

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for rate) DOCKET NO. 950495-WS
increase and increase in service) ORDER NO. PSC-95-1258-PCO-WS
availability charges by Southern) ISSUED: October 13, 1995
States Utilities, Inc. for)
Orange-Osceola Utilities, Inc.)
in Osceola County, and in)
Bradford, Brevard, Charlotte,)
Citrus, Clay, Collier, Duval,)
Hernando, Highlands,)
Hillsborough, Lake, Lee, Marion,)
Martin, Nassau, Orange, Osceola,)
Pasco, Polk, Putnam, Seminole,)
St. Johns, St. Lucie, Volusia,)
and Washington Counties.)

ORDER GRANTING IN PART AND DENYING IN PART THE
OFFICE OF PUBLIC COUNSEL'S MOTIONS TO COMPEL AND
SOUTHERN STATES UTILITIES, INC.'S MOTION FOR A PROTECTIVE
ORDER, DENYING THE OFFICE OF PUBLIC COUNSEL'S MOTION
TO CONDUCT AN IN CAMERA INSPECTION OF DOCUMENTS,
DENYING THE OFFICE OF PUBLIC COUNSEL'S MOTIONS TO
POSTPONE DATE FOR FILING INTERVENOR TESTIMONY,
AND DENYING REQUESTS FOR ORAL ARGUMENT

This order addresses one combined motion objecting to interrogatories and requests for production of documents and for a protective order filed by Southern States Utilities, Inc. (SSU or utility) and two combined motions filed by the Office of Public Counsel (OPC). First, on August 30, 1995, SSU filed its Objections to OPC's First Set of Interrogatories and First Set of Requests for Production of Documents and Motion for Protective Order. Second, on August 31, 1995, OPC filed the Citizens' First Motion to Compel and First Motion to Postpone Date for Filing Intervenor Testimony. Third, on September 6, 1995, OPC filed the Citizens' Response to SSU's Motion for Protective Order; Citizens' First Motion to Conduct In Camera Inspection of Documents; Citizens' Second Motion to Compel; and Citizens' Second Motion to Postpone Date for Filing Intervenor Testimony. Fourth, on September 7, 1995, SSU filed its Response to OPC's First Motion to Compel and First Motion to Postpone Date for Filing Intervenor Testimony. Fifth, on September 13, 1995, SSU filed its Response to OPC's Second Motion to Compel, First Motion to Conduct In Camera Inspection and Second Motion to Postpone Date for Filing Intervenor Testimony.

DOCUMENT NUMBER-DATE

10140 OCT 13 88

FPSC-RECORDS/REPORTING

Because these motions address the same sets of discovery requests, it is appropriate to address them in one order. Having reviewed the arguments in the utility's and OPC's motions and responses, OPC's motions to compel and SSU's motion for a protective order are granted in part and denied in part. OPC's motion to conduct an in camera inspection of documents, OPC's motions to postpone the deadline for filing intervenor testimony, and OPC's requests for oral argument are denied.

THE MOTIONS

On August 30, 1995, SSU filed its Objections to OPC's First Set of Interrogatories and First Set of Requests for Production of Documents and Motion for Protective Order. In that motion, SSU objects to several of OPC's interrogatories and requests for production of documents. SSU objects on the following bases: 1) beyond the permissible scope of discovery; 2) attorney/client privilege and work product; and 3) other. SSU requests that the Prehearing Officer enter a protective order relieving SSU of responsibility from answering those interrogatories and requests for production of documents.

On August 31, 1995, OPC filed the Citizens' First Motion to Compel and First Motion to Postpone Date for Filing Intervenor Testimony. In that motion, OPC requests the Commission to order SSU to immediately answer certain interrogatories and requests for production of documents that had at the time been unanswered. Additionally, OPC requests that the Commission postpone the date for filing intervenor testimony on a day-for-day basis for every day of delay encountered by the Citizens in receiving the requested documents.

