

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for rate) DOCKET NO. 950495-WS
increase and increase in service) ORDER NO. PSC-95-1571-PCO-WS
availability charges by Southern) ISSUED: December 20, 1995
States Utilities, Inc. 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, Putnam, Seminole, St.)
Johns, St. Lucie, Volusia, and)
Washington Counties.)

ORDER DENYING PETITIONS FOR SPECIAL APPEARANCE
AND
MOTIONS TO STRIKE
AND GRANTING IN PART AND DENYING IN PART
MOTION FOR PROTECTIVE ORDER

This Order addresses the Office of Public Counsel's (OPC) Motions for Special Appearance and Motions to Strike Southern States Utilities, Inc.'s (SSU) First Set of Interrogatories and First Set of Requests for Production of Documents and, in addition, OPC's Objection to Certain Discovery and Motion for Protective Order in reference to the same discovery.

OPC'S PETITIONS FOR SPECIAL APPEARANCE AND MOTIONS TO STRIKE

On October 30, and November 1, 1995, OPC filed Petitions For Special Appearance and Motions to Strike the First Set of Interrogatories and First Set of Requests for Production of Documents served on OPC by SSU. SSU timely filed a response to these motions on November 6, 1995.

OPC argues that service of discovery on OPC should be struck because OPC is not a party litigant in this proceeding. SSU responds that 1) special appearances are no longer recognized by Florida courts; 2) intervention and party status in this proceeding, and historically in other proceedings, was granted to OPC without objection by OPC; 3) discovery has been served on OPC in prior proceedings without objection; 4) OPC's argument is inconsistent with the provisions of Chapter 350, Florida Statutes; 5) OPC has failed to timely raise lack of jurisdiction or challenge

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its party status; 6) OPC's petitions and motions constitute an abuse of the discovery process.

By Order No. PSC-95-0901-PCO-WS, issued July 6, 1995, the Commission acknowledged OPC's intervention in this proceeding. OPC did not object to that order and has submitted to other succeeding orders. OPC's actions in this proceeding constitute a submission to the commission's jurisdiction. See, First Wisconsin National Bank of Milwaukee v. Donian, 343 So.2d 943 (Fla. 2nd DCA 1977). Accordingly, the Petitions for Special Appearance are denied.

Section 350.0611, Florida Statutes, authorizes the Public Counsel to participate as a party in proceedings "in the name of the state or its citizens." Further, Section 350.0613, Florida Statutes, clearly contemplates that OPC will participate in commission proceedings where it states, ". . . if the Public Counsel intervenes as a party in any proceeding he shall be served with copies of all subsequent pleadings, exhibits, and prepared testimony . . ." OPC's responsibilities are not the same as those of an attorney representing a client in the ordinary course of business, as argued in OPC's pleadings; rather, OPC has a very special role "to provide legal representation for the people of the state in proceedings before the commission." Section 350.0611, Florida Statutes. In carrying out that role, OPC is authorized by the statute to retain additional attorneys, expert witnesses and other technical personnel. By virtue of employing staff who will participate in the hearing, OPC has opened the door for the kind of discovery that has been served in this proceeding. OPC has shown no prejudice, confusion or other good cause for the motions to strike. Therefore, the Motions to Strike are denied based on a finding that OPC, as the representative of the citizens of the state, is a proper party to this docket on whom discovery requests can be served.

OPC'S OBJECTION TO CERTAIN DISCOVERY
AND MOTION FOR PROTECTIVE ORDER

On November 9, 1995, OPC filed an Objection to Certain Discovery and Motion for Protective Order. On November 16, 1995, SSU filed its response. SSU served its First Set of Interrogatories on October 20, 1995, and its First Set of Requests for Production of Documents on October 25, 1995. Based on OPC's Motions to Strike, SSU re-served discovery on October 30, 1995. Having denied OPC's Petitions for Special Appearance and Motions to Strike, OPC's Objections to discovery are untimely. However, in the interest of fairness and to prevent any undue burden, the objections raised by OPC are addressed herein on the merits and the Motions for Protective Order are granted to the extent set forth

below. It is also noted that because of the postponement of the hearing date, there is no prejudice from the delay in the production of the discovery in this instance.

