

FLORIDA PUBLIC SERVICE COMMISSION

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M E M O R A N D U M

SEPTEMBER 14, 1995

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (JAEGER) *RP*
DIVISION OF WATER AND WASTEWATER (WILLIS) *WP*

RE: UTILITY: SOUTHERN STATES UTILITIES, INC.
DOCKET NO. 950495-WS
COUNTY: BRADFORD, BREVARD, CHARLOTTE, CITRUS,
CLAY, COLLIER, DUVAL, HERNANDO, HIGHLANDS,
HILLSBOROUGH, LAKE, LEE, MARION, MARTIN,
NASSAU, ORANGE, OSCEOLA, PASCO, POLK, PUTNAM,
SEMINOLE, ST. JOHNS, ST. LUCIE, VOLUSIA, AND
WASHINGTON

CASE: APPLICATION BY SOUTHERN STATES UTILITIES, INC.
FOR RATE INCREASE AND INCREASE IN SERVICE
AVAILABILITY CHARGES

AGENDA: SEPTEMBER 26, 1995 - REGULAR AGENDA - DECISION PRIOR TO
HEARING - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\950495-M.RCM

CASE BACKGROUND

Southern States Utilities, Inc. (SSU or utility) is a Class A utility, which provides water and wastewater service to service areas in 25 counties. On June 28, 1995, SSU filed an application with the Commission requesting increased water and wastewater rates for 141 services areas, pursuant to Section 367.081, Florida Statutes, and for an increase in service availability charges, pursuant to Section 367.101, Florida Statutes. The utility also requested that the Commission approve an allowance for funds used during construction (AFUDC) and an allowance for funds prudently invested.

DOCUMENT NUMBER-DATE

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The intervention of the Office of the Public Counsel (OPC), was acknowledged by Order No. PSC-95-0901-PCO-WS, issued on July 26, 1995. The Sugarmill Woods Civic Association, Inc., the Spring Hill Civic Association, Inc., and the Marco Island Civic Association, Inc., have also intervened. Intervention was granted by Order No. PSC-95-1034-WS, issued August 21, 1995, and an order which has been signed by the prehearing officer but has not been issued as of this date.

The Commission recently reviewed the jurisdictional status of SSU's facilities throughout the state in Docket No. 930945-WS. In Order No. PSC-95-0894-FOF-WS, issued on July 21, 1995 (now on appeal), the Commission determined that SSU's facilities and land constituted a single system and that the Commission had jurisdiction over all of SSU's facilities and land throughout the state pursuant to Section 367.171, Florida Statutes.

However, the utility's initial filing in this docket did not include SSU's facilities in Hernando, Hillsborough and Polk Counties. Staff advised the utility that after a review of the information, the filing was incomplete and the minimum filing requirements (MFRs) were deficient. Staff listed nine specific deficiencies concerning schedules and other filings, and also stated that because of the Commission's decision in Docket No. 930945-WS the application must be modified to include Hernando, Hillsborough, and Polk Counties.

SSU agreed to provide information to satisfy the nine specific deficiencies, but asserted that the MFRs did not require the information on Hernando, Hillsborough and Polk Counties. This dispute was brought before the Commission at the August 1st Agenda Conference for resolution. The Commission found that the utility's filing was deficient and that the utility must include all of its facilities when seeking uniform rates (this decision was memorialized by Order No. PSC-95-1043-FOF-WS, issued on August 21, 1995). On August 2, 1995, the day after the Commission vote, SSU filed the information on Hillsborough, Polk, and Hernando counties, but did not file any additional testimony.

On August 29, 1995, OPC filed a motion to dismiss SSU's filing. OPC also filed a motion to dismiss SSU's request for interim rates on August 30, 1995. On September 5, 1995, SSU filed a response to OPC's motion to dismiss SSU's filing and the request for oral argument.

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This recommendation concerns OPC's August 29, 1995, motion to dismiss, and SSU's response. OPC's motion to dismiss SSU's request for interim rates will be reviewed in the recommendation addressing SSU's interim request, which is currently scheduled to be filed on September 26, 1995.

DISCUSSION OF ISSUES

ISSUE 1: Should OPC's Request for Oral Argument on its Motion to Dismiss be granted?

RECOMMENDATION: Yes. However, oral argument should be limited to five minutes for each side at the agenda conference in which the Commission considers the Motion to Dismiss. (JAEGER)

STAFF ANALYSIS: On August 30, 1995, the day after filing its Motion to Dismiss, the OPC filed one request for oral argument for both its Motion to Dismiss and its Motion to Dismiss SSU's Request for an Interim Increase. The latter Motion is to be considered at the Special Agenda Conference in October where the Commission will also consider SSU's request for interim rates. The OPC's motion to dismiss, and SSU's response, are the subjects of Issue 2 of this recommendation.

Rule 25-22.058(1), Florida Administrative Code, requires a request for oral argument to accompany the pleading upon which argument is requested and to "...state with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it." OPC failed to file its request for oral argument with its Motion and made no attempt to demonstrate with particularity why oral argument would aid the Commission. SSU argues that these deficiencies should bar the granting of a request for oral argument, and that the granting of oral argument would needlessly increase rate case expense.

