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**FILE COPY**

November 22, 1995

Ms. Blanca S. Bayo, Director  
Division of Records and Reporting  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Betty Easley Conference Center  
Room 110  
Tallahassee, Florida 32399-0850

**HAND DELIVERY**

Re: Docket No. **950495-WS**

Dear Ms. Bayo:

Enclosed herewith for filing in the above-referenced docket on behalf of Southern States Utilities, Inc. ("SSU") are the following documents:

1. Original and fifteen copies of SSU's Motion to Strike OPC's Reply;
2. Original and fifteen copies of SSU's Response to OPC's Motion for Reconsideration of Order No. PSC-95-1387-PCO-WS; and
3. A disk in Word Perfect 6.0 containing a copy of the motion entitled "Reply."

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely,

*Kenneth A. Hoffman*  
Kenneth A. Hoffman

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 AFA \_\_\_\_\_  
 APP \_\_\_\_\_  
 CAF \_\_\_\_\_  
 CMU \_\_\_\_\_  
 CTR \_\_\_\_\_  
 EAC \_\_\_\_\_  
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 LE 5 \_\_\_\_\_  
 OCS \_\_\_\_\_  
 ROH \_\_\_\_\_  
 SEC \_\_\_\_\_  
 WAS Atkins  
 OTH \_\_\_\_\_

cc: All Parties of Record  
Trib.3

RECEIVED & FILED

*JD*  
EPSC

*Motion for Reconsideration*  
DOCUMENT NUMBER-DATE

11755 NOV 22 1995

FPSC-RECORDS/REPORTING

*Motion to Strike*  
DOCUMENT NUMBER-DATE

11754 NOV 22 1995

FPSC-RECORDS/REPORTING

ORIGINAL  
FILE COPY

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application by Southern )  
States Utilities, Inc. for rate )  
increase and increase in service )  
availability charges for Orange- )  
Osceola Utilities, Inc. in )  
Osceola County, and in Bradford, )  
Brevard, Charlotte, Citrus, Clay, )  
Collier, Duval, Hernando, High- )  
lands, Hillsborough, Lake, Lee, )  
Marion, Martin, Nassau, Orange, )  
Osceola, Pasco, Polk, Putnam, )  
Seminole, St. Johns, St. Lucie )  
Volusia and Washington Counties. )  
\_\_\_\_\_ )  
)

Docket No. 950495-WS

Filed: November 22, 1995

**SSU'S MOTION TO STRIKE  
OPC'S REPLY**

Southern States Utilities, Inc. ("SSU"), by and through its undersigned counsel, hereby files its Motion to Strike the Reply filed by the Office of Public Counsel ("OPC") on November 16, 1995, and as grounds therefor, states as follows:

1. On November 3, 1995, OPC filed its Tenth Motion to Compel, Tenth Motion to Postpone Date for Filing Intervenor Testimony, and Request for In Camera Inspection of Document. OPC's Tenth Motion to Compel was directed to a privileged letter dated December 14, 1993 from Laura A. Holquist, an officer of Lehigh Corporation, to Ron Sorensen, an attorney retained by Lehigh Corporation. The letter was inadvertently produced for inspection by SSU's outside auditors, Price Waterhouse, during an extensive document review by OPC at the offices of Price Waterhouse on September 18, 1995.

2. OPC's Tenth Motion to Compel acknowledged the fact that OPC had seen the privileged letter and that SSU refused to provide a copy of the letter based on its privileged nature.

DOCUMENT NUMBER-DATE  
11754 NOV 22 1995  
FPSC-RECORDS/REPORTS 364

3. OPC's Tenth Motion to Compel focused solely on its argument that SSU had allegedly waived the right to withhold a copy of the letter based on SSU's claim of privilege. Although OPC had reviewed the letter and was aware of SSU's claim of privilege, OPC's Tenth Motion to Compel in no way contested SSU's substantive assertion that the letter is privileged.

4. On November 13, 1995, SSU filed its Response to OPC's Tenth Motion to Compel, etc. SSU's Response set forth the factual and legal grounds supporting its contentions that the letter was protected by both the attorney-client and accountant-client privileges recognized under Florida law and that such privileges had not been waived.

