

RUTLEDGE, ECENIA, UNDERWOOD, PURNELL & HOFFMAN

PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS AT LAW

SEP 10 1997

STEPHEN A. ECENIA
KENNETH A. HOFFMAN
THOMAS W. KONRAD
MICHAEL G. MAIDA
J. STEPHEN MENTON
R. DAVID PRESCOTT
HAROLD F. X. PURNELL
GARY R. RUTLEDGE
R. MICHAEL UNDERWOOD
WILLIAM B. WILLINGHAM

POST OFFICE BOX 551, 32302-0551
215 SOUTH MONROE STREET, SUITE 420
TALLAHASSEE, FLORIDA 32301-1841

GOVERNMENTAL CONSULTANTS:
PATRICK R. MALOY
AMY J. YOUNG

TELEPHONE (850) 681-6788
TELECOPIER (850) 681-6515

September 9, 1997

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. 920199-WS

Dear Ms. Bayo:

Enclosed herewith for filing in the above-referenced docket on behalf of Florida Water Services Corporation ("Florida Water") are the following documents:

1. Original and fifteen copies of Florida Water's Response in Opposition to Motion for Fees and Costs; and
2. A disk in Word Perfect 6.0 containing a copy of the document.

ACK 1
 AFA 1
 APP 1
 CAF _____
 CMH _____
 CTR _____
 EMT _____
 JG 1
 _____ 5
 _____ KAH/rl

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

cc: All Parties of Record

RECEIVED & FILED

FLORIDA PUBLIC SERVICE COMMISSION

DOCUMENT NUMBER-DATE

004290 09042 SEP-96

FPSC-RECORDS/REPORTING

W.C. (circled)
L.H.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL FILE COPY

In re: Application of)
Southern States Utilities,)
Inc. and Deltona Utilities,)
Inc. for Increased Water and)
and Wastewater Rates in Citrus,)
Nassau, Seminole, Osceola, Duval,)
Putnam, Charlotte, Lee, Lake,)
Orange, Marion, Volusia, Martin,)
Clay, Brevard, Highlands,)
Collier, Pasco, Hernando, and)
Washington Counties.)

Docket No. 920199-WS

Filed: September 9, 1997

FLORIDA WATER SERVICES CORPORATION'S
RESPONSE IN OPPOSITION TO MOTION FOR FEES AND COSTS

Florida Water Services Corporation ("Florida Water"), by and through its undersigned counsel, hereby files its Response to the Motion for Fees and Costs ("Motion") filed by Senator Ginny Brown-Waite and Mr. Morty Miller and states as follows:

A. BACKGROUND FACTS

1. On August 5, 1997, at its regularly scheduled Agenda Conference, the Commission heard oral argument on the Petition to Intervene filed by Senator Brown-Waite and Mr. Miller and the Petitioners' Motion to Compel Rate Reductions and Rate Refunds.

2. During the course of the oral argument, counsel for the Petitioners distributed two color pictures to each Commissioner purporting to show the residences of two Florida Water customers, one of whom is supposedly eligible for a refund and the other supposedly subject to a surcharge if refunds are ordered by the Commission. Color copies of the two pictures were not provided to counsel for Florida Water. No explanation was given by counsel for the Petitioners for failing to provide counsel for Florida Water

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with color copies of the two pictures. At the Agenda Conference, counsel for Florida Water requested copies of the pictures and the location and address of each residence shown in the pictures. Counsel for the Petitioners advised the Commission that he would provide copies of such pictures to counsel for Florida Water.

3. The following day, counsel for Florida Water mailed a letter to counsel for the Petitioners confirming Florida Water's request that it be provided copies of the two pictures together with the name and address of the Florida Water customer whose residence is purportedly shown in each picture. Florida Water requested that the two pictures and accompanying information be provided within seven days.

4. The Motion admits that "the photographs were intended to influence the Commission to reject Staff's recommendation and immediately order refunds financed by customer surcharges" but "that goal failed." Motion at 2. Indeed, counsel and the Senator made repeated representations to the Commission of the probative value of the residences shown in the photographs -- the "Rockingham Estate" allegedly representing a typical Florida Water customer who would pay surcharges and a federally subsidized housing unit allegedly representing a typical Florida Water customer who would receive a refund. See pp. 35-43 of transcript of August 5 Agenda Conference, attached hereto as Exhibit A, at p. 35.

