

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for rate increase and increase in service availability charges by Southern States Utilities, Inc. 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, Putnam, Seminole, St. Johns, St. Lucie, Volusia, and Washington Counties.

DOCKET NO. 950495-WS  
ORDER NO. PSC-98-0231-FOF-WS  
ISSUED: February 5, 1998

The following Commissioners participated in the disposition of this matter:

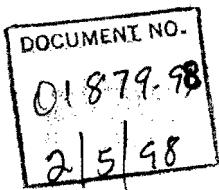
JULIA L. JOHNSON, Chairman  
J. TERRY DEASON  
SUSAN F. CLARK  
E. LEON JACOBS, JR.

ORDER DISMISSING MOTION TO ESTABLISH MECHANISM  
FOR LACK OF JURISDICTION  
AND  
REQUIRING UTILITY TO FILE A PLEADING ON WHETHER AN AUTOMATIC  
STAY EXISTS

BY THE COMMISSION:

BACKGROUND

Southern States Utilities, Inc., now Florida Water Services Corporation (hereinafter Florida Water, SSU or utility) is a Class A utility, which provides water and wastewater service to 152 service areas in 25 counties. In 1994, the utility recorded total company operating revenues of \$23,498,289 and \$16,985,104 for water and wastewater, respectively. The resulting total utility net operating income for that same period was \$3,445,315 for water and \$2,690,791 for wastewater. SSU reported that in 1994 it had



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102,514 and 43,131 respective water and wastewater customers for the total utility.

On June 28, 1995, SSU filed an application for approval of uniform interim and final water and wastewater rate increases for 141 service areas in 22 counties, pursuant to Sections 367.081 and 367.082, Florida Statutes, respectively. The utility also requested a uniform increase in service availability charges, approval of an allowance for funds used during construction (AFUDC) and an allowance for funds prudently invested (AFPI). August 2, 1995, was established as the official date of filing. The utility's application for increased final water and wastewater rates was based on the projected twelve-month period ending December 31, 1996. The utility requested a rate of return of 10.32 percent, which would have resulted in additional annual operating revenues of \$18,137,502 for the utility's combined water and wastewater operations.

By Order No. PSC-95-1327-FOF-WS, issued November 1, 1995, we denied SSU's initial request for interim rate relief based on a projected test year, suspended the proposed final rates, and allowed the utility to file another petition for interim rates. SSU filed its supplemental petition for interim revenue relief on November 13, 1995, which was granted by Order No. PSC-96-0125-FOF-WS (Interim Order), issued January 25, 1996, based upon the historical test year ended December 31, 1994. By the Interim Order, we required SSU to post security as a condition for collecting interim rates, and SSU did so by filing a bond in the amount of \$5,864,375.

We held 24 customer service hearings throughout the state during the pendency of this rate proceeding, and a ten-day technical hearing from April 29 through May 10, 1996. We also held an additional day of hearing on May 31, 1996, to consider rate case expense.

On October 30, 1996, we issued Order No. PSC-96-1320-FOF-WS (Final Order on Appeal) on the rate proceeding. On November 1, 1996, SSU filed a notice of appeal of the Final Order with the First District Court of Appeal. On November 14, 1996, several intervening parties (designated as Marco, et al.) filed a joint motion for reconsideration. On that same date, those parties filed

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a motion for relinquishment of jurisdiction with the First District Court of Appeal so that we could consider the motion for reconsideration. SSU did not object to the motion to relinquish jurisdiction, and on November 26, 1996, filed a cross-motion for reconsideration with the Commission.

On November 26, 1996, the Office of Public Counsel (OPC) filed its Notice of Cross-Appeal. Also, on November 27, 1997, Citrus County filed its Notice of Cross-Appeal.

On December 2, 1996, and December 31, 1996, the First District Court of Appeal issued orders abating the appeal pending our disposition of all motions or cross-motions for reconsideration. On December 3, 1996, SSU filed a Motion to Stay Refund of Interim Rates and Reduction to AFPI Charges Pending Appeal and Motion to Release/Modify Bond Securing Refund of Interim Rates (Motion). In that Motion, SSU requested a stay of the provisions of the Final Order relating to the refund of a portion of the interim rates and the imposition of new charges for AFPI. SSU requested expedited review of the Motion because of the pending expiration of the bond on January 8, 1997. OPC filed a response in opposition to SSU's Motion.

