

FLORIDA PUBLIC SERVICE COMMISSION

Gerald L. Gunter Building  
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Tallahassee, Florida 32399-0850

M E M O R A N D U M

November 20, 1995

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (O'SULLIVAN) *MS*  
DIVISION OF WATER AND WASTEWATER (WILLIS) *AS*

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

CASE: APPLICATION FOR RATE INCREASE FOR ORANGE-OSCEOLA UTILITIES, INC. IN OSCEOLA COUNTY, AND IN BRADFORD, BREVARD, CHARLOTTE, CITRUS, CLAY, COLLIER, DUVAL, HIGHLANDS, LAKE, LEE, MARION, MARTIN, NASSAU, ORANGE, OSCEOLA, PASCO, PUTNAM, SEMINOLE, ST. JOHNS, ST. LUCIE, VOLUSIA, AND WASHINGTON COUNTIES BY SOUTHERN STATES UTILITIES, INC.

AGENDA: DECEMBER 5, 1995 - REGULAR AGENDA - DECISION PRIOR TO HEARING - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\950495-5.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. SSU also requested 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

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Docket No. 950495-WS  
November 20, 1995

prudently invested.

On July 26, 1995, the Commission issued Order No. PSC-95-0901-PCO-WS that acknowledged the intervention of the Office of the Public Counsel (OPC). The Sugarmill Woods Civic Association, Inc., and the Spring Hill Civic Association, Inc. were granted intervenor status by Order No. PSC-95-1034-PCO-WS, issued August 21, 1995. The Marco Island Civic Association, Inc., was granted intervenor status by Order No. PSC-95-1143-PCO-WS, issued September 14, 1995. A technical hearing has been scheduled for January 29-31, February 1, 2, 5, and 7-9, 1996.

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 SSU's facilities and land throughout the state pursuant to Section 367.171, Florida Statutes. That decision has been appealed to the First District Court of Appeal.

The First District Court of Appeal reversed portions of Order No. PSC-93-0423-FOF-WS, which addressed SSU's previous rate proceeding in Docket No. 920199-WS. The Commission determined in Order No. PSC-95-1292-FOF-WS, issued October 19, 1995, that SSU should charge final rates based on a modified stand alone basis.

By Order No. PSC-95-1327-FOF-WS, issued November 1, 1995, the Commission denied SSU's request for interim rates in this docket, but acknowledged that the utility may file another petition for interim relief. On November 13, 1995, SSU filed a second request for interim rates.

OPC has filed four previous motions to dismiss in this docket. The Commission has denied each of these motions. On October 17, 1995, OPC filed a Fifth Motion to Dismiss, seeking a dismissal of the rate proceeding based upon cumulative violations of Commission rules governing discovery. SSU filed a timely response in opposition to OPC's motion on October 24, 1995. This recommendation addresses OPC's Fifth Motion to Dismiss.

Docket No. 950495-WS  
November 20, 1995

DISCUSSION OF ISSUES

**ISSUE 1:** Should the Commission grant OPC's Fifth Motion to Dismiss Southern States Utilities, Inc.'s application for a rate increase?

**RECOMMENDATION:** No. The Commission should deny OPC's Fifth Motion to Dismiss. SSU's petition adequately states a cause of action upon which the Commission can grant relief.

**STAFF ANALYSIS:** On October 17, 1995, OPC filed its Fifth Motion to Dismiss SSU's application for rate increase. SSU timely responded to that motion on October 24, 1995.

At the time of the filing of this recommendation, OPC has filed ten motions to compel discovery. OPC contends the matters raised in its first, seventh and eighth motions demonstrate SSU's flagrant disregard of the Commission's discovery rules. OPC states that SSU has ignored its obligation to respond to discovery in a timely manner, which in turn impedes OPC's preparation and ability to file testimony. OPC contends that this rate proceeding should be dismissed as a result of SSU's failure to respond to discovery in a timely manner. In support of its contention, OPC cites Watson v. Peskoe, 407 So.2d 954 (Fla 3d DCA 1981), which holds that "a deliberate and contumacious disregard of the court's authority will justify application of this severest of sanctions [dismissal]." Watson at 954. OPC refers to several other cases which upheld the dismissal of an action for failure to obey discovery orders.

In its response, SSU's contends that it has worked diligently to respond to OPC's hundreds of discovery requests. The utility argues that it has not willfully or flagrantly disregarded OPC's discovery requests, but has instead "bent over backwards" to provide OPC with discovery responses. In its response, the utility lists the dates to which it responded to OPC's discovery. SSU argues that most of its responses were served on time, and that it made efforts to ensure that the late responses were made as soon as possible. SSU cites Neal v. Neal, 636 So.2d 810 (Fla. 1st DCA 1994) and the cases cited therein, for the proposition that dismissal of a rate case is "the ultimate sanction" that should only be utilized in extreme cases. The utility states that it has not been sanctioned by the Prehearing Officer and has complied with the Commission's rules and orders regarding discovery. It further argues that OPC has not been prejudiced in the discovery process.

OPC's Fifth Motion to Dismiss cites the matters raised in its First, Seventh and Eighth Motions to Compel as grounds for dismissal. The disposition of those motions are set forth below:

In its First Motion to Compel, filed August 31, 1995, OPC

Docket No. 950495-WS  
November 20, 1995

listed approximately 110 interrogatories and requests for production which had not been served within the 35 day period allotted for discovery responses. Order No. PSC-95-1258-PCO-WS, issued October 13, 1995, noted that the significant portion of those responses were served after OPC's first motion to compel was filed. In fact, only one interrogatory from that first motion to compel had to be addressed in that order: SSU was ordered to respond to Interrogatory No. 87.

