1 30 pm

STATE OF FLORIDA

OFFICE OF THE PUBLIC COUNSEL

c/o The Florida Legislature
111 West Madison Street
Room 812
Tallahassee, Florida 32399-1400
904-488-9330

JACK SHREVE
PUBLIC COUNSEL

December 11, 1995

Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Docket No. 920199-WS

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket are the original and 15 copies of Citizens' Response in Opposition to Southern States' Motion for Leave to File Reply and Proposed Reply. A diskette in IBM-compatible WordPerfect 5.1 is also submitted.

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

Sincerely,

John Roger Howe
Deputy Public Counsel

ACK ✓
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Enclosures

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application of Southern States Utilities, Inc. and Deltona Utilities, Inc. for Increased Water and Wastewater Rates in Citrus, Nassau, Seminole, Osceola, Duval, Putnam, Charolotte, Lee, Lake, Orange, Marion, Volusia, Martin, Clay, Brevard, Highlands, Collier, Pasco, Hernando, and Washington Counties.	Docket No. 920199-WS Filed: December 11, 1995

CITIZENS' RESPONSE IN OPPOSITION
TO SOUTHERN STATES' MOTION FOR LEAVE
TO FILE REPLY AND PROPOSED REPLY

The Citizens of the State of Florida, through the Office of Public Counsel, pursuant to Rule 25-22.037(1)(b), Florida Administrative Code, respond in opposition to the Motion of Southern States Utilities, Inc. for Leave to File Reply and Proposed Reply, which should be denied for the following reasons:

1. SSU's motion for leave to file a reply is made pursuant to Rule 25.22.037(2), Florida Administrative Code. That rule (which, interestingly, allows for responses to the motion but not for replies) is found within Subpart B of the Commission's procedural rules. Subpart B is entitled: "Prehearing Procedures." The only motions specifically contemplated by Subpart D, "Post-Hearing Procedures," are motions for reconsideration, Rule 25-22.060, and motions to either impose a stay or to vacate an automatic stay pending appeal, Rule 25-22.061. Even if the umbrella rule on motions can be invoked during the post-hearing process in appropriate circumstances, the Commission should not (and, perhaps,

cannot) indulge a party's attempt to modify the specific procedures applicable to reconsideration.

2. An administrative agency has no general authority, apart from rule or statute, to entertain motions for reconsideration. In Systems Management Associates, Inc. v. State, Department of HRS, 391 So. 2d 688 (Fla. 1st DCA 1980), the court held that a notice of appeal was not timely, even though it was filed within 30 days of the order disposing of a motion for rehearing, because the motion, itself, was not sanctioned by rule or statute. In Department of Corrections v. Career Service Commission, 429 So. 2d 1244 (Fla. 1st DCA 1983), the court distinguished Systems Management and held that rendition of a final order was tolled if the agency is affirmatively authorized by rule to consider motions for rehearing. (Judge Wentworth, in dissent, however, would have also dismissed this appeal as untimely "because Chapter 120, Florida Statutes, does not authorize tolling of the period for appeal of final agency action by any motion." 429 So. 2d at 1246.)

3. These cases suggest that an agency's rule on reconsideration should be strictly construed. The Commission, itself, recently took the position before the First District Court of Appeal that it could not extend, by motion or otherwise, the 15-day period allowed after entry of a final order for filing a motion for reconsideration.[1] Rule 25-22.060(3)(c) limits the responsive pleadings to one response for each motion and for each cross-motion for reconsidera-

[1]Appellee Florida Public Service Commission Response to Court's Order to Show Cause, filed November 7, 1995, in Citizens v. North Fort Myers Utility Co., No. 95-01439 (Fla. 1st DCA 1995).

tion. The Commission must have contemplated that the process would end with the filing of a response to the initiating motion for reconsideration. SSU's motion for leave to file a reply should be denied. The proposed reply included with SSU's motion should not be considered by the Commission.

