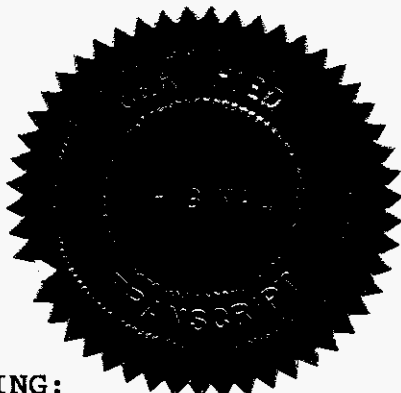


BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION  
TALLAHASSEE, FLORIDA

IN RE: Application for rate increase in Brevard,  
Charlotte/Lee, Citrus, Clay, Duval, Highlands, Lake, Marion,  
Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole,  
Volusia, and Washington Counties by Southern States  
Utilities, Inc.; Collier County Marco Shores Utilities  
(Deltona); Hernando County by Spring Hill Utilities  
(Deltona); and Volusia County by Deltona Lakes Utilities  
(Deltona).

DOCKET NO. 920199-WS



BEFORE:

CHAIRMAN SUSAN F. CLARK  
COMMISSIONER J. TERRY DEASON  
COMMISSIONER JULIA L. JOHNSON  
COMMISSIONER DIANE K. KIESLING  
COMMISSIONER JOE GARCIA

PROCEEDING:

AGENDA CONFERENCE

ITEM NUMBER:

24A\*\*

DATE:

March 5, 1996

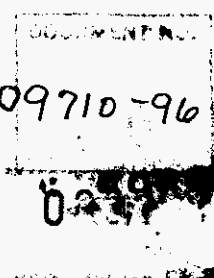
PLACE:

4075 Esplanade Way, Room 148  
Tallahassee, Florida

REPORTED BY:

JANE FAUROT, RPR  
Notary Public in and for the  
State of Florida at Large

JANE FAUROT, RPR  
P.O. BOX 10751  
TALLAHASSEE, FLORIDA 32302  
(904) 379-8669



1 PARTICIPATING:

2 Ken Hoffman, Esquire, and Mr. England representing  
 3 SSU. Roger Howe, Esquire, representing OPC.  
 4 Mike Twomey, Esquire  
 Ms. Fox, Attorney at Law

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STAFF RECOMMENDATIONS

8 Issue 1: What impact, if any, does the Supreme Court's  
 9 February 29, 1996 opinion in the GTE case have on the  
 Commission's decision regarding the remand in this docket?  
 10 Recommendation: The Commission should issue an order which  
 bifurcates its February 20, 1996 decision regarding  
 11 reconsideration matters as set forth in staff's memorandum  
 dated March 4, 1996. The Commission should delay  
 12 consideration of whether, on its own motion, to require  
 backbilling until briefs are filed by the parties regarding  
 13 their view of whether the GTE decision is applicable to the  
 Commission's remand decision. All parties listed in staff's  
 14 memorandum should be given an opportunity to file briefs  
 limited to this point as set forth in staff's memorandum  
 15 within 10 days of the Court's opinion becoming final.

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P R O C E E D I N G S

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CHAIRMAN CLARK: Item 24A.

COMMISSION STAFF: Commissioners, Item 24A is an emergency recommendation that was filed yesterday in the Southern States remand case. As you recall, at the February 20th agenda you voted on the reconsideration of a motion before you regarding the remand in the 199 case.

This past Thursday, the Florida Supreme Court issued its opinion in the GTE Telephone Company remand case, and there appears to be quite a bit of that decision that might be applicable to the Southern States case, so we felt we had an obligation to bring this to your attention and that's why we filed this emergency recommendation.

The recommendation was filed yesterday morning. Sometime yesterday afternoon, I believe, Southern States filed what is called a notice of filing and a motion to vacate non-final order. Also, in attempts, I believe, to bring before you this new opinion of the Florida Supreme Court.

In staff's recommendation, what we were attempting to do was figure out a way to go forward with your decision that you made in the reconsideration vote to require the company to refund the monies to the

1 customers to whom refunds were due. Also, recognizing  
2 the potential impact of the Supreme Court decision, we  
3 thought you should ask the parties who are enumerated  
4 in the recommendation to file a brief on the point of  
5 whether, in their view, the new GTE decision impacts  
6 the Southern States case and would require the  
7 backbilling of the customers who paid less under  
8 uniform rates than they would under the stand-alone  
9 rates that you voted in the SSU remand. So that's what  
10 this emergency filing is all about. There are parties  
11 here, and I'm sure they would want to address the  
12 issue.

13 CHAIRMAN CLARK: Let me just be clear. Your  
14 recommendation here is the Commission should issue an  
15 order which bifurcates and then allows parties the time  
16 to file briefs limited to this point as set forth  
17 below. So it's not a decision on whether or not we  
18 should reconsider our order or anything like that.

