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July 12, 1999

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
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Tallahassee, Florida 32399-0850

HAND DELIVERY

Re: Docket No. 950495-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 Office of Public Counsel's Motion to Consolidate; and
2. A disk in Word Perfect 6.0 containing a copy of the document.

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

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[Signature]
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RECORDS AND REPORTING

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DOCUMENT NUMBER-DATE
08238 JUL 12 99
FPSO-RECORDS/REPORTING

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: July 12, 1999

**FLORIDA WATER SERVICES CORPORATION'S
RESPONSE IN OPPOSITION TO OFFICE OF PUBLIC
COUNSEL'S MOTION TO CONSOLIDATE**

Florida Water Services Corporation ("Florida Water"), by and through its undersigned counsel, hereby files this Response in Opposition to the Motion to Consolidate filed by the Office of Public Counsel ("OPC"), and states as follows:

BACKGROUND

This case stems from an application for increased water and wastewater rates filed by Florida Water in 1995. The final hearing was held in the spring of 1996, and a final rate case order was entered by the Commission in October of that year (the "Final Order"). Florida Water appealed the Final Order, and the court rendered its opinion on June 10, 1998, and subsequently denied rehearing. The court's decision reversed the Commission in various respects, 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. See Southern States Utilities v.

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FPSC-RECORDS/REPORTING

Florida Public Service Commission, 714 So.2d 1046 (Fla. 1st DCA 1998) ("Southern States").

On remand, the Commission appropriately corrected certain matters which the court had addressed. It approved an increase in rates to reflect: (1) reversal of the Commission's failure to afford 100% used and useful treatment for reuse facilities, (2) reversal of the Commission's unlawful imposition of one-sided refunds which had been ordered in another Commission proceeding (and which itself was subsequently reversed by the court¹), and (3) the Commission's confession of error in failing to use the average daily flows in the maximum month ("MMADF") in the calculation of the used and useful investment for three wastewater treatment plants. It also ordered surcharges necessary to restore approved revenue requirements. See Order No. PSC-99-0093-FOF-WS, at 10-12, 25-27.²

Other matters in the Final Order which the court reversed, however, have been set for further hearing before the Commission. Order Nos. PSC-0093-FOF-WS, at 13-14 and PSC-99-0181-PCO-WS. These include the court's reversal of the Commission's use of average annual daily flows ("AADF") in the numerator of the calculation of used and useful for four wastewater treatment plants,³ and the Commission's use of the lot count method in determining the level of used and useful investment in water transmission and distribution ("T&D") and wastewater collection facilities. The court held that both of these determinations constituted a departure from established

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

²The appropriate methodology for recovery of these surcharges remains at issue, due to a protest filed by Sugarmill Woods Civic Association, Inc.

³Those plants are Buenaventura Lakes, Citrus Park, Marco Island and Marco Shores. Over Florida Water's objection, the Commission has added the Leisure Lakes wastewater treatment plant to the used and useful issues on remand.

Commission policy which were not supported by record evidence. As to AADF, the court held that,

because this policy shift was essentially unsupported ... 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, 714 So. 2d at 1056. As to the lot count method, the court similarly held that this

is another "policy shift ... essentially unsupported" 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.

Southern States, 714 So. 2d at 1057 (citation and footnote omitted).

On June 14, 1999, Florida Water filed a Motion for Approval of New Offer of Settlement and Proposal for Disposition of Mandate on Remand. OPC filed a response to Florida Water's Motion for Approval of the New Settlement Offer and a Motion to Consolidate. Florida Water's New Offer of Settlement provides a fair and reasonable proposal addressing not only the revenue requirements, surcharges and rate case expense for the instant rate case but also the closure of Docket No. 980744-WS addressing gains on sale from Florida Water's Orange County facilities and Volusia County laboratory. Florida Water's settlement offer is supported, in full, by the two largest customer groups who have intervened and participated in this proceeding - - the Marco Island and Amelia Island customers.