Similarly, when OPC filed its seventh and eighth motion to compel, several responses to its interrogatories and requests for production remained outstanding. However, as stated in Order No. PSC-95-1394-PCO-WS, issued November 9, 1995, following the filing of the motions to compel, SSU responded to all of the outstanding discovery requests.

Motions to dismiss are typically addressed by considering whether the facts set forth in the initial pleadings, viewed in the most favorable light, demonstrate a claim for which the Commission can grant relief under the provisions of Section 367.081, Florida Statutes. In Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993), the 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 court further stated 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." This standard is not applicable to OPC's motion. OPC does not allege that SSU has not stated a cause of action, but rather that SSU's petition should be dismissed because of SSU's failure to respond to discovery requests in a timely manner.

OPC's motion seeks dismissal as a punitive sanction, rather than for failure to state a cause of action. The Commission has the authority to dismiss a matter for failure to comply with discovery procedures. Rule 25-30.034, Florida Administrative Code, permits sanctions against a party that does not comply with discovery procedures or an order requiring discovery. Dismissal is permissible under Rule 1.380, Florida Rules of Civil Procedure. See also Rule 25-30.042, Florida Administrative Code.

The dismissal of a proceeding, even a dismissal without prejudice, is a severe penalty to impose upon a party. It is "the most severe of all sanctions, and should be employed only in extreme circumstances." Neal v. Neal, 636 So.2d 810, 812 (Fla. 1st DCA 1994). It requires an express finding of a willful or deliberate refusal to obey an order regarding discovery. Commonwealth Federal Savings & Loan v. Tubero, 569 So.2d 1271, 1273 (Fla. 1990). The party moving for sanctions must demonstrate

Docket No. 950495-WS  
November 20, 1995

meaningful prejudice as a result of the failure to comply. In re Estate of Brandt, 613 So.2d 1365, 1367 (Fla. 1st DCA 1993).

Pursuant to Rule 25-22.034, Florida Administrative Code, and Order No. PSC-95-0943-PCO-WS, issued August 4, 1995, the discovery procedures in this docket are governed by Rules 1.280 through 1.400, Florida Rules of Civil Procedure. The volume and complexity of the utility's filing is unique. The nature of this docket requires cooperation and consideration by all parties. Even given the volume of discovery, parties in this docket should be expected to comply with discovery requests in a timely manner.

SSU's untimely responses did not comply with Rules 1.340 and 1.350, Florida Rules of Civil Procedure, or the Commission's rules and orders cited above. Moreover, when the utility recognized that certain responses would be late, it could have notified OPC of the delay, and the anticipated response time. This may have alleviated the need for OPC to file its motions to compel. Nonetheless, while SSU has not responded to every request within the appropriate time period, the vast majority of the discovery has been responded to within the appropriate time limits. Staff recommends that SSU's untimely responses to discovery do not rise to the level for which sanctions should be imposed, let alone the dismissal of the entire proceeding. SSU has not wilfully or deliberately refused to comply with the Commission's rules or orders, as required by Neal v. Neal. Furthermore, Staff recommends that OPC has not demonstrated a meaningful prejudice which would justify the dismissal of the case, as required by In re Estate of Brandt.

The cases which address this topic uniformly demonstrate that dismissal for failure to comply with discovery is seldom imposed, and is done so only after numerous attempts to secure compliance. For instance, in Merrill Lynch Pierce Fenner & Smith, Inc. v. Haydu, 413 So.2d 102 (Fla. 1st DCA 1982), the court upheld the entry of default against the defendant, Merrill Lynch, after it had failed to produce any documents after being ordered to do so by the lower court on four separate occasions over a two-year period. In Ferrante v. Waters, 383 So.2d 749 (Fla. 4th DCA 1980), a default was entered after the defendant failed to comply with discovery orders for six months. In Watson v. Peskoe, 407 So.2d 954 (Fla. 3d DCA 1981) the court upheld the dismissal where the plaintiff failed to comply with several orders concerning discovery and sanctions.

In other cases where non-compliance was not as severe, appellate courts have reversed lower court dismissals. For instance, in Belflower v. Wakefield, 510 So.2d 1130 (Fla. 2d DCA 1987), the court remanded a default against a defendant who had not appeared for two scheduled depositions so that the lower court could hold a hearing to determine whether the defendant's actions

Docket No. 950495-WS  
November 20, 1995

justified default. In Zafirakopoulous v. South Miami International Crabhouse Corp., 513 So.2d 1353 (Fla. 3d DCA 1987), the reviewing court found that the plaintiff's failure to appear at a scheduled deposition while she was out of the country did not warrant dismissal with prejudice.

Staff further notes that the Prehearing Officer has addressed this issue in Order No. PSC-95-1394-PCO-WS, issued November 9, 1995, which addresses OPC's seventh and eighth motions to compel. That order noted that SSU had answered the majority of OPC's discovery requests in a manner which gave OPC sufficient time to prepare its testimony. However, the order required the utility to notify the party propounding the discovery request, if that request could not be responded to within the 30 day timeframe. This requirement gives parties notice as to untimely discovery, and may help rectify potential disputes before they are brought before the Commission. Additionally, that order postponed the date of filing intervenor testimony by seven days.

Docket No. 950495-WS  
November 20, 1995

ISSUE 2: Should this docket remain open?

RECOMMENDATION: Yes, if the Commission approves Staff's recommendation in Issue 1.

STAFF ANALYSIS: If the Commission approves Staff's recommendation to deny OPC's Fifth Motion to Dismiss, this docket should remain open.