19 COMMISSION STAFF: Correct.

20 CHAIRMAN CLARK: Okay. Is that everything, staff?

21 COMMISSION STAFF: Yes, I was just going to give  
22 you a list of options after listening to the parties'  
23 arguments.

24 CHAIRMAN CLARK: Okay. Mr. Hoffman. Mr. England.  
25 I would urge the parties to keep their presentations to

1 five minutes.

2 MR. ENGLAND: I'm not going to be able to do that,  
3 but I will try. I'll talk very fast. Thank you, Madam  
4 Chairman.

5 I have to give you a brief overview of the GTE  
6 Florida case, and it is the briefest of overviews. The  
7 facts relevant are that GTE began a rate case, you  
8 denied a rate increase and ordered a rate reduction in  
9 May of 1993. GTE appealed that decision, but did not  
10 seek a stay. The Supreme Court reversed in July of  
11 1994, and on remand the Commission denied the  
12 appropriate rates from the commencement of the case  
13 saying it should only be prospective from the  
14 conclusion of the remand proceeding. And that is what  
15 the Supreme Court again reversed on the 29th, holding  
16 that GTE was entitled to the appropriate level from May  
17 of 1993, when the first order was entered by the  
18 Commission in the rate case.

19 What is relevant about the GTE case is what the  
20 Court had before it, because you are aware of the legal  
21 principal that the court not only decides everything  
22 that is presented to it, but that which could have been  
23 decided. We only have to talk about what was  
24 presented, and I have had an opportunity to read the  
25 briefs in the GTE case. The appellate counsel for this

1 Commission and Public Counsel argued that what was  
2 going on was retroactive ratemaking. The Staff had  
3 advised that it was not, but appellate counsel was  
4 protecting the Commission's order. Public Counsel  
5 argued -- I'm sorry, the Public Service Commission's  
6 counsel argued to the Supreme Court that a denial of  
7 the rate recovery from the onset of the rate case was a  
8 choice that GTE made. It was a waiver. It was a  
9 willingly not action to make sure that the rates were  
10 implemented. In other words, that the utility was  
11 really at fault. And that was the theme of the  
12 Commission's brief.

13 The Commission also argued to the Florida Supreme  
14 Court that utility customers were entitled to be  
15 charged only lawfully approved rates and to know what  
16 those charges were so they could adjust their  
17 consumption. To which, by the way, GTE Florida said in  
18 reply brief they were fully informed by being  
19 represented by Public Counsel.

20 All of the arguments made by the Commission and  
21 all of the arguments made by Public Counsel were  
22 rejected by the Florida Supreme Court last week. Let's  
23 look at what the Court said. It distorts fairness on  
24 which the Commission had relied in the GTE case for  
25 customer satisfaction, to consider only the customers'

1 role and the customers' side of the equation. The  
2 Commission must consider utility interests. In fact,  
3 the Court said, and I quote, "Equity applies to both  
4 utilities and ratepayers when an erroneous rate order  
5 is entered," unquote. Go back and emphasize the word  
6 ratepayers. Not a class of ratepayers, ratepayers as a  
7 body.

8 Second, the Florida Supreme Court said that a stay  
9 is not relevant to the substance of the ratemaking  
10 process. It is not a risk that the utility company  
11 runs to seek a stay or not to seek a stay. And, by the  
12 way, I note in our case -- and I mentioned this to you  
13 when I appeared on February 20th, had there been no  
14 Citrus County in the case, an appeal would not have  
15 resulted in a stay. This case would have been in  
16 exactly the same posture as GTE. It was only the  
17 happenstance of a governmental unit which took the  
18 appeal that lead to what happened here, the vacation of  
19 the stay and all the rest.

20 Third, the Florida Supreme Court said it is not  
21 retroactive ratemaking to collect undercharges during  
22 the pendency of an appeal and during remand  
23 consideration by surcharging. The utility company is  
24 entitled to be made whole from the date of the entry of  
25 the order of an erroneous Commission order.

1           And, fourth, the Florida Supreme Court said with  
2 regard to customer notice, a concern that you have had  
3 in our case, but customers were protected by Public  
4 Counsel. And in effect the Court was saying, and this  
5 is how it was argued in brief to the Court, notice at  
6 the commencement of a rate case, the public notice of  
7 the event is the notice to customers, and there is no  
8 additional notice requirement with regard to rate  
9 structure or particular rates at the end of the  
10 proceeding on remand which then justifies overriding  
11 the utility's interests. That's what the Court said.

12           Let's look at the case before us because there are  
13 three features of your order of October 19. The refund  
14 order, which is the one that we challenged and which is  
15 under consideration because it's not final. First,  
16 that order says that a surcharge is retroactive  
17 ratemaking. It can't be. GTE Florida, last week.