ARGUMENT

OPC's Motion to Consolidate must be denied. Rule 28-106.108, Florida Administrative Code, the procedural rule governing motions for consolidation in formal administrative hearings

(such as this), authorizes consolidation of "separate matters which involve similar issues of law or fact" but only "if it appears that consolidation would promote the just, speedy and inexpensive resolution of the proceedings, and would not unduly prejudice the rights of a party." Here, of course, OPC has failed to allege and could not establish that the used and useful issues reversed and remanded by the Southern States court are in any way similar to the gain on sale issues in Docket No. 980744-WS. For that reason alone, the Motion to Consolidate should be denied. Moreover, consolidation is only appropriate if it would not unduly prejudice the rights of a party. OPC wishes to consolidate significant post-test year revenue items into the Docket No. 950495-WS rate case remand proceeding while ignoring Florida Water's post-test year increased investments and expenses. Such an approach would clearly prejudice the rights of Florida Water and warrants denial of the Motion to Consolidate.

OPC's request amounts to nothing more than a superficial attempt to transform Florida Water's settlement offer, which includes the proposed closure of Docket No. 980744-WS, into a purported justification to consolidate the two dockets for hearing. OPC's motion lacks any colorable basis in fact or law. As discussed above, OPC's motion ignores the prerequisites for consolidation set forth in Rule 28-106.108, Florida Administrative Code. Instead, OPC offers the irrelevant and erroneous observation that the surcharges proposed to be recovered by Florida Water through a regulatory asset may be eliminated if OPC prevails in the gain on sale docket.⁴ OPC's statement is irrelevant because it offers no basis for consolidation. OPC's statement is erroneous and misleading because the regulatory asset is part of Florida Water's settlement proposal. If Florida Water's

⁴OPC's Motion to Consolidate, at 5.

settlement offer is not approved and this case goes to hearing, the final approved total amount of Category I rate increase surcharges and the to be determined Category II rate increase surcharges will be recovered by Florida Water through a mechanism to be established by the Commission.

It must also be emphasized that OPC's attempt to expand the scope of the Southern States remand by consolidating the gain on sale docket for hearing would violate the mandate of the Southern States court. In Basic Energy Corp. v. Hamilton County, 667 So. 2d 249, 250 (Fla. 1st DCA 1995), the court summarized the role of a trial court in response to an appellate court mandate:

[a] trial court's role upon the issuance of a mandate from an appellate court becomes purely ministerial and its function is limited to obeying the appellate court's order or decree.... A trial court does not have discretionary power to alter or modify the mandate of an appellate court in any way, shape or form....

A lower tribunal must comply with the appellate court's mandate *as written*. Doctors' Osteopathic Medical Center v. Department of Health & Rehabilitative Services, 459 So. 2d 1063 (Fla. 1st DCA 1984).

Florida courts distinguish between general and specific mandates. A reversal accompanied by a general direction for further proceedings consistent with the court's opinion gives the lower tribunal broad discretion to frame the scope of the proceeding on remand. State, Department of Revenue v. Air Jamaica, Ltd., 522 So. 2d 446 (Fla. 1st DCA 1998). A specific mandate, on the other hand, limits the lower tribunal to proceedings on remand which conform to the specific language used by the court in reversing the lower tribunal.

A remand phrased in language which limits the issues for determination will preclude consideration of new matters affecting the cause.

Basic Energy, 667 So. 2d at 250.

In Southern States, the court gave specific instructions as to the scope of the remand proceeding. OPC seeks to unlawfully expand the scope of Docket No. 950495-WS, a rate case based on a 1996 test year, to include significant 1997 revenues items without consideration of offsetting 1997 and/or 1998 increased investments and expenses. OPC's belief that such a one-sided approach to establishing rates would "provide a more even-handed approach to all parties"⁵ is not credible and reminiscent of the Commission's ill-fated attempt to impose one-sided refunds on Florida Water. Any attempt on the part of the Commission to expand the scope of any hearings which may be held in this remand proceeding to include the gain on sale issues in Docket No. 980744-WS would violate the court's mandate.

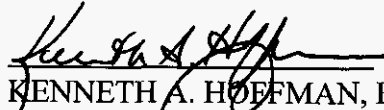
Finally, OPC's request for consolidation, if granted, would violate basic tenets of ratemaking. This rate case has been remanded by the court to address two specific used and useful issues based on 1996 test year data. It would be inappropriate to skew the ratemaking equation by factoring in potential gains on sale which arose after the 1996 test year used to establish rates, while ignoring post-test year increases in investments and expenses.

CONCLUSION

For the foregoing reasons, Florida Water respectfully requests that the Commission deny OPC's Motion to Consolidate.

⁵Id.

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 12th day of July, 1999:

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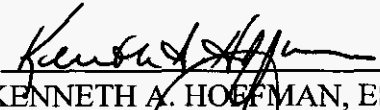
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