On September 6, 1995, OPC filed the Citizens' Response to SSU's Motion for Protective Order; Citizens' First Motion to Conduct In Camera Inspection of Documents; Citizens' Second Motion to Compel; and Citizens' Second Motion to Postpone Date for Filing Intervenor Testimony. In their response, OPC contends that their interrogatories and requests for production of documents are discoverable primarily based on the breadth of SSU's prefiled direct testimony. OPC requests the Commission to enter an order to conduct an in camera inspection of every document withheld on the basis of a claim of privilege; and reiterates their motions to compel production of documents and interrogatory answers and to postpone the date for filing intervenor testimony.

On September 7, 1995, SSU filed its Response to OPC's First Motion to Compel and First Motion to Postpone Date for Filing Intervenor Testimony, in which it requests the Commission to deny

OPC's First Motion to Compel and First Motion to Postpone Date for Filing Intervenor Testimony. In this response, SSU contends that it complied with the vast majority of OPC's requests, that OPC has the burden of proof to show that it is prejudiced by a late answer, and that OPC is not, in fact, prejudiced by any late answers.

On September 13, 1995, SSU filed its Response to OPC's Second Motion to Compel, First Motion to Conduct In Camera Inspection and Second Motion to Postpone Date for Filing Intervenor Testimony. In this response, SSU reiterates its objections set forth in its August 29, 1995 motion, and states reasons why certain OPC requests are not discoverable. SSU requests that the Commission deny OPC's September 6, 1995 Response and Motion.

The motions filed by OPC and SSU addressed a considerable number of discovery requests. However, since that filing, SSU has supplied responses to a significant portion of those requests. The following interrogatories and requests for production of documents remain subject to SSU's objections and motion for protective order and/or OPC's motions to compel: interrogatory no. 87; requests for production of documents nos. 51, 52, 108, and 127. It is these specific requests for production of documents and interrogatory that are ruled on herein.

THE SPECIFIC DISCOVERY REQUESTS

As stated above, SSU's objections fell into three categories: 1) beyond the permissible scope of discovery; 2) attorney/client privilege and work product; and 3) other. This Order addresses the items based on which of the preceding categories the item falls under.

1. Beyond the Scope of Permissible Discovery

Document Requests Nos. 51 and 52

OPC's document request no. 51 states as follows:

Provide a copy of all minutes of the Topeka Group, Inc.'s Board of Directors Meetings for the years 1992 to date.

Document request no. 52 is worded identically to document request no. 51, except that Minnesota Power & Light (MPL) is substituted for Topeka Group, Inc. (TGI). SSU objects to these document production requests to the extent they ask for information unrelated to SSU or this instant docket. SSU asserts that there is no reasonably calculated causal connection between the information

sought and possible evidence relevant to the material issues of the instant rate case. Furthermore, SSU asserts that MPL and TGI's interest in maintaining the privacy of its non-SSU business outweighs OPC's need for this discovery and its possible probative value. In its response, OPC first asserts that SSU opened the door to this discovery request through the breadth of MPL's CEO Sandbulte's prefiled direct testimony. Second, OPC asserts that the discovery is necessary to explore the amount of shareholder services that MPL charged to SSU. Third, OPC asserts that its request is proper because information regarding the acquisition of Lehigh Utilities is substantively probative and relates to the credibility of SSU and its witnesses. SSU responded to OPC's position by stating that the document request is too speculative.

Rule 1.280(b), Fla. R. Civ. P., allows discovery of information that appears reasonably calculated to lead to the discovery of admissible evidence. OPC's arguments regarding the shareholder service charges and Lehigh Utilities are persuasive. Such discovery is reasonably calculated to lead to admissible evidence probative to the instant rate proceeding. Since SSU witness Sandbulte's prefiled testimony and exhibits do address MPL's investment in SSU (through TGI), the discovery is appropriate, but only as to minutes pertaining to SSU. SSU does not necessarily have possession or control over minutes that do not pertain to it. Accordingly, discovery shall be allowed, but only as to those minutes pertaining in any way to SSU.