On January 15, 1997, OPC filed a Motion for Reconsideration of the Final Order. Also, on March 3, 1997, OPC filed a motion requesting that the full Commission reconsider the prehearing officer's denial of its request for the prehearing officer to establish a schedule for filing motions for reconsideration.

By Order No. PSC-97-0099-FOF-WS (Stay Order), issued January 27, 1997, we acknowledged that, pursuant to Rule 25-22.061(1)(a), Florida Administrative Code, there was a mandatory stay as to the refund of interim rates relating to Lehigh and Marco Island. However, by that same Order, we denied SSU's request to stay the reduction to AFPI charges. On February 11, 1997, SSU filed a motion for reconsideration of the Stay Order related to the partial stay of AFPI charges. This motion was accompanied by a request for oral argument.

By Order No. PSC-97-0374-FOF-WS, issued April 7, 1997, we ruled on: Marco, et al.'s November 14, 1996 Motion for Reconsideration; SSU's November 26, 1996 Cross-Motion for

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Reconsideration; and OPC's January 15, 1997 Motion for Reconsideration. Also, on our own motion, we reconsidered and corrected certain errors in regard to AFPI charges, private fire protection charges, and plant capacity charges/main extension charges.

Finally, by Order No. PSC-97-0613-FOF-WS, issued May 29, 1997, we ruled on SSU's February 11, 1997 motion for reconsideration of the Stay Order and OPC's March 3, 1997 motion requesting the full Commission to reconsider the prehearing officer's denial of its request for the prehearing officer to establish a schedule for filing motions for reconsideration. In this last Order, we reconsidered our previous decisions on stays of AFPI charges and allowed SSU to implement its alternate stay proposal, to continue charging, subject to refund, the higher of any AFPI charges. Through this mechanism, we recognized that AFPI charges were severable and the potential for backbilling was minimized.

With the issuance of this last Order, we disposed of all motions for reconsideration and any requests for stays, and briefs were filed with the First District Court of Appeal. However, on November 25, 1997, SSU filed a Motion to Establish Mechanism to Hold Florida Water Harmless Should the Commission Approved Rate Structure Be Reversed (Motion to Establish Mechanism). No responses were filed to this motion. This Order addresses that motion.

MOTION TO ESTABLISH MECHANISM TO HOLD FLORIDA WATER HARMLESS SHOULD THE COMMISSION APPROVED RATE STRUCTURE BE REVERSED

In its Motion to Establish Mechanism, Florida Water expresses concern over whether there is competent substantial evidence in the record to support the capband rate structure on appeal. Citing the two opinions of the First District Court of Appeal which arose from Docket No. 920199-WS (Citrus County v. Southern States Utils., Inc., 656 So. 2d 1307 (Fla. 1st DCA 1995); and Southern States Utils., Inc. v. Florida Public Service Commission, 22 Fla. L. Weekly D1492 (Fla. 1st DCA June 17, 1997)), Florida Water requests that the Commission address the stay issue as it impacts rate structure and establish a mechanism, consistent with those decisions, to hold Florida Water harmless and minimize adverse

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impacts on customers should the Commission-approved modified stand-alone capband rate structure be reversed.

Rule 9.600(b), Florida Rules of Appellate Procedure, entitled Jurisdiction of Lower Tribunal Pending Review, provides in pertinent part that "[if] the jurisdiction of the lower tribunal has been divested by an appeal from a final order, the court by order may permit the lower tribunal to proceed with specifically stated matters during the pendency of the appeal." As noted earlier, the two December, 1996 opinions of the First District Court of Appeal abated the appeal to allow us to dispose of all motions or cross-motions for reconsideration. By Order No. PSC-97-0613-FOF-WS, issued May 29, 1997, we disposed of the last of the motions on reconsideration. Therefore, the matters on which the First District Court of Appeal allowed us to proceed have all been resolved, and the Order is once again under the jurisdiction of the First District Court of Appeal.

