lead the Commission to reach results different from those expressed in Order No. PSC-95-1292-FOF-WS ("the Refund Order"). Instead, SSU asserts summarily that a result contrary to its interests could only result

from a mistake which, ergo, gives grounds for reconsideration. This is not, and never has been, the standard for reconsideration.[1]

2. SSU's "Grounds for Rehearing" are summarized at pages 5-6 of its motion. None of the grounds alleged justifies reconsideration. First, SSU alleges the Commission's Refund Order nullified much of the revenue requirement found reasonable in the 1993 Final Order. This may be SSU's slant on the result, but the motion contains nothing to show the Commission was unaware of the consequences flowing from the prospective application of its new rates. Next, SSU argues that the Commission "failed to exercise the ample discretion it has following the Court's remand." The Citizens would suggest that an agency action taken within a range of options is not subject to reconsideration. Moreover, SSU's allegation that the Commission "disregarded" the financial impact of its decision bespeaks an evaluation of alternatives with which SSU disagrees, not a mistake of fact or law. Similarly, SSU's allegation that the Commission "refused to affirm its original 1993 decision" shows a conscious evaluation of alternatives without overlooking salient points SSU had the opportunity to raise earlier.

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[1]See State ex rel. Jaytex Realty Co. v. Green, 105 So. 2d 817, 819 (Fla. 1st DCA 1958): "[B]efore filing a petition for rehearing a member of the bar should, as objectively as his position as an advocate will permit, carefully analyze the law as it appears in his and his opponent's brief and the opinion of the court, if one is filed. It is only in those instances in which the analysis leads to an honest conviction that the court did in fact fail to consider (as distinguished from agreeing with) a question of law or fact which, had it been considered, would require a different decision, that a petition for rehearing should be filed." Justice England cited to State ex rel. Jaytex Realty to support his concurring opinion on denial of rehearing in United Gas Pipe Line Co. v. Bevis, 336 So. 2d 560, 565 (Fla. 1976).

3. SSU goes on to allege the Commission "erroneously" concluded a surcharge would constitute retroactive ratemaking. Again, this is simple disagreement with the result; it does not identify a mistake that compels an interpretation consistent with the utility's. Next, SSU alleges the Commission "erred" in adjusting the rate structure. Clearly, SSU would prefer a different base facility charge for Pine Ridge Utilities and Sugarmill Woods water customers, but that, alone, does nothing to show the Commission overlooked relevant facts or law in reaching its decision. Finally, SSU alleges the end results of the Refund Order were violative of its rights under the Florida and United States Constitutions. However, without a well-founded allegation that SSU did not have an adequate opportunity to be heard or that it will not, through prospective rates, have a reasonable opportunity to earn a reasonable return while those rates are in effect, no mistake of fact or law has been shown.

4. The overall tenor of SSU's motion is that it has been sand-bagged by the Commission's attempt to adopt a rate design unacceptable to the appellate court. Having established a revenue requirement, the company believes that the Commission, on remand, must authorize rates designed to afford the opportunity to collect these revenues. Since, in the company's estimation, the revenue requirement is inviolable, all other principles of ratemaking -- such as the prohibition against retroactive ratemaking -- must fall by the way side if they interfere with its ability to collect those revenues from the date of the Commission's original decision.

5. SSU is simply wrong. When it filed its rate case, SSU identified a revenue requirement and proposed rates it felt were lawful and would be supported by the company's evidentiary presentation. The Commission's adoption of statewide uniform rates explicitly rejected the company's own rate proposals. SSU was free to contest this adverse action by moving for reconsideration or filing a notice of appeal. Instead, SSU embraced the Commission's decision.

6. SSU's endorsement of statewide rates negated any opposition it might have had to the Commission's action. By abandoning its own rate proposals, SSU placed itself in the same position as any other utility which defers to the Commission to fashion rates to generate the revenue requirement. There is always the risk that Commission-approved rates will fail appellate scrutiny.