4. If the Commission considers the substance of SSU's motion, it must also consider whether SSU's filing is truly a reply, or merely a "replay," of its earlier arguments. Having begun by stating it must reply to unanticipated responses, SSU begins, instead (at pages 2-3), with a listing and summary of SSU's position on issues that were, in SSU's opinion, "either affirmatively recognized or not seriously dispute[d]" in the responses. SSU is undoubtedly trying to bolster weaknesses in its original motion for reconsideration. Even then, it makes mistakes. If SSU's reply is to be considered, fairness dictates the Citizens have an opportunity to respond to these gratuitous allegations.

5. To begin with, the Citizens did not "affirmatively recognize" SSU's portrayal of revenue requirements as the "law of the case" to be a "governing principle[] of law." Reply, at 2. To the contrary, the Citizens refused to concede the issue's relevance because it could have no effect on the outcome.[2]

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[2]The Citizens' response at page 9 states:"Thus, even if it is assumed (without conceding) that the revenue requirement could become the law of the case after appeal, it would not always dictate the rates to be awarded on remand, and it would never force the retroactive application of rates of service consumed during the pendency of the appeal." The following sentence appears on page 13 of the response: "Assuming, for the sake of argument, that a revenue requirement could be 'the law of the case,' it would be (continued...)

6. SSU's law-of-the-case arguments are irrelevant because the relief SSU is after is inconsistent with its own theory. If the finality of the revenue requirements issue protects SSU from harm caused by making refunds, there would be no reason for SSU to offer its surcharge proposal or explain why its approach avoids conflict with the proscription against retroactive ratemaking. SSU could just sit back comfortable in the knowledge that, no matter what the Commission did, SSU could not suffer adverse consequences. The only reason SSU portrays its surcharge proposal as having only prospective effect is because SSU knows it must steer clear of the retroactive-ratemaking barrier standing squarely in its path. But there would be no roadblock if the law of the case envisioned by SSU provided the protection SSU claims.

7. Next, SSU's allegation that the Citizens failed to dispute SSU's claim that interim rates were inadequate to generate the final revenue requirements is misleading at best. Reply, at 2. The adequacy of the interim rates was not a subject for reconsideration of the Final Order, let alone the Refund Order. There was no reason for the Citizens to address interim rates in response to the motion for reconsideration.

8. SSU repeats its assertions about interim rates at page 8, note 10, as part of its explanation for not seeking a stay of the Final Order. Whether SSU should have applied for a stay, however,

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[2](...continued)
given full effect if, on remand, the Commission awarded rates it believed would afford a fair opportunity to earn the intended return on equity during <u>future</u> periods in which such rates were in effect. [Emphasis in original.]"

is already addressed in the motion for reconsideration and in the Citizens' response. If the Commission desires further clarification on the subject, it need only refer to its own November 28, 1995, filing in GTE Florida, Inc. v. Clark, etc., et al., Case No. 85,776 (Fla. 1995). The Commission, in a notice of supplemental authority, brought to the Court's attention the case of New England Telephone and Telegraph Co. v. Rhode Island Public Utilities Commission, 358 A. 2d 1, 15 PUR4th 249 (R.I. 1976). After referring to the applicable statute, the Rhode Island Supreme Court said that "if the company feels aggrieved by the commission's order, its remedy is to seek a stay of that order pending judicial review thereof." 15 PUR4th at 270. [3]

9. Furthermore, the Citizens neither affirmatively recognized nor failed to seriously dispute SSU's interpretation that "the effect of the Court's remand was to afford the Commission the opportunity and authority to return the parties to their former

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[3]In that case, the court gave a negative answer to the question "whether this court may direct the commission, upon remand, to authorize the company to recoup revenues lost during the pendency of this court's review of an erroneous commission decision." 15 PUR4th at 266. The company had taken the position that it was "entitled to earn what is ultimately determined to be a fair return from the date that the [Commission's] original report and order were issued." 15 PUR4th at 266. "In the case at bar, the company asks this court to permit calculation of future rates on the basis of known past losses, to wit, losses resulting from the operation of an allegedly wrongful order. This is precisely what [other cited courts] found to be in violation of the nonretroactivity principle." 15 PUR4th at 268. The Rhode Island court found its interpretation of the proscription against retroactive ratemaking and the presumed validity of current rates to be "consistent with the often repeated warning that a utility company, by commencing a rate proceeding, impliedly accepts all the risks inherent in that course of action." [Emphasis added; citations omitted.] 15 PUR4th at 269.

positions, preserving all the rights and options they had prior to the uniform rate structure in the 1993 Final Order." [Emphasis by SSU] Reply, at 3. The Citizens' position was just the opposite; customers who paid higher rates must receive a refund without surcharging other customers, without regard to the position in which the utility found itself.