5. The August 5 Agenda Conference was not an evidentiary hearing. Yet counsel for Petitioners produced the two pictures in an admitted attempt to persuade the Commission to order refunds

without further proceedings or briefing of the issues. This "proof" offered by counsel for Petitioners in the form of the two pictures would not be admissible in an evidentiary proceeding unless the pictures were determined to be relevant and a proper predicate was laid for their introduction into evidence. Metropolitan Dade County v. Zapata, 601 So.2d 239, 244 (Fla. 3rd DCA 1992). Not only were these pictures irrelevant to the issues of refunds and surcharges, but as feared by Florida Water, they were used to inaccurately portray the residences of customers who would be subject to refunds and/or surcharges. As now admitted in the Motion, neither counsel for Senator Brown-Waite nor Senator Brown-Waite were "aware of the circumstances under which the photographs were taken, the addresses of the structure shown or the names of the residents of the structures shown." Motion at 5. To this day, counsel for the Senator cannot provide the address of the "Rockingham Estate."

6. Having failed to produce the two pictures and accompanying requested information, on August 22, Florida Water filed a Motion to Compel color copies of the two pictures and the names, addresses and service areas of the customers whose residences are purportedly shown in the pictures. As indicated in Florida Water's Motion to Compel, to the extent that the "Rockingham Estate" is located in Florida Water's Palm Valley service area in St. Johns County, as represented by counsel for the Petitioners, and assuming, for purposes of this Response only, that the resident of the home is in fact a customer of Florida Water,

the Palm Valley service area was never a part of this docket. Counsel's assertions at the August 5 Agenda Conference that the resident of this home would pay a surcharge was false.

7. Counsel now reveals that the federally subsidized housing is located in Florida Water's Spring Gardens service area in Citrus County. The Spring Gardens service area was not even acquired by Florida Water until after the order setting rates in this docket was issued. The Spring Gardens service area never was under a uniform rate structure. Counsel's assertion at the August 5 Agenda Conference that the resident of this home would receive a refund also was false.

8. Now, based on his misrepresentations to the Commission at the August 5 Agenda Conference, counsel for the Petitioners does not offer a retraction of his statements but instead asks the Commission to award attorneys' fees and costs against Florida Water. The Motion, of course, should be denied. Florida Water, like any other party appearing before the Commission, is entitled to basic rights of due process. Consistent with practice before the Commission, other administrative tribunals and the courts, a party offering documentary evidence to the Commission is required to provide copies to affected parties. Florida Water was given no notice by counsel for the Petitioners that these two pictures would be utilized at the August 5 Agenda Conference in support of his argument for immediate refunds. Had such notice been given and had the accompanying verifying information been provided to Florida Water, the parties and the Commission could have been apprised on

August 5, rather than now, that to the extent the two pictures represent the residences of Florida Water customers in the Palm Valley and Spring Garden service areas, these customers are not affected by refund and surcharge issues which will be resolved by the Commission in this proceeding.

9. Now that these facts have been laid bare by counsel for Petitioners, it would appear that the only plausible and reasonable step for counsel for the Petitioners to take would be retract his statements at the August 5 Agenda Conference concerning the alleged relevancy and probative value of these two pictures. Instead, counsel for the Petitioners offers an assortment of irrelevant allegations and threats. For example, the Motion "warns" the Commission to "guard against being goaded into incurring liability for fees and costs as a result of entering clearly improvident orders." The Motion also relies on the fact that the pictures and counsel's argument concerning the two pictures were evidently not deemed to be relevant or sufficient by the Commission to support an immediate determination that refunds be ordered. See Motion at 2.

10. The Motion also asserts that Florida Water may not move to compel copies of the two pictures and the accompanying information because Florida Water did not request same pursuant to a formal discovery request under the Florida Rules of Civil Procedure which have been adopted by the Commission.¹ This assertion lacks merit. As previously stated, Florida Water has a fundamental due process right to the same two color pictures that

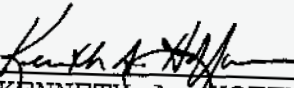
¹See Fla. Admin. Code R. 25-22.034.

were provided to the Commission and to the verifying information concerning each such picture, i.e., the name, address and service area information requested by Florida Water.