18           Second, that order says that Southern assumed the  
19 risk of refunds by seeking to vacate a stay. Can't be.  
20 There is no assumption of risk in a stay proceeding.  
21 GTE Florida, last week. Nowhere in your order of  
22 refund have you addressed the fairness to Southern  
23 States of imposing a refund without collecting the  
24 surcharge from the undercharged customers. That is  
25 also contrary to the theme of the Florida Supreme



1 Court. Southern States came back to you on  
2 reconsideration, and in the hearing held you heard both  
3 Public Counsel and staff counsel say that we assumed  
4 the risk, and you heard the surcharge is retroactive  
5 ratemaking. Those we suggested were not correct. I  
6 believe the Florida Supreme Court has settled that.  
7 You did reject our arguments, but you have not entered  
8 your final order, which really brings us to today what  
9 the staff's is recommending.

10 Our position today is simplicity itself. It is  
11 the same position we urged before. If it was not clear  
12 before, although we think it was, it is certainly clear  
13 now that surcharges to customers in this proceeding are  
14 not retroactive ratemaking. Again, we note that your  
15 staff has long urged no refunds in this case back to  
16 September of last year, which would solve the problem  
17 altogether of surcharges. There are no refunds, there  
18 is no need for surcharges. We also note that the  
19 Florida Supreme Court happened to touch on that very  
20 point when it said, "We cannot accept the notion that  
21 customers will now be subjected to unexpected charges.  
22 The Office of Public Counsel has represented the  
23 citizen ratepayers at every step of this procedure."

24 CHAIRMAN CLARK: Let me ask you a question. You  
25 say that no refunds are appropriate, but the Court has

1 told us we could not -- that without a finding of  
2 functionally related, we could not impose uniform  
3 rates. So, in effect, it seems that for that period of  
4 time uniform rates were unlawful. How do we go back  
5 and correct that? I mean, in the GTE case, in effect  
6 what they are saying is we correct it by doing a  
7 surcharge. How do we go back and correct that for  
8 those customers who overpaid?

9 MR. ENGLAND: Very easy. But, again, Madam  
10 Chairman --

11 CHAIRMAN CLARK: I mean, it's not as easy as  
12 saying just no refund because you have corrected  
13 nothing.

14 MR. ENGLAND: Yes, it is. And I have to make sure  
15 you understand our position, because it's not just no  
16 refund. We are saying you can avoid any problem by not  
17 having a refund and just make the adjustment to  
18 stand-alone rates wherever it falls. There will  
19 obviously be some rates that are different for some  
20 customers, like there always is, always are. What we  
21 are saying is what you cannot do is change the revenue  
22 requirement on us by adding a refund of \$8.2 million.  
23 So the answer there is will be a composition of  
24 surcharges on the one side and refunds on the other  
25 among -- and this is really the interesting part of

1 this case -- among the only class of customers here.

2 We're talking about a division among the same  
3 class of customers. We're not even talking about the  
4 difference between commercial or industrial on the one  
5 hand and residential. This is residential, all. So  
6 our position is we have to be made whole. That's what  
7 GTE stands for from our point of view. The choice is  
8 the fairness between the utility company and ratepayers  
9 as a class.

10 And the stay proceedings had nothing to do with  
11 that. Our position is that we have to be made whole  
12 because no one has ever said that the \$6.7 million rate  
13 increase that you gave in 1993 is other than just,  
14 reasonable, and appropriate for this utility. And we  
15 collected it during the period of time and then were  
16 affirmed by the Florida Supreme -- pardon me, by the  
17 First District Court of Appeal in the challenge brought  
18 by Public Counsel to that revenue requirement.

19 I have to tell you that there is real harm in what  
20 the staff is suggesting in this regard. Staff says  
21 give the refund and then worry about the surcharge  
22 after briefing and after the finality of the GTE  
23 decision. GTE may or may not be sought for rehearing.  
24 It was a unanimous decision, we will know by March 16  
25 whether anybody's going to ask for rehearing.

1           But we do know that you're planning to issue a  
2 final order on March 11th in this proceeding. If a  
3 refund is ordered now out of expediency, Southern can  
4 appeal that order, and we are back in front of the  
5 First District Court of Appeal on the appropriateness  
6 of a bite of \$8.2 million into our revenue requirement.  
7 There is the cost attendant to that, there is the  
8 labor.

9           CHAIRMAN CLARK: What do you suggest, Mr. England?

10          MR. ENGLAND: That you take up the two issues of  
11 refund and surcharge simultaneously, and decide if  
12 there is going to be a rate adjustment by structure  
13 change, how it's going to play out, and leave our  
14 revenue requirements alone. We don't care what you do  
15 with a select group of customers or how that sorts out.  
16 Go to stand-alone rates as the district court has  
17 ordered, but leave the revenue which we have lawfully  
18 collected because it is a lawful order, leave it  
19 intact. Don't take it out of us. Find out -- if it's  
20 going to be given to anybody, it has got to be taken  
21 from some other source.

