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**ORIGINAL  
FILE COPY**

November 13, 1995

Ms. Blanca S. Bayo, Director  
Division of Records and Reporting  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Betty Easley Conference Center  
Room 110  
Tallahassee, Florida 32399-0850

**HAND DELIVERY**

Re: Docket No. 950495-WS

Dear Ms. Bayo:

Enclosed herewith for filing in the above-referenced docket on behalf of Southern States Utilities, Inc. ("SSU") are the following documents:

1. Original and fifteen copies of Southern States Utilities, Inc.'s Response to Office of Public Counsel's Tenth Motion to Compel, Tenth Motion to Postpone Date for Filing Intervenor Testimony, and Request for In Camera Inspection of Document; and

2. A disk in Word Perfect 6.0 containing a copy of the document entitled "Resp.10". *(Disk had virus)*

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*  
Kenneth A. Hoffman

ACK 1  
AFA 3  
APP \_\_\_\_\_  
CAF \_\_\_\_\_  
CMUJ \_\_\_\_\_  
CTR \_\_\_\_\_  
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OFC \_\_\_\_\_  
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SEC 1  
WAS 1  
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cc: All Parties of Record  
Trib.3

RECEIVED & FILED  
29  
EPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE  
11286 NOV 14 95  
FPSC-RECORDS/REPORTING

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, Highlands, 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: November 13, 1995

SOUTHERN STATES UTILITIES, INC.'S RESPONSE TO OFFICE OF PUBLIC COUNSEL'S TENTH MOTION TO COMPEL, TENTH MOTION TO POSTPONE DATE FOR FILING INTERVENOR TESTIMONY, AND REQUEST FOR IN CAMERA INSPECTION OF DOCUMENT

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") Tenth Motion to Compel, Tenth Motion to Postpone Date for Filing Intervenor Testimony, and Request for In Camera Inspection of Document, and in support thereof, states as follows:

OPC's Tenth Motion to Compel

1. OPC's recitation of facts purporting to support its Tenth Motion to Compel conveniently ignores material facts which undermine its request that SSU produce a privileged letter dated December 14, 1993 from Laura A. Holquist, an officer of Lehigh Corporation, to Ronald Sorenson, an attorney retained by Lehigh Corporation. A complete recitation of the material facts is set forth below.

DOCUMENT NUMBER-DATE

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a. On August 17, 1995, OPC served its First Set of Requests for Production of Documents including Document Request No. 63 which states as follows:

Provide copies of the outside independent auditors' workpapers for each of the past three years for the company, Topeka Group, Inc., MPL, Buenaventura Lakes, East L.A. Services Corporation, and Lehigh Acquisition Corporation.

b. OPC's Motion neglects to advise the Commission that on August 29, 1995, SSU filed a number of objections to OPC's First Set of Interrogatories and First Set of Requests for Production of Documents including an objection to Document Request No. 63, together with a motion for protective order. With respect to Lehigh Acquisition Corporation, the holding company of Lehigh Corporation, the objection was based on SSU's contentions that the request was overbroad, burdensome, and outside the scope of discovery and that the documents requested were not within SSU's possession, custody and control. Further, OPC's Document Request No. 63 did not include a request for outside auditors' workpapers for Lehigh Corporation which is a separate entity from Lehigh Acquisition Corporation. Nonetheless, in an attempt to cooperate with OPC's discovery efforts, SSU consented to OPC's on-site review of Price Waterhouse's workpapers in the Price Waterhouse files for SSU.

c. SSU did not assert an objection based on privilege in its August 29, 1995 objections since SSU was not in possession of the documents and had no knowledge as to whether the documents contained privileged materials. SSU's objections to OPC's Document

Request No. 63 remain pending.

d. On September 18, 1995, OPC conducted an on-site review of Price Waterhouse's audit workpaper files maintained for SSU at Price Waterhouse's offices in Orlando. Pursuant to that review, the December 14, 1993 letter, clearly a privileged document, was inadvertently produced by Price Waterhouse for inspection and review by OPC.

2. OPC has reviewed the document at issue. It is critical to note that OPC does not dispute the privileged nature of the letter. The letter is marked as an attorney-client communication on its face and its privileged nature is acknowledged by OPC. Instead, OPC alleges that any privilege has been waived by virtue of SSU's failure to lodge a timely objection based on privilege and by production of the document. OPC's contentions are in error.

3. OPC's implicit acknowledgment of the privileged nature of the letter is consistent with Florida law. Section 90.502, Florida Statutes (1993), codifies the attorney-client privilege and there is no dispute that the letter from Ms. Holquist (the authorized representative of the client, Lehigh Corporation) to Mr. Sorenson (Lehigh Corporation's attorney) falls within the protection of the statutory privilege. Further, Florida law indicates that the attorney-client privilege available to Lehigh Corporation may be properly asserted by SSU.

4. In Visual Scene, Inc. v. Pilkington Brothers, plc., 508 So.2d 437 (Fla. 3d DCA 1987), the Court held that the attorney-client privilege is not waived where privileged information is

shared among parties and their counsel who have a common interest in preserving the privileged nature of the shared information. While Lehigh Corporation is not a party to the proceeding, this is clearly a distinction without a substantive difference<sup>1</sup> since Lehigh and SSU do share a common interest in maintaining the confidentiality of the shared information in the letter.

5. Nor has SSU (or Lehigh) waived the attorney-client privilege in this case. Further, as a matter of law, the failure to make a timely objection based on privilege does not constitute a waiver of the objection. See, e.g., Truly Nolen Exterminating, Inc. v. Thomasson, 554 So.2d 5 (Fla. 3d DCA 1989) (as to work-product privilege); Insurance Company of North America v. Noya, 398 So.2d 836, 838 (Fla. 5th DCA 1981) (as to attorney-client privilege). Finally, the inadvertent production of the letter by SSU's outside auditors does not waive the privilege.