RULINGS ON INTERROGATORIES

OPC filed objections to Interrogatories Nos. 7, 8, 9, 10, 13, 17, 29 and 51 on the grounds that they are neither relevant nor reasonably calculated to lead to discovery of admissible evidence. Interrogatories Nos. 7, 9 and 29 have been withdrawn and therefore are not ruled on herein. OPC objects to Interrogatory No. 12 as unduly burdensome and without any imaginable benefit to SSU. OPC objects to Interrogatories Nos. 15, 43 and 44 on the grounds they seek privileged information. OPC further objects to portions of the definitions and instructions contained in the interrogatories.

Interrogatories Nos. 8 and 10

8. State the amount of expense incurred by OPC for the use of temporary employees for the last four years for activities associated with any rate cases, and the budgeted expenses for such activity during the four year period.
10. State the expense incurred and projected to be incurred by OPC for all documents OPC has sent or proposes sending as applicable, to SSU's customers in connection with the current docket and all previous dockets over the last four years. State the amount, etc.

SSU alleges that these interrogatories are relevant to the issue of rate case expense. The information sought by these interrogatories cannot lead to admissible evidence on rate case expense. Further, it does not appear to be reasonably calculated to the discovery of any other relevant information or admissible evidence. Accordingly, the Motion for Protective Order is granted as to Interrogatories Nos. 8 and 10.

Interrogatory No. 13

13. (a) Please explain how OPC employees charge time and expenses to a utility rate case or other matter pending before the FPSC.
(b) Does the OPC have any written policies or procedures which describe this process? If so, please provide same.

13(a). This interrogatory cannot lead to admissible evidence. Accordingly, the Motion for Protective Order is granted as to

subpart (a). 13(b). To the extent that this interrogatory seeks information on policies and procedures which are public record, the Motion for Protective Order is denied.

Interrogatories Nos. 17 and 51

17. List all annual, monthly, and weekly reports OPC provides to the Florida Legislature or any attorneys, representatives, employees, agents, or members of the Florida Legislature.
51. Describe all OPC efforts to encourage water conservation including communications with Florida residents, customer groups, state and local legislative bodies, state and local environmental agencies or other governmental authorities.

Interrogatory No. 17 seeks information which could lead to admissible evidence on any number of issues in this proceeding. Further, the information sought is discoverable as public records. Similarly, Interrogatory 51 specifically seeks information regarding water conservation which will be at issue in this rate case. Therefore, OPC's Motion for Protective Order as to Interrogatories Nos. 17 and 51 is denied.

Interrogatory No. 12

12. (a) Please list all SSU journals, registers, and ledgers which were reviewed by OPC in connection with this rate proceeding.
(b) Please provide the date each document was reviewed, and the name of all OPC employee(s) and consultant(s) who reviewed each document.

As noted above, OPC argues that this request is unduly burdensome and not relevant. It does not appear to be unduly burdensome and it does seek information that could lead to admissible evidence related to the testimony of OPC's witnesses. Therefore, the Motion for Protective Order for Interrogatory No. 12 is hereby denied.

Interrogatory No. 15

15. Describe all anticipated contacts, meetings, and mailings with or to SSU customers including, but not limited to, the date of meetings currently scheduled.

OPC objects to this discovery on the ground that the information it seeks is privileged. OPC's Motion for Protective Order as to this interrogatory is denied as the information sought

is not privileged. The word "describe" shall not be interpreted to require the disclosure of privileged material.

Interrogatories Nos. 43 and 44

43. What are OPC's criteria for judging the materiality of expenses and capital items on a utility's books and records? Are the criteria different for expense items than they are for capital items? Are the criteria different from case to case or utility to utility? If so, why? If not, why not?
44. What are OPC's criteria for judging the materiality of expense and capital items for the purpose of advocating adjustments to the Commission? Are the criteria for expense and capital items different? Are those criteria different from cases (sic) to case? If so, why?

To the extent that OPC may have set forth the requested criteria in a manner that has created a public record discoverable under the provisions of Chapter 119, Florida Statutes, the Motion for protective order is denied. To the extent that the information requested exists as mental impressions or litigation strategy prepared specifically for these administrative proceedings, the information shall be protected, pursuant to Section 119.07(3)(n), Florida Statutes.