22          CHAIRMAN CLARK: So you're saying don't bifurcate  
23 the order, reconsider our order and issue an order  
24 dealing with all of the issues?

25          MR. ENGLAND: Exactly. My recommendation is in

1 this order that you do not bifurcate, that you maintain  
2 our full revenue requirements as ordered in 1993,  
3 however you choose to do that, and either deny all  
4 refunds and then adjust or mix surcharge and refund  
5 simultaneously, because there is no lawful impediment  
6 now to do that, that's what GTE stands for, but don't  
7 bifurcate the proceeding. Just split it and then force  
8 an unnecessary appeal which, by the way, takes us back  
9 to the chaos we had earlier because we would have to  
10 supersede and stay that refund in order to maintain our  
11 position again. We are back again in the same kind of  
12 a cycle.

13 CHAIRMAN CLARK: Okay.

14 MR. ENGLAND: Thank you very much.

15 COMMISSIONER KIESLING: Could I inquire, Madam  
16 Chairman.

17 CHAIRMAN CLARK: Yes.

18 COMMISSIONER KIESLING: I'm trying to figure out  
19 if we were on the motion to vacate nonfinal order,  
20 which was just filed --

21 CHAIRMAN CLARK: That's not what I'm on. I'm on  
22 the staff recommendation.

23 COMMISSIONER KIESLING: Okay. I mean, that's what  
24 I'm trying to figure out. So, if I understand  
25 correctly, another option that is not in staff's rec

1 would be for one of the Commissioners who was on the  
2 affirmative side of the vote to now move to reconsider  
3 that vote. And then if that passes, to move to grant  
4 reconsideration so we can get briefed and look at it in  
5 light of GTE without bifurcating. Is that also --

6 CHAIRMAN CLARK: I think that's certainly an  
7 option for us to entertain in this recommendation.

8 COMMISSIONER KIESLING: Okay.

9 CHAIRMAN CLARK: Mr. Twomey.

10 MR. TWOMEY: Thank you, Commissioners. I'm Mike  
11 Twomey. First, I want to commend your staff for their  
12 alacrity in getting this item to you. And note that it  
13 took several months for them to bring to you the First  
14 DCA's reversal of the uniform rates last year.

15 Now, I say that because I think staff is  
16 premature, and I think you're premature in considering  
17 this now. This case, this opinion just issued from the  
18 Florida Supreme Court last week is not final. It is  
19 not final. No mandate has been issued. The Public  
20 Counsel and some other party that has the right to may  
21 seek rehearing, so it's premature.

22 And as far as the company's motion to vacate and  
23 so forth, which I hear you're not considering, we, of  
24 course, haven't had a chance to respond to it, so you  
25 shouldn't properly consider it.

1           I think that if you're going to consider the GTE  
2 opinion, it can be distinguished, and I'm sure the  
3 other counsel will tell you the same. The distinction  
4 being whether they got the full revenue requirement in  
5 GTE as opposed to here where they did. This is a rate  
6 structure case we are dealing with. It's premature.  
7 My clients, of course, want the refunds, and I think  
8 under no circumstances should you go back on the refund  
9 requirements. I think the Chairman raised the  
10 pertinent question to Mr. England, don't we have to  
11 make the refunds. I think you do. I would ask that  
12 you view this as premature. You don't have any  
13 obligation to take this up now. Wait until the time  
14 for rehearing runs, if it does. You voted on your  
15 order once, let it become final. If the company wants  
16 to appeal, fine, they know how to do it.

17           So I would ask you to reject your staff  
18 recommendation in its entirety, essentially. Let  
19 matters take their course. If you do decide to take it  
20 up, please don't do any reconsideration or go back on  
21 the requirement that there be refunds to the customers  
22 that overpaid during the pendency of the uniform rates.  
23 Thank you.

24           CHAIRMAN CLARK: Mr. Howe.

25           MR. HOWE: Hello, Commissioners. I'm Roger Howe

1 with the Office of Public Counsel. We generally  
2 support the staff recommendation. We think the staff  
3 was obligated to bring it to your attention. We think  
4 if given the opportunity we will be able to show you  
5 how the GTE opinion is not controlling in this case. I  
6 do believe that you do need to focus on the fact that  
7 that opinion is not final. There is no reason -- if  
8 necessary, I can get into my view of that case. I  
9 don't believe it's really necessary at this time. It  
10 is not final. If you give us the opportunity to brief  
11 it, we will do so. The appropriate time is after that  
12 opinion does become final.

13 I would point out that I'm not sure how the  
14 Commission intends to treat the company's notice of  
15 filing and motion to vacate. On that motion, I would  
16 point out to you that the company does not cite to any  
17 rule or statute that authorizes that filing. It is  
18 essentially a second motion for reconsideration. The  
19 Commission's rules on reconsideration specifically  
20 provide that it will not entertain a second motion for  
21 reconsideration.

