

ORIGINAL

**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. )  
)  
)  
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Docket No. 950495-WS

Filed: March 1, 1999

**FLORIDA WATER SERVICES CORPORATION'S  
MOTION TO TRANSFER REMAND PROCEEDING TO  
THE DIVISION OF ADMINISTRATIVE HEARINGS**

**TO: HONORABLE JOE A. GARCIA, CHAIRMAN  
Florida Public Service Commission**

Florida Water Services Corporation ("Florida Water"), by and through its undersigned counsel, and pursuant to Rule 25-22.0355, Florida Administrative Code, respectfully requests that the remand stage of this proceeding be transferred to the Division of Administrative Hearings ("DOAH") for the entry of a recommended order which would be addressed and considered by the Commission in entering a final order in this proceeding. Due to the fact that the parties have begun the process of identifying issues and will be preparing prefiled testimony for the June 16-18, 1999 final hearing, Florida Water requests that the Commission rule on this request as soon as practicable.

This case stems from an application for increased water and wastewater rates filed by Florida Water in 1995. The Commission entered its final order on October 30, 1996. Following appeals by

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FPSC-RECORDS/REPORTING

Florida Water and other parties, on June 10, 1998, the First District Court of Appeal issued its opinion in Southern States Utilities v. Florida Public Service Commission, 714 So.2d 1046 (Fla. 1<sup>st</sup> DCA 1998) ("Southern States II").<sup>1</sup>

In Southern States II, the court reversed the Commission and accepted the Commission's confession of error on a multitude of issues affecting Florida Water's revenue requirements and allowance for funds prudently invested charges. On remand, in accordance with the Southern States II decision, the Commission approved an increase in rates in response to the court's reversal of the Commission's: (1) failure to afford 100% used and useful treatment for reuse facilities; (2) unlawful reduction to Florida Water's equity due to the one-sided refund order issued in Docket No. 920199-WS subsequently reversed by the court;<sup>2</sup> and (3) confession of error in failing to use the average flows in the maximum month for the calculation of used and useful for three wastewater treatment plants. Surcharges also were ordered by the Commission in connection with the increased revenue requirements as a result of these reversals; however, that issue remains pending due to a protest filed by Sugarmill Woods Civic Association, Inc.

In addition to the above issues, the court reversed the Commission's use of average annual daily flows in the numerator of the calculation of used and useful for four wastewater treatment plants and the Commission's use of the lot count method in determining the level of used and useful investment in water transmission and distribution and wastewater collection facilities. The court held that both of these determinations constituted departure from Commission policies that were not

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<sup>1</sup>A motion for rehearing was denied by the court on July 5, 1998.

<sup>2</sup>See Southern States Utility, Inc. v. Florida Public Service Commission, 704 So.2d 555 (Fla. 1<sup>st</sup> DCA 1997).

supported by record evidence. The court authorized the Commission, on remand, to adduce evidence, if it can, to support the Commission's departure from established policies. The hearing currently scheduled for June 16-18, 1999 has been set in response to the court's reversal and remand on the wastewater treatment plant and lot count used and useful issues.

In challenging the Commission's determinations of used and useful for the four wastewater treatment plants, Florida Water argued before the court that the Commission had departed from established Commission policy without adequate record support, that the new policy produced used and useful levels below those previously authorized by the Commission, and that the lowering of previously established used and useful investments was a departure from Commission precedent, in violation of the doctrine of administrative finality and constituted an unconstitutional confiscation of Florida Water's property. The court reversed the Commission on the ground that the Commission's new policy was not supported by record evidence in violation of applicable statutory requirements under Chapter 120, Florida Statutes, and applicable decisions thereunder.

In remanding the case to the Commission, the court held:

[b]ecause this policy shift was essentially unsupported by "expert testimony, documentary opinion or other evidence appropriate to the nature of the issue involved," ... (citation omitted), the PSC must, on remand, give a reasonable explanation, if it can, supported by record evidence (which all parties must have an opportunity to address) as to why average daily flow in the peak month was ignored.

Southern States II, 714 So.2d at 1056. Having reversed on this ground, the court did not address the additional grounds for reversal urged by Florida Water. See Southern States II, 714 So.2d at 1059.

