

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for rate) DOCKET NO. 950495-WS
increase and increase in service) ORDER NO. PSC-96-0500-FOF-WS
availability charges by Southern) ISSUED: April 9, 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 MOTION FOR REASSIGNMENT OF ALL
SOUTHERN STATES UTILITIES' DOCKETS TO THE
DIVISION OF ADMINISTRATIVE HEARINGS

BY THE COMMISSION:

BACKGROUND

Southern States Utilities, Inc. (SSU or utility) is a Class A utility, which provides water and wastewater service to 152 service areas in 25 counties. On June 28, 1995, SSU filed an application for approval of interim and final water and wastewater rate increases for 141 service areas in 22 counties, pursuant to Sections 367.081 and 367.082, Florida Statutes. The utility also requested an increase in service availability charges, approval of an allowance for funds used during construction and an allowance for funds prudently invested. On August 1, 1995, the Commission determined that SSU's application was deficient because it did not include information for Hernando, Hillsborough and Polk Counties in its filing. On August 2, 1995, the utility filed an amended application which included facilities in those counties to meet

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

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minimum filing requirements. That date has been established as the official date of filing.

The Office of the Public Counsel (OPC), the Sugarmill Woods Civic Association, Inc. (Sugarmill Woods), the Spring Hill Civic Association, Inc. (Spring Hill), the Marco Island Civic Association, Inc. (Marco Island), the Concerned Citizens of Lehigh Acres (Lehigh Acres), and the Harbour Woods Civic Association (Harbour Woods) have intervened in this docket. The Commission has scheduled and held customer service hearings throughout the state. Technical hearings are now scheduled to begin on April 29, 1996, and continue into May. Special Agenda Conferences to decide SSU's revenue requirements and rates are scheduled for July 31, 1996, and August 15, 1996, respectively.

By two separate memoranda, Chairman Clark disclosed that she had received two letters (with letters attached) pertaining to this docket. The first was a one-page letter from Florida Lieutenant Governor MacKay, dated December 21, 1995, to which was attached a four-page letter, dated November 21, 1995, from Arend Sandbulte, Chief Executive Officer (CEO) of Minnesota Power, the parent corporation of SSU, to the Honorable Lawton Chiles, Governor of the State of Florida. The second was a two-page letter from Charles Dusseau, Secretary of the Florida Department of Commerce, dated January 2, 1996, to Chairman Clark.

On February 16, 1996, Sugarmill Woods, Marco Island, Spring Hill, Lehigh Acres, and Harbour Woods (Petitioners) filed an Initial Motion for Assignment of All Dockets Involving Southern States Utilities, Inc., to the Division of Administrative Hearings (DOAH) for Hearing of Matters Involving Substantial Interests and Issuance of Recommended Orders (attached to this motion was a September 8, 1995 letter from John Cirello, President and C.E.O. of SSU, to the Lieutenant Governor). On February 23, 1996, SSU filed its Response to Motion for Assignment of All Dockets Involving SSU to the Division of Administrative Hearings.

MOTION TO ASSIGN ALL DOCKETS INVOLVING
SOUTHERN STATES UTILITIES, INC., TO THE
DIVISION OF ADMINISTRATIVE HEARINGS

As stated above, the Petitioners, based on the letters of Lieutenant Governor MacKay (dated December 21, 1995), and Secretary of Commerce Dusseau (dated January 2, 1996), to Chairman Clark, have moved the Commission to assign all dockets involving SSU to DOAH for hearing of matters involving substantial interests and issuance of recommended orders. The Petitioners allege that, because of these two letters from the executive branch, a dark and

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heavy shadow "has been cast over the impartiality of each and every Commissioner assigned to this proceeding". They further allege that this intercession on behalf of the utility in this case is the exercise of undue influence on the Commissioners by the Executive Office of the Governor.

Petitioners state that there appears to be two main points to the letters. First, the Executive Office of the Governor is concerned about the financial welfare of SSU, and the only cure is for the PSC to give the utility more of the customers' money. Secondly, the Governor has the final and sole vote in determining whether these Commissioners keep their employment after their current terms expire, and three Commissioners are up for reappointment.

Citing Sections 120.66 and 350.042 (both entitled "Ex parte communications"), Florida Statutes, Petitioners allege that these letters are ex parte communications. Petitioners specifically quote Section 350.042(4), Florida Statutes, which provides:

The commissioner may, if he deems it necessary to eliminate the effect of an ex parte communication received by him, withdraw from the proceeding, in which case the chairman shall substitute another commissioner for the proceeding. (emphasis supplied)

Petitioners then state:

It requires no citation that all parties to these proceedings should be legally entitled to have their substantial interests adjudicated by persons having no personal bias or prejudice or personal knowledge of the disputed evidentiary facts concerning the proceeding. The fact finder cannot sit in judgment of the merits of a case when his or her neutrality is shadowed or even questioned.

Section 350.01(5), Florida Statutes, governs the normal procedures for assignment of commissioners to Commission hearings. However, Petitioners note that Section 350.125, Florida Statutes, specifically provides:

Any provision of the law to the contrary notwithstanding, the commission shall utilize hearing officers of the Division of Administrative Hearings of the Department of

Administration to conduct hearings not assigned to members of the commission.

Based on the above, and specifically, this latter section, Petitioners' prayer for relief is that the Commission immediately transfer Docket No. 950495-WS and all other dockets involving SSU to DOAH.