7. Even though the delay in obtaining final approval for prospective rates has a financial impact, a utility cannot suffer a taking in the constitutional sense while the regulatory process, including an appeal of the Commission decision, runs its course. See e.g. Boyd v. Southeastern Telephone Co., 105 So. 2d 889, 894 (Fla. 1st DCA 1958) ("[W]e do not think that the withholding by a regulatory body of permission temporarily to increase rates pending the administrative process contemplated by law (i.e., public notice and hearing, etc.) can properly or legally be considered a confiscation of the company's property in violation of its constitutional rights.") A utility has no binding authority to impose specific

rates, and it has no unconditional claim to revenues from those rates until the Commission issues a rate order which is truly final.[2]

8. A utility has no legal stake in revenues "lost" between the time revenue requirements are identified and lawful rates are set for the future, regardless of how long it takes. The absence of any utility entitlement is, of course, in harmony with the absence of any Commission authority to make its rate decisions retroactive.

9. Interim rates provide some protection against regulatory lag, but only while the case is pending at the Commission. Protection while the case is on appeal, and on remand to the Commission after appeal, is provided by Commission rules allowing for reasonable conditions to be imposed to effectuate a stay of the Commission order, to vacate an automatic stay, or some combination of the two.

10. Under Rule 9.310(b)(2), Florida Rules of Appellate Procedure, the filing of a notice of appeal by a public body or a public officer effects an automatic stay of the Commission's order.

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[2]Constitutional issues do not arise in the context of either revenue requirements or specific rate levels. Instead, the issue of confiscatory rates arises within the context of profits at any rate level. Thus, rates that were reasonable at one time may become confiscatory, i.e., a taking by state action, if the Commission fails to adjust them upon an adequate showing that they are now inadequate. See United Telephone Co. v. Mayo, 345 So. 2d 648, 653 (Fla. 1977)(Quoting from Board of Public Utility Commissioners v. New York Telephone Co., 271 U.S. 23, 31, 46 S. Ct. 363, 366, 70 L.Ed. 808 (1926):'The just compensation safeguarded by the Fourteenth Amendment is a reasonable return on the value of the property used at the time that it is being used for the public service. And rates not sufficient to yield that return are confiscatory.') The governmental process employed to set rates and challenge them on appeal, however, cannot effect a taking.

The notice of appeal filed by Citrus County effected such an automatic stay in this case. Rule 25-22.061(3)(a), Florida Administrative Code, provides for the stay to be vacated upon motion of the utility and the posting of an adequate bond or corporate undertaking. The Commission issued Order No. PSC-93-1788-FOF-WS in response to SSU's motion pursuant to the rule on October 13, 1993.

11. Having opposed the automatic stay, which may have protected SSU against an adverse appellate decision, SSU then failed to avail itself of Rule 25-22.061(2), which allows for stays under reasonable conditions. Among the things the Commission may consider in evaluating a request under Rule 25-22.061(2) is whether the petitioning party has shown that "he is likely to suffer irreparable harm if the stay is not granted." The harm SSU is now complaining of was a possibility from the start. SSU, however, after abandoning its own rate design proposals, forfeited its opportunity to protect itself during the appeal.

12. Rule 25-22.061(4) allows for the Commission to set the rate of interest "in the event the Court's decision requires a refund to customers." The requirement for a bond or corporate undertaking evinces an understanding on the Commission's part that any refunds should be made from revenues collected by the utility during the pendency of the appeal, not, as SSU urges, from surcharges imposed on other customers at a later date.

13. There is no requirement under either Chapter 367, Florida Statutes (1993), or the Administrative Procedure Act, Chapter 120, that a utility must be saved from itself. SSU chose to accept the

Commission's uniform rate decision, to increase some customers rates above the cost to serve them and reduce others below cost. That action imposed the full burden of additional revenue requirements on only some of its systems. Those were the only customers "adversely affected" by the Commission order. Since that decision was reversed by the appellate court, SSUs never had the lawful authority to impose higher rates upon them. Those customers harmed must be made whole.

14. An analogous situation would be one in which a utility asks the Commission for permission to charge only one class of customers with the full burden of additional revenue requirements since the last rate case. Clearly, the Commission could deny the petition, even after hearing, because the Commission concluded the utility sought to impose discriminatory rates. The fact that the Commission might concede an overall increase in revenues is justified could not validate the rate design. And the Commission would not be obligated to fashion nondiscriminatory rates. The result would be the same if, as in this case, the Commission approved an unlawful method of recovery which was later overturned on appeal. A utility which sought and received permission to increase rates for some customers and reduce rates for others (or acquiesced in the Commission's imposition of such rates) is bound by its decision. It cannot bestow upon the Commission powers to go back and impose different rates retroactively in the event of a reversal on appeal.