However, because this matter has not been to hearing, parties may participate at the Agenda Conference where the Motion to Dismiss is considered. Therefore, the Commission should allow oral argument, but have it coincide with the Agenda Conference. Further, staff recommends that such argument should be limited to five minutes for each side. This will not significantly increase rate case expense and will give everyone an opportunity to be heard.

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ISSUE 2: Should the Commission grant the Citizens' Motion to Dismiss?

RECOMMENDATION: No. The utility has met the minimum filing requirements as of the date set out in Chairman Clark's letter. (JAEGER, WILLIS)

STAFF ANALYSIS: As stated in the Background portion of this Recommendation, the Office of the Public Counsel (OPC) filed its Motion to Dismiss SSU's rate case on August 29, 1995, and SSU responded on September 5, 1995. In its motion, the OPC claims that Chairman Clark's May 4th letter required the filing to be complete by August 2, 1995, and that it implied that no extensions would be granted. OPC further argues that since the Director's letter did not go out until the second week of August, the filing could not be determined to be complete as of August 2, 1995 (as stated in the Director's letter). Specifically, OPC disputes "the official date of filing because the filing is incomplete and because the date, as established by Mr. Hill, was established retroactively." OPC claims that since SSU filed additional data on Hillsborough, Hernando, and Polk counties, as required by the Commission, without filing additional or supplemental prefiled testimony, the MFRs are still not complete. The OPC also argues that the official date of filing is as of the time of the director's (Director of Water and Wastewater) determination, and that since that determination came approximately 12 days after August 2, 1995, SSU did not comply with the Chairman's letter and the appropriate sanction is dismissal.

In its response, SSU argues that its testimony is in compliance with Rule 25-22.436, Florida Administrative Code, and is valid whether the three counties (Hernando, Hillsborough, or Polk) are included or not.

In the case of Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993), the Florida Supreme Court stated that "[t]he function of a motion to dismiss is to raise as a question of law the sufficiency of facts alleged to state a cause of action." The Florida Supreme Court went on to say in that same case that "[i]n determining the sufficiency of the complaint, the trial court must not look beyond the four corners of the complaint, . . . nor consider any evidence likely to be produced by the other side."

In the Order Finding Deficiency and Requiring Revised Filing, Order No. PSC-95-1043-FOF-WS, the Commission found SSU's original filing to be deficient and ordered that it "shall not be considered complete until the utility has included Hernando, Hillsborough, and Polk County in its filing." SSU then filed only the documentation and no additional testimony. Upon Staff's review of this documentation, the Director found that the deficiencies had been

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met and issued his letter saying in its entirety, "Please be advised that the minimum filing requirements have now been met and that the official date of filing for the above case is hereby established as August 2, 1995." Unfortunately, although the letter went out in the second week of August, it was misdated as June 26, 1995.

Section 367.083, Florida Statutes, governs the Commission's determination of an official date of filing ("ODF"), and states as follows:

Within 30 days after receipt of an application, rate request, or other written document for which an official date of filing is to be established, the Commission or its designee shall either determine the official date of filing or issue a statement of deficiencies to the applicant. . . . Such statement of deficiencies shall be binding upon the Commission to the extent that, once the deficiencies in the statement are satisfied, the official date of filing shall be promptly established as provided herein. Thereafter, within 20 days after the applicant indicates to the Commission that it believes that it has met the minimum filing requirements, the Commission or its designee shall either determine the official date of filing or issue another statement of deficiencies. . . . this procedure shall be repeated until the applicant meets the minimum filing requirements and the official date of filing is established. (emphasis supplied)

Rule 25-30.025, entitled "Official Date of Filing", Florida Administrative Code, implements Section 367.083, Florida Statutes, and states:

(1) The "official date of filing" is the date on which the Director of the Division of Water and Wastewater determines the utility has filed completed sets of the minimum filing requirements (MFRs), including testimony that may be required by Rule 25-30.436(2) and payment of the appropriate filing fee to the Director of Records and Reporting.

(2) The Director of the Division of Water and Wastewater shall determine the official date of filing for any utility's application and

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advise the applicant. The Commission shall resolve any dispute regarding the official date of filing.

Pursuant to this rule, the Commission's designee, the Director of the Division of Water and Wastewater ("Director"), complied with the 30-day requirement in Section 367.083 by issuing a letter dated July 10, 1995 outlining ten deficiencies in SSU's Application and MFRs. On July 14, 1995, SSU filed the necessary documents and information responding to MFR deficiencies 1 through 9 outlined in the Director's July 10th letter, but challenged the other deficiency concerning MFR information for the additional counties. On August 1, 1995, the Commission ruled that SSU was required to file such information for the additional counties, and SSU filed such information on August 2, 1995.

Under Section 367.083, the Commission had 20 days after August 2, 1995, to issue another statement of deficiencies. No such statement was issued, and, instead, the Director, on or about August 8, 1995, issued a letter advising that the official date of filing had been established as August 2, 1995. Therefore, the requirement for a deficiency letter within 20 days has already passed and no deficiency letter has been issued. Section 367.083, Florida Statutes, states that such statement of deficiencies shall be binding upon the Commission, and it is hard to understand how a statement of no deficiencies would not be equally binding.

