

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Investigation into) DOCKET NO. 930945-WS
Florida Public Service) ORDER NO. PSC-95-0042-POF-WS
Commission jurisdiction over) ISSUED: January 10, 1995
SOUTHERN STATES UTILITIES, INC.)
in Florida)
_____)

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
SUSAN F. CLARK
JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

ORDER GRANTING REQUESTS FOR ORAL ARGUMENT ON MOTIONS FOR FULL COMMISSION REVIEW AND DENYING MOTIONS FOR FULL COMMISSION REVIEW

BY THE COMMISSION:

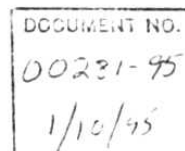
BACKGROUND

On June 6, 1994, the Commission issued Order No. PSC-94-0686-DS-WS, in which it denied Southern States Utilities, Inc.'s (SSU or the Utility) petition for a declaratory statement delineating Commission jurisdiction over the utility's water and wastewater operations in the nonjurisdictional counties of Polk and Hillsborough under Section 367.171 (7), Florida Statutes. In that order, this Commission also initiated an investigation to determine:

which of SSU's facilities and land in Florida are functionally related and ... whether the combination of functionally related facilities and land, wherever located, constitutes a single system as that term is defined in section 367.021 (11) and as contemplated in section 367.171 (7).

Order No. PSC-94-0686-DS-WS at p.2.

In Order No. PSC-94-0814-PCO-WS, an Order Establishing Procedure in this docket, the Commission identified the following four preliminary issues:



1. Are SSU's facilities and land functionally related?
2. Does the combination of functionally related facilities and land, wherever located, constitute a single system?
3. Does the Commission have exclusive jurisdiction over all SSU systems in the State of Florida?
4. Will the Commission have exclusive jurisdiction over all SSU systems acquired in the future?

Order No. PSC-94-0686-DS-WS at p.5.

On September 6, 1994, the Commission issued Order No. PSC-94-1095-PCO-WS, granting Sarasota County leave to intervene in this docket. Sarasota County filed the testimony of three witnesses on September 12, 1994: Kathleen R. Colombo, Rate Analyst Supervisor, Sarasota County Utilities Department, Franchise Division; Dewey E. Wallace, Franchise Division Manager, Sarasota County Utilities Department; and Richard A. Drummond, Manager, Sarasota County Planning Department, Long Range Planning Division. On September 16, 1994, SSU filed with this Commission a Motion to Strike Portions of the Testimony of Witnesses on behalf of Sarasota County. On September 26, 1994, Sarasota County filed its Response to SSU's Motion to Strike. On October 14, 1994, the Prehearing Officer denied SSU's Motion to Strike in Order No. PSC 94-1279-PCO-WS.

On September 15, 1994, the Commission issued Order No. PSC-94-1133-PCO-WS, granting Hillsborough County leave to intervene in this docket. Hillsborough County filed the testimony of Michael W. McWeeny, Director, Public Utilities Department, Hillsborough County, on September 12, 1994. On September 26, 1994, SSU filed with this Commission a Motion to Strike the Testimony of Hillsborough County Witness Michael W. McWeeny, P.E. On October 10, 1994, Hillsborough County filed Hillsborough County's Response to Southern States Utilities, Inc.'s Motion to Strike. On October 25, 1994, in Order No. PSC-94-1314-PCO-WS, the Prehearing Officer denied SSU's Motion to Strike the Testimony of Hillsborough County Witness Michael W. McWeeny, P.E.

On October 24, 1994 and November 2, 1994, SSU filed Requests for Oral Argument and Motions for Full Commission Review of Orders No. PSC-94-1279-PCO-WS and No. PSC-94-1314-PCO-WS. Sarasota County filed a response on November 4, 1994, and Hillsborough County filed a response on November 14, 1994. These requests and motions are the subject of this Order.