11. Accordingly, the grounds raised in the Motion as support for an award of fees and costs are frivolous. The Motion offers no apology for the false and misleading information presented to the Commission for the purpose of influencing the Commission to achieve counsel's "goal." Florida Water has not received duplicate color photographs of the type presented to each Commissioner. Florida Water is entitled to this information. Florida Water has not been provided the address of the "Rockingham Estate." Florida Water is entitled to this information to confirm whether the resident is even a customer of Florida Water.

WHEREFORE, Florida Water respectfully requests that the Prehearing Officer deny the Motion for Fees and Costs and order counsel for the Petitioners to provide the above-described information.

Respectfully submitted,


KENNETH A. HOFFMAN, ESQ.
RUTLEDGE, ECENIA, UNDERWOOD,
PURNELL & HOFFMAN, P.A.
P. O. Box 551
Tallahassee, FL 32302-0551
(904) 681-6788

and

BRIAN P. ARMSTRONG, ESQ.
Florida Water Services Corporation
1000 Color Place
Apopka, Florida 32703
(407) 880-0058

Attorneys for Florida Water Services
Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Florida Water Services Corporation's Response in Opposition to Motion for Fees and Costs was furnished by U. S. Mail to the following this 9th day of September, 1997:

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

Lila Jaber, Esq.
Division of Legal Services
Florida Public Service
Commission
2540 Shumard Oak Boulevard
Room 370
Tallahassee, FL 32399-0850

Ms. Anne Broadbent
President, Sugarmill Woods
Civic Association
91 Cypress Boulevard West
Homasassa, Florida 34446

Michael S. Mullin, Esq.
P. O. Box 1563
Fernandina Beach, Florida 32034

Larry M. Haag, Esq.
County Attorney
111 West Main Street #B
Inverness, Florida 34450-4852

Susan W. Fox, Esq.
MacFarlane, Ferguson
P. O. Box 1531
Tampa, Florida 33601

Michael B. Twomey, Esq.
Route 28, Box 1264
Tallahassee, Florida 31310

Joseph A. McGlothlin, Esq.
Vicki Gordon Kaufman, Esq.
117 S. Gadsden Street
Tallahassee, FL 32301

Darol H.N. Carr, Esq.
David Holmes, Esq.
P. O. Drawer 159
Port Charlotte, FL 33949

Michael A. Gross, Esq.
Assistant Attorney General
Department of Legal Affairs
Room PL-01, The Capitol
Tallahassee, FL 32399-1050

By: 
KENNETH A. HOFFMAN, ESQ.

Giga.5res

1 They are willing to pay their share. In order for a
2 decision to be made, I think that you need to
3 certainly have this group, myself and Mr. Miller
4 representing them, have our side actually be heard.

5 If anything, it's kind of a David and Goliath
6 fight that we have undertaken here. And a long time
7 ago, long before I was ever elected, I learned that
8 you don't tilt at windmills and you don't take on
9 issues that would seem to be tilting at windmills.
10 This isn't tilting at windmills. This is tilting at
11 -- trying to tilt at that scale the way that it
12 belongs.

13 One of the reasons why we are seeking to have
14 this intervention is a question of -- and I know this
15 almost looks like Rockingham, O.J. Simpson's estate,
16 but it's not. It could be. This is a group of the
17 potential surcharge payers. And I will pass these up.
18 I will ask Mr. Twomey to pass them up.

19 This very humble abode is very similar to the
20 residence that my grandchildren -- I brought my
21 grandchildren up today -- that they live in. And it
22 is in the SSU area of coverage. This home would
23 benefit from the refund. I really think that if we
24 are considering, if you all are considering the issue,
25 we need to have the intervention of the people like my



1 grandchildren who live in a home probably a little
2 smaller than this one.

3 And while the utility company is willing to offer
4 scholarships to young children, they are at the same
5 time in a position of seeing that their parents are
6 denied funding to maybe get them through high school.

7 I don't live in Springhill any longer. I did
8 until the date that's in there, October of '94. But
9 it's very important that you hear both sides, because
10 I really don't want to be back here saying, and not
11 having my constituents say, wait a minute, we were
12 never heard on that issue. And that's the reason why
13 I asked Mr. Twomey to file the motion that he filed
14 before you all.

