

LAW OFFICES

MESSER, VICKERS, CAPARELLO, MADSEN, LEWIS, GOLDMAN & METZ  
A PROFESSIONAL ASSOCIATION

SUITE 701, FIRST FLORIDA BANK BUILDING  
215 SOUTH MONROE STREET  
POST OFFICE BOX 1876  
TALLAHASSEE, FLORIDA 32302-1876  
TELEPHONE (904) 222-0720  
TELECOPIER (904) 224-4359

SUITE 900  
2000 PALM BEACH LAKES BOULEVARD  
WEST PALM BEACH, FLORIDA 33409  
TELEPHONE (407) 640-0820  
TELECOPIER (407) 640-8202

REPLY TO: Tallahassee

April 5, 1993

Mr. Steve Tribble, Director  
Division of Records and Reporting  
Florida Public Service Commission  
101 East Gaines Street  
Tallahassee, Florida 32399-0850

HAND DELIVERY

Re: FPSC Docket No. 920199-WS

Dear Mr. Tribble:

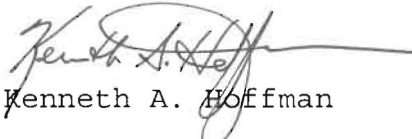
Enclosed for filing in the above-referenced docket are the the following documents:

1. Original and fifteen copies of Southern States' Response to Public Counsel's Motion for Waiver of Rule 25-22.060(3)(A), F.A.C. and Request for Additional Time to File Motion for Reconsideration of Order No. PSC-93-0423-FOF-WS; and
2. A disk in Word Perfect 5.0 containing a copy of the document entitled "Giga.Res."

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely,

  
Kenneth A. Hoffman

KAH/rl  
Enclosures

4  
RECEIVED & FILED

  
FPSC BUREAU OF RECORDS

DOCUMENT NUMBER-DATE  
03689 APR-5 93  
FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application of Southern )  
States Utilities, Inc. and Deltona )  
Utilities, Inc. for Increased )  
Water and Wastewater Rates in ) Docket No. 920199-WS  
Citrus, Nassau, Seminole, Osceola, ) Filed: April 5, 1992  
Duval, Putnam, Charlotte, Lee, )  
Lake, Orange, Marion, Volusia, )  
Martin, Clay, Brevard, Highlands, )  
Collier, Pasco, Hernando, and )  
Washington Counties. )

---

**SOUTHERN STATES' RESPONSE TO  
PUBLIC COUNSEL'S MOTION FOR WAIVER OF  
RULE 25-22.060(3)(A), F.A.C. AND REQUEST  
FOR ADDITIONAL TIME TO FILE MOTION FOR  
RECONSIDERATION OF ORDER NO. PSC-93-0423-FOF-WS**

SOUTHERN STATES UTILITIES, INC. ("Southern States"), by and through its undersigned counsel, hereby files its Response to OFFICE OF PUBLIC COUNSEL'S ("Public Counsel") Motion for Wavier of Rule 25-22.060(3)(a), F.A.C.: Request for Additional Time in Which to File Motion for Reconsideration of Order PSC-93-0423-FOF-WS ("Motion"). In support of its Response, Southern States states as follows:

1. On March 22, 1993, the Commission issued Order No. PSC-93-0423-FOF-WS ("Final Order"). Pursuant to the Final Order, at 112, and Rule 25-22.060(3)(a), F.A.C., a motion for reconsideration must be filed within 15 days of the date of issuance of the Final Order, i.e., by April 6, 1993.

2. On April 2, 1993, Public Counsel filed its Motion requesting a waiver of Rule 25-22.060(3)(a) and an extension of 15 days until April 21, 1993 to file a motion for reconsideration of the Final Order.

DOCUMENT NUMBER-DATE

03689 APR-5 8

FILED-RECORDS/REPORTING

1074

3. In support of its Motion, Public Counsel points to the length of the Final Order, the number of systems involved in the case, and the mathematical calculations of used and useful (including margin reserves) reflected in the Final Order.

4. Public Counsel's Motion is without merit and should be denied for two reasons: (a) the filing requirements for motions for reconsideration are jurisdictional and, as a matter of law, are not subject to waiver by the Commission; and, (b) Public Counsel has failed to demonstrate the existence of extraordinary circumstances justifying an extension of time.

