

FLORIDA PUBLIC SERVICE COMMISSION  
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Tallahassee, Florida 32399-0850

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FPSC - Records/Reporting

M E M O R A N D U M

OCTOBER 1, 1997

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (JABEF) *JABEF*  
DIVISION OF WATER AND WASTEWATER (WIS, CHASE, RENDELL) *WIS, CHASE, RENDELL*

RE: DOCKET NO. 920199-WS - APPLICATION FOR RATE INCREASE  
COUNTIES: 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 BY  
MARCO SHORES UTILITIES (DELTONA); HERNANDO  
COUNTY BY SPRING HILL UTILITIES (DELTONA); AND  
VOLUSIA COUNTY BY DELTONA LAKES UTILITIES  
(DELTONA)

AGENDA: OCTOBER 7, 1997 - REGULAR AGENDA - PARTIES MAY  
PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\920199-R.RCM

CASE BACKGROUND

On May 11, 1992, Florida Water Services Corporation, formerly known as Southern States Utilities, Inc. (FWSC or utility), filed an application to increase the rates and charges for 127 of its water and wastewater service areas regulated by this Commission. By Order No. PSC-93-0423-FOF-WS, issued March 22, 1993, the Commission approved an increase in the utility's final rates and charges, basing the rates on a uniform rate structure.

On April 6, 1995, Order No. PSC-93-0423-FOF-WS was reversed in part and affirmed in part by the First District Court of Appeal. Citrus County v. Southern States Utils., Inc., 656 So. 2d 1307 (Fla. 1st DCA 1995). On October 19, 1995, Order No. PSC-95-1292-FOF-WS was issued, Order Complying with Mandate, Requiring Refund, and Disposing of Joint Petition (decision on remand). By that Order, FWSC was ordered to implement a modified stand-alone rate structure, develop rates based on a water benchmark of \$52.00 and

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a wastewater benchmark of \$65.00, and to refund accordingly. On November 3, 1995, FWSC filed a Motion for Reconsideration of Order No. PSC-95-1292-FOF-WS. At the February 20, 1996, Agenda Conference, the Commission voted, inter alia, to deny FWSC's motion for reconsideration.

On February 29, 1996, subsequent to the Commission's vote on the utility's motion for reconsideration but prior to the issuance of the order memorializing the vote, the Supreme Court of Florida issued its opinion in GTE Florida, Inc. v. Clark, 668 So. 2d 971 (Fla. 1996). By Order No. PSC-96-0406-FOF-WS, issued March 21, 1996, after finding that the GTE decision may have an impact on the decision in this case, the Commission voted to reconsider on its own motion, the entire decision on remand.

By Order No. PSC-96-1046-FOF-WS, issued August 14, 1996, the Commission affirmed its earlier determination that FWSC was required to implement the modified stand-alone rate structure and to make refunds to customers. However, the Commission determined that FWSC could not impose a surcharge on those customers who paid less under the uniform rate structure. The utility was ordered to make refunds (within 90 days of the issuance of the order) to its customers for the period between the implementation of final rates in September, 1993, and the date that interim rates were placed into effect in Docket No. 950495-WS. This decision was appealed by the utility to the First District Court of Appeal (DCA). On June 17, 1997, the First DCA issued its opinion in Southern States Utils., Inc. v. Florida Public Service Comm'n, reversing the Commission's order implementing the remand of the Citrus County decision. 22 Fla. L. Weekly D1492 (Fla. 1st DCA 1997).

By Order No. PSC-97-1033-PCO-WS, issued August 27, 1997, the Commission required FWSC to provide an exact calculation by service area of the potential refund and surcharge amounts with and without interest as of June 30, 1997. By that Order, the Commission also allowed all parties to file briefs on the appropriate action the Commission should take in light of the Southern States decision. Since that time, the parties have filed several motions regarding whether the Commission should require the utility to provide notice to its customers of the Court's opinion and the potential customer impact. This recommendation addresses the issue of notice in Issue 1. Issue 2 addresses the utility's August 22, 1997 motion to compel the production of two photographs used by Counsel Twomey at the August 5, 1997 Agenda Conference and a motion for fees and costs filed by Mr. Twomey on September 3, 1997.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission require Florida Water Services Corporation to notice all of the utility's customers who may be impacted by the remand decision in Southern States Utils. of the potential impact to the customers?

