

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application by Southern)
States Utilities, Inc. for rate)
increase and increase in service)
availability charges for Orange-)
Osceola Utilities, Inc. in)
Osceola County, and in Bradford,)
Brevard, Charlotte, Citrus, Clay,)
Collier, Duval, Hernando, High-)
lands, Hillsborough, Lake, Lee,)
Marion, Martin, Nassau, Orange,)
Osceola, Pasco, Polk, Putnam,)
Seminole, St. Johns, St. Lucie)
Volusia and Washington Counties.)
)
)

ORIGINAL
FILE COPY

Docket No. 950495-WS

Filed: September 6, 1995

**SOUTHERN STATES UTILITIES, INC.'S
RESPONSE TO OFFICE OF PUBLIC COUNSEL'S MOTION
TO DISMISS REQUEST FOR INTERIM RATE INCREASE**

Southern States Utilities, Inc. ("SSU"), by and through its undersigned counsel, and pursuant to Rule 25-22.037(2)(b), Florida Administrative Code, hereby files its Response to the Office of Public Counsel's ("OPC") Motion to Dismiss SSU's Request for an Interim Increase in Rates ("Motion"). In support of its Response, SSU states as follows:

1. OPC has no standing to participate in the Commission's determination of interim rates pursuant to Section 367.082, Florida Statutes. The Commission has consistently responded to requests for interim rate relief without the participation of the petitioning utility or intervenors. OPC's Motion is an inappropriate effort to present its interpretation of Section 367.082 to the Commission albeit without a shred of citation to supporting legal authority. The only point of entry permitted under Section 367.082 is with respect to a petition (or on the Commission's own motion) to "... preclude the recovery of any

extraordinary or imprudently incurred expenditures or, for good cause shown, increase the amount of the bond, escrow, letter of credit, or corporate undertaking." See §367.082(3), Fla. Stat. Such issues are not raised in OPC's Motion. If the Legislature had intended to provide an opportunity for parties to participate in the determination of interim rates, apart from the Section 367.082(3) issues, it would have said so. Under the rule of expressio unius est exclusio alterius (the mention of one thing implies the exclusion of another),¹ the Legislature's provision for participation only under Section 367.082(3) dictates the conclusion that the Legislature intended no other vehicle for party participation in interim rates determinations. Perhaps the best evidence and supporting rationale for this conclusion is Commission Rule 25-22.0021(1), Florida Administrative Code, which authorizes parties affected by Commission action on Agenda Conference items to address the Commission at Agenda "**... other than actions on interim rates in file and suspend rate cases and declaratory statements....**" (Emphasis supplied.) Accordingly, OPC's Motion should be stricken or, in the alternative, denied for lack of standing. If, however, the Commission considers the substance of OPC's Motion, the Commission should also consider SSU's arguments set forth below and deny OPC's Motion.

2. OPC essentially argues that the Commission should hold SSU to a strict standard of pleading with regard to stating a cause

¹See Thayer v. State, 335 So.2d 815, 817 (Fla. 1976); PW Ventures, Inc. v. Nichols, 533 So.2d 281, 283 (Fla. 1988).

of action for interim rates. OPC should not be heard to complain, then, if its Motion is held to the same strict standard. If held to that standard, OPC's Motion should be stricken as untimely. The Motion purports to be a motion to dismiss for failure to state a cause of action for which relief can be granted. Under Rule 1.140 of the Florida Rules of Civil Procedure, an answer or motion to dismiss in lieu thereof must be served within twenty (20) days after service of the initial pleading.² Rule 25-22.037(1), Florida Administrative Code, allows an answer within twenty (20) days of service as well. The latest date by which SSU's Petition can said to have been served is August 2, 1995. OPC's Motion was served August 30, 1995, well beyond the twenty (20) days allowed for a motion of its type. Therefore, OPC's Motion should be considered untimely and its defense of failure to state a cause of action waived.

3. Alternatively, the Commission should deny OPC's Motion on its merits. Again, holding OPC to the pleading standard which OPC would impose on SSU, the Commission must assume all facts in SSU's Petition for Interim Rates to be true and resolve all reasonable factual inferences in SSU's favor. E.G. Orlando Sports Stadium, Inc. v. State ex rel. Powell, 262 So.2d 881 (Fla. 1972). SSU's Amended Application for Increased Water and Wastewater Rates, etc. includes a request for interim rate relief and incorporates its

²Under Rule 25-22.035(3), Florida Administrative Code, the Florida Rules of Civil Procedure apply to this proceeding unless there is a conflict between a rule of civil procedure and a rule within Chapter 25-22, Florida Administrative Code, in which case the Commission rule would prevail.

MFRs by reference. The MFRs contain rate base and expense information for the years 1994, 1995 and 1996. Therefore, all of the data in SSU's MFRs, historical and projected, must be, for purposes of OPC's Motion, taken as true. Section 367.082(1) requires only a prima facie showing that the utility is earning outside the range of its authorized rate of return. Since a prima facie showing is all that is required, and all the facts in SSU's MFRs are deemed true, the threshold level of proof SSU must show to be entitled to interim rates has been met. This type of prima facie showing as a predicate to interim rate relief is consistent with the intent of the file and suspend statutes as interpreted by the Florida Supreme Court including the protection for ratepayers of requiring a bond or other security so that refunds will be secured if permanent rates, derived after full discovery and the evidentiary hearing process, exceed interim rates.

