

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, Highlands, Lake, Lee, Marion, Martin, Nassau, Orange, Osceola, Pasco, Polk, Putnam, Seminole, St. Johns, St. Lucie, Volusia and Washington Counties.

Docket No. 950495-WS

Filed: January 16, 1997

FLORIDA WATER SERVICES CORPORATION'S RESPONSE IN OPPOSITION TO OPC'S MOTION TO ESTABLISH SCHEDULE FOR FILING MOTIONS FOR RECONSIDERATION

Florida Water Services Corporation ("Florida Water"), formerly Southern States Utilities, Inc., by and through its undersigned counsel, hereby files its Response in Opposition to the Office of Public Counsel's ("OPC") Motion to Establish Schedule for Filing Motions for Reconsideration.

A. BACKGROUND

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1. On October 30, 1996, the Commission issued Order No. PSC-96-1320-FOF-WS ("Final Order") in this docket. On November 1, Florida Water filed its Notice of Appeal of the Final Order. Florida Water's appeal was assigned First District Court of Appeal Case No. 96-04227. Subsequently, notices of cross-appeal were filed in First District Court of Appeal Case No. 96-04227. On November 26, OPC filed a Notice of Cross-Appeal and on November 27, a Notice of Cross-Appeal was filed by Intervenors Citrus County Board of County Commissioners, et. al. (hereinafter referred to collectively as "Citrus County").

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

- 2. In the meantime, on November 14, Citrus County timely filed a Motion for Reconsideration of the Final Order with the Commission. On the same date, Citrus County filed a Motion with the First District Court of Appeal asking the court "to temporarily relinquish jurisdiction of the case to the Florida Public Service Commission (for the) limited purpose of allowing it to hear motions for reconsideration of the Final Order published on October 30, 1996, but which order was appealed to this Court by Southern States Utilities, Inc. ("SSU") two days later on November 1, 1996."
- 3. On November 26, Florida Water timely filed a Cross-Motion for Reconsideration of the Final Order with the Commission.
- 4. On December 2, the Court issued an order granting Citrus County's Motion to Relinquish Jurisdiction. The Court ruled:

[T]his appeal is abated pending disposition of the movants' pending motions for reconsideration by the lower tribunal. Time for filing notices of cross-appeal, briefs, and other matters pursuant to the rules of appellate procedure is tolled during the period of abatement.

<u>See</u> December 2, 1996 order in First DCA Case No. 96-04227 attached hereto as Exhibit A.

5. On December 3, Florida Water filed a Motion for Clarification of the December 2 order requesting that the court clarify and confirm that the abatement of the appeal remain in effect pending disposition of both Citrus County's Motion for Reconsideration and Florida Water's Cross-Motion for

¹See Citrus County Motion to Relinquish Jurisdiction filed in First DCA Case No. 96-04227, at 1 (emphasis supplied).

Reconsideration.

- 6. On December 4, OPC filed a Motion for Reconsideration and Clarification of the December 2 order asking the court to enter an order authorizing OPC to file a motion for reconsideration with the Commission well beyond the 15 day period (following the date of issuance of the Final Order) set forth in Rule 25-22.060(3)(a), Florida Administrative Code.
- 7. On December 31, the court issued an order amending the December 2 order to reflect that:

... the appeal is abated pending the lower tribunal's disposition of all motions or cross-motions for reconsideration of the order for which review is sought in this proceeding. The determination of the timeliness or propriety of any such motion or cross-motion shall be made by the lower tribunal.

<u>See</u> December 31, 1996 order issued in First DCA Case No. 96-04227 attached hereto as Exhibit B.

8. Having failed to secure an order from the First DCA authorizing an untimely motion for reconsideration, OPC filed its instant motion asking the Commission to establish a schedule for the filing (and/or readopting a previously filed) of an untimely motion for reconsideration.