RECOMMENDATION: Yes. FWSC should provide the attached notice to all of its customers who may be impacted by the remand decision by October 13, 1997. Accordingly, OPC's motion to provide notice to customers, the motion of customers DeRouin et al. for formal notice, the utility's motion for reconsideration on the notice issue, and Keystone/Marion's motion to provide customer notice and input from customers, should be found moot. All petitions to intervene and written comments, letters, or briefs regarding what action the Commission should take in light of the remand decision in Southern States should be filed by November 5, 1997. The Commission should put the parties on notice that no further extensions of time to file briefs, written comments, letters and petitions to intervene will be granted. (JABER, CHASE, RENDELL)

STAFF ANALYSIS: As stated in the case background, the Commission required the utility to provide a refund/surcharge report outlining the potential impact to customers from the remand decision in Southern States. The report was initially provided by the utility on August 28, 1997 and a revised report was provided on September 16, 1997. The Commission also allowed parties to file briefs by October 7, 1997 regarding what action the Commission should take in addressing the Southern States decision.

On September 8, 1997, OPC filed a Motion to Provide Notice to Customers. On September 11, 1997, the utility filed a motion for reconsideration, wherein among other things, it requests that the Commission reconsider its August 5, 1997 decision that a notice to customers is not required. On September 19, 1997, customers DeRouin, Heeschen, Riordan, Simpson, and Slezak (customers DeRouin et al..) filed a Motion for Formal Notice to Customers and Request for Extension of Time to File Briefs. On September 22, 1997, Senator Ginny Brown-Waite, Morty Miller, Sugarmill Woods Civic Association, Inc., Spring Hill Civic Association, Inc., Sugarmill Manor, Inc., Cypress Village Property Owners Association, Inc., Harbour Woods Civic Association, Inc., and Hidden Hills Country Club Homeowners Association, Inc. (Brown-Waite et al..) filed its response to OPC's motion to provide notice. On September 25, 1997, the City of Keystone Heights and the Marion Oaks Civic Association (Keystone/Marion) filed a Motion to Provide Customer Notice and Input From Customers. It should be noted that the time

to file responses to this latter motion had not expired at the time of writing this recommendation. The purpose of this recommendation is to bring to the Commission's attention the pending motions regarding notice and to dispose of all of the related motions by one order.

Each motion regarding notice requests that the Commission order the utility to provide notice to each of its customers informing them of the potential refund/surcharge impact. OPC asserts that the refund/surcharge report provided by the utility indicates potential refunds/surcharges of hundreds and even thousands of dollars, but that the customers have never received notice of this and have not been provided a mechanism to provide input. In its motion for reconsideration, the utility requests that it be required to provide notice to each current utility customer whose rates were initially established by Order No. PSC-93-0423-FOF-WS of the estimated potential refund/surcharge; that the Commission establish a deadline for intervention or input by the customers; and that briefs be extended four weeks after this deadline. Customers DeRouin, et al., agree but request a 45-day intervention period from the date of notice and a 60-day period thereafter for filing briefs. Keystone/Marion, in its motion, request the Commission to require FWSC to provide notice to each customer that it serves, informing each customer of the impact that any potential surcharge or refund will have on that customer. Keystone/Marion believes that customers should be provided information meaningful to their individual circumstances. Keystone/Marion also requests that public hearings be held so that affected customers may inform the Commission of the impact of any such actions.

Brown-Waite et al.'s response to OPC's motion indicates that the proposed notice is without purpose and will only occasion additional delay in the case. Brown-Waite et al. believes that there is nothing left that the surcharge customers can effectively do to provide input to the Commission.

Staff has considered the pleadings, the language of the Southern States opinion, and the nature of this case. The opinion does not mandate that the Commission require notice of the opinion, nor has the Commission required such notice in the past. The opinion does mandate that the Commission grant intervention to potential surcharge payers. However, the Commission has already interpreted the opinion broadly to allow intervention to all substantially affected persons. See Order No. PSC-97-1033-PCO-WS, issued August 27, 1997. For the reasons outlined in that Order regarding the uniqueness of the case, Staff believes that a short notice regarding the issuance of the court's opinion and setting a

time certain for intervention, and a statement of the deadlines of the case are in order. Also, because Staff believes that the Commission wants to hear from as many customers as possible and believes many may not want to formally petition to intervene, customers should be informed in the notice that they may present their views to the Commission by a letter, other form of written comments, or a brief. A time certain should be set for these written submittals and Staff recommends that it should be November 5, 1997. Staff believes that this would give the affected customers ample opportunity to inform the Commission of the impact of any potential refund or surcharge. Since this is an implementation of a remand, staff believes, therefore, that there is no need for public hearings.

Staff is concerned with the amount of time taken to address the remand decision. The Court's mandate was issued July 3, 1997. In that regard, Staff recommends that the Commission order FWSC to notice each customer of their respective potential refund/surcharge amount. In an effort to expedite this process and comply with the mandate, Staff recommends that the Commission order the utility to use the draft notice prepared by Staff which is attached to this recommendation. (Attachment A) The utility should be required to provide the notice by October 13, 1997. All petitions to intervene, and comments, letters, or briefs regarding what action the Commission should take in light of the Southern States remand decision should be filed by November 5, 1997.