(Interim) rates were specifically authorized "subject to refund ... to require further and more detailed audit and scrutiny to verify the accuracy of the underlying data and of the calculations, and to provide the public and other interested parties the opportunity to be heard.... [T]he public will be fully protected by the refund provision ..." Order No. 7791. Indeed, the File and Suspend Law itself restricts the Commission's action and imposes the time and bond requirements to protect the public. Citizens of Florida v. Mayo, 316 So.2d 262, 264 (Fla. 1975).

Florida Power Corporation v. Hawkins, 367 So.2d 1011, 1014 (Fla. 1979). OPC's Motion ignores the legislative intent of the interim rates statute. As previously stated, the Legislature designed Section 367.082 to give a utility a rapid mechanism for beginning

to earn its last authorized rate of return while a rate case is pending. Interim revenues are held subject to refund so ratepayers are protected if the utility recovers revenues in excess of its newly authorized rate of return during the interim collection period. Granting OPC's Motion would thwart the Legislature's intent. SSU's opportunity to earn its last authorized rate of return will be irreparably harmed whereas the ratepayers would be completely protected by the refund provisions. In consideration of all of the foregoing, OPC's Motion should be denied.

4. OPC's Motion essentially raises a point of statutory interpretation, but OPC expends little effort in advancing its interpretation. OPC's justification for arguing that the Commission cannot allow a water and wastewater utility to recover interim rates based on projected expenses is, at best, skeletal. OPC argues that Section 367.082(5) requires the Commission to determine the difference between the "achieved rate of return" and the "required rate of return" based on a historical period and "[t]hat difference is then applied to a rate base that may be historic or projected." Motion at 2. OPC goes on to state that SSU has confused "the ability to apply the difference of these historic returns to a projected rate base with ... the use of a projected income statement to determine the initial difference between achieved and required rate of return." Motion at 2. OPC's focus seems to be that the Commission cannot set interim rates using projected expenses even if a projected rate base is used. The Commission should first note that Section 367.082 does not


contain a single reference to the word "expenses." Therefore, the Legislature expressed no direct preference for historic or projected expenses even if a projected rate base is allowed. OPC relies solely on the reference in Section 367.082(5) to earnings, achieved and required, for the most recent twelve month period. Earnings are measured by both rate base and expenses. If rate base is projected and expenses are not, the interim test year will contain inconsistent, and perhaps irreconcilable, data. OPC does not address this point. Mixing ratemaking components (rate base and expenses) from different test years is so utterly contrary to traditional ratemaking practice that the Legislature would not have intended for the Commission to engage in that endeavor without expressly directing the Commission on how to go about doing so. Prior to the amendment of Section 367.082(1) in 1993³, the statute made no reference whatsoever to operating expenses. Under traditional ratemaking, the Commission used historic operating expenses consistent with the use of historic rate base to establish interim rates. Similarly, after the 1993 amendment to this statute, the Commission is authorized to use projected rate base data and projected operating expenses to establish interim rates since this is the only proper ratemaking procedure. Further, apparently disparate statutory provisions must be read together so as to harmonize both provisions. Forsythe v. Longboat Key Beach Erosion Control District, 605 So.2d 452 (Fla. 1992). The reference in Section 367.082(1) to a projected rate base and the reference in

³See Chapter 93-35, Section 7, Laws of Florida.

367.082(5) to earnings for the most recent twelve month period can be harmonized by allowing the use of a projected rate base with projected expenses. This approach achieves harmony between the two statutory provisions as required by Forsythe and it maintains the totality and consistency of the projected interim test year. The ratepayers are still projected since interim revenues are collected subject to refund, and the interim collection by which any refunds are measured is, in SSU's case at least, closely aligned with the projected interim year. OPC's suggestion that SSU's request for interim rates be dismissed because of SSU's use of projected expenses should be rejected. As stated above, SSU has made a prima facie showing that it is entitled to interim relief. An unsolved issue of statutory construction should not serve as a premise for denying SSU that interim relief.

5. OPC's request for oral argument should be denied. OPC fails to state any reason whatsoever why oral argument should be granted or how oral argument will aid the Commission as required by Rule 25-22.058, Florida Administrative Code. Moreover, Rule 25-22.0021, Florida Administrative Code, does not allow parties to participate at Agenda Conference items where action on interim rates will be taken. OPC's Motion, as indicated earlier, is an inappropriate and disguised effort by OPC to participate in the Commission's interim rates determination when OPC has not even made an attempt to explain its right of standing to do so. OPC's request for oral argument should, therefore, be denied.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Southern States Utilities, Inc.'s Response to Office of Public Counsel's Motion to Dismiss Request for Interim Rate Increase was furnished by U. S. Mail to the following 6th day of September, 1995:

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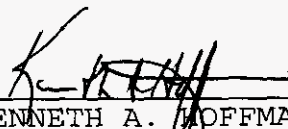
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