BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for rate increase and increase in service availability charges by Southern 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.	DOCKET NO. 950495-WS ORDER NO. PSC-96-0624-FOF-WS ISSUED: May 9, 1996

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 ALLOWING ADDITION OF ISSUE AND PERMITTING PRESENTATION OF EVIDENCE ON THAT ISSUE AT THE FORMAL HEARING AND DEFERRING RULING ON THE INTERVENORS' MOTIONS TO DISMISS

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 official date of filing was August 2, 1995.

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.

By memoranda dated December 28, 1995, and January 3, 1996, Chairman Clark disclosed that she had received two letters pertaining to this docket. The first was a one-page letter from Florida Lieutenant Governor McKay, 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 CEO 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. The February 16th motion (motion to reassign) was considered and denied at the March 19th Agenda Conference.

Subsequent to the filing of the above motion, OPC and the other Intervenors filed, on March 12, 1996, a joint Motion to Dismiss and a Request to Schedule Evidentiary Hearing on that motion. SSU timely filed its Response in Opposition to the motion on March 19, 1996.

Also, Citrus County filed its own Motion to Dismiss on March 25, 1996, before filing a petition to intervene. In that motion, Citrus County adopts the Motion to Dismiss of the other intervenors and requests that its motion be considered at the same time as the other Intervenors' Motion to Dismiss. By Order No. PSC-96-0528-PCO-WS, issued April 15, 1996, Citrus County has been granted party status.

INTERVENORS' REQUEST FOR AN EVIDENTIARY HEARING ON THEIR JOINT MOTION TO DISMISS

The Intervenors have filed a joint Motion to Dismiss, which Citrus County has adopted, that is based on the following three alleged instances of misconduct by SSU: (1) soliciting ex parte communications intended to influence the Commission; (2) interference with the notice to customers; and (3) interference with the Citizens' right to counsel. In conjunction with this joint motion, the Intervenors have requested that an evidentiary hearing be held.

The first instance of alleged misconduct concerns the sending of two letters to Chairman Clark and the actions taken by SSU which led up to these letters. As stated earlier, Chairman Clark, upon receiving the letters of Secretary of Commerce Dusseau and Lieutenant Governor McKay (to which Arend Sandbulte's four-page letter was attached), placed those documents on the record of these proceedings. In her cover memoranda, the Chairman stated that the letters addressed matters relevant to pending proceedings, and that her actions were taken pursuant to Section 350.042, Florida Statutes.

Her memoranda also stated that all parties should be given notice of these communications and that they should be informed that they had 10 days from receipt of the notice to file a response. Subsection 350.042(4), Florida Statutes, specifically states that any response must be received by the Commission within 10 days after receiving notice that the ex parte communication has been placed on the record. However, no timely response was received.

The Intervenors allege that these two letters were solicited by SSU's lobbyist Jeff Sharkey, and that a letter sent by Mr. Sharkey to the Lieutenant Governor asked the Chairman to respond to the Lieutenant Governor about the overall economic and financial consequences facing SSU. Also, the Intervenors allege that Mr. Sharkey also sent two facsimiles to the Secretary of Commerce advising him that the situation was critical and that the "deadline" was January 3, 1996 (the day before the Commission's second vote on interim rates).

For the second instance of misconduct, the Intervenors allege that SSU has interfered with the notice to customers. The Intervenors allege that SSU, by sending out post cards which only presented one side of the uniform rate issue, insinuated that the notice required by the Commission was inadequate. Intervenors further allege that the postcards, and SSU's subsequent meetings

with customers, led the customers to believe that the required revenue was a foregone conclusion and that the only issue affecting their rates in this case is the uniform rates versus the stand-alone rates issue. The Intervenors claim that these actions may have convinced the customers that the Commission had been influenced through ex parte contacts, and that such actions amount to an improper attempt to obstruct the notice required by the Commission and an interference with the due process rights of the Citizens.

For the third instance, the Intervenors state that the actions of SSU interfere with the Citizens' right to representation by the Public Counsel. In particular, the Intervenors allege that SSU advised its customers that OPC "had a conflict with what, according to Southern States was the only important remaining issue in the case: uniform rates versus stand-alone rates." Although OPC admits to this conflict on rate structure, they deny that it is the only important remaining issue.

Based on these alleged actions of misconduct, the Intervenors, state that, pursuant to the case of Jennings v. Dade County, 589 So. 2d 1337, 1342 (Fla. 3d DCA 1991), they are entitled to an evidentiary hearing on the motion. The Jennings case was a zoning case in Dade County. In that case, Mr. Schatzman applied for a variance to permit him to operate a quick oil change business on his property, which was adjacent to the property of Mr. Jennings. Mr. Jennings opposed this variance, but after a quasi-judicial hearing, the County Commission upheld the Zoning Appeals Board granting of a variance.