OPC argues that the plain meaning to Rule 25-30.025(1), Florida Administrative Code, requires the Director to establish the official date of filing as of the time he makes the determination that MFRs are complete and not as of the date the completed MFRs were filed. This is inconsistent with many years of Commission practice. The history of Rule 25-30.025(1) shows that prior to November 1993, the rule read as follows:

The "official date of filing" is the date on which a utility has filed completed sets of the minimum filing requirements for any application and paid the appropriate filing fee to the Director of Records and Reporting.

The main reason for the change on November 30, 1993, appears to be to state the Director's role in designating the official date of filing and not to change what that date would be. Both prior to the change, and after the change, the Commission has consistently set the official date of filing as the date all the MFRs and testimony were available for review, i.e., the date the Division of Records and Reporting received it.

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In support of its position, that the official date of filing should not be until the Director makes his determination, the OPC quotes the following sentences from Chairman Clark's letter:

To minimize any regulatory lag that may occur, we request that you file the above [referring to the petition] no later than August 2, 1995. Because of the difficulty in scheduling hearing dates it is not anticipated that an extension of this filing date will be granted.

Under the file and suspend law, the time period for processing the request will begin when all of the required data is filed and accepted as complete. If not complete, the official filing date will be the date the corrections to the deficiencies are accepted. The utility is instructed to file all information it wishes the Commission to consider when arriving at a decision on its rate case application with its original filing. Because of the time limitations contained in Section 367.081, Florida Statutes, and the lengthy auditing and investigation required, information not filed with the original application may not be considered.

OPC then states that both this letter and Rule 25-30.025(1), Florida Administrative Code, require that the official date of filing be set as of the date that the Director may review the filings and determines them to be acceptable.

A close review of both the rule and the letter, and past practices of the Commission, shows this not to be the case. When there are no further deficiencies, the Commission has always set the official date of filing as of the date of the last filing that corrected any and all deficiencies. That way, the OPC gets its full eight months, and OPC's contention that the official date of filing should not be as of the day of filing is not correct.

OPC also argues that additional prefiled testimony on the three additional counties was required and the Director was not correct when he made his determination that the MFR's were complete. SSU argues that OPC does not have standing to challenge the Director's determination that there are no further deficiencies. Also, SSU questions whether the Commission has the authority to require SSU to file additional testimony on the three counties in light of the appeal of the order in Docket No. 930945-

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WS, by governmental entities which creates an automatic stay. SSU further argues that OPC has not met its burden of showing that the Commission has the authority to grant the relief requested. SSU also argues that OPC's motion goes to the sufficiency of SSU's testimony to support its filing, and not whether the testimony was filed and the requirements of the rules met.

Rule 25-30.436, Florida Administrative Code, requires the direct testimony to, at a minimum, explain why the rate increase is necessary and address those areas anticipated at the time of filing to be at issue. SSU has filed several volumes of testimony, and the Director has determined that such testimony satisfies Rule 25-30.436, Florida Administrative Code. Clearly, SSU attempts, in its prefiled testimony, to set out a case for increased rates and addresses many issues, to include the applicability of uniform rates. It has now provided information about the three counties and believes that its prefiled testimony is styled in such a way that it presents a case for rate relief whether the three counties are included or not. Whether it has completely justified its case and addressed all issues merely goes to the adequacy of its case, and not whether it has met the MFRs. Therefore OPC's argument would appear to go to the sufficiency of the filing to support its case and this should be determined at hearing and not in a motion to dismiss. Staff believes that SSU has filed all the documentation required by the Commission, and that its prefiled testimony complies with Rule 25-30.436, Florida Administrative Code (i.e., the prefiled testimony explains why the rate increase is necessary and addresses those areas anticipated at the time of filing to be at issue).

As stated previously, in considering a motion to dismiss, a court should not consider any evidence likely to be produced. Since SSU has complied with Commission rules and orders, the Commission should not at this point in the proceedings make a determination which would amount to a granting of summary judgment.

The OPC is seeking a sanction in this case for a perceived deficiency in the filing. The courts have repeatedly held that "the severity of the sanction should be commensurate with the violation" and that "dismissal is inappropriate when the moving party is unable to demonstrate meaningful prejudice." See, Neal v. Neal, 363 So. 2d 810, 812 (Fla. 1st DCA 1994). Also, dismissal is a "drastic remedy" that should be used only in "extreme situations", and the actions of SSU do not warrant a dismissal. Carr v. Dean Steel Buildings, Inc., 619 So. 2d 392 (Fla. 1st DCA 1993).

Based on all the above, Staff recommends that OPC's Motion to Dismiss be denied.

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ISSUE 3: Should this docket remain open?

STAFF RECOMMENDATION: Yes, if the Commission approves Issue 2.
(JAEGER)

STAFF ANALYSIS: If the Commission approves Staff's recommendation in Issue 2, the docket should remain open in order to process the utility's filing.