Document Request No. 127

Document request no. 127 states as follows:

Provide a copy of all internal memorandum, reports, studies, and other documents between or by employees of the company, Topeka, MPL, between or by consultants of the company, Topeka, and MPL and all memorandum to files which address the sale of any properties owned by SSU or Lehigh Acquisition Corporation.

SSU objects to this request to the extent that it solicits information regarding Lehigh Acquisition Corporation (LAC) property sold to SSU that is not included in the revenue requirements requested in this case, and states that such information is beyond SSU's control. In its response, OPC asserts that the discovery is necessary to test SSU's credibility regarding its representations of the value of LAC acquired properties, and that it believes SSU does have control to produce such documents.

Although the scope of the request may include information regarding property sold to SSU that is not included in the revenue requirement, the discovery is reasonably calculated to lead to admissible evidence regarding whether the represented values of LAC acquired properties are true and correct. The discovery requested in document request no. 127 is appropriate; and accordingly, it shall be allowed. However, SSU shall provide only discovery information which addresses the sale of any properties owned by SSU or Lehigh Acquisition Corporation if the information pertains in any way to SSU. SSU shall not be required to produce documents created by LAC, or any other entity, over which SSU has no control.

2. Attorney/Client Privilege and/or Work Product Privilege

Document Request No. 108

Document request no. 108 states as follows:

Please provide a copy of all correspondence, memorandum, letters, reports, etc., between the company and the consultants that it retained for purposes of assisting with the instant rate proceeding.

SSU objects to OPC's request because it solicits information which violates the attorney/client privilege and/or work product privilege and which was protected in Docket No. 920199-WS under OPC's identical document request. SSU is willing to produce on-site the documents OPC requests that do not fall under one of the above privileges, consistent with the holding on this document request in Docket No. 920199-WS. OPC responds by first stating that SSU failed to make a claim of privilege in their motion. Secondly, OPC states that SSU should not be the party to make the determination whether such documents exist and/or if a justified privilege exists vis a vis a particular document, and therefore requests that the Commission conduct an in camera inspection of the documents withheld by SSU to determine whether an applicable privilege exists. OPC further cites Southern Bell Telephone and Telegraph Company v. J. Terry Deason, et. al, 632 So.2d 1377 (Fla. 1994) for various criteria by which to determine whether a claim of privilege is justified. OPC requests that the Commission apply such criteria to each document withheld by SSU. SSU responds by first asserting that it did make a claim of privilege with respect to document request no. 108. Secondly, SSU distinguishes the Deason case by stating that it is only applicable to communications between corporate counsel and a corporate employee, and that it is beyond the scope of document request no. 108. Lastly, SSU states that an in camera inspection is not well settled Commission policy,

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and is inconsistent with SSU's experience, based on prior Commission orders.

Given the broad scope of the request, SSU's motion for a protective order is hereby granted to the extent that the requested information falls within the work product exception. Therefore, communications between the utility's counsel and any consultants or between the utility and any consultants which contain either factual or opinion work product prepared in anticipation of litigation or for hearing need not be produced until OPC makes the required showing of need under Fla. R. Civ. P. 1.280. If a communication does not fall within the work product exception, such as a communication concerning fees, the utility shall produce the communication.

SSU did make a claim of privilege with respect to certain documents which are within the scope of this request. If any of the communications requested under document request no. 108 are communications between corporate counsel and a corporate employee, then the criteria set forth in the Deason case shall apply.

The broad scope of OPC's request also precludes a meaningful in camera review of the documents. OPC's motion for an in camera inspection of all documents withheld by SSU is therefore denied.

3. Other

Interrogatory No. 87

OPC's Interrogatory No. 87 is in three parts and asks for information concerning actual or potential condemnations. Since SSU has failed to either answer the interrogatory or object to it, and the discovery appears to be reasonably calculated to lead to admissible evidence, OPC's motion to compel an answer to this interrogatory is hereby granted.

