

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for rate) DOCKET NO. 950495-WS
increase and increase in service) ORDER NO. PSC-96-0301-FOF-WS
availability charges by Southern) ISSUED: February 27, 1996
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.)

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 PUBLIC COUNSEL'S MOTION FOR APPOINTMENT OF COUNSEL

BY THE COMMISSION:

Background

Southern States Utilities, Inc. (SSU or utility) is a Class A utility, which provides water and wastewater service to service areas in 25 counties. On June 28, 1995, SSU filed an application with the Commission requesting increased water and wastewater rates for 141 services areas, pursuant to Section 367.081, Florida Statutes. SSU also requested an increase in service availability charges, pursuant to Section 367.101, Florida Statutes. The utility also requested that the Commission approve an allowance for funds used during construction (AFUDC) and an allowance for funds prudently invested.

On July 26, 1995, we issued Order No. PSC-95-0901-PCO-WS acknowledging the intervention of the Office of the Public Counsel (OPC or Public Counsel). Several homeowners associations and civic associations have also intervened in this matter.

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On September 18, 1995, OPC filed a Motion for Appointment of Counsel. SSU filed a response in opposition to that request. By Order No. PSC-95-1387-PCO-WS, issued November 8, 1995, the Prehearing Officer in this matter denied OPC's motion. The order stated that this Commission has no authority to appoint additional counsel as OPC requested, that the law does not provide for OPC's retention of alternate counsel in the event of a conflict, and that OPC incorrectly and prematurely categorized the customers into two separate groups. On November 15, 1995, OPC filed a Motion for Reconsideration of Order No. PSC-95-1387-PCO-WS, wherein it requested that the full Commission consider the Prehearing Officer's order. SSU filed a response opposing OPC's motion on November 22, 1995.

At our January 16, 1996, Agenda Conference, we determined that, on our own motion, we would hear OPC's motion for counsel on a de novo basis, based upon the original pleadings that were filed on the issue. We heard argument and considered OPC's motion for counsel at our February 6, 1996, Agenda Conference.

Motion for Appointment of Counsel

In its motion for counsel, OPC requested that we require SSU to provide funding for legal representation of what OPC perceived as two separate groups of customers created by SSU's petition for uniform rates. OPC asserted that the uniform rate structure requested by SSU creates two distinct customer groups whose interests are adverse, and that Public Counsel's representation of either group would be harmful to the other group's interests. OPC cited Rule 4-1.7 of the Rules of Professional Conduct, which prohibits a lawyer from representing a client if that representation will be directly adverse to the interests of another client.

In its October 2, 1995, response, SSU contended that we lack the statutory authority to grant OPC's request. SSU argued that OPC has deferred from advocating rate design positions in past cases, that the customers have received notice of the uniform rate structure, and that OPC's request would escalate rate case expense. SSU also contended that OPC incorrectly assumed that all customers in each group would have the same position regarding uniform rates, and that there may be more than two groups of customers.

The Public Counsel is authorized to represent the general public, to file actions, and to appear in the name of the State or its citizens, pursuant to Sections 350.061 and .0611, Florida Statutes. Section 350.0614(1), Florida Statutes, specifically states that the salaries and expenses of the Public Counsel may be

allocated by the Joint Legislative Auditing Committee "only from moneys appropriated to the Public Counsel by the Legislature." The Public Counsel is permitted to retain the services of additional attorneys or experts, "to the extent that the best interests of the people of the state will be better served thereby," provided such expenses are authorized by the Joint Legislative Auditing Committee. Section 350.0613, Florida Statutes.

In our review of OPC's motion, the most essential consideration is whether it is within our authority to grant the relief sought. OPC has not cited any statutory language to support its request, nor has it indicated any case law or other authority which might support its contention that we can require a utility to provide counsel for divergent customer groups.

Section 350.011, Florida Statutes, sets forth our general jurisdiction over utility matters, and Section 367.011(2), Florida Statutes, grants this Commission exclusive jurisdiction over the authority, service, and rates of water and wastewater utilities. While these sections are construed broadly, we find that OPC's request does not fall within our general authority. Moreover, the appointment of counsel for utility customers is not one of the enumerated powers listed in Section 367.121, Florida Statutes. Any reasonable doubt as to the existence of a particular power must be resolved against its exercise. City of Cape Coral v. GAC Utilities, Inc. of Florida, 281 So.2d 493, 496 (Fla. 1973).

There is no statutory directive regarding the appointment of counsel when a conflict exists in the Public Counsel's office. However, representational conflicts have been addressed in other areas. In a case of a conflict between the representation of two clients, Section 27.53(3), Florida Statutes, authorizes the public defender to petition the trial court to appoint other counsel and obtain compensation. In the case of a conflict, the Office of Capital Collateral Representative is authorized pursuant to Section 27.703, Florida Statutes, to petition the sentencing court for alternate counsel, but must pay for that appointed counsel. The Department of Legal Affairs, which is responsible for providing legal services to any department in the state, is authorized to utilize public counsel when a professional conflict of interest exists. Section 16.015, Florida Statutes.

The principle of statutory construction of inclusio unis est exclusio alterius looks to the existence or non-existence of similar statutory provisions. Chapters 350 and 367, Florida Statutes, are silent on the provision for appointment of counsel in the event of a perceived conflict. The fact that the appointment of counsel is addressed in other statutes, but not in those related

to Public Counsel, leads to our conclusion that Florida law does not provide for alternate counsel in this situation. In addition, none of the above cited statutes require the opposing party to provide additional counsel in the event of a perceived conflict.

Florida law places the authority and duty to provide counsel to the general public in utility matters upon the Public Counsel. The law permits the Public Counsel to utilize additional attorneys in order to serve the best interest of the citizens. Moreover, Section 350.0613, Florida Statutes, may already provide OPC the means to obtain the services of alternate counsel, although that statute does not specifically mention conflict.

Even if we determined that we had the authority to appoint alternate counsel, OPC has not demonstrated that a professional conflict exists among the classes of customers. The interests of customers cannot always be quantified merely by the rates which will be set. Moreover, customer groups could not likely be quantified into two categories, as there are many possible variations on rate structure which may result in this hearing.

As to the issue of requiring SSU to provide funds for counsel, OPC argued that the expense would be prudently incurred and could be considered rate case expense. Section 367.0816, Florida Statutes, permits the amount of rate case expense determined by the Commission pursuant to the provisions of Chapter 367 to be recovered in rates. However, as stated above, this Commission has no authority pursuant to Chapter 367 or Chapter 350 to require the utility to incur this expense. There are no provisions for oversight or other administration of such expenses.

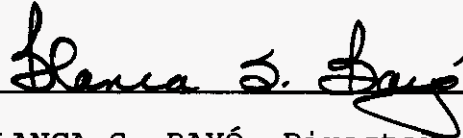
While this is an important issue which affects countless utility customers throughout the state, absent a statutory provision which permits the appointment of counsel in the manner suggested by OPC, or a statutory provision which permits OPC to obtain counsel, we find that we do not have the authority to grant OPC's request. Therefore, we deny OPC's motion for appointment of counsel.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that the Office of Public Counsel's Motion for Appointment of Counsel is hereby denied.

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By ORDER of the Florida Public Service Commission, this 27th
day of February, 1996.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

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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.