B. ARGUMENT

- 9. OPC's Motion should be denied. OPC asks the Commission to order what the First DCA refused to order, that is, authorization to file an untimely motion for reconsideration. The Commission should deny OPC's request.
 - 10. In the December 2, 1996 order abating the appeal, the

court did in fact toll the time for filing notices of cross-appeal, briefs and other matters pursuant to the Rules of Appellate Procedure. The court specifically excluded from the December 2 order any tolling of the time for filing a motion for reconsideration under Commission Rule 25-22.060(3), Florida Administrative Code.

- 11. The time parameters attached to motion for a reconsideration under Commission rules are jurisdictional and may not be extended by the Commission. In Citizens of the State of Florida v. North Fort Myers Utility, Inc., First DCA Case No. 95-1439, OPC requested and was granted an extension of time to file a motion for reconsideration by the Prehearing Officer subsequently filed an appeal of two Commission orders with the First District Court of Appeal. The court, on its own motion, required OPC to show cause why the appeal should not be dismissed as untimely filed in view of the decision in City of Hollywood v. Public Employees Relations Commission, 432 So. 2d 79, 81-82 (Fla. 4th DCA 1983) (holding "that PERC does not have authority to grant an extension of time to file a motion for reconsideration of an order so as to suspend rendition of said order."). ultimately determined that OPC's appeal was untimely and should be dismissed for lack of jurisdiction. See Orders dated October 19, 1995 and November 16, 1995 issued in Citizens of the State of Florida v. North Fort Myers Utility, Inc., attached hereto as Composite Exhibit C.
 - 12. OPC asserts that its failure to timely file a motion for

OPC asserts that its failure to timely file a motion for reconsideration should be legally excused because the Commission had no jurisdiction to consider any motions for reconsideration until the December 2 order. Under OPC's theory, OPC's Notice of Cross-Appeal of the Final Order filed on November 26th with the Commission must be dismissed on the ground that the Commission lacked jurisdiction. OPC's inconsistent positions undermine the credibility of its argument. Having failed to timely file a motion for reconsideration, and having failed to secure authority from the First DCA to file an untimely motion for reconsideration, the Prehearing Officer should deny OPC's Motion to Establish a Schedule for Filing (Untimely) Motions for Reconsideration.

Florida WHEREFORE, for the foregoing reasons, Water respectfully requests that the Prehearing Officer enter an order denying OPC's Motion to Establish Schedule for Filing Motions for Reconsideration.

Respectfully submitted,

KÉNNETH A/X 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. Florida Water Services Corporation 1000 Color Place Apopka, Florida 32703 (407) 880-0058

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Florida Water Services Corporation's Response in Opposition to OPC's Motion to Establish Schedule for Filing Motions for Reconsideration was furnished by U. S. Mail to the following on this 16th day of January, 1997:

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

Charles J. Beck, Esq. Office of Public Counsel 111 W. Madison Street Room 812 Tallahassee, FL 32399-1400

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

Mr. Kjell Pettersen P. O. Box 712 Marco Island, FL 33969

Mr. Paul Mauer, President Harbour Woods Civic Association 11364 Woodsong Loop N Jacksonville, FL 32225

Larry M. Haag, Esq. 111 West Main Street Suite #B Inverness, FL 34450

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2315 Aaron Street
P. O. Drawer 2159
Port Charlotte, FL 33949

ENNETH A. MOFFMAN, ESQ.

1995/fwc.response

12/2/98

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Fl. 32399

Telephone (904) 488-6151

DATE December 2, 1996

CASE NO. 96-4227

L.T. NO. 950495-WS

Southern Jtates Utilities, Inc. v. Florida Public Service Comm., et al. appellant/petitioner appellee/respondent

BY ORDER OF THE COURT:

The relief requested in the motion to relinquish jurisdiction, filed November 14, 1996, by appellees Citrus County Board of County Commissioners, et al., is granted, and this appeal is abated pending disposition of the movants' pending motions for reconsideration by the lower tribunal. Time for filing notices of cross-appeal, briefs, and other matters pursuant to the rules of appellate procedure is tolled during the period of abatement.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Jan S. Tikatian

Jon S. Wheeler, Clerk

Deputy Clerk

Copies:

EXHIBIT A

Arthur J. England, Jr. William B. Willingham Matthew J. Feil Charles J. Beck Larry M. Haag Vicki Gordon Kaufman