ORAL ARGUMENT ON MOTION CONCERNING SARASOTA COUNTY TESTIMONY

On October 24, 1994, SSU filed a Motion for Full Commission Review of Order No. PSC-94-1279-PCO-WS, in which the Prehearing Officer denied SSU's Motion to Strike Portions of the Testimony of Witnesses on behalf of Sarasota County. Contemporaneously with the Motion for Full Commission Review of Order No. PSC-94-1279-PCO-WS, SSU filed a Request for Oral Argument on Motion for Full Commission Review of Order No. PSC-94-1279-PCO-WS. The Commission may, in its discretion, grant oral argument upon request of any party to a formal hearing conducted pursuant to Section 120.57, Florida Statutes. Rule 25-22.058 (1), Florida Administrative Code, requires that the party requesting oral argument state with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it. We find that SSU has made no such statement. The Utility stresses its view that the issues in this proceeding be confined to the jurisdictional criteria set forth in Sections 367.021 (11) and 367.171 (7), Florida Statutes. Noting that it disputes the relevance of the prefiled direct testimony of several counties, SSU states its belief that oral argument would benefit the Commission in comprehending and evaluating the factual and legal issues raised in its Motion for Full Commission Review.

At the Agenda Conference, December 20, 1994, we stated our belief that oral argument was not necessary because the Utility's arguments could be well understood upon review of its pleadings. However, since this matter had not yet been to hearing, parties are permitted to participate at the Agenda Conference. Therefore, we granted SSU's Request for Oral Argument on Motion for Full Commission Review of Order No. PSC-94-1279-PCO-WS, but limited each party's argument to five minutes.

MOTION FOR FULL COMMISSION REVIEW CONCERNING SARASOTA COUNTY TESTIMONY

In Order No. PSC-94-1279-PCO-WS, the Prehearing Officer denied SSU's Motion to Strike Portions of the Testimony of Witnesses on behalf of Sarasota County. In that Motion, SSU asserted that no portion of Mr. Drummond's or Mr. Wallace's testimony and only certain portions of Ms. Colombo's testimony are relevant to any of the issues set forth in the Order Establishing Procedure, Order No. PSC-94-0814-PCO-WS. The Prehearing Officer determined that the testimony of Mr. Drummond and Mr. Wallace is directly related to the Commission's obligation, under Section 367.011(3), Florida Statutes, to protect the public health, safety, and welfare through the exercise of the police power of the State; that Mr. Drummond

addresses the importance of local government control of water and wastewater utilities in connection with the planning of development coordinated with the provision of public facilities and services; that Mr. Wallace addresses the effect of local government control of water and wastewater utilities on the effectiveness and efficiency of regulation; and that Ms. Colombo addresses the present Sarasota County regulation of the Venice Gardens utility system, the SSU-owned water and wastewater system.

SSU argued particularly in the Motion to Strike that the Commission is, under Section 367.171 (7), Florida Statutes, limited to determining the functional relatedness of SSU's services and may not look to Chapters 125 and 163, Florida Statutes, concerning county government and county and municipal planning and land development regulation, respectively, to defeat Commission jurisdiction; that Sarasota County's comprehensive plan is irrelevant to determining the functional relatedness of the Utility's services; that Sarasota County's local regulation policy and practice is similarly irrelevant; that Order No. 22459, issued in Docket No. 891190-WS, In Re: Petition of General Development Utilities, Inc. for Declaratory Statement Concerning Regulatory Jurisdiction Over Its Water and Wastewater System in DeSoto, Charlotte, and Sarasota Counties, is precedent for the proposition that counties may not control growth through granting or extending utility service territories; and that Ms. Colombo addresses subjects outside the jurisdictional determination.

Upon full consideration of SSU's arguments and the response of Sarasota County, the Prehearing Officer denied the Utility's Motion to Strike in Order No. PSC 94-1279-PCO-WS. As stated earlier, on October 24, 1994, SSU filed the instant Motion for Full Commission Review of that Order. In that motion, the Utility petitions the Commission to reconsider and to enter an order reversing Order No. PSC-94-1279-PCO-WS and to limit the scope of the investigation in this docket to the four issues set forth in the Order Establishing Procedure, Order No. PSC-94-0814-PCO-WS. However, we find that SSU merely challenges the Prehearing Officer's findings in Order No. PSC 94-1279-PCO-WS, through reassertions of its arguments in the Motion to Strike. The Utility seeks to avoid the need to obtain discovery on matters that it asserts to be irrelevant, or that may be stricken at the hearing as irrelevant, to the jurisdictional issue in this docket. An aggrieved party may be granted reconsideration only upon a showing of an error or an omission of law or fact. In the Motion for Full Commission Review, SSU does not advance any argument appropriate to reconsideration of the Prehearing Officer's Order.

Sarasota County, in its response, correctly states that it is well-established in the law that the purpose for reconsideration or full Commission review is to bring to the Commission's attention some point which the hearing officer overlooked or failed to consider or a mistake of law or fact. The standard for reconsideration is laid down in Diamond Cab Co. of Miami v. King, 146 So. 2d 889 (Fla. 1962). The court stated that:

[t]he purpose of a petition for rehearing is merely to bring to the attention of the trial court or, in this instance, the administrative agency, some point which it overlooked or failed to consider when it rendered its order in the first instance. (citations omitted) It is not intended as a procedure for re-arguing the whole case merely because the losing party disagrees with the judgment or the order.

Id. at 891.

We find that SSU does not bring forward in the instant Motion any point overlooked or not considered or an error or an omission of law or fact. The Utility may not be permitted an opportunity to re-argue to the full Commission upon a motion for reconsideration issues already decided. Accordingly, we find it appropriate to deny SSU's Motion for Full Commission Review of Order No. PSC-94-1279-PCO-WS.

ORAL ARGUMENT ON MOTION CONCERNING HILLSBOROUGH COUNTY
TESTIMONY

On November 2, 1994, SSU filed a Motion for Full Commission Review of Order No. PSC-94-1314-PCO-WS, in which the Prehearing Officer denied SSU's Motion to Strike the Testimony of Hillsborough County Witness Michael W. McWeeny, P.E. Contemporaneously with the Motion for Full Commission Review of Order No. PSC-94-1314-PCO-WS, SSU filed a Request for Oral Argument on Motion for Full Commission Review of Order No. PSC-94-1314-PCO-WS. As stated earlier, the Commission may, in its discretion, grant oral argument upon request of any party to a formal hearing conducted pursuant to Section 120.57, Florida Statutes. Rule 25-22.058 (1), Florida Administrative Code, requires that the party requesting oral argument state with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it. SSU has made no such statement. Again, the Utility stresses its view that the issues in this proceeding be confined to the jurisdictional criteria set forth in Sections 367.021 (11) and 367.171 (7), Florida Statutes. Noting that it disputes the

relevance of the prefiled direct testimony of several counties, SSU states its belief that oral argument would benefit the Commission in comprehending and evaluating the factual and legal issues raised in its Motion for Full Commission Review.

As before, we stated our belief that oral argument was not necessary because the Utility's arguments could be well understood upon review of its pleadings. However, since this matter had not yet been to hearing, parties are permitted to participate at the Agenda Conference. Therefore, we found it appropriate to grant SSU's Request for Oral Argument on Motion for Full Commission Review of Order No. PSC-94-1279-PCO-WS, but limited each party's argument to five minutes.

MOTION FOR FULL COMMISSION REVIEW CONCERNING HILLSBOROUGH COUNTY
TESTIMONY

In Order No. PSC-94-1314-PCO-WS, the Prehearing Officer denied SSU's Motion to Strike Testimony of Hillsborough County Witness Michael W. McWeeny, P.E. In that Motion, SSU asserted that no portion of Mr. McWeeny's testimony is relevant to any of the issues set forth in the Order Establishing Procedure, Order No. PSC-94-0814-PCO-WS, or any other issue conceivably relevant to the Commission's jurisdictional determination in this proceeding. The Prehearing Officer determined that the testimony is directly related to the Commission's obligation to protect the public health, safety, and welfare in regulating public utilities. Further determining that Mr. McWeeny's testimony principally focused on the question whether the public interest is more efficaciously protected by means of county regulation of utilities having facilities, land, operations, and services entirely contained within the county's boundaries, or Commission regulation under the provisions of Section 367.171 (7), Florida Statutes, of such utilities that may receive administrative direction and operational support from outside the county, the Prehearing Officer found that the Commission may wish to consider public policy underlying utility regulation in this deliberation. The Prehearing Officer concluded that Mr. McWeeny's testimony may be helpful to the Commission's understanding of the broad jurisdiction issues set forth in Order No. PSC-94-0686-DS-WS, and particularly to the issues that ask whether the Commission has exclusive jurisdiction over all existing and future-acquired SSU systems in Florida, including those operating entirely within a single nonjurisdictional county's boundaries.

SSU argued particularly in the Motion to Strike that Mr. McWeeny's testimony concerning the County's regulatory apparatus;

the County's goal of eliminating franchises; the efficacy of County regulation; and the County's interest in its growth management plans is irrelevant to the Commission's jurisdictional determination; that Mr. McWeeny's testimony concerning a comparison of the regulatory practices and procedures of the County and the Commission is irrelevant to the issues to be decided in this proceeding; that Order No. 22459, issued in Docket No. 891190-WS, In Re: Petition of General Development Utilities, Inc. for Declaratory Statement Concerning Regulatory Jurisdiction Over Its Water and Wastewater System in DeSoto, Charlotte, and Sarasota Counties, is precedent for the proposition that counties may not control growth through granting or extending utility service territories; and that Mr. McWeeny's stated purpose in offering his testimony, to demonstrate to the Commission that it is not in the best interests of SSU's Hillsborough County customers to transfer jurisdiction to the Commission, is at odds with Section 367.171 (7), Florida Statutes, providing for one regulatory authority over a utility whose service transverses county boundaries.

Upon full consideration of SSU's arguments and the response of Hillsborough County, the Prehearing Officer denied the Utility's Motion to Strike in Order No. PSC 94-1314-PCO-WS. As stated earlier, on November 2, 1994, SSU filed the instant Motion for Full Commission Review of that Order. The Utility petitions the Commission to reconsider and to enter an order reversing Order No. PSC-94-1314-PCO-WS and to limit the scope of the four issues set forth in the Order Establishing Procedure, Order No. PSC-94-0814-PCO-WS. SSU states that it relies, in the instant Motion, upon the legal arguments, grounds, and authorities that it advances in its Motion for Full Commission Review of Order No. PSC-94-1279-PCO-WS, appended to and incorporated into the instant Motion as an exhibit. Thus, we find, as before, that SSU merely challenges the Prehearing Officer's findings in Order No. PSC 94-1314-PCO-WS, through reassertions of its arguments in the Motion to Strike. An aggrieved party may be granted reconsideration only upon a showing of an error or an omission of law or fact. In the Motion for Full Commission Review, SSU does not advance any argument appropriate to reconsideration of the Prehearing Officer's Order.

In Hillsborough County's Response to SSU's instant Motion, the County elected to address the Utility's substantive contentions, in urging that the Motion for Full Commission Review be denied. Nevertheless, we find it appropriate to deny SSU's Motion for Full Commission Review of Order No. PSC-94-1314-PCO-WS. As noted earlier, it is well-established that the purpose for reconsideration or full Commission review is to bring to the Commission's attention some point which the hearing officer overlooked or failed to consider or an error or an omission of law

or fact. The standard for reconsideration is laid down in Diamond Cab Co. of Miami v. King, supra. We determine that SSU does not bring forward in the instant Motion any point overlooked or not considered or an error or an omission of law or fact.

This docket is currently scheduled for a January 23, 1995 administrative hearing. Accordingly, this docket shall remain open.

Based on the foregoing, it is therefore

ORDERED by the Florida Public Service Commission that the Request of Southern States Utilities, Inc. for Oral Argument on its Motion for Full Commission Review of Order No. PSC-94-1279-PCO-WS is granted. It is further

ORDERED that Southern States Utilities, Inc.'s Motion for Full Commission Review of Order No. PSC-94-1279-PCO-WS is denied. It is further

ORDERED by the Florida Public Service Commission that the Request of Southern States Utilities, Inc. for Oral Argument on its Motion for Full Commission Review of Order No. PSC-94-1314-PCO-WS is granted. It is further

ORDERED that Southern States Utilities, Inc.'s Motion for Full Commission Review of Order No. PSC-94-1314-PCO-WS is denied. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission, this 10th day of January, 1995.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

by: Kay Hegan
Chief, Bureau of Records

(S E A L)

CJP

ORDER NO. PSC-95-0042-FOF-WS
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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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 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 9.9