15. This is true because the outcome of a rate case is never an entitlement to a given level of revenues. A final Commission rate order culminates in an approved level of rates which a utility is authorized to charge its customers in the future. Although revenue requirements are "considered" in arriving at the rate decision, the link between revenue requirements and rates is broken after rates are established and rate schedules are filed. Actual revenues collected after a rate case are going to be more or less than the revenue requirement used to establish rates because of myriad factors.[3] After a rate case is over, the Commission is only concerned (and then only for informational purposes) whether the utility is earning a fair return under prevailing economic conditions. Even if revenues have fallen precipitously, earnings might be adequate if, for example, the capital markets have declined in step.

16. There are cases, of which this may be considered one, in which the utility itself breaks any link between rates and revenue requirements. One example would be when a utility asks for less-than-compensatory rates. See Utilities Operating Co., Inc. v. King, 143 So. 2d 854, 858 (Fla. 1962) ("[I]n the absence of some showing that the service to the public will suffer by allowing the utility to charge rates which will not produce a fair return, the utility and not the Commission has the right of decision as to the

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[3]On this point, it is noteworthy that SSU's surcharge proposal would give it more protection than it would have had if the uniform statewide rates had been upheld on appeal.

rates it will charge so long as they do not exceed those which would produce a fair return as determined by the Commission.") Although the court in Utilities Operating Co. recognized that the Commission should give effect to statutory directives to set rate base (and presumably a revenue requirement), the appropriate rates were those requested by the utility since they were not designed to generate full revenue requirements.[4] Thus, even if it is assumed (without conceding) that the revenue requirement could become the law of the case after appeal, it would not always dictate the rates to be awarded on remand, and it would never force the retroactive application of rates to service consumed during the pendency of the appeal.

17. Another example of rates unrelated to revenue requirements has been demonstrated by SSU when it received permission to charge newly acquired systems the statewide rates. Obviously, those rates bore no relationship to the incremental revenue requirements associated with the addition of the new system or with the SSU systems in total. Tariff filings in all of the industries are other examples of rates divorced from revenue requirements, as

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[4]Section 367.081(2)(a), Florida Statutes (1993), provides that the Commission "shall" fix rates which are just, reasonable, compensatory, and not unfairly discriminatory. What is "compensatory" under the Utilities Operating Co. case, however, depends on what the utility asks for before hearing or what it accepts and endorses after hearing. Certainly, SSU is in no position to argue that the rates for any customers under the uniform rate scheme it continues to advocate are not compensatory. Additionally, the Commission's obligation is to establish prospective, compensatory rates after the court's remand. Whereas rates are something the Commission must establish, elements of the revenue requirement are only things the Commission "shall consider" under Section 367.081(2)(a).

is the inclusion of CWIP in rate base after the revenue requirement has been determined so that specific coverage ratios can be satisfied. The common feature of each is that the orders establish rates and charges that utilities may lawfully impose but none establishes revenue requirements as a legal entitlement -- either before or after rates are established.

18. Some of SSU's customers may have paid less than they would have paid on a stand-alone basis because SSU adopted the statewide rates as its own. But the company was not harmed and those customers were not benefitted (any more than Utilities Operating Co.'s customers were) by paying exactly the rates asked of them.[5] This is unaltered by the fact that other, higher rates may have also been lawful. It would be a clear violation of the proscription against retroactive ratemaking to tell those customers that they must pay higher rates in the future because their previous rates were not high enough (or, stated differently, that their utility service for past periods cost more than they thought it did and more than the utility was authorized to impose at the time service was provided). Other customers, however, were, by

[5]SSU maintains, at page 9, that "customers whose rates were lower under uniform rates receive a windfall while SSU is penalized by having to pay refunds to the customers whose rates were higher under uniform rates." If this is true, the "windfall" must arise from the fact that some rates were set below cost, a situation which would remain if uniform rates had been upheld on appeal. But SSU's position on appeal was that rates were reasonable for these customers. In its motion for reconsideration, at page 15, SSU continues to argue that "maintenance of the uniform rate structure is fully justified by the evidence and policy considerations underlying the Jurisdictional Order." Customers paying exactly the rates SSU continues to advocate did not receive a "windfall."

definition, harmed by the imposition and collection of higher rates determined by the appellate court to have been unlawful at the time service was rendered.

