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April 13, 1993

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

Re: Docket No. 920199-WS

Dear Mr. Tribble:

Enclosed for filing in the above-captioned proceeding on behalf of the Citizens of the State of Florida are the original and 15 copies of the Citizens' Response to Southern States Motion for Reconsideration.

Please indicate the time and date of receipt on the enclosed duplicate of this letter and return it to our office.

Sincerely,

Harold McLean
Associate Public Counsel

ACK _____
AFA 1 _____
APP _____
CAF _____
CMU _____
CTR _____
EAG _____
LEG 1 _____
LIN 4 _____
OPC _____
RCH _____

Enclosure

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DOCUMENT NUMBER-DATE

04024 APR 13 93

FPSC-PUBLIC RECORDS

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for a rate increase)
by Southern States Utilities, Inc.)

Docket No. 920199-WS

Filed: April 13, 1993

CITIZENS' RESPONSE TO SOUTHERN STATES'
MOTION FOR RECONSIDERATION

The Citizens of the state of Florida, (Citizens) by and through JACK SHREVE, Public Counsel, respond to Southern States Utility Inc.'s (SSU) motion for reconsideration of order PSC-93-0423-FOF-WS as follows:

By motion dated April 6, 1993, SSU moves the commission to reconsider its resolution of OPEB issues by, on the one hand, rearguing its various points first made in the hearing, and on the other by urging the commission to improperly consider matters from some other docket. The nearly irresistible tendency to reargue ones case on reconsideration is well known, and its impropriety is at least as notorious: the commission has never permitted the practice and ought not in this instance.

SSU also seeks to import testimony from another docket under the guise of official recognition. As purported authority for the importation, SSU offers Southern California

Funding, Inc. v. Hutto, 438 So. 2d 426, (Fla. 1st DCA 1983, rev. den., 449 So.2d 265 (Fla. 1984); Allstate Insurance Company v. Greyhound Rent-A-Car, Inc., 586 So.2d 482 (Fla. 4th DCA 1991); Sections 90.202(b) (sic) and Section 120.61, Florida Statutes. None of the purported authority stands for the proposition that the commission may officially notice testimony in some other commission docket.

Hutto addresses a situation in which a plaintiff suffered an adverse summary judgement, which is a finding that there is no genuine issue as to any material fact. The plaintiff, as an appellant asked the First District Court of Appeal to find that the trial court should have judicially noticed a proffered deposition of a witness which may have set up an issue of fact for the trial court. While the District court did offer some language as to the judicial notice matter--trial judge was "probably in error" and "it would seem that the trial judge could properly take notice"¹--the court affirmed the trial court in all respects, rendering the language about judicial notice nonessential to the finding of the court. Moreover, the court was discussing judicial notice to be taken by a circuit court of matters part of the record of a prior circuit court case. It was by no means discussing the inclusion of the self-serving testimony offered by an interested party in a subsequent proceeding before an administrative agency. The case has nothing to do with SSU's belated attempt to bolster the instant record with testimony it offered a later case.

Allstate is even more distant from matters appropriate for consideration here. In Allstate, despite language touching on judicial notice, the extra-record material was

¹ Hutto at 430

admitted under Section 90.804(2)(a) Florida Statutes. Section 90.804(2)(a) codifies the well-known exception to the hearsay rule, namely the *former* testimony of an *unavailable* witness. Messrs Phillips' and Neuwirth's testimony was not former and they were not unavailable: their testimony should have been offered by SSU at the hearing; the hearsay exception applied in Allstate has no place here.

SSU also relies upon Section 90.202(6) which provides:

A *court* may take judicial notice of the following matters...

(6) Records of any *court* of this state or of any *court of record* of the United States or of any state, territory, or jurisdiction of the United States. (italics added)

The Florida Public Service Commission isn't a court; the statute has no application to the commission. Section 90.202(5) permits *courts* of the state to judicially notice official acts of agencies such as the commission but says nothing of their records or of testimony which might be offered before them.

Finally, 120.61, upon which SSU relies is silent as to what material might be officially noticed; but it does provide a requirement² that parties ought to have notice of what material official notice is sought. That is a requirement which SSU did not honor.

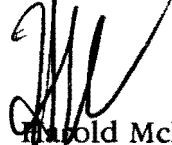
There is neither rule, statute, nor case, which would permit the commission to allow SSU to bolster its case months after its direct and rebuttal cases were made. If the commission permits a subsequent incorporation of subsequent testimony into its records,

² A similar requirement appears in Section 90.203(1), Florida Statutes

its final orders will always be weakened by the possibility that a party will include in a present docket material they should have thought to add in an earlier docket, thus rendering the final order subject to modification upon extra-record evidence.

SSU's suggestion is neither good law nor good sense.

Respectfully submitted,



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Attorney for the Citizens
of the State of Florida

**CERTIFICATE OF SERVICE
DOCKET NO. 920199-WS**

I HEREBY CERTIFY that a correct copy of the foregoing has been furnished by U.S. Mail or hand-delivery to the following parties on this 13th day of April, 1993.

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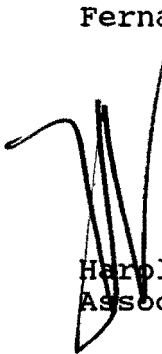
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