10. The Citizens response did not specifically address SSU's repetitive reference to its refund obligation as a "cost" or "expense." Motion for Reconsideration, at 6, 17, 19, 22, 24, 25, 44, App. B (Ludsen affidavit), at 2, 4, 6. Yet SSU feels the need to renew these assertions, again describing its plan as one "which provides prospective rate mechanisms to discharge a current expense incurred in 1995 as a consequence of a remand remedy." [Emphasis added.] Reply, at 12-13, n. 16.

11. The refund of excess collections, however, is not an expense; it should be booked to a contra-revenue account (and then below-the-line to the extent refunds are for revenues collected in prior years). Regulation allows a utility to charge rates which cover its costs, including the cost of capital. A refund of excess collections is not a cost. The Commission cannot do indirectly what it cannot do directly: It cannot use the utility and its ability to terminate service for lack of payment as an intermediary to force some customers to pay others.

12. All the Commission can do is authorize the utility to bill customers pursuant to its approved tariffs for future service, in which case the utility keeps whatever money it is fortunate

enough to collect. Final approval, however, is not received until the rate order becomes final, either because it was not challenged or because it was upheld on appeal. The Commission must order the refund of revenues collected pursuant to an order overturned on appeal because the Commission lacked the authority to allow their collection in the first place. The utility does not have to return all the money it collected pursuant to the overturned order because the previous rate order (which would otherwise have been superseded by a new, valid rate order) remains in force. Thus, the utility must only refund the additional revenue collected from the imposition of rates higher than those previously authorized, and the refund must be made to whoever paid higher rates. This would include any customers whose uniform statewide rates were "below cost" but still above their previously approved rates. Under SSU's proposal, however, customers who are themselves entitled to a refund would be surcharged to make refunds to others.

13. If one person wants to send money to another person, he need not involve his local utility. Moreover, the Commission has no jurisdiction over utility customers. It cannot direct one customer to pay another (the relief sought by SSU), any more than it can order a customer to pay a utility.

14. SSU alleges it must be allowed to answer arguments in the responses which it could not anticipate in its motion for reconsideration. Reply, at 1-2. But, with rare exception, it ignores the arguments raised against it. The Citizens' response, at page 11, for example, stated that SSU's surcharge proposal would

allow the utility to retain the actual payments of increased rates collected from customers who mounted a successful appeal against those rates. This is, apparently, a subject SSU did not anticipate because it was not addressed in SSU's motion for reconsideration. Yet SSU ignores the issue altogether in its purported reply.

15. SSU did not address the question whether the delay inherent in the rate-setting process could effect a taking in violation of constitutional principles. This, too, is apparently a subject SSU could not have anticipated. The Citizens response, at page 4, brought the matter to SSU's attention by stating "a utility cannot suffer a taking in the constitutional sense while the regulatory process, including an appeal of the Commission's decision, runs its course." The "reply" is silent on the subject.

16. To demonstrate that rates are not always linked to revenue requirements, the Citizens, at page 9, cited to those circumstances in which SSU received permission to charge statewide rates to newly acquired systems. The "reply" ignores the fact that SSU asks for rates bearing no relationship to revenue requirements when it suits its purposes.