22 I think your staff has essentially framed the same  
23 issue, however, and the company will have adequate  
24 opportunity if you follow the staff's proposal, as the  
25 other parties, to explain to you what their views are



1 of the GTE opinion, if and when it does become final.  
2 In that light, I think you should ignore the company's  
3 notice of filing and motion because otherwise I'm going  
4 to have to respond to it, and if you adopt the staff's  
5 recommendation I will also respond to your order  
6 adopting staff's recommendation.

7 The one thing I would point out to you here  
8 overall is keep in mind that SSU on the issue of the  
9 uniform rates was the unsuccessful party to that  
10 appeal. And in that appeal, they argued to maintain  
11 uniform rates, to charge some customers higher rates,  
12 others lower. The customers who paid the lower rates  
13 paid the rates that Southern States advocated. The  
14 customers who paid the higher rates were harmed. Those  
15 were the ones who benefited by the Court's decision,  
16 the one that you took up on remand. Southern States'  
17 proposal here, I think, is virtually unheard of.  
18 They're asking to be allowed to retain the rates and  
19 revenues collected from successful appellants. I don't  
20 believe it makes any sense at all.

21 CHAIRMAN CLARK: Ms. Fox.

22 MS. FOX: If you consider the company's proposal  
23 that you revisit again the refund issue, this would be  
24 the third time you have visited that issue, and there  
25 is absolutely nothing in the GTE case that would

1 warrant that, that would warrant going back and  
2 determining for the third time whether or not the  
3 successful appellants are entitled to a refund.

4 The GTE case simply does not address that.  
5 Instead, it confirms the propriety of the refund.  
6 There are also many distinguishing factors here  
7 relating to the whole issue of a stay, and whether or  
8 not the company waived anything in that process. So it  
9 might be appropriate to go back and look at that on the  
10 surcharge issue, but my position on behalf of Sugarmill  
11 Woods is I think we don't object to the staff  
12 recommendation. We would like to see the refunds go  
13 forward, and if you feel time is needed to look at the  
14 surcharge issue, then that could be bifurcated and done  
15 separately.

16 CHAIRMAN CLARK: Thank you.

17 MR. ENGLAND: Madam Chairman, may I just respond  
18 very briefly, and I promise to be brief.

19 CHAIRMAN CLARK: Go ahead, Mr. England.

20 MR. ENGLAND: We hear the plea for more procedural  
21 obstacles. We thought it was the responsibility of any  
22 party to this proceeding to call to the court's  
23 attention, just like you would do a court, a notice of  
24 current and supplemental authority, but the staff did  
25 that for us. The staff did that very promptly on

1 March 4th, and so the matter is before you, the  
2 procedural --

3 CHAIRMAN CLARK: No, I think they did it on March  
4 1st.

5 MR. ENGLAND: I thought it was dated March 4th,  
6 I'm sorry.

7 CHAIRMAN CLARK: Well, it had to get on the agenda  
8 earlier than that. Go ahead.

9 MR. ENGLAND: Well, that's terrific, and they  
10 should do that. And so we think it's properly in front  
11 of you. I have not heard, I'm sorry, anywhere in this  
12 proceeding to this point why it's lawful to give  
13 refunds. I just have not heard how one bifurcates a  
14 class of customers, some of whom get a refund out of  
15 the company's revenue requirements. That has never  
16 been explained that I can find, and so when you talk  
17 about get on with the lawful refunds as they would have  
18 you do, all three of them, I don't know what you're  
19 talking about. The lawful rates are the rates that you  
20 set by your original order.

21 Very simply, I think the Commission is going to  
22 have to be very practical. This is a Florida Supreme  
23 Court decision, it is unanimous. I don't know whether  
24 there is going to be a rehearing or on what grounds, I  
25 did read the briefs and the Court touched almost every

1 portion of what was briefed. Mr. Howe knows more about  
2 it, he was in the case, and his brief is there on  
3 retroactive ratemaking.

4 I think this is properly in front of you. This is  
5 an opportunity to save the customers of this utility an  
6 awful lot of additional costs and delay in resolving  
7 this by going one more time to an appellate court, and  
8 it seems to me that the time is right for you to  
9 consider how to resolve the interests of the customers  
10 and the utility compatibly. I mean, there is nothing  
11 mysterious about the GTE case. That's what it says,  
12 they have to be balanced. The customers are all the  
13 customers, not a few of them who happen to have special  
14 counsel and who have a whole voice. They are all  
15 represented by Mr. Howe. Some of them are going to  
16 have to pay surcharges to meet the needs of Ms. Fox and  
17 Mr. Twomey. Thank you.