5. Rule 25-22.060(1)(d), F.A.C., provides an express waiver provision applicable to the right to file a motion for reconsideration, and states as follows:

Failure to file a timely motion for reconsideration ... shall constitute a waiver of the right to do so.<sup>1</sup>

6. Thus, the right to seek reconsideration within 15 days of a final order must be timely exercised or it will be waived as a matter of Commission rule. Rule 25-22.060(1)(d) does not permit a request for an extension of time to file a motion for reconsideration -- it forbids it. The legal rationale and support for Rule 25-22.060(1)(d) is found in City of Hollywood v. Public Employees Relations Commission, 432 So.79 (Fla. 4th DCA 1983). In City of Hollywood, at 81-82, the Court held that PERC had the statutory authority to adopt a rule authorizing a motion for reconsideration but had no statutory authority to extend the time for filing an authorized

---

<sup>1</sup>Public Counsel's Motion did not and could not seek waiver of this provision of Rule 25-22.060, F.A.C.

motion for reconsideration:

Granting an extension of time to file this authorized motion for reconsideration, on the other hand, is a different matter. There is no express authority either in the APA, PERC's rules, or in the Model Rules of Procedure for extending the time for filing such a motion. Nor do we believe the agency has inherent power to do so. By analogizing an agency's inherent power to that of a court of general jurisdiction, we conclude that if a circuit court cannot extend the time for filing a motion for new trial in a criminal case, then it would seem to follow that an agency cannot extend the time for filing a motion for reconsideration in an administration proceeding. In State v. Robinson, 417 So.2d 760 (Fla. 1st DCA 1982), the appellate court reversed the trial court for granting a new trial pursuant to a motion filed within the time allowed by an order of extension but not within the ten days provided by the rule.

As with PERC in the City of Hollywood case, there is no statutory or rule authority for the Commission to grant an extension of time to file a motion for reconsideration. Consequently, the Commission's adoption of Rule 25-22.060(1)(d) forbidding extensions of time for filing motions for reconsideration by its express waiver provision is consistent with the Commission's statutory authority and the City of Hollywood decision.

7. Further, prior Commission orders have demonstrated the mandatory and jurisdictional nature of Rule 25-22.060(3)(a) by denying requests for reconsideration filed more than 15 days after the issuance of the order for which reconsideration was sought. See Order No. 17418 issued April 16, 1987, 87 FPSC 4:224 (order denies motion for reconsideration filed 19 days after issuance of order for which reconsideration was sought); City of Plant City v. Mayo, 337 So.2d 966, 971 (Fla. 1976) (petitions for reconsideration filed more than

one month after entry of final order were untimely).<sup>2</sup>

8. Summarizing, the Commission's rules setting forth the specific time limit for filing a motion for reconsideration and providing for a waiver of the right to seek reconsideration if the time limit is not met are properly construed as mandatory and jurisdictional in nature and consistent with the Commission's statutory authority.<sup>3</sup> For this reason alone, Public Counsel's Motion should be denied.

9. In addition, Public Counsel's Motion fails to allege extraordinary circumstances which would justify an extension of time to file a motion for reconsideration. Public Counsel and Southern States are both working under the same time constraints in terms of reviewing the Final Order and preparing, if necessary, a motion for reconsideration. Public Counsel's reliance on the length of the Order as justification for an extension of time ignores the fact that approximately one-tenth of the Order is narrative discussion and decisions on issues with the remainder consisting of schedules reflecting the mathematical calculations applicable to rate base,

---

<sup>2</sup>Similar rulings have been entered by the Commission in response to untimely filed requests for oral argument based on the waiver provision found in Rule 22.0581(1), F.A.C. ("Failure to file a timely request for oral argument shall constitute waiver thereof"). See Order No. 17443 issued April 21, 1987, 87 FPSC 4:306, 311, affirmed U.S. Sprint v. Nichols, 534 So.2d 698 (Fla. 1988); Order No. 21435 issued June 26, 1989, 89 FPSC 6:429.

