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December 27, 1995

Blanca S. Bayo
Director
Division of Records & Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-1400

Dear Ms. Bayo:

Enclosed please find two copies of a Petition filed with the First District Court of Appeal today, which Petition is related to Dockets Nos. 920199-WS, 930880-WS, 950495-WS. Please forward one copy to Lila Jaber.

Thank you for your assistance.

Sincerely,

Michael B. Twomey

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IN THE DISTRICT COURT OF APPEAL
IN AND FOR THE STATE OF FLORIDA
FIRST DISTRICT

CITRUS COUNTY, FLORIDA,
SUGARMILL WOODS CIVIC ASSOCIATION,
INC. f/n/a CYPRESS AND OAKS VILLAGES ASSOCIATION, AND THE SPRING HILL CIVIC ASSOCIATION, INC.

Petitioners,

vs.

SOUTHERN STATES UTILITIES, INC., and THE FLORIDA PUBLIC SERVICE COMMISSION,

Respondents.
_____/

CASE NO.:

PSC Docket Nos.920199-WS, 930880-WS, & 950495-WS

PETITION FOR REVIEW OF NON-FINAL ADMINISTRATION ACTION OF FLORIDA PUBLIC SERVICE COMMISSION IN PSC DOCKET NOS. 920199-WS, 930880-WS, AND 950495-WS: ORDER NO. PSC-95-1438-FOF-WS, ORDER DECIDING AGAINST THE DISQUALIFICATION OF COMMISSIONER DIANE K. KIESLING IN DOCKETS NOS. 950495-WS, 930880-WS, AND 920199-WS

PETITION OF CITRUS COUNTY, SUGARMILL WOODS CIVIC ASSOCIATION, INC. AND SPRING HILL CIVIC ASSOCIATION, INC.

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COUNSEL FOR PETITIONERS CITRUS COUNTY, SUGARMILL WOODS CIVIC ASSOCIATION, INC., AND SPRING HILL CIVIC ASSOCIATION, INC.

JURISDICTION

1. The jurisdiction of this Court is sought pursuant to Rule 9.100(c)(3), Fla.R.App.P., which provides that this Court shall have the jurisdiction to consider:

> (3) A petition for review of non-final administrative action under the Florida Administrative Procedure Act.

The order[1] which the Petitioners seek this Court's review is a non-final order of the Florida Public Service Commission ("PSC") affirming the earlier order[2] of PSC Commissioner Diane Kiesling in which she declined to disqualify herself from further participation in three PSC dockets in which the petitioners are parties.[3] Each of the three dockets were Section 120.57(1), Florida Statutes proceedings held pursuant to Chapter 120, Florida Statutes, the Administrative Procedure Act.

FACTS

2. The facts Petitioners rely upon in seeking this Court's review of the non-final agency action of the PSC are as follows:

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[1] Order No. PSC-95-1438-FOF-WS, Order Deciding Against The Disqualification Of Commissioner Diane K. Kiesling In Dockets Nos. 950495-WS, 930880-WS, and 920199-WS, issued November 27, 1995. (Appendix, Tab A)

[2] Order No. PSC-95-1199-PCO-WS, Order Declining To Withdraw From Proceeding, issued September 25, 1995. (Appendix, Tab B)

[3] The Sugarmill Woods Civic Association, Inc., f/n/a the Cypress and Oaks Villages Association, is a party to all three dockets. Citrus County is only a party to Docket No. 920199-WS, while the Spring Hill Civic Association, Inc. is a party to Dockets Nos. 930880-WS and 950495-WS.

A. Southern States Utilities, Inc. ("SSU") is a Class A utility providing water and wastewater service to 152 service areas in 25 counties. (Appendix, Tab A, Page 2).

B. Docket No. 920199-WS was a SSU rate increase request in numerous Florida counties, including Citrus County. (Appendix, Tab A, Page 3). The PSC final order issued in Docket No. 920199-WS granted SSU a so-called "uniform rate" structure for some 127 of its water and wastewater systems. Petitioners Citrus County and Sugarmill Woods Civic Association, Inc. unsuccessfully sought reconsideration of the final rate order from the PSC arguing, among other things, that the uniform rates were unduly discriminatory, were not supported by the evidence of record, and had not been properly noticed.

C. Docket No. 930880-WS involved a PSC investigation into what was the appropriate rate structure for SSU in numerous Florida counties. (Appendix, Tab A, Page 3). The central issue of this docket was whether the so-called "uniform rate" structure approved by the PSC in Docket No. 920199-WS should be retained or replaced with some other rate structure. Petitioners Sugarmill Woods Civic Association, Inc. and the Spring Hill Civic Association, Inc. argued that uniform rates required the payment of unlawful, unconstitutional and unduly discriminatory rate subsidies and were, thus, impermissible. SSU and the PSC staff supported the uniform rate structure and urged its retention. The PSC precluded petitioners arguing the legality of uniform

rates in this docket and, ultimately, entered a final order approving the retention of uniform rates.

D. On January 10, 1995, this Court heard lengthy Oral Arguments on the appeal of Docket No. 920199-WS. The sole subject of the Oral Arguments involved the legality and constitutionality of uniform rates, whether the uniform rate structure had been properly noticed and whether the PSC's findings of fact in support of uniform rates were supported by competent, substantial evidence of record.

E. Prior to the beginning of the 1995 Legislative Session, which began in March, 1995, State Senator Ginny Brown-Waite, whose senatorial district includes Hernando County and the Spring Hill community in which Petitioner Spring Hill Civic Association, Inc. is located, filed Senate Bill 298. Senate Bill 298 provided that the PSC

> ...may not include in a customer's rates or charges any operating expenses incurred in the operation of any property that is part of a water or wastewater system that is not interconnected with a system providing utility service to that customer or a return on investment in property that is part of a water or wastewater system that is not interconnected with the system providing utility service to that customer, notwithstanding any common ownership of the non-interconnected systems.

Senator Brown-Waite's bill was clearly intended to prohibit the PSC from approving "uniform rates" of the type that it had earlier approved in Docket No. 920199-WS. (Appendix, Tab B, Pages 15, 16).

F. On March 7, 1995 the Florida Senate Commerce Committee took up Senator Brown-Waite's SB 298. Senator Brown-Waite testified first in support of her bill and told the Committee that her bill was necessitated by earlier action by the PSC in approving uniform rates for SSU, which had petitioned for "stand-alone" rates. (Appendix, Tab B, Page 15, 16). Senator Brown-Waite testified that uniform rates required "major subsidization of one utility customer subsidizing another utility customer", which in Hernando County [her district] took $1.8 million annually over and above the cost to operate the system "out of the county to subsidize other systems." (Appendix, Tab B, Pages 15,16). Senator Brown-Waite stated that under uniform rates "[c]ustomers who paid significant connection charges to a utility lose the benefit of the lower monthly rates because they are then grouped for ratemaking purposes with systems with either lower initial contributions or no contributions at all." (Appendix, Tab B, Page 16). Senator Brown-Waite testified that uniform rates took away the incentive to conserve water if one group's water rates were subsidized by another. (Tab B, Pages 16, 17). Senator Brown-Waite answered a question about whether stand-alone rates would result in $150 a month water rates by saying that the subsidies in the PSC-approved uniform rates did not tend toward rural areas, but, rather, some "very wealthy areas" benefitted from them. (Tab B, Page 19).

G. Diane Kiesling, "a Commissioner on the Public Service

Commission" testified after Senator Brown-Waite. She stated that there was a uniform rate decision entered in 1993, which was on appeal, but which was decided by only two commissioners. Commissioner Kiesling added that the PSC (on a 3-1 vote) reached its more recent decision to approve uniform rates for SSU after months of fact-finding and a great deal of input from customers. (Tab B, Pages 24,25). Commissioner Kiesling discussed some of the pros and cons of uniform rates, argued that they had been in use in Florida and other states for some years, and stated that there were more than 2,000 small water and wastewater systems in Florida which were going to require "some kind of regulatory intervention to continue to provide safe affordable service" because they were running up high costs "because of environmental regulations" and "because of deteriorating infrastructure." She said that the PSC was concerned about Senator Brown-Waite's bill "because it would prohibit us from using single-tariff pricing to help in the consolidation of some of these troubled small systems." (Tab B, Page 28). She continued, saying

> The issue of rate equalization must be addressed by regulators as an acquisition incentive, and a means to fully realize the benefits of the larger more viable utilities. We believe this ratemaking concept is a powerful economic incentive to encourage consolidation and restructuring of the water and wastewater industry in Florida. We would urge you not to take away one tool in our tool chest that allows us as economic regulators to deal with the significant water problems that are coming.

(Tab B, Page 28). (Emphasis supplied).

Commissioner Kiesling denied that the PSC was taking a "position pro or con" on Senator Brown-Waite's bill, saying that "we're simply trying to give you information about what will happen as economic regulators if you take one of these tools away. She continued denying a partisan view, saying

> So to the extent that, you know, you view us as being opposed to the bill, I want to clarify that. We're not happy with it but we're not overtly standing before you to oppose it.

(Tab B, Page 31) (Emphasis supplied).

When asked by an unidentified Senator, "So in other words, unified rates is the Commission policy where the Commission thinks it's a good policy, and is not their policy where they don't think it's a good policy", Commissioner Kiesling responded, "That's right. It's one form of ratemaking that we view as part of our arsenal."

When the Committee Chair indicated that other persons were waiting to testify and that he would go on to the next person, Commissioner Kiesling insisted on continuing to testify so that she could say what the systems' "rates would be when they are not stand-alone." She said that some rates at 10,000 gallon levels of consumption would be as high as $155.85 or $117.59 a month for water alone, or as much as $192 a month for wastewater at one system without uniform rates. (Tab B, Pages 36,37). In response to one Senator, she denied that the PSC was setting "rates based

on the ability of the people to pay", but said that "you have to consider whether the people can pay it." (Tab B, Pages 37, 38).

In response to another Senator's question, Commissioner Kiesling stated that counties could still opt-out of PSC regulation and, thus, escape the uniform rates being imposed.[4] (Tab B, Page 31).

H. Mr. James Desjardin testified following Commissioner Kiesling. He stated that he represented the Petitioner Sugarmill Woods Civic Association, Inc., which has about 2,000 homes and 5,800 people in Citrus County. He said that his organization had been active in PSC rate cases for 10, 12 years. Desjardin said that the impact of uniform rates was that Sugarmill Woods rates had gone up from around $400 a year to $760 a year and that they were "paying somewhere in the neighborhood of $300 a year subsidy over what our stand-alone rates were." (Tab B, Page 39). Desjardin went on to say about the forced rate subsidies resulting from uniform rates:

> And who is receiving them? We have a reverse osmosis system that gets $916 a year for [sic] on water and 224

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[4] This may have been true when she uttered the statement, but shortly thereafter Commissioner Kiesling and other commissioners voted to preclude the ability of counties to statutorily "opt-out" of PSC regulation when multi-county utilities such as SSU were involved. Effectively, this decision prevented counties with high subsidy paying systems from opting out to protect their constituents from the payment of subsidies. This decision is also on appeal to this court by a number of affected counties and by Petitioner Sugarmill Woods Civic Association, Inc., as an amicus. Case No. 95-02935. PSC Docket No. 930945-WS.

> for sewer. We have an industrial park that receives $3,840 a year subsidy in water. In the seven instances, the recipients of the subsidies receive more subsidy than their operating costs are, and so we're afraid uniform rates discounts two rather critical things: One is the up-front CIAC or up-front money we paid which can prepay for our system and make a better one. And the other one is the operating costs. So those two things have had a big impact.
>
> * * *
>
> So overall when we look at this, there were 86 water companies, and ten of them paid out the subsidies such as one of ours, but it was 74% of the people. And there were 38 sewer companies and 11 of them paid out a subsidy such as ours, but that was 59% of the households. So its a way of assessing people who are unfortunate enough to be Southern States utility customers and spreading it around.

(Tab B, Pages 39, 40).

I. Mike Twomey, attorney for the Petitioners here, testified on behalf of Petitioner, Spring Hill Civic Association, Inc., which is located in Hernando County and generally represents the interests of some 24,000 of Senator Brown-Waite's constituents. Twomey testified that Hernando County had opted-out of PSC regulation because uniform rates forced Spring Hill customers to pay $1.164 million in subsidies over and above their own costs of service, which already included the benefits of a large consolidated utility alluded to by Commissioner Kiesling. Twomey stated that the $1.164 million was " a subsidy pure and simple" and "not related to anything that the people in Spring Hill are going to receive in the terms of service." (Tab B, Page 41). Twomey stated that the PSC was entertaining a SