

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Investigation into) DOCKET NO. 930945-WS
Florida Public Service) ORDER NO. PSC-95-0186-FOF-WS
Commission jurisdiction over) ISSUED: February 8, 1995
SOUTHERN STATES UTILITIES, INC.)
in Florida)
_____)

The following Commissioners participated in the disposition of this matter:

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

ORDER DENYING MOTION FOR FULL COMMISSION REVIEW OF
ORDER NO. PSC-94-1520-PCO-WS

BY THE COMMISSION:

CASE BACKGROUND

On June 6, 1994, this 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, we 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, this Commission identified the following four preliminary issues:

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01470 FEB-88
FPSC-RECORDS/REPORTING

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, we issued Order No. PSC-94-1181-PCO-WS, granting Polk County (the County) leave to intervene in this docket. Further, on September 29, 1994, we issued Order No. PSC-94-1190-PCO-WS, granting the County an extension of time until October 6, 1994 to file direct testimony and exhibits. On October 7, 1994, the County filed the direct testimony of Ms. Paula Zwack, Fiscal and Franchise Manager, Polk County Utilities Division. On October 20, 1994, SSU filed with this Commission a Motion to Strike Portions of Direct Testimony of Witness On Behalf of Polk County (Motion to Strike). Polk County did not file a response. In Order No. PSC 94-1520-PCO-WS, issued December 9, 1994, the Prehearing Officer granted in part and denied in part the Utility's Motion to Strike.

On December 12, 1994, SSU filed a Motion for Full Commission Review of Order No. PSC-94-1520-PCO-WS (Motion for Review). Polk County did not file a response to the motion. SSU's Motion for Review is the subject of this Order.

MOTION FOR FULL COMMISSION REVIEW CONCERNING POLK COUNTY
TESTIMONY

In Order No. 94-1520-PCO-WS, the Prehearing Officer struck the portions of Ms. Zwack's testimony relating to uniform rates and franchise agreement obligations, while permitting the testimony relating to the interests of the Utility's customers and the quality of County regulation to stand. The Prehearing Officer found that Ms. Zwack's testimony concerning the County's franchise agreement with the Utility is legal argument that may only be addressed to the Commission in a party's posthearing brief, and that, furthermore, the subject matter of franchise agreements could be relevant to this proceeding. This finding stemmed from the Commission's purpose in this docket to determine whether specific SSU utilities, whose operation and service distribution are contained within a single county that has not elected to be subject to the Commission's jurisdiction, but which may receive

administrative direction and operational support from outside the county, are to be considered part of a system as contemplated in Section 367.171 (7), Florida Statutes, and subject, therefore, to the Commission's jurisdiction.

In its October 20, 1994, Motion to Strike, SSU generally had asserted that very little of Ms. Zwack's testimony is relevant to any of the issues set forth in the Order Establishing Procedure, Order No. PSC-94-0814-PCO-WS, or to any issue that could be reasonably argued to be relevant to the Commission's jurisdictional determination in this docket under Section 367.171 (7), Florida Statutes.

SSU had particularly asserted that Ms. Zwack's testimony concerning Polk County's current rates and SSU's statewide uniform rates, approved in Order No. PSC-94-1123-FOF-WS, issued September 13, 1994 and amended by Order No. PSC-94-1123A-FOF-WS, issued September 27, 1994, is not relevant to the jurisdictional issues to be decided in this proceeding. Furthermore, SSU had asserted that Ms. Zwack's testimony that a transfer of jurisdiction would violate SSU's agreement to be bound by Polk County jurisdiction is, one, irrelevant to this proceeding, and, two, would raise an issue beyond the jurisdiction of the Commission, i.e., the effect of private franchise agreements. SSU had noted that this testimony constitutes expert witness testimony concerning a legal issue appropriately addressed only in a party's posthearing brief. Finally, SSU had asserted that neither Ms. Zwack's testimony that states that the best interests of SSU's Polk County customers would not be well served by transferring jurisdiction to the Commission, nor her testimony that states that the quality of utility regulation under County jurisdiction is superior, is relevant to the issues to be decided in this proceeding.

In support of its Motion for Full Commission Review of Order No. PSC-94-1520-PCO-WS, SSU submitted as an exhibit its Motion for Full Commission Review of Order No. PSC-94-1279-PCO-WS, in which the Prehearing Officer denied SSU's motion to strike similar testimony of Sarasota County witnesses. By Order No. PSC-95-0042-FOF-WS, issued January 10, 1995, we denied SSU's Motion for Full Commission Review of Order No. PSC-94-1279-PCO-WS.

In the instant Motion for Review, the Utility contends that the Prehearing Officer failed to consider its arguments that Ms. Zwack's testimony concerning "parochial benefits and adequacy of county regulation" is "irrelevant as a matter of law because the Florida Legislature already has made a public policy determination that the Commission shall have jurisdiction over functionally related, cross-county utility systems notwithstanding

considerations regarding county regulation," and "that Section 367.011(3), Florida Statutes, cannot be improperly used to broaden or alter the plain meaning of Section 367.171(7), Florida Statutes." 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 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 the Prehearing Officer fully considered the Utility's arguments related to that portion of Ms. Zwack's testimony that is concerned with the protection of the Utility's customers' interests and the comparative quality of County and Commission regulation. In this Motion for Review, SSU relied essentially upon the arguments made previously in its Motion for Full Commission Review of Order No. PSC-94-1279-PCO-WS to support its contentions in respect to these aspects of the testimony of Ms. Zwack. Therefore, to that extent, we conclude that, in this Motion for Review, SSU has failed to bring forward any point overlooked or not considered or a material error or omission of law or fact in the order presently in question. The Utility may not be permitted an opportunity to re-argue to the full Commission upon a motion for reconsideration issues already decided.

Additionally, in the instant Motion for Review, SSU contended that the Prehearing Officer failed to give any consideration to its arguments that Ms. Zwack's testimony concerning franchise agreements is irrelevant because the Commission has neither jurisdiction over breaches of contract matters, such as utility franchise agreements, nor the competence to consider an allegation of an unconstitutional impairment of contract. Again, we find that the Prehearing Officer fully considered SSU's arguments concerning the County's franchise agreement with the Utility. On this issue, we also conclude that in the instant Motion for Review, SSU has failed to bring forward any point overlooked or not considered or

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a material error or a omission of law or fact in Order No. PSC-94-1520-PCO-WS.

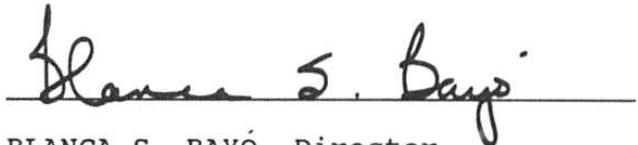
For all of the foregoing reasons, we find it appropriate to deny SSU's Motion for Full Commission Review of Order No. PSC-94-1520-PCO-WS. This docket shall remain open pending final resolution of our investigation.

Based on the foregoing, it is therefore,

ORDERED that Southern States Utilities, Inc.'s Motion for Full Commission Review of Order No. PSC-94-1520-PCO-WS is denied. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission, this 8th day of February, 1995.

A handwritten signature in cursive script, reading "Blanca S. Bayó", is written over a horizontal line.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

CJP

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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 this order, which is preliminary, procedural or intermediate in nature, may request 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 or wastewater utility. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.