5. Now OPC seeks to buttress its Tenth Motion to Compel by filing a Reply alleging that the privileges claimed by SSU do not apply and arguing again that the privileges have been waived.<sup>1</sup> For example, OPC cites a recent article authored by Dorothea Beane and Heath Nailos entitled Inadvertent Disclosure of Attorney-Client Privileged Material: Putting the Horse Back in the Barn published in the October, 1995 Florida Bar Journal, for the proposition that "[i]n Florida, the issue is far from settled as to whether inadvertent disclosure of an otherwise privileged document waives

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<sup>1</sup>OPC also argues that if Lehigh Corporation and SSU "were truly separate," a Lehigh Corporation document would not be in the SSU files of SSU's outside accountant. See OPC's Reply, at fn. 1. The argument is specious. Lehigh Corporation and SSU are, as OPC knows, separate entities. If Price Waterhouse placed a copy of an OPC document request in SSU's files, SSU assumes that OPC would not question the fact that SSU and OPC are separate entities.

that privilege."<sup>2</sup> A close review of the article belies OPC's allegation. The article, citing Smith v. Armour Pharmaceutical Company, 838 F.Supp. 1573, 1576 (S.D. Fla. 1993), very clearly states:

The court held that, under Florida law, for a document to lose its privileged status, it must be found that the holder of the privilege intentionally waived his rights. The Armour court reasoned that the strict view of the privilege was rejected by the Florida Legislature when it enacted its statutes governing privilege. The critical language of F.S. §90.502(1)(c) focuses on intent and states that a communication "is 'confidential' if it is not intended to be disclosed to third persons." The intent to disclose requirement protects the holder of the privilege by scrutinizing the circumstances of the inadvertent disclosure. Thus, the most recent interpretations of Florida law reject the Wigmore view of privilege.<sup>3</sup>

The facts demonstrate that the production of the December 14, 1993 letter by Price Waterhouse was inadvertent -- OPC has never alleged to the contrary either in its Tenth Motion to Compel or in its Reply. Under Armour and the Florida Bar Journal Article cited by OPC, the document remains privileged.

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<sup>2</sup>OPC's Reply, at par. 3.

<sup>3</sup>See Bean and Nailos, Inadvertent Disclosure of Attorney-Client Privileged Material: Putting the Horse Back in the Barn, The Florida Bar Journal, October 1995, at 67-68 (emphasis supplied). The "Wigmore view of privilege" which has been rejected by recent decisions interpreting Florida law "... held that once the contents of the subject document had become public, regardless of the means of the disclosure, the document's confidentiality and privilege had been destroyed." Id., at 67, citing J. Wigmore, 8 Evidence §2292, at 554 (McNaughton rev. ed. 1961).

Nonetheless, for the reasons stated below, OPC's Reply must be stricken.

6. On October 31, 1995, the Prehearing Officer issued Order No. PSC-95-1321-PCO-WS which, inter alia, required the parties to discuss and attempt to resolve discovery disputes before filing a motion to compel. OPC followed this procedure which led to its knowledge that SSU would claim the letter was privileged. OPC then filed its Tenth Motion to Compel failing to challenge the privileged nature of the letter it had reviewed (arguing only that the privilege had been waived). OPC's Reply is nothing more than an attempt to buttress its Tenth Motion to Compel. There is no authority for such a pleading.

7. OPC's Reply is yet another attempt to ignore the Commission's rules.<sup>4</sup> There is no express authority to file a reply under Rule 25-22.037(2), Florida Administrative Code. OPC failed to request leave to file its Reply or even attempt to establish why a reply was required in the interest of justice, to avoid prejudice, the magnitude of the issue, or any other justifiable reason -- the reply was just filed as though it were expressly authorized under Commission rules. It is not. Since OPC has not even attempted to demonstrate that there are circumstances concerning the issues raised in its Tenth Motion to Compel and SSU's Response thereto which demonstrate good cause and justification for the submission of the Reply, the Reply must be

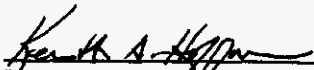
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<sup>4</sup>See also OPC's numerous requests for oral argument filed in this proceeding, none of which comply with Rule 25-22.058(1), Florida Administrative Code.

stricken.

WHEREFORE, for the foregoing reasons, SSU respectfully requests that OPC's Reply be stricken.

Respectfully submitted,

  
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and

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing SSU's Motion to Strike OPC's Reply was furnished by hand delivery(\*) and/or U. S. Mail to the following on this 22nd day of November, 1995:

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REPLY