Definitions and Instructions

OPC's general objections to SSU's Definition of "you" and "your" and Instruction A are noted. This order addresses the issue of privilege where specifically raised by OPC. Neither the definition nor the instruction requires the disclosure of privileged information. Therefore, it is not necessary to address these broader objections.

RULINGS ON REQUESTS FOR PRODUCTION OF DOCUMENTS

OPC objects to Requests for Production of Documents (PODs) Nos. 11-16 and 19-22 on the grounds that they are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. PODs Nos. 19 and 21 have since been withdrawn. OPC objects to PODs Nos. 6-8 on the ground that they seek discovery of privileged attorney-client communications. In addition, OPC objects to the definition of "Citizens" and to Instruction 1 contained in the PODs.

PODs Nos. 11-14

- No. 11 Provide the Citizens' budget for all spending outlays associated with this proceeding.
- No. 12 Provide a copy of all variance reports, variance explanations, summaries of variance reports and variance explanations used to monitor or to control the budget referred to in the immediately preceding Document Request No. 11.
- No. 13 Provide the Citizens' budget for all spending outlays associated with any rate proceeding before the FPSC to which the Citizens were a party in the last eight years.
- No. 14 Provide a copy of all variance reports, variance explanations, summaries of variance reports and variance explanations used to monitor or control the budget referred to in the immediately preceding Document Request.

SSU argues that these requests are relevant to the issue of rate case expense and to compare the outlays for this rate case to other rate cases. The information sought cannot relate to rate case expense. The information sought in POD No. 13 on the proportionality of OPC's expenses in this case compared to other cases is not relevant to this proceeding and is unreasonably burdensome. Further, PODs Nos. 11-14 do not appear to be reasonably calculated to lead to the discovery of any other relevant information or admissible evidence. Accordingly, the Motion for Protective Order is granted as to PODs Nos. 11-14.

PODs Nos. 15 and 16

- No. 15 Provide any narrative plans describing the Citizens' goals and objectives for the years 1992, 1993, 1994, 1995, and 1996 relative to the water and wastewater industry.
- No. 16 Provide any recommendations submitted by the Citizens to the Florida Legislature for the years 1992, 1993, and 1994 relative to the water and wastewater industry.

The information sought in these two PODs are public record. No attorney/client privilege exists between the Legislature and OPC and written goals and objectives of OPC are not mental impressions, conclusions, litigation strategies or legal theories prepared for adversarial administrative proceedings. The information sought may

lead to admissible evidence relevant to issues such as water conservation, reuse, or acquisition adjustment. The Motion for Protective Order as to PODs Nos. 15 and 16 is denied.

POD No. 20

No. 20 Provide a copy of any and all guidelines, policies or procedures that the Citizens' consultants, witnesses, and employees use in deciding whether a company should capitalize or expense a particular cost.

Guidelines, policies and procedures used by consultants, expert witnesses or employees in forming an opinion on capitalizing or expensing a particular cost is discoverable in a rate proceeding. Any witness testifying on an expense item would have to explain the basis of his testimony; a source document used as the basis of forming an opinion is not privileged. Therefore, the Motion for Protective Order as to POD No. 20 is denied.

POD No. 22

No. 22 Provide a copy of any and all time sheets used by employees of the OPC which are used in any way to allocate or charge time for work relating to SSU's current rate case or any prior rate case during the last five years.

Although the requested time sheets are public record, they are not relevant to this rate case and do not appear to be reasonably calculated to lead to the discovery of any other relevant information or admissible evidence. POD No. 22, furthermore, is unduly burdensome. Accordingly, the Motion for Protective Order is granted as to POD No. 22

PODs Nos. 6-8

No. 6 Provide all written communications and all writings reflecting verbal communications between the Citizens and SSU customers and between the Citizens and attorneys, representatives, employees, agents and consultants of any organization having SSU customers as members which (1) took place after December 1991 and (2) in any way address the following subjects:

- (a) margin reserve, used and useful for water facilities, wastewater facilities, reuse facilities, or some combination thereof;
- (b) SSU;

- (c) SSU's uniform rates;
- (d) SSU's current rate case;
- (e) any positions the Citizens will advocate in SSU's current rate case;
- (f) any docketed matter before the FPSC to which SSU was a party;
- (g) any spending outlays or proposed spending outlays by the Citizens or by any other entity to fund customer representation by anyone other than the Citizens in SSU's current rate case;
- (h) water conservation;
- (i) water conservation rates;
- (j) rates for reclaimed water;
- (k) rates for bulk water and wastewater services.