In consideration of the foregoing, OPC's motion to provide notice to customers, customers DeRouin et al.'s, motion for formal notice, the utility's motion for reconsideration on the notice issue, and Keystone/Marion's motion to provide customer notice and input from customers, should be found moot. The Commission should put the parties on notice that no further extensions of time to file briefs will be granted.

ISSUE 2: Should the Commission grant Florida Water Services Corporation's Motion to Compel?

RECOMMENDATION: Yes, in part. Counsel for Intervenors has now provided the utility with copies of the photographs used at the August 5, 1997 Agenda Conference. In this regard, a ruling on the utility's motion to compel is not necessary. However, counsel for the Intervenors should produce the names of the customers, address of the second home, and the respective service areas of the homes depicted in the photographs, within ten days of the vote. The Intervenors' motion for fees and costs should be denied. (JABER)

STAFF ANALYSIS: On August 22, 1997, FWSC filed a motion to compel the production of two photographs together with the names, addresses, and service area of the customers' homes depicted in the photographs distributed to the Commissioners by counsel representing Intervenors Senator Ginny Brown-Waite and Morty Miller at the August 5, 1997 Agenda Conference. On September 3, 1997, the Intervenors filed a response to the motion to compel and a motion for fees and costs. On September 9, 1997, FWSC filed its response in opposition to the motion for fees and costs.

In its motion to compel, FWSC argues that the Intervenors failed to provide it with the photographs together with the pertinent information even though counsel for the Intervenors advised the Commission at agenda on record that he would provide copies of the photographs to FWSC. FWSC requests that the Commission order the Intervenors to provide it with copies of the photographs with the pertinent information as a matter of due process.

In his response to the motion to compel and motion for fees and costs, counsel for the Intervenors states that he has now provided copies of the photographs to FWSC in an attachment to a letter dated August 29, 1997 to the Commission's Chairman along with the address of one of the homes which is serviced by the utility's Spring Garden system in Citrus County. Counsel for the Intervenors asserts that he does not have the names of the customers, address of the second home (allegedly in St. Johns County), or the service areas depicted in the photographs. In support of his assertion that the Commission cannot require the production of this information, counsel for the Intervenors states that the photographs were not entered into the record of the Agenda Conference, were not retained by the Commissioners, and were not used in the Commission's decision-making. He further states that the Commission is without authority to entertain this motion to

compel or any discovery demands as this case was remanded by the First District Court of Appeal to address the point overturned on appeal regarding allowing the utility to impose surcharges. In support thereof, counsel cites to the Commission's discovery rule, Rule 25-22.034, Florida Administrative Code, and Rule 1.380(4), Florida Rules of Civil Procedure, which provides that if a motion to compel is denied and after the opportunity for hearing, the court shall require the moving party to pay opposing party reasonable expenses in opposing the motion which may include attorney fees.

In its response to the motion for fees and costs, the utility asserts that counsel for Intervenors made misrepresentations regarding the location of the homes and therefore, the relevancy of the locations to the refund/surcharge issue. The utility further asserts that consistent with practice, a party offering documentary evidence to the Commission is required to provide copies to affected parties.

At the August 5, 1997 Agenda Conference, Intervenors distributed two photographs to the Commission and stated that the homes in the photographs were located in FWSC's service area. The photographs were not distributed to parties or to Staff. Counsel for Intervenors represented that one home was a refund recipient and the other a potential surcharge payer. At the same agenda conference, utility counsel requested copies of the photographs, as well as the addresses for the homes. In response, counsel for Intervenors stated that he would "make sure that they get copies. I'm not sure if I had the addresses." More than three weeks later, counsel for Intervenors provided copies of the photographs via an attachment to a letter addressed to the Chairman in another docket (Docket No. 950495-WS). To date, counsel for the Intervenors has not provided the names of the customers, address of the second home, and the respective service areas.

By its motion to compel, FWSC is not seeking the production of a document requested through the discovery process. Instead, the utility requests that the Commission require counsel for the Intervenors to adhere to his own commitment at the August 5, 1997 Agenda Conference to produce the photographs which would confirm or rebut assertions made by Intervenors. The relevant portion of the agenda transcript follows:

CHAIRMAN: Mr. Twomey.

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

COMMISSIONER: Which was which, again?

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

COMMISSIONER: And they get a refund?

MR. TWOMEY: Pardon Me. I didn't mean that guffaw.

COMMISSIONER: Oh, these are just customers.