In its response to the petition, SSU disputes the characterization of the letters as ex parte communications and believes that the Petitioners have a strained interpretation of such letters. SSU claims that the letters contain no information relevant to the case, no positions in support of or against any substantive issue, and that the letters simply request information. SSU further states that the Petitioners have made no attempt to demonstrate how they have been prejudiced and that no such prejudice exists or could arise as a result of the information sought pursuant to the letters. However, SSU does not object to the transfer of this proceeding to DOAH as long as there is no further delay in this proceeding.

Other than claiming that there are ex parte communications and citing Sections 120.66, 350.042, and 350.125, Florida Statutes, Petitioners do not state specifically on what code or statute they rely. Section 120.66, Florida Statutes, provides in pertinent part:

- (1) In any proceeding under s. 120.57, no ex parte communication relative to the merits, threat, or offer of reward shall be made to the agency head, after the agency head has received a recommended order, or to the hearing officer by:
 - (a) An agency head or member of the agency or any other public employee or official engaged in prosecution or advocacy in connection with the matter under consideration or a factually related matter.
 - (b) A party to the proceeding or any person who, directly or indirectly, would have a substantial interest in the proposed agency action, or his or her authorized representative or counsel.
- (2) A hearing officer who is involved in the decisional process and who receives an ex parte communication in violation of subsection (1) shall place on the record of the pending matter all written communications received, all written responses to such communications, and a

memorandum stating the substance of all oral communications received and all oral responses made, and shall also advise all parties that such matters have been placed on the record. Any party desiring to rebut the ex parte communication shall be allowed to do so, if such party requests the opportunity for rebuttal within 10 days after notice of such communication. The hearing officer may, if the officer deems it necessary to eliminate the effect of an ex parte communication received by him or her, withdraw from the proceeding, in which case the division shall assign a successor. (emphasis supplied)

Section 350.042, Florida Statutes, provides that commissioners "shall neither initiate nor consider ex parte communications concerning the merits, threat, or offer of reward in any proceeding" The section provides that commissioners knowingly receiving such ex parte communications must place on the record of the proceedings copies of all communications received and provide notice of the same to the appropriate parties. Then, subsection (4) of that section provides that a commissioner may, if he or she deems it necessary to eliminate the effect of an ex parte communication, withdraw from the proceeding, in which case the chair shall substitute another commissioner.

We find that the referenced two letters do not rise to the level which warrants the Commission to withdraw from this case. Although Section 350.125, Florida Statutes, recognizes that DOAH hearing officers may be used for those hearings not assigned to members of the Commission, it gives no guidance on what sort of cases may be assigned to DOAH. However, Section 120.57(1)(b)9, states what the hearing officer's recommended order contains, namely: findings of fact, conclusions, interpretations of administrative rules, and recommended penalty. Where an agency head is unavailable, and a hearing officer is called to preside, then the hearing officer, in addition to making findings of fact and conclusions of law, is charged to record, recommend, and critique agency policy as revealed in the record. However, his or her observations concerning policy matters do not carry the authority attending his findings of fact. See, McDonald v. Department of Banking and Finance, 346 So. 2d 569, 582 (Fla. 1st DCA 1977).

Utility ratemaking is a legislative function (See, Chiles v. Florida Public Service Commission Nominating Council, 573 So.2d. 829, 832 (Fla. 1991)). Many issues in a rate case are not strictly factual, but are imbued with policy considerations. For example, in Docket No. 951029-WU, we are currently considering how to

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calculate the used-and-useful plant when efforts of the water management district, coupled with the Commission's approved rate structure, produce a significant decrease in water usage. This is not just a purely factual determination, but is imbued with policy considerations. Also, for this case specifically, the appropriate rate structure is a major policy consideration. Because ratemaking is primarily a legislative function and infused with policy making, it would be inefficient to send a rate case to DOAH. The hearing officer just does not have the specialized expertise and responsibilities that this Commission has. This specialized knowledge should be present at any hearing.

Although Petitioners have not moved for recusal or disqualification, their request for assignment of all SSU cases to DOAH, to include this docket, would effectively remove the Commission's expertise and special knowledge from being present at the formal hearing. In the cases of McDonald, supra, at 579, and Charlotte County v. General Development Utilities, Inc., 653 So. 2d 1081, 1085 (Fla. 1st DCA 1995), the District Court recognized that agencies had special expertise and that many decisions concerning ultimate facts are actually opinions infused by policy considerations for which the agency has special responsibility. It would seem incongruous that, in a case of this magnitude and having statewide implications, that we would take an action that would limit our ability to use our special expertise.

We note that the Petitioners have requested that all SSU dockets be transferred to DOAH. Docket No. 920199-WS is on remand, and Dockets Nos. 930880-WS and 930945-WS are currently on appeal. Therefore, these dockets are not currently in a position to be transferred.

We find that the Petitioners have failed to demonstrate why all SSU cases should be assigned to DOAH. The letters, without anything more, do not justify the reassigning of all SSU cases to DOAH. Therefore, we find it appropriate to deny the Petitioners' motion to reassign all SSU cases to DOAH.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that the Petitioners' Initial Motion for Assignment of All Dockets Involving Southern States Utilities, Inc., to the Division of Administrative Hearings for Hearing of Matters Involving Substantial Interests and Issuance of Recommended Orders is hereby denied. It is further

ORDERED that this docket shall remain open for the continued processing of this case.

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By ORDER of the Florida Public Service Commission, this 9th
day of April, 1996.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

by: Kay Flynn
Chief, Bureau of Records

(S E A L)

RRJ

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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 25-22.0376, 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.