Numerous courts have held that the inadvertent production of privileged material by an attorney does not waive the attorney-client privilege. See, e.g., Georgetown Manor, Inc. v. Ethan Allen, Inc., 753 F.Supp. 936 (S.D. Fla. 1991); see also, Kusch v. Ballard, 645 So.2d 1035, 1039 (Fla. 4th DCA 1994) (Stevenson, J., concurring in part and dissenting in part). The issue of waiver typically depends on the facts of each case. In Georgetown, an attorney produced thousands of pages of documents which

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<sup>1</sup>Stated differently, to require Lehigh Corporation to file a petition for leave to intervene to attain party status would appear to be unnecessary in order to achieve the purpose and intent of the "common interest" rule established in the Visual Scene decision.

inadvertently contained the transcript of a privileged attorney-client conversation. The Court held that the inadvertently produced documents remained privileged. The Court cited Transamerica Computer Co. v. International Business Machine Corp., 573 F.2d 646, 650-52 (9th Cir. 1978) where the Ninth Court had made a similar ruling "... in light of the voluminous accelerated discovery proceedings...." Georgetown, 753 F.Supp. at 938-939, fn. 4.

These decisions support a similar result in this case. Here, the letter was not inadvertently produced by SSU's attorneys but was instead inadvertently produced by SSU's outside auditors who maintained custody of the letter on a confidential basis pursuant to the accountant-client privilege between Price Waterhouse and SSU, discussed infra, recognized under Florida law pursuant to Sections 90.5055, 90.507 and 473.616, Florida Statutes (1993). As in the Georgetown and Transamerica cases, discovery in this case clearly has been voluminous (OPC has served several hundred interrogatories and document requests) and accelerated (under the eight month statutory clock).

Accordingly, the Commission should determine that the December 14, 1993 letter is protected under the attorney-client privilege and that assertion of the privilege has not been waived by SSU or Lehigh Corporation.

6. The letter also is protected under Florida's statutory accountant-client privilege. See §90.5055, 90.507 and 473.316, Fla. Stat. (1993). Again, OPC has made no claim to the contrary.

7. Nor has the accountant-client privilege been waived. The accountant-client privilege belongs to the client (SSU) and the accountant cannot waive the privilege absent authorization from the client. See, e.g., Wray v. Department of Professional Regulation, 410 So.2d 960, 961 (Fla. 1st DCA 1982) ("[P]sychotherapist-patient privilege inures to the patient, not the psychotherapist, and can be waived only by the patient or someone acting on the patient's behalf.") Applying the principles of the Wray decision to this case, Price Waterhouse could not, as a matter of law, waive SSU's (nor Lehigh Corporation's) accountant-privilege as it concerned and served to protect disclosure of the December 14, 1993 letter by virtue of Price Waterhouse's inadvertent production of the letter.

8. As a final matter, SSU notes that OPC took the depositions of SSU witnesses Vierima and Bencini on November 9, 1995 and asked questions and received responses (as well as anticipated late-filed deposition exhibits) concerning non-privileged information surrounding Lehigh Corporation's relationship with SSU, the pertinent Lehigh developer agreement and the modification thereto, the escrow agreements with the states of New York and Michigan, the details concerning how these agreements are being applied and the accounting treatment of transactions (i.e., lot sales, construction of facilities) pursuant to or affected by the Lehigh agreements. OPC has the information it needs to prepare its testimony and there is no need to produce the confidential December 14, 1993 letter which contains the confidential disclosures of Ms. Holquist to her counsel, Mr.

Sorenson, concerning these subjects.

**OPC's Request for In-Camera Inspection**

9. As previously stated, OPC has reviewed the document which was inadvertently provided and makes no claim that it is not privileged. Thus, there is no need for an in-camera inspection and the request should be denied.

**OPC's Tenth Motion to Postpone Date for Filing Intervenor Testimony**

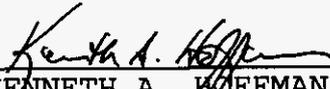
10. As previously noted, OPC has all of the non-privileged information it requested (apart from the late-filed deposition exhibits) during the November 9 depositions on the aforementioned Lehigh Corporation subjects. All previous motions filed by OPC requesting additional time to file testimony that have been ruled on by the Prehearing Officer have been denied.<sup>2</sup> OPC produces no rationale or support in this Tenth Motion to Postpone which would support a different result. Further, by Order No. PSC-95-1394-PCO-WS issued November 9, 1995 (after the filing of OPC's instant Motion), the Prehearing Officer granted OPC seven additional days for the filing of its testimony.

WHEREFORE, for the foregoing reasons, SSU respectfully requests that OPC's Tenth Motion to Compel, Tenth Motion to Postpone Date for Filing Intervenor Testimony, and Request for In-Camera Inspection of Document be denied.

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<sup>2</sup>See Order Nos. PSC-95-1258-PCO-WS, PSC-95-1321-PCO-WS, PSC-95-1368-PCO-WS, and PSC-95-1394-PCO-WS.

Respectfully submitted,

  
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Apopka, Florida 32703  
(407) 880-0058

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Southern States Utilities, Inc.'s Response to Office of Public Counsel's Tenth Motion to Compel, Tenth Motion to Postpone Date for Filing Intervenor Testimony, and Request for In Camera Inspection of Document was furnished by U. S. Mail to the following on this 13th day of November, 1995:

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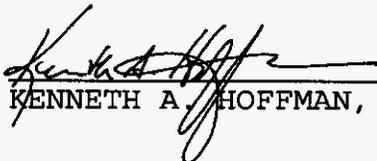
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Resp. 10