MR. TWOMEY: The rather palatial looking estate picture is somebody that has received subsidies on the order of, I think, \$900 a year during the period that the uniform rates were in effect. We could refer to the record to get more specifics. And the more modest housing is located in Citrus County, and it is federally subsidized income housing. And I will get copies of those for Mr. Armstrong.

In his response to the motion to compel, counsel for the Intervenor states that to the extent the photographs were used to influence the Commission to reject Staff's recommendation and immediately order refunds financed by customer surcharges, that goal failed as evidenced by the decision to accept briefs. See Intervenor's response to motion to compel at 2. The relevance and accuracy of the representation made at the Agenda Conference by counsel for Intervenor regarding the photographs has come into question. As an officer of the court, counsel made a commitment to produce the photographs and the addresses. Although he did state that the addresses may not be available, it is incumbent upon Intervenor's counsel to clarify the representation made at the August 5, 1997 Agenda Conference by producing the addresses and other pertinent information requested by the utility. It appears that the photographs were used to influence the Commission in its August 5, 1997 decision regarding the Staff's recommendation; therefore, the statements should be clarified to ensure that the Commission has complete, accurate information. Further, in the interest of due process and fundamental fairness, the utility should have the opportunity to respond to or rebut the information presented.



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Counsel for Intervenors has now provided the utility with copies of the photographs used by him at the August 5, 1997 Agenda Conference. In this regard, Staff recommends that a ruling on that portion of the motion to compel is not necessary. However, counsel for the Intervenors should produce the names of the customers, address of the second home, and the respective service areas of the homes depicted in the photographs, within ten days of the Commission's vote on this matter. Accordingly, Staff recommends that the Intervenors' motion for fees and costs should be denied.

DOCKET NO. 920199-WS

NOTICE TO CUSTOMERS OF FLORIDA WATER SERVICES CORPORATION

On October 7, 1997, the Florida Public Service Commission (Commission) ordered Florida Water Services Corporation (FWSC or utility) to send a notice to all of its customers who were affected by a recent court decision in the above-referenced case. The purpose of this notice is to inform you of the action that has taken place in that case, and the potential impact on you as a customer.

In light of the recent court decision, the Commission must now decide the final resolution of this case. A brief history of this case might be helpful in order to explain the circumstances involved in the decision pending before the Commission at this time. In Docket No. 920199-WS, the Commission approved an increase in the utility's rates based on a uniform rate structure, meaning customers in all service areas of FWSC (then known as Southern States Utilities, Inc.) were billed the same water and wastewater rates. This decision on the rate structure was appealed by some customer groups. On April 6, 1995, the First District Court of Appeal reversed the Commission's decision to establish a uniform rate structure. On October 19, 1995, the Commission issued a new order changing the rate structure to a modified stand-alone rate structure. In addition, the Commission directed the utility to refund to customers whose rates under the new rate structure were less than under the uniform rate structure. However, the Commission did not allow FWSC to impose a surcharge to those customers who paid less under the uniform rate structure than under the new rate structure.

This decision was appealed by the utility on September 3, 1996. On June 17, 1997, the court issued its opinion reversing the Commission's order. Southern States Utils., Inc. v. Florida Public Service Comm'n. The Court noted in its opinion that the change in rate structure results in a rate decrease for some customers and a rate increase for others. It ruled that in order to be equitable to all concerned, any refunds to customers would have to be accompanied by surcharges to the customers who had benefitted under the uniform rate structure.

The Commission issued an order requiring FWSC to provide information by service area of the potential refund and surcharge amounts with and without interest as of June 30, 1997. The Commission also allowed all parties in the case to file briefs on the appropriate action the Commission should take. The following potential options were identified for the parties to argue in their briefs:

1. require refunds with interest and allow surcharges with interest;
2. do not require refunds and do not allow surcharges because the rates have been changed prospectively;
3. order refunds without interest and allow surcharges without interest;
4. allow the utility to make refunds and collect surcharges over an extended period of time to mitigate financial impacts; and
5. allow the utility to make refunds and collect surcharges over different periods of time.

It should be noted, however, that the parties may identify and argue other options not contained in this list.

Please be advised that according to our billing records, the impact on you, as a customer during the period of time uniform rates were in effect, would be a [refund/surcharge (utility must indicate one)], including interest, of \_\_\_\_\_.

Further, the Commission has directed us to inform you that you may send your written comments, letters, petitions to intervene, or briefs regarding your views on what action the Commission should take in light of the decision requiring that any refund to customers who overpaid under the uniform rate structure would require a surcharge to other customers who underpaid under this rate structure. These written submittals must be received by the Commission no later than November 5, 1997 and should be addressed to:

Director, Division of Records and Reporting  
Florida Public Service Commission  
Docket No. 920199-WS  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850