15 COMMISSIONER CLARK: Senator, are you asking for
16 status as an individual or as a representative of
17 Springhill?

18 SENATOR BROWN-WAITE: Commissioner Clark, with
19 all due respect, I think that if I received the refund
20 and the others didn't, I would be run out of town on a
21 rail. But I think that obviously for my intervention
22 it would also end up also representing the people of
23 Springhill.

24 COMMISSIONER CLARK: But you are seeking status
25 in your own right, and to the extent you advocate

1 something that is consistent with what other people
2 want, that is up to you. Okay. And is the civic
3 association part of this group?

4 MR. TWOMEY: Is that the second?

5 COMMISSIONER CLARK: Yes.

6 MR. TWOMEY: Yes, ma'am.

7 COMMISSIONER CLARK: Okay.

8 CHAIRMAN JOHNSON: Any other questions? Thank
9 you, Senator. Any other comments?

10 COMMISSIONER CLARK: Well, I have been most vocal
11 on this, I guess, I -- well, now I just want to say
12 that I voted for the motion to deny the intervention.
13 I thought it was correct then, it was in compliance
14 with our rules and what the law was at that time. And
15 I would only point out that we have procedural rules
16 to ensure fairness. It seems to me a lot of times
17 people suggest that the procedural rules are there for
18 or are used for unfair purposes, and I don't think we
19 intended to do that.

20 And I think many times in this Southern States
21 case we have had decisions that have been at odds with
22 what we thought our authority was. Certainly the
23 majority of the Commission thought we had no authority
24 for a surcharge, and the court has now said, well, you
25 do. And not only do you, but you have to.

1 So it has been a series of decisions that have
2 brought about different principles than I thought were
3 applicable. But in this case what the court seems to
4 be saying, I think, is make sure you have everybody
5 who is potentially affected and who wants to come in
6 at the table so they can argue their view. And for
7 that reason, I would deny staff. And to the extent
8 they are entitled to standing as being a customer and
9 they meet the other requirements, that they be allowed
10 to intervene.

11 COMMISSIONER DEASON: Let me say that, as I
12 indicated earlier, of course, I was in the minority at
13 the time, but I voted to allow intervention of the
14 City of Keystone Heights, Marion Oaks Civic
15 Association, and Burnt Store Marina, and that matter
16 was addressed by the court. And I agree with you,
17 Commissioner Clark, that our procedural rules
18 generally should apply, but I think they should be a
19 help to us and should not unnecessarily dictate to us
20 or take away our flexibility in addressing a situation
21 where we think equity dictates that we take a
22 different action.

23 That was the basis of my decision and my vote at
24 that time. I think that the same underpinning applies
25 here, the same rationale applies here in that -- so

1 that we can get all sides and input from the various
2 parties that intervention should be granted. And that
3 I think that it is a situation where we basically are
4 addressing the issues which could not reasonably have
5 been -- could not have been forecasted or predicted
6 would be issues that we are addressing at this time.

7 And to put a burden on a party to say that you
8 should have intervened within five days, not knowing
9 that we were going to be at this particular juncture
10 at this time addressing these particular issues is an
11 unreasonable burden to expect. And, therefore, I
12 think that the parallel in this case is very similar
13 to the situation that the court has already addressed,
14 and that the court's decision should be interpreted
15 broadly, and that intervention should be granted. So
16 I would second your motion to deny staff on Issue 2.

17 CHAIRMAN JOHNSON: There is a motion and a
18 second. Any further discussion?

19 COMMISSIONER KIESLING: I just need a
20 clarification. If I understood correctly, the motion
21 was made to allow intervention by Senator Brown-Waite
22 and Mr. Miller because they are customers, and I have
23 some concern if we grant intervention to Senator
24 Brown-Waite as a representative of her constituents.
25 I have no problem if we grant it as a customer.

1 And I'm not in any way trying to restrict what
2 she can say once she is a party, but technically I
3 think we have a problem if we grant intervention as a
4 representative of a particular constituency that has
5 not been -- I see it differently when it's the
6 president of a homeowners association or something,
7 but Senator Brown-Waite is no longer a customer, and
8 while she had been elected to public office by these
9 people, that is a different mandate in my mind than a
10 mandate to the president of your homeowners
11 association to go forward and represent you on a
12 particular issue.