17. When SSU chooses to mention the Citizens' response, it sidesteps the issue instead of replying directly. For example, the Citizens' response, at page 6, states that "SSU . . . failed to avail itself of Rule 25-22.061(2), which allows for stays under reasonable conditions." SSU notes correctly (Reply, at 11) that the rule is available to "a party seeking to stay a final or nonfinal order of the Commission pending judicial review." SSU is a party,

and the Commission's order was at the First District Court of Appeal pending judicial review. Obviously, SSU qualified under the rule to ask the Commission to stay its order under reasonable conditions pending the outcome of the appeal taken by Citrus County and Sugarmill Woods. The fact that Citrus County effected an automatic stay under a different provision of the rule had no bearing on SSU's right to ask for a stay under this provision. Nothing in the rule suggests only the party filing the appeal is entitled to request a stay. But, in SSU's view (Reply, at 11), the rule did not apply because SSU chose not to invoke it: "Since SSU was not the party seeking judicial review of the 1993 Final Order or the party seeking to stay that Order, the cited provision of the Rule did not apply to SSU."[4]

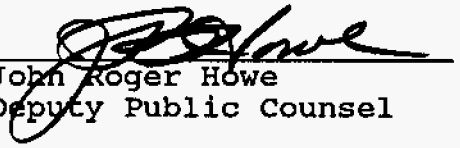
18. The Citizens will, however, concede that SSU points out one mistake in the Citizens' response. Reply, at 9-10. After considering the explanation contained in the reply, the Citizens agree that SSU's refund proposal would not put the company in a better position than if the uniform statewide rates had been upheld on appeal.

[4]SSU suggests (Reply, at 8, n. 10) that the only alternative rates that the Commission might have approved pending the outcome of the appeal were those originally proposed by SSU or a continuation of the interim rates authorized during the pendency of the Commission proceeding. This assertion ignores the fact that Rule 25-22.061(2) places no limitations on the Commission's ability to protect SSU from irreparable harm.

WHEREFORE, the Citizens of the State of Florida, through the Office of Public Counsel, urge the Florida Public Service Commission to deny the Motion of Southern States Utilities, Inc. for Leave to File Reply and Proposed Reply.

Respectfully submitted,

JACK SHREVE
Public Counsel



John Roger Howe
Deputy Public Counsel

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111 West Madison Street
Room 812
Tallahassee, Florida 32399-1400

(904) 488-9330

Attorneys 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 Citizens' Response in Opossition to Southern States' Motion for Leave to File Reply and Proposed Reply has been furnished by U.S. Mail or hand-delivery* to the following party representatives on this 11th day of December, 1995.

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Purnell & Hoffman, P.A.
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SSU
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FILE COPY

December 14, 1995

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FPSC-RECORDS/REPORTING

Via UPS

Ms. Blanca S. Bayo
Florida Public Service Commission
Director of Records & Reporting
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Docket No. 920199-WS: Application of Southern States Utilities, Inc. and Deltona Utilities, Inc. for Increased Water and Wastewater Rates in Citrus, Nassau, Seminole, Osceola, Duval Putnam, Charlotte, Lee, Lake, Orange, Marion, Volusia, Martin, Clay, Brevard, Highlands, Collier, Pasco, Hernando, and Washington Counties.

Dear Ms. Bayo:

In accordance with Order No. PSC-95-1292-FOF-WS, issued October 19, 1995 ("Order Complying With Mandate, Requiring Refund, and Disposing of Joint Petition"), please find enclosed 15 copies of this letter and the attached Surety Rider extending the duration and amount of the bond posted as security for the appeal in the above docket.

If you have any questions, please contact me at (407) 880-0048, ext. 152.

Very truly yours,

Brian P. Armstrong
General Counsel

dlh/95L70

Enclosures

c: All Parties of Record

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SAFECO

SURETY RIDER

SAFECO INSURANCE COMPANY OF AMERICA
GENERAL INSURANCE COMPANY OF AMERICA
FIRST NATIONAL INSURANCE COMPANY OF AMERICA
HOME OFFICE: SAFECO PLAZA
SEATTLE, WASHINGTON 98185

To be attached to and form a part of

Type of Bond: Appeal Bond Docket No. 920199-WS

ORIGINAL
FILE COPY

Bond No. 5723795

dated effective 12/14/93
(MONTH, DAY, YEAR)

executed by Southern States Utilities, Inc., as Principal,
(PRINCIPAL)

and by Safeco Insurance Company of America, as Surety,
(SURETY)

in favor of Florida Public Service Commission.
(OBLIGEE)

In consideration of the mutual agreements herein contained the Principal and the Surety hereby consent to changing

the bond penalty

From: Three million and no/100 ($3,000,000.00)

To: Eight million and no/100 ($8,000,000.00)

Nothing herein contained shall vary, alter or extend any provision or condition of this bond except as herein expressly stated.