Subsequent to this decision, Mr. Jennings found out that a lobbyist hired by Mr. Schatzman had had ex parte communications with some or all of the county commissioners prior to the vote. Mr. Jennings then filed an action for declaratory and injunctive relief in circuit court alleging that such contacts denied him due process both under the United States and Florida constitutions.

The Third District Court of Appeal noted that the quality of due process required in a quasi-judicial hearing is not the same as that to which a party to a full judicial hearing is entitled. However, it went on to say that certain standards of basic fairness must be adhered to in order to afford due process, and that a quasi-judicial decision based upon the record is not conclusive if these minimal standards of due process are denied. The court then concluded that the allegation of prejudice resulting from ex parte contacts with the decision makers in a quasi-judicial proceeding states a cause of action, and that upon proof that an ex parte contact occurred, its effect is presumed to be prejudicial unless

the defendant proves the contrary by competent evidence. In reviewing the above arguments, we note that ratemaking is a legislative function, rather than a judicial function (See, Chiles v. Public Service Commission, 573 So. 2d 829, 832 (Fla. 1991), Also, the Intervenors have not directly alleged that the actions of SSU have caused prejudice or bias, and Jennings directed that on remand such allegation be made (presumably the allegation was required, but, once made, prejudice would be presumed in a quasi-judicial case). Therefore, we believe that Jennings is not controlling.

Instead of focusing "on the effect of the ex parte communication on the decision maker" as the court did in Jennings, the Intervenors have focused "instead on the misconduct of Southern States in attempting to influence the Commission, whether those actions by Southern States were successful or not." Intervenors argue that, where there has been a deliberate and contumacious disregard of a court's authority in discovery abuse cases, dismissal has been found to be appropriate. The Intervenors further allege that the actions of SSU in securing the letters of the Lieutenant Governor and Secretary of Commerce were much worse than any discovery abuse, and show this deliberate and contumacious disregard for the Commission's authority.

In its response to the Motion to Dismiss, SSU argues that the letters do not address the merits of this proceeding, are not ex parte communications as contemplated by Section 350.042(1), Florida Statutes, and are constitutionally permitted. SSU also argues that dismissal is the wrong remedy.

Notwithstanding the above, we find that the allegations of the Intervenors require further review. Intervenors allege that through SSU's attempt to gain an advantage through outside or ex parte influence, SSU has subverted "the fundamental notion of a fair process and deprive parties of due process." Specifically, Intervenors allege that SSU solicited the ex parte communications and that this is improper.

SSU has raised the question of whether the letters of the Lieutenant Governor and Secretary of Commerce are even ex parte communications. Black's Law Dictionary, Revised Fourth Edition (1982), defines ex parte as:

> On one side only; by or for one party; done for, in behalf of, or on the application of, one party only.

Also, Section 120.66, Florida Statutes, states:

> no ex parte communication relative to the merits, threat, or offer of reward shall be made . . . to the hearing officer by:
>
> * * *
>
> (b) . . . any person who, directly or indirectly, would have a substantial interest in the proposed agency action . . .

It would appear that we should first determine whether the letters were sent or "done for in behalf of, or on the application of" SSU. A part of this question would appear to be did SSU solicit the communications, and were they made on its behalf? A review of the letters themselves does not answer these questions.

Based on all the above, we find that a separate hearing should not be held, but the issue of misconduct or mismanagement should be added as an issue in this case, and the parties should be allowed to present evidence at the formal hearing on whether there is or was misconduct, and what is the appropriate remedy.

The issue shall read:

> Has there been misconduct or mismanagement on the part of SSU, and, if so, what is the appropriate sanction or remedy?

MOTIONS TO DISMISS

Because we have decided to allow the question of whether there has been misconduct or mismanagement to be added as an issue in this proceeding, we will defer ruling on the Motions to Dismiss until the evidence has been presented at the formal hearing.

Based on the foregoing, it is therefore,

ORDERED by the Florida Public Service Commission that the Office of Public Counsel's Request to Schedule an Evidentiary Hearing, as joined by the other intervenors, is denied to the extent set forth herein. It is further

ORDERED that the issue of misconduct or mismanagement shall be added as an issue in this case, and the parties shall be allowed to present evidence on this issue at the scheduled formal hearing.

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

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

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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.