<sup>3</sup>Compare State Dept. of Env. Reg. v. Puckett Oil Co., 577 So.2d 988 (Fla. 1st DCA 1991) which rejected an argument of implied waiver due to the absence of clear agency procedures establishing waiver. Puckett Oil Co. is clearly distinguishable from the instant case since it did not involve: (1) a motion for reconsideration; and (2) there was no agency rule in that case which expressly provided that the failure to timely file the response at issue was a waiver of the right to do so.

revenues, expenses and rate design implementing the Commission's decisions. Indeed, on some issues, including rate design, Public Counsel maintained "no position" prior to hearing and in its posthearing brief. Accordingly, apart from the legal authorities which support the conclusion that Public Counsel must file its motion for reconsideration within 15 days or waive its right to do so, Public Counsel's Motion fails to allege extraordinary circumstances justifying an extension of time for the filing of its motion for reconsideration.

10. On April 5, 1993, Southern States received a motion for reconsideration filed by Intervenor Cypress and Oak Villages Association ("COVA"). The response to COVA's motion for reconsideration is due April 14, 1993. Additional motions for reconsideration may be filed by other Intervenors (apart from Public Counsel) on or before April 6, 1993. Public Counsel has requested an extension until April 19, 1993 to file its motion for reconsideration. **Southern States reiterates and emphasizes its position that Public Counsel's motion should be denied and no extension granted.** However, if the Commission grants Public Counsel's Motion, Public Counsel should not have the undue benefit and advantage of using Southern States' response to COVA's motion for reconsideration in preparing its own motion for reconsideration on issues similar to those addressed by COVA. Accordingly, and without waiving its positions in opposition to Public Counsel's Motion, Southern States maintains that if Public Counsel's Motion is granted, the Commission also should order that:

a. Southern States shall file its response to all motions for reconsideration filed by all Intervenors on the same date; and

b. Southern States' response to all such motions for reconsideration shall be filed within two weeks following the filing of Public Counsel's motion for reconsideration.

WHEREFORE, Southern States respectfully requests the Commission to enter an Order denying Public Counsel's Motion for Waiver of Rule 25-22.060(3)(a), F.A.C.: Request for Additional Time In Which to File Motion for Reconsideration of Order PSC-93-0423-FOF-WS. If the Commission enters an Order granting Public Counsel's Motion, Southern States requests that such Order provide the relief requested in paragraph 10 of this Response.

Respectfully submitted,



KENNETH A. HOFFMAN, ESQUIRE  
FLOYD R. SELF, ESQUIRE  
LAURA L. WILSON, ESQUIRE  
Messer, Vickers, Caparello,  
Madsen, Lewis, Goldman & Metz, P.A.  
P. O. Box 1876  
Tallahassee, Florida 32302-1876  
(904) 222-0720

and

BRIAN P. ARMSTRONG, ESQUIRE  
Southern States Utilities, Inc.  
1000 Color Place  
Apopka, Florida 32703  
(407) 880-0058

Attorneys for Southern States  
Utilities, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Southern States' Response to Public Counsel's Motion for Wavier of Rule 25-22.060(3)(a), F.A.C. and Request for Additional Time To File Motion for Reconsideration of Order No. PSC-93-0423-FOF-WS was furnished by hand delivery (\*) and/or U. S. Mail, this 5th day of April, 1993, to the following:

Harold McLean, Esq.\*  
Office of Public Counsel  
111 West Madison Street  
Room 812  
Tallahassee, Florida 32399-1400

Larry M. Haag, Esq.  
County Attorney  
107 N. Park Avenue  
Suite 8  
Inverness, Florida 34450

Matthew Feil, Esq.\*  
Catherine Bedell, Esq.\*  
Florida Public Service Commission  
Division of Legal Services  
101 East Gaines Street  
Room 226  
Tallahassee, Florida 32399

Susan W. Fox, Esq.  
MacFarlane Ferguson  
111 Madison Street, Suite 2300  
P. O. Box 1531  
Tampa, Florida 33601

Michael S. Mullin, Esq.  
P. O. Box 1563  
Fernandina Beach, Florida 32034

By:   
KENNETH A. HOFFMAN, ESQ.