This rider is effective 12/14/95
(MONTH, DAY, YEAR)

Signed and Sealed 12/04/95
(MONTH, DAY, YEAR)

Southern States Utilities, Inc.
PRINCIPAL

By: Scott A. Thomas VP/CFO
TITLE

Safeco Insurance Company of America
SURETY

By: Lee McGriff III
Lee McGriff III
ATTORNEY-IN-FACT

SAFECO®

POWER OF ATTORNEY

SAFECO INSURANCE COMPANY OF AMERICA
GENERAL INSURANCE COMPANY OF AMERICA
HOME OFFICE: SAFECO PLAZA
SEATTLE, WASHINGTON 98185

No. 5904

KNOW ALL BY THESE PRESENTS:

That **SAFECO INSURANCE COMPANY OF AMERICA** and **GENERAL INSURANCE COMPANY OF AMERICA**, each a Washington corporation, does each hereby appoint
LEE MCGRIFF, III; R. E. DANIELS; ANITA W. ROSENAU; MIKE WOODS; JEFFERY L. JOHNSON; MARY JO LYONS; MARK W. EDWARDS, II; BETTY W. BOURQUE, Birmingham, Alabama*****************************

its true and lawful attorney(s)-in-fact, with full authority to execute on its behalf fidelity and surety bonds or undertakings and other documents of a similar character issued in the course of its business, and to bind the respective company thereby.

IN WITNESS WHEREOF, **SAFECO INSURANCE COMPANY OF AMERICA** and **GENERAL INSURANCE COMPANY OF AMERICA** have each executed and attested these presents

this 1st day of July, 19 94.

CERTIFICATE

Extract from the By-Laws of **SAFECO INSURANCE COMPANY OF AMERICA**
and of **GENERAL INSURANCE COMPANY OF AMERICA:**

"Article V, Section 13. - FIDELITY AND SURETY BONDS . . . the President, any Vice President, the Secretary, and any Assistant Vice President appointed for that purpose by the officer in charge of surety operations, shall each have authority to appoint individuals as attorneys-in-fact or under other appropriate titles with authority to execute on behalf of the company fidelity and surety bonds and other documents of similar character issued by the company in the course of its business . . . On any instrument making or evidencing such appointment, the signatures may be affixed by facsimile. On any instrument conferring such authority or on any bond or undertaking of the company, the seal, or a facsimile thereof, may be impressed or affixed or in any other manner reproduced; provided, however, that the seal shall not be necessary to the validity of any such instrument or undertaking."

Extract from a Resolution of the Board of Directors of **SAFECO INSURANCE COMPANY OF AMERICA**
and of **GENERAL INSURANCE COMPANY OF AMERICA** adopted July 28, 1970.

"On any certificate executed by the Secretary or an assistant secretary of the Company setting out,
(i) The provisions of Article V, Section 13 of the By-Laws, and
(ii) A copy of the power-of-attorney appointment, executed pursuant thereto, and
(iii) Certifying that said power-of-attorney appointment is in full force and effect,
the signature of the certifying officer may be by facsimile, and the seal of the Company may be a facsimile thereof."

I, R. A. Pierson, Secretary of **SAFECO INSURANCE COMPANY OF AMERICA** and of **GENERAL INSURANCE COMPANY OF AMERICA**, do hereby certify that the foregoing extracts of the By-Laws and of a Resolution of the Board of Directors of these corporations, and of a Power of Attorney issued pursuant thereto, are true and correct, and that both the By-Laws, the Resolution and the Power of Attorney are still in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the facsimile seal of said corporation

this 4th day of December, 19 95.

S-974/EP 1/93

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