Kenneth A. Hoffman Brian P. Armstrong Lila Jaber Michael B. Twomey Arthur I. Jacobs David Carr

David Holmes
Joseph McGlothlin
Jack Shrive 586
Blanca Bayo

F 1/3/47

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Fl. 32399

Telephone (904) 488-6151

DATE December 31, 1996

CASE NO. 96-4227

L.T. NO. 950495-WS

Southern States Utilities, Inc. Florida Public Service Comm., et al. appellant/petitioner appellee/respondent

BY ORDER OF THE COURT:

The motions for reconsideration and clarification filed by appellant and appellee Citizens of Florida are granted, and the order of December 2, 1996, is amended to reflect that the appeal is abated pending the lower tribunal's disposition of all motions or cross-motions for reconsideration of the order for which review is sought in this proceeding. The determination of the timeliness or propriety of any such motion or cross-motion shall be made by the lower tribunal.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Jon S. Wheeler, Clerk

Deputy Clerk

Copies:

EXHIBIT B

Christiana T. Moore
Arthur J. England, Jr.
William B. Willingham
Matthew J. Feil
Charles J. Beck
Larry M. Haag
Vicki Gordon Kaufman
David Holmes
Jack Shreve

Blanco Bayo
Kenneth A. Hoffman
Brian P. Armstrong
Lila Jaber
Michael B. Twomey
Arthur I. Jacobs
Darol H.N. Carr
Joseph A. McGlothlin
Mary Anne Helton



DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399-1850

RECEIVED

Telephone (904) 488-6151

OCT 2-0 1995

DATE: October 19, 1995

Rose, Sundstrom & Bentley

CASE NO.: 95-1439

CITIZENS OF THE STATE OF FLORIDA

vs.

NORTH FORT MYERS UTILITY, INC. and THE FLORIDA PUBLIC SERVICE COMMISSION

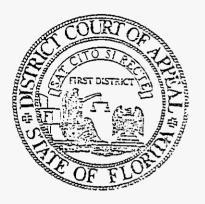
Appellant.

Appellees.

BY ORDER OF THE COURT:

Upon review of the file in this case, it appears to the court that the Appellants' motion for reconsideration of the final order of the Florida Public Service Commission issued on December 13, 1994, was not timely filed within fifteen (15) days after issuance of that order as required by Fla. Admin. Code R. 25-22.060(3)(a). Appellants are therefore ordered to show cause, within seven (7) days from the date of this order, why the appeal of the final orders of the Florida Public Service Commission issued on December 13, 1994, and March 27, 1995, should not be dismissed for lack of jurisdiction. See City of Hollywood v. Public Employees Relations Commin, 432 So. 2d 79 (Fla. 4th DCA 1983); Fla. R. App. P. 9.020(g). Appellees responses shall be filed within seven (7) days thereafter.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.



Jon S. WHEELER, CLERK

By: Deputy Clerk

copies:

Stephen C. Reilly Margaret O'Sullivan Robert Vandiver

Martin S. Friedman Diana W. Caldwell

PURSE!

DISTRICT COURT OF APPEAL, FIRST DISTRUCTION 17 PH 2:43

Tallahassee, Florida 32399-1850: LTQDA LL A LTTTLAME.

Telephone (904) 488-6151

DATE: November 16, 1995

CASE NO.: 95-1439

LT# 930373-SU

CITIZENS OF THE STATE OF vs.

FLORIDA

NORTH FORT MYERS UTILITY, INC. and THE FLORIDA PUBLIC

SERVICE COMMISSION

Appellant.

Appellees.

BY ORDER OF THE COURT:

The court has reviewed appellant's and appellees' responses to the court's order to show cause why the appeal should not be dismissed for lack of jurisdiction. Having reviewed the parties' responses, and appellant not having shown good cause, the appeal is hereby dismissed.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

COURT OF ELGI

Copies: Stephen C. Reilly Margaret O'Sullivan Robert Vandiver Jon S. WHEELER, CLERK

Deputy Clerk

Martin S. Friedman Diana W. Caldwell Blanca Bayo