13 And I just am afraid we are going to a run afoul
14 of some other principles if we explicitly grant
15 intervention as a representative although not trying
16 to restrict what might get said afterwards. I'm
17 trying to frame the order as opposed to the content.

18 MR. TWOMEY: Madam Chair, let me just address
19 that briefly. I appreciate Commissioner Kiesling's
20 concerns entirely, and I would think her concerns can
21 be addressed by this resolution. That is I don't
22 think I asked for Senator Brown-Waite to be a
23 representative of anybody but herself as a party. And
24 if I did, I was mistaken.

25 She only wants to have party status herself.

1 Even though she is not presently a customer, she has a
2 substantial interest, of course, in the fact that she
3 would stand to get a refund, which Commissioner
4 Kiesling recognizes.

5 So the fact that we could just -- senator is a
6 title that she possesses by virtue of her constituents
7 putting her in office. We can strip off senator if
8 you want to, or pretend that she is not a senator, but
9 she seeks intervention just like Morty Miller, who is
10 just a mister.

11 COMMISSIONER CLARK: I think that is
12 clarification, that she is seeking it as her status as
13 a customer.

14 COMMISSIONER KIESLING: Then I'm fine. That's
15 all I need.

16 SENATOR BROWN-WAITE: Madam Chairman, just so the
17 record can be reflective of my comments, I am seeking
18 it solely as Ginny Brown-Waite, a former customer of
19 the utility formerly known as SSU.

20 CHAIRMAN JOHNSON: There is a motion and a
21 second. Any further discussion? Seeing none, all
22 those in favor signify by saying aye.

23 (Unanimous affirmative vote.)

24 CHAIRMAN JOHNSON: Show it approved unanimously.
25 Or show staff denied, and the intervention granted.

1 MR. ARMSTRONG: Madam Chair, before we move
2 along, could I just make a request? I believe a
3 couple of copies of pictures were handed out, we
4 didn't get a copy of those pictures. I was wondering
5 if I could get a copy, as well as find out what the
6 location and addresses were for the pictures, where
7 they were taken.

8 COMMISSIONER KIESLING: I only got one of them,
9 so --

10 CHAIRMAN JOHNSON: Mr. Twomey.

11 MR. TWOMEY: I will make sure they get copies.
12 I'm not sure if I had the addresses.

13 COMMISSIONER CLARK: Which was which, again?

14 MR. TWOMEY: Pardon?

15 COMMISSIONER CLARK: Which was which?

16 MR. TWOMEY: The O.J. Simpson look-alike place is
17 located in Palm Valley in St. Johns County. It's one
18 of the systems that you now have jurisdiction over.

19 COMMISSIONER CLARK: And they get a refund?

20 MR. TWOMEY: Pardon me. I didn't mean that
21 guffaw.

22 COMMISSIONER CLARK: Oh, these are just
23 customers.

24 MR. TWOMEY: The rather palatial looking estate
25 picture is somebody that has received subsidies on the

1 order of, I think, \$900 a year during the period that
2 the uniform rates were in effect. We could refer to
3 the record to get more specifics. And the more modest
4 housing is located in Citrus County, and it is
5 federally subsidized income housing. And I will get
6 copies of those for Mr. Armstrong.

7 CHAIRMAN JOHNSON: Thank you. In one of the
8 petitions, someone raised the issue of notice. It was
9 in conjunction with the intervention and how would we
10 give other parties notice and how we would proceed. I
11 can't put my hand on it.

12 MS. JABER: In Florida Water's response to
13 Senator Ginny Brown-Waite's petition and Mr. Miller's
14 petition, I think Mr. Hoffman raised the question of
15 if you are going to -- how are you going to open up
16 the opportunity for potentially surcharged customers
17 to intervene? Are you going to require a notice, and
18 that's what you're talking about, I think. It's Page
19 4 of the utility's response.

20 CHAIRMAN JOHNSON: Okay. And do we have any
21 comments on that?

22 MS. JABER: We took the view that -- it was
23 something we considered in our first issue. We took
24 the view that, you know, the court didn't mandate that
25 we go ahead and formally require the utility to notice