However, the utility has now requested that we fashion some sort of mechanism to protect both the utility and the customers in the event the capband rate structure is overturned on appeal. We note that in Order No. PSC-97-0613-FOF-WS, we did fashion a stay which minimized the possibility of backbilling for AFPI charges. However, in regards to rates, the utility has not suggested how any stay or partial stay in regards to rates should be fashioned. The utility has now been charging the final rates since September 20, 1996, and is just now requesting that some sort of mechanism be implemented. Also, the utility has not demonstrated how any relief could be fashioned without modifying the Final Order or affecting the jurisdiction of the First District Court of Appeal. Indeed, the utility makes no statement concerning our jurisdiction to entertain the motion at all.

In the case of Gillman v. Nemeroff, 423 So. 2d 961 (Fla. 4th DCA 1983), the trial court attempted to enter a post-judgment order directing the return of a deposit. The Fourth District Court of Appeal ruled that this was actually a modification of the previously entered final judgment and such a modification was not permitted while the merits of the action were in issue on appeal. Also, in the case of Ponzoli v. Hawkesworth, 390 So. 2d 784 (Fla. 3d DCA 1980), the Third District Court of Appeal considered an appeal of the correctness of an order apportioning costs during the

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pendency of an appeal. The Third District Court of Appeal ruled in that case that the order under appeal had the effect of modifying the original final judgment while the appeal in the cited cause was pending, and was thus improper. Therefore, we find that we can take no action which would modify the Final Order in this case pending final resolution of the appeal.

By implementing the rates, and not seeking a mechanism at the beginning of the appeals process, the utility has again placed us in the same situation we faced in Docket No. 920199-WS. Even if it were possible to fashion a remedy, to do so would result in a substantive modification of Order No. PSC-96-1320-FOF-WS, which is not appropriate at this point. Therefore, pursuant to Rule 9.600, Florida Rules of Appellate Procedure, we find that we have no jurisdiction to substantively change Order No. PSC-96-1320-FOF-WS, and the Motion to Establish Mechanism to Hold Florida Water Harmless Should the Commission Approved Rate Structure Be Reversed shall be dismissed for lack of jurisdiction.

#### EXISTENCE OF AUTOMATIC STAY

Although we are dismissing the Motion to Establish Mechanism for lack of jurisdiction, we note that the motion did raise the question of whether an automatic stay of the final rates authorized in Order No. PSC-96-1320-FOF-WS has resulted pursuant to Rule 25-22.061(3)(a), Florida Administrative Code, because of the cross-appeals filed by OPC and Citrus County, both public bodies.

The Motion to Establish Mechanism does not make it clear whether the utility believes there is an automatic stay, and the utility has not filed a specific motion to vacate any automatic stay. Therefore, we find it appropriate to require the utility to file a pleading articulating its view as to whether an automatic stay has resulted by virtue of the cross-appeals. If the utility believes that an automatic stay has resulted, it may file the appropriate motion to vacate the stay with specific terms and conditions pursuant to Rule 25-22.061(3)(a), Florida Administrative Code. All parties would then have an opportunity to respond in writing to any such filing, and would also be allowed to orally address the Commission at a subsequent agenda conference.

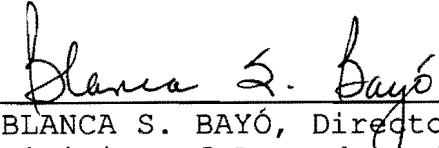
Based on the foregoing, it is

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ORDERED by the Florida Public Service Commission that the Motion to Establish Mechanism to Hold Florida Water Harmless Should the Commission Approved Rate Structure Be Reversed is dismissed for lack of jurisdiction. It is further

ORDERED that Florida Water Services Corporation shall file its pleading articulating its views on whether an automatic stay is in effect, and if so, it may file the appropriate motion to vacate the stay with specific terms and conditions pursuant to Rule 25-22.061(3)(a), Florida Administrative Code.

By ORDER of the Florida Public Service Commission this 5th day of February, 1998.

  
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BLANCA S. BAYÓ, Director  
Division of Records and Reporting

( S E A L )

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.