As previously stated, Florida Water also challenged the Commission's use of the lot count method in calculating the level of used and useful investment in water transmission and distribution

and wastewater collection facilities. As with the wastewater treatment used and useful issue, Florida Water asserted that the use of the lot count method was an unsupported departure from prior Commission rejections of the lot count method, unlawfully lowered previously established used and useful levels, and unconstitutionally confiscated Florida Water's property. The court reversed on the basis that the Commission had failed to provide adequate record support for its employment of the new lot count method. The court held:

The PSC's conceded change of method in calculating used and useful percentages for distribution and collection systems is another "policy shift... essentially unsupported 'by expert testimony, documentary opinion, or other evidence appropriate to the nature of the issue involved,' (citation omitted)." For this policy shift, too, the PSC must give a reasonable explanation on remand and adduce supporting evidence, if it can, to justify a change in policy required by no rule or statute. That failing, the PSC should adhere to its prior practices in calculating used and useful percentages for water transmission and distribution systems and wastewater collection systems serving mixed use areas. (Footnote omitted).

Southern States II, 714 So.2d at 1057.

With respect to both of these used and useful issues, the court has placed the burden on the Commission to justify its departure from existing policy. In essence, the Commission on remand must justify - - to itself - - that there is adequate record support for new policies which it has already endorsed and that the application of these new policies would not unlawfully confiscate Florida Water's property. In the case of the wastewater treatment used and useful issue, expressions of support for using average annual daily flows to supposedly "match" a wastewater treatment plant permit that states average annual daily flows on the permit have already been expressed by Commissioners and staff prior to oral argument before the First District Court of Appeal in Southern States II and in the recent Florida Cities remand proceeding. In light of these expressions of support

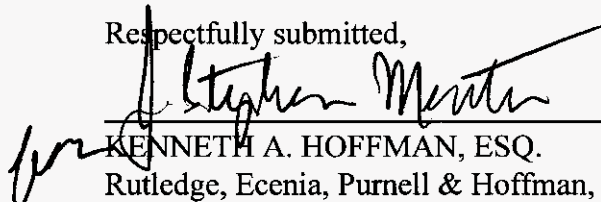
and advocacy by the Commission on an issue which is at the heart of this remand proceeding, and because the Commission has been cast into conflicting roles of advocate and decision-maker, it is both necessary and appropriate to transfer the remand stage of this proceeding to DOAH. Florida Water notes that this is precisely what would occur if any other agency had been reversed by the court on similar grounds.

Principles of fairness and due process will not be satisfied unless the Commission recognizes the unique nature of this case as a result of the court's remand. Because the Commission has already gone on record as supporting the change in policies, Florida Water believes that in order to meet the court's directive for an assessment of the evidence for changing the policies, it is necessary to transfer the remand hearing stage of this proceeding to an independent Administrative Law Judge assigned by DOAH. In this regard, the decision of the Florida Supreme Court in Cherry Communications, Inc. v. Deason, 652 So.2d 803 (Fla. 1995), is instructive. In Cherry, the court held that an interexchange carrier's due process rights were violated when the Commission allowed its staff attorney, who had prosecuted the license revocation action, to also serve as a legal advisor to the Commission during its posthearing deliberation. The court held that "because the prosecution was given special access to the deliberation, this adjudicatory process 'can hardly be characterized as unbiased, critical review.'" Cherry, 652 So.2d at 805. Admittedly, the procedural posture of the present case is not identical to Cherry. However, the fundamental considerations are analogous. The Commission has been placed in the conflicting roles of advocate and decision-maker. In view of the prior expressions of support and advocacy for positions opposed by Florida Water made by commissioners in public meetings and hearings, it is appropriate and, indeed, essential that the remand stage of this proceeding be transferred to DOAH for hearing and the entry of a recommended

order by an independent Administrative Law Judge.

WHEREFORE, for the reasons stated, Florida Water Services Corporation respectfully requests that the remand stage of this proceeding be transferred to the Division of Administrative Hearings.

Respectfully submitted,

  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U. S. Mail to the following on this 1<sup>st</sup> day of March, 1999:

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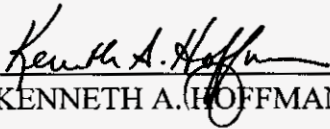
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