SSU's COMPLIANCE WITH THIS ORDER

SSU shall provide the responses to discovery required by this Order to OPC within 15 days of the date of this Order, unless good cause is shown.

MOTIONS TO POSTPONE DATE FOR FILING INTERVENOR TESTIMONY

This order addresses OPC's first and second motions to postpone the date for filing intervenor testimony. In its motions, OPC argues that the delay in obtaining certain discovery requests from the utility has harmed its case. It argues that the utility

has ignored production of discovery on its due date, and has frustrated the citizens' right to discovery. SSU responds that it has responded timely to the vast majority of the hundreds of discovery requests, that only a few responses were late, and that OPC has made up in number [of discovery requests] anything which it may have lost in time. Further, SSU asserts that it is OPC's burden of proof to show that it is prejudiced by any late submittal of discovery responses. Finally, SSU and OPC disagree as to the dates when discovery requests were actually due.

OPC served SSU with its first set of discovery requests on July 18, 1995. On that same date, OPC filed a motion requesting that the Commission permit OPC to exceed the discovery limitations set forth in the Florida Rules of Civil Procedure. SSU contends that the time for responding to OPC's discovery requests did not begin to run until after the official date of filing, August 2, 1995. SSU argues that the rate proceeding does not commence until after the minimum filing requirements (MFRs) have been met. SSU's argument is unpersuasive. Action in any docket is initiated upon the filing of a petition. The fact that the utility has not met the MFRs does not preclude a party from serving discovery requests upon it.

Nonetheless, OPC's request to postpone its testimony is unpersuasive and is hereby denied. With a date to file testimony presently set for November 20, 1995, OPC has sufficient time to prepare its testimony. SSU has answered the overwhelming majority of OPC's discovery in a manner that gives OPC sufficient time to file its testimony on the date established in Order No. PSC-95-1208-PCO-WS.

REQUESTS FOR ORAL ARGUMENT

OPC filed two requests for oral argument. The first request was filed in conjunction with the Citizens' First Motion to Compel and First Motion to Postpone Date for Filing Intervenor Testimony, filed August 31, 1995. The second request was filed in conjunction with the Citizens' Response to SSU's Motion for Protective Order; Citizens' First Motion to Conduct In Camera Inspection of Documents; Citizens' Second Motion to Compel; and Citizens' Second Motion to Postpone Date for Filing Intervenor Testimony, filed September 6, 1995. OPC has failed to state with particularity why oral argument would aid the Commission in comprehending and evaluating the pending issues, as required by Rule 25-22.058, Florida Administrative Code. Accordingly, OPC's requests for oral argument are denied.

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Based on the foregoing, it is, therefore,

ORDERED by Commissioner Diane K. Kiesling, as Prehearing Officer, that Southern States Utilities, Inc.'s, August 30, 1995 Motion for Protective Order is granted in part and denied in part as set forth in the body of this Order. It is further

ORDERED that the Office of Public Counsel's August 31, 1995 and September 6, 1995 Motions to Compel are granted in part and denied in part as set forth in the body of this Order. It is further

ORDERED that Southern States Utilities, Inc., is hereby directed to respond to the pertinent portions of the Office of Public Counsel's discovery requests as set forth in the body of this Order within 15 days of the date of this Order. It is further

ORDERED that the Office of Public Counsel's September 6, 1995 Motion to Conduct In Camera Inspection of Documents is denied. It is further

ORDERED that the Office of Public Counsel's August 31, 1995 and September 6, 1995 Motions to Postpone Date for Filing Intervenor Testimony are denied. It is further

ORDERED that the Office of Public Counsel's August 31, 1995 and September 6, 1995 Requests for Oral Argument are denied.

By ORDER of Commissioner Diane K. Kiesling, as Prehearing Officer, this 13th day of October, 1995.

/s/ Diane K. Kiesling

DIANE K. KIESLING, Commissioner
and Prehearing Officer

This is a facsimile copy. A signed copy of the order may be obtained by calling 1-904-413-6770.

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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: (1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) 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. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. 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.