18 CHAIRMAN CLARK: Thank you. Did you want to add  
19 anything?

20 MR. TWOMEY: No, I will refrain.

21 CHAIRMAN CLARK: Okay. Staff.

22 COMMISSION STAFF: Thank you. Commissioners, you  
23 have several options based on what you have heard  
24 today. You could go ahead with the staff  
25 recommendation, you could delay issuance of your order,

1 which would delay the refund responsibility of the  
2 company, allow the parties to brief the point that is  
3 raised in staff's recommendation, and also allow them  
4 to respond to the motion to vacate that SSU filed.  
5 Staff recognizes that the GTE opinion is not final, and  
6 in its recommendation recommended that the briefs be  
7 filed within 10 days after the Court's opinion becomes  
8 final, recognizing it would be wasted energy if, in  
9 fact, a rehearing were requested.

10 Another option would be, as Commissioner Kiesling  
11 suggested, reconsider on your own motion now, but not  
12 make any substantive decision and essentially just  
13 allow the parties to brief the point and file responses  
14 to the motion.

15 CHAIRMAN CLARK: Questions, Commissioners?

16 COMMISSIONER KIESLING: Well, let me just say that  
17 I just have a problem with the idea of bifurcating a  
18 final order. Because of the various parties appeal  
19 rights that run from the date that it becomes final,  
20 and recognizing that they can no longer ask for  
21 reconsideration to try to toll that, it causes me some  
22 problems about point of entry and judicial efficiency  
23 to try to figure out how to bifurcate a final order.  
24 And that's the reason that I would be leaning more to,  
25 as one of the Commissioners who was on the majority

1 side on our vote on reconsideration, to move on my  
2 motion that we reconsider our vote on reconsideration  
3 so that we can pull back the whole order, wait until  
4 GTE is final, and then try to figure out what it means.

5 Does it mean -- once it's final, will it mean that  
6 there is a refund and some kind of equal surcharge,  
7 will it mean that it's all a wash? I don't think we  
8 are being fair to the company if we make the refund  
9 portion of it final so that they have to appeal that  
10 now, when we still don't know what we are going to do  
11 with the other part of it which the Supreme Court order  
12 in GTE says we are supposed to balance. I don't know  
13 how we can balance it if we don't have half of it. And  
14 so that was my concern. And I guess to put that  
15 forward, I'm willing to make a motion that we  
16 reconsider our vote on the motion to reconsider.

17 COMMISSIONER JOHNSON: I'm going to second that  
18 motion, because I agree with everything that you just  
19 said, and it's a matter of being able to look at these  
20 as a comprehensive package as opposed to bifurcating  
21 them, forcing them to appeal, which based on their  
22 arguments they will appeal. And if we end up where we  
23 have to work out something, we need to have all the  
24 facts, and we need to be dealing with all the issues in  
25 one set.

1           CHAIRMAN CLARK: There has been a motion and a  
2 second. I would add one thing, that having read the  
3 GTE decision, or at least looked over it, one thing  
4 that I found troubling about it was what is the  
5 Commission's opportunities once we get a case back that  
6 says you have decided a particular issue wrong. What  
7 is available to us?

8           And I remember the debate in the GTE case was it a  
9 general or a specific remand. And it is very troubling  
10 to me for them to have, in a sense, in my view, come  
11 out with a new standard, say we had to weigh against  
12 that standard, and now the only option we have is to go  
13 back and surcharge those people. And it seems to me  
14 that we should have had the option, which it didn't  
15 appear they gave us, to retry that issue.

16           And that brings us to this case. As I read the  
17 Southern States case, functionally related was a new  
18 standard. We never even discussed that. And it seems  
19 to me that's also something, if we move to reconsider,  
20 we should address whether or not we should again open  
21 up this record and look at that case. And I know that  
22 is troubling to some people, but I want that addressed  
23 in terms of these -- both of these cases in my mind  
24 came out with new standards.

25           And how are we supposed to deal with that? You

1 know, if we know the standards ahead of time and we  
2 don't apply it, that's one thing. If we don't know the  
3 standards ahead of time, once it's given to us  
4 shouldn't we have the opportunity to do that, because  
5 then it is equitable to everybody. And I think Public  
6 Counsel and GTE suggested that we open the record in  
7 that case and we said no. And I just think that should  
8 be part of the discussion that takes place in this.

9 COMMISSION STAFF: Yes, ma'am.

10 CHAIRMAN CLARK: There has been a motion and a  
11 second. Is there further discussion? All those in  
12 favor say aye.

13 (Unanimous affirmative vote.)

14 CHAIRMAN CLARK: Opposed, nay. Thank you all for  
15 coming.

16 COMMISSIONER KIESLING: Wait a minute. That was  
17 just to reopen --

18 CHAIRMAN CLARK: Move to reconsider.

19 COMMISSIONER KIESLING: Right. Now I am moving  
20 that we actually reconsider. That we grant  
21 reconsideration so that we can get us back in the  
22 posture where we haven't dealt with reconsideration  
23 such that a time frame would start to run.

24 CHAIRMAN CLARK: Okay. We have moved to  
25 reconsider and now you want to --



1           COMMISSIONER KIESLING: I move to reconsider our  
2 vote on the motion to reconsider.

3           CHAIRMAN CLARK: You're right.

4           COMMISSIONER KIESLING: And now I'm moving that we  
5 grant reconsideration so that we can try to figure out  
6 what impact the GTE opinion will have.