19. SSU has no valid claim to rates it was never authorized to charge some of its systems (i.e., increased rates for customers whose rates were lower under statewide uniform rates) nor to rate increases imposed on other systems which were held to have been unlawful all along. As a result, SSU has no basis to claim that the former group of customers must provide the money to make refunds to the latter group. On the other hand, if SSU's position were accepted, the company would retain every dollar of the rates paid to it under the overturned statewide uniform rates, including the rates paid by the successful appellants. Then SSU would surcharge other customers to provide a separate source for refunds to those harmed by excessive rates, with SSU functioning as a mere conduit for money traveling from some systems to others. Yet SSU has not cited to any precedent (the Citizens maintain there is none) for a utility to retain the actual payments of increased rates made by customers who mounted a successful appeal.

20. The prohibition against retroactive ratemaking in Florida emanates from the case of City of Miami v. Florida Public Service Commission, 208 So. 2d 249, 259-60 (Fla. 1968). There, the Florida Supreme Court held that, since the Commission's statutory authority over telephone utilities was limited to the establishment of rates to be charged in the future, it could not order refunds for past overearnings.

21. The prospective nature of ratemaking was recognized to be applicable to water and wastewater regulation in Westwood Lake, Inc. v. Dade County, 264 So. 2d 7, 12 (Fla. 1972), and Keystone Water Co. v. Bevis, 278 So. 2d 606, 608-9 (Fla. 1973)("A Statute is not to be given retrospective application unless it is required by the terms of the Statute or it is unequivocally implied.") The doctrine was extended further in Gulf Power Company v. Cresse, 410 So. 2d 492, 493 (Fla. 1982), where the court agreed with the Commission's decision that imposing higher rates on even future bills might constitute retroactive ratemaking if the utility service being billed occurred before the Commission voted to change rates.

22. There is another line of cases beginning with Southern Bell Telephone & Telegraph Co. v. Bevis, 279 So. 2d 285 (Fla. 1973), which allows the Commission to avoid the proscription against retroactive ratemaking by making a rate change subject to a later determination of reasonableness. This concept is embodied in the interim statutes for all utilities and in the cost recovery mechanisms used by electric and gas utilities. In spite of SSU's strained attempts to analogize its situation to such cost recovery proceedings, they are clearly inapplicable because SSU was never granted rates subject either to refund or to a later true-up. As noted earlier, SSU failed to avail itself of the protection afforded by Rule 25-22.061 and thereby forfeited any claim of harm from having to refund overcharges.

23. The Citizens' interpretation of retroactive ratemaking is completely consistent with the Commission own interpretation contained in its answer brief filed with the Florida Supreme Court on August 23, 1995, in GTE Florida, Inc. v. Clark, No. 85,776. The Commission, in that case, maintains that the proscription against retroactive ratemaking prevents it from increasing GTE's rates prospectively even though the Court found that the rate reduction ordered by the Commission was excessive. In that appeal, as in SSU's, GTE failed to seek a stay of the Commission order.

24. SSU's law-of-the-case arguments are completely defeated by the proscription against retroactive ratemaking because, if it were otherwise, the Commission would have had to reduce rates prospectively in the City of Miami case, supra, to give effect to the excessive earnings for past periods. Similarly, in Gulf Power, rates would have had to increase immediately because to do otherwise would prevent the utility from achieving its target revenue requirement until 30 days after the vote approving a rate increase. The reason this did not happen is, of course, obvious: the "law of the case" cannot dictate a result that is contrary to statutes and prevailing case law.

25. Assuming, for the sake of argument, that a revenue requirement could be "the law of the case," it would be given full effect if, on remand, the Commission awarded rates it believed would afford a fair opportunity to earn the intended return on equity during future periods in which such rates were in effect. This is exactly what the Commission has done.

WHEREFORE, the Citizens of the State of Florida, through the Office of Public Counsel, urge the Florida Public Service Commission to deny the Motion of Southern States Utilities, Inc. for Reconsideration of Order No. PSC-95-1292-FOF-WS.

Respectfully submitted,

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Attorneys for the Citizens
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CERTIFICATE OF SERVICE
DOCKET NO. 920199-WS

I HEREBY CERTIFY that a correct copy of the foregoing Citizens' Response in Opossition to Southern States' Motion for Reconsideration has been furnished by U.S. Mail or hand-delivery* to the following party representatives on this 15th day of November, 1995.

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