(Documents on file with the FPSC's Division of Records and Reporting need not be provided.)

No. 7 Provide all written communications and all writings reflecting verbal communications between and among the Citizens' own attorneys, representatives, employees, agents and consultants which (1) took place after December 1991 and (2) relate in any way to the following subjects:

- (a) margin reserve, used and useful for water facilities, wastewater facilities, reuse facilities, or some combination thereof;
- (b) SSU;
- (c) SSU's uniform rates;
- (d) SSU's current rate case;
- (e) any positions the Citizens will advocate in SSU's current rate case;
- (f) any docketed matter before the FPSC to which SSU was a party;
- (g) any spending outlays or proposed spending outlays by the Citizens or by any other entity to fund customer representation by anyone other than the Citizens in SSU's current rate case;
- (h) water conservation;
- (i) water conservation rates;
- (j) rates for reclaimed water;
- (k) rates for bulk water and wastewater services;
- (l) the qualifications and background of any person who has been contacted about testifying in this

rate case, regardless of whether such person will testify in this case;

(m) the prior testimony, opinions and views of any person who has been contacted about testifying in this rate case, regardless whether such person will testify in this case.

(Documents on file with the FPSC's Division of Records and Reporting need not be provided.)

No. 8 Provide all documents, including memoranda to file, prepared by the Citizens' own attorneys, representatives, employees, agents and consultants, including all documents prepared at the direction or under the control of such persons, after December 1991 which relate in any way to the following subjects:

(a) margin reserve, used and useful for water facilities, wastewater facilities, reuse facilities, or some combination thereof;

(b) SSU;

(c) SSU's uniform rates;

(d) SSU's current rate case;

(e) any positions the Citizens will advocate in SSU's current rate case;

(f) any docketed matter before the FPSC to which SSU was a party;

(g) any spending outlays or proposed spending outlays by the Citizens or by any other entity to fund customer representation by anyone other than the Citizens in SSU's current rate case;

(h) water conservation;

(i) water conservation rates;

(j) rates for reclaimed water;

(k) rates for bulk water and wastewater services;

(l) the qualifications and background of any person who has been contacted about testifying in this rate case, regardless of whether such person will testify in this case;

(m) the prior testimony, opinions and views of any person who has been contacted about testifying in this rate case, regardless whether such person will testify in this case.

(Documents on file with the FPSC's Division of Records and Reporting need not be provided.)

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As argued by SSU in its response, the information sought in PODs 6-8 is discoverable pursuant to the public records law, except as provided in Sec. 119.07 (3)(n), Florida Statutes. The PODs seek information which could reasonably lead to the discovery of admissible evidence. Therefore, the Motion for Protective Order is granted in part and denied in part. Those documents sought by PODs 6-8 which meet the requirements for the exception set forth in Sec 119.07(3)(n), Florida Statutes, shall be protected; those documents requested in the subject PODs which are not covered under the statutory exception must be produced.

Definitions and Instructions

OPC's general objections to SSU's Definition of "Citizens" and Instruction 1 are noted. This order addresses the issue of privilege where specifically raised by OPC. Neither the definition nor the instruction requires the disclosure of privileged information. Therefore, it is not necessary to address these broader objections.

Based on the foregoing, it is

ORDERED by Commissioner Diane K. Kiesling, as Prehearing Officer, that the Office of Public Counsel's Motions for Special Appearance and Motions to Strike, filed October 30, 1995, and November 1, 1995, are denied. It is further

ORDERED that the Office of Public Counsel's Objection to Certain Discovery and Motion for Protective Order with reference to Southern States Utilities, Inc.'s First Set of Interrogatories to the Citizens of the State of Florida 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 Objection to Certain Discovery and Motion for Protective Order with reference to Southern States Utilities, Inc.'s First Request for Production of Documents to the Citizens of the State of Florida is granted in part and denied in part as set forth in the body of this Order.

By ORDER of Commissioner Diane K. Kiesling, as Prehearing Officer, this 20th day of December, 1995.


DIANE K. KIESLING, Commissioner and
Prehearing Officer

(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: (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.