7           CHAIRMAN CLARK: Now, we are not granting  
8 consideration, we are reconsidering it now.

9           COMMISSIONER KIESLING: Yes.

10          COMMISSIONER JOHNSON: Second.

11          COMMISSIONER DEASON: And implicit in that is that  
12 the order would not become final, our order would not  
13 become final until the Supreme Court order becomes  
14 final, and parties have an opportunity to brief the  
15 matter.

16          COMMISSIONER KIESLING: Exactly.

17          COMMISSION STAFF: That's correct. You will not  
18 be issuing on March 11th the order on reconsideration  
19 that you voted out February 20th, because you are  
20 reconsidering the whole matter. The substantive part  
21 of your decision will not take place until after the  
22 parties file the brief if, in fact, the GTE case  
23 becomes final.

24          CHAIRMAN CLARK: Okay.

25          COMMISSION STAFF: And then we will return with a

1 recommendation on the substantive points.

2 CHAIRMAN CLARK: So then the staff recommendation  
3 that has been denied, we would not bifurcate the case.

4 COMMISSIONER KIESLING: Correct.

5 COMMISSION STAFF: Correct.

6 CHAIRMAN CLARK: And that within 10 days after the  
7 Supreme Court's order becomes final, parties shall  
8 brief the Commission --

9 COMMISSION STAFF: Yes. And the exact wording of  
10 the issue to be briefed is found on Page 4 of staff's  
11 recommendation, the very last sentence, and it's in  
12 bold type, whether the Supreme Court's February 29th,  
13 1996 decision in the GTE case requires the backbilling  
14 of customers in the SSU case who paid less under the  
15 uniform rate structure than they would pay under the  
16 modified stand-alone rate structure.

17 CHAIRMAN CLARK: I would like it broader than  
18 that.

19 COMMISSIONER KIESLING: Yes. I mean, that's why  
20 I'm trying to make it broader. I don't want to be just  
21 tied to that, because if we are going to take --

22 COMMISSION STAFF: Well, what's the point -- I'm  
23 sorry.

24 CHAIRMAN CLARK: No, I think that the parties  
25 should brief whether or not we should --

1           COMMISSIONER DEASON: It should be the question of  
2 refunds, period. It should be the question of if there  
3 are refunds, is there going to be a surcharge to make  
4 the company whole. Then there is the question that you  
5 brought forth about a new standard being set forth and  
6 how that impacts this entire process.

7           CHAIRMAN CLARK: In my view, it is simply to  
8 address whether we should reconsider the order we  
9 issued on remand of this case. It's that broad.

10          COMMISSION STAFF: All right.

11          COMMISSIONER KIESLING: I'm confused, because to  
12 me when I made a motion to reconsider, that's what we  
13 are doing. We are reconsidering the whole question.

14          CHAIRMAN CLARK: Okay.

15          COMMISSION STAFF: And in the parties, I guess,  
16 response to -- well, what are they going to be filing a  
17 response to? In response to the original motion for  
18 reconsideration that was filed or in response to --

19          CHAIRMAN CLARK: We have moved to reconsider our  
20 order on remand.

21          COMMISSION STAFF: Okay. But you want the parties  
22 to file after the GTE decision becomes final their view  
23 in light of that new decision.

24          COMMISSIONER KIESLING: Yes.

25          CHAIRMAN CLARK: What action we should take on the

1 remand from the Court in the Southern States case. Is  
2 that clear?

3 MR. HOWE: Chairman Clark, it's not clear for one  
4 reason. As I understand it, the order on remand for  
5 reconsideration, the standard that we will have to  
6 address is whether the Commission made a mistake or  
7 misapprehension of law or fact in that order that if  
8 corrected will necessarily lead to a different result  
9 in light of the Supreme Court's opinion in GTE. So in  
10 that sense, I believe we are still going to be in the  
11 reconsideration mode. And so I don't believe the  
12 Commission can fully open its order on remand, it will  
13 only be mistake, misapprehension of fact or law.

14 CHAIRMAN CLARK: No, that's what the parties can  
15 move for reconsideration on, but we can reconsider on  
16 our own motion and we are not constrained by those.

17 MR. HOWE: All right. Well, is that the  
18 parameters you're defining?

19 COMMISSIONER KIESLING: Yes. I want to  
20 reconsider.

21 CHAIRMAN CLARK: We are doing it on our own  
22 motion.

23 COMMISSIONER KIESLING: And I want to reconsider  
24 the underlying order that the motion for  
25 reconsideration that we heard, whenever it was, two

1 weeks ago --

2 CHAIRMAN CLARK: The last agenda.

3 COMMISSIONER KIESLING: Yes. I want to grant  
4 reconsideration and relook at that first order in light  
5 of the GTE.

6 CHAIRMAN CLARK: We are not granting  
7 reconsideration, we are moving to reconsider on our own  
8 motion. There is a difference.

9 COMMISSIONER KIESLING: I agree there is a  
10 difference. And what I think I'm doing is granting  
11 reconsideration. I want to reconsider the order that  
12 -- the original order when we ordered a refund, denied  
13 a surcharge or any other recovery, et cetera.

14 CHAIRMAN CLARK: But you're not doing it on  
15 anybody's motion.

16 COMMISSIONER KIESLING: Right, I'm doing it on my  
17 own motion.

18 CHAIRMAN CLARK: Right. Mr. Twomey.

19 MR. TWOMEY: I'm sorry. I didn't mean to  
20 interrupt.

21 CHAIRMAN CLARK: If you can clarify this, go  
22 ahead.

23 MR. TWOMEY: I just wanted to -- I agree with  
24 Mr. Howe to the extent that it seems to me appropriate,  
25 given that you are bound to do it, to reopen this, that

1           you look at the first two issues. But it seems  
2           inappropriate to me that you go into the business of  
3           looking at whether you should reopen the entire record  
4           and get into this business of determining whether --  
5           the functionally related question. And I would urge  
6           you not to do that. I think you would be on safer  
7           ground if you just stuck to what the impact of the GTE  
8           decision was on whether there could be surcharges and  
9           whether there could be --

10           CHAIRMAN CLARK: Well, I certainly think that is  
11           an argument you can make, but it's legally more  
12           defensible to do that. But I would like that issue  
13           briefed, because it seems to me now we are talking --  
14           we are not only talking equities between company and  
15           customers, we are talking about equities between  
16           customer classes. And what concerns me is we have made  
17           a decision that they were functionally related after  
18           that. I realize that's still pending, but I think to  
19           get it, to sort of look at the broad thing we ought to  
20           discuss those things and make sure that we have  
21           decided, yes, this is the course of action we want to  
22           take.

23           MR. TWOMEY: Okay. Then if your position is  
24           adopted, which I don't think it has been yet, I would  
25           ask you to direct your staff to make it abundantly

1 clear in your order coming out of this decision  
2 precisely what you intend to do, for what reason, you  
3 know, and hopefully whatever the authority is. Thank  
4 you.

5 COMMISSION STAFF: I think I have it. And if not  
6 I will replay the tape.

7 CHAIRMAN CLARK: Well, Commissioners, as I  
8 understand our vote, we have moved to reconsider our  
9 order dealing with the remand in this case. And  
10 parties will have until 10 days after the Supreme Court  
11 decision in the GTE case becomes final to brief the  
12 reconsideration of that order and what decision they  
13 think we should reach in the remand of SSU taking into  
14 account the Supreme Court's decision in GTE. Is that  
15 clear?

16 COMMISSIONER KIESLING: Don't we have to vote on  
17 that? That was a restatement of the motion. Have we  
18 had a vote on that?

19 CHAIRMAN CLARK: Just so it's clear. Are you  
20 comfortable with that as being a statement?

21 COMMISSIONER KIESLING: Yes. I'm comfortable with  
22 that as being a restatement of my motion.

23 CHAIRMAN CLARK: There has been a motion and a  
24 second. All those in favor say aye.

25 (Unanimous affirmative vote.)

1           CHAIRMAN CLARK: Opposed, nay.

2           COMMISSIONER KIESLING: And I do want to say just  
3 one thing for the record, since I'm the one who made  
4 the motion. You know, I'm really sympathetic to how  
5 long it took, and personally I'm embarrassed in regard  
6 to how long it took from the remand to when we did  
7 finally make that decision several months later. And I  
8 am concerned about if we do, you know, determine that  
9 there are customers who deserve a refund, them getting  
10 their money. So, I'm not unmindful of the length of  
11 time that this has taken. And had it not been for GTE  
12 coming down last Thursday, you know, as far as I'm  
13 concerned it would have been become final and we would  
14 have gone on from there. But, you know, be that as it  
15 may, it did come down. I think it does impact on it,  
16 and I think we have to pull back the whole thing to  
17 figure out the equities of it now that the Supreme  
18 Court has made it clear that we somehow do have to deal  
19 with equity as opposed to law.

20           CHAIRMAN CLARK: Okay. We have taken our vote.

21           I want to tell you all I appreciate your coming up  
22 here on short notice. I realize it was short notice to  
23 you all and I appreciate you all being prepared to  
24 brief this issue. Thank you.

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CERTIFICATE OF REPORTER

STATE OF FLORIDA )  
COUNTY OF LEON )

I, JANE FAUROT, Court Reporter, do hereby certify that the foregoing proceedings was transcribed from cassette tape, and the foregoing pages numbered 1 through 32 are a true and correct record of the proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing action.

DATED THIS 12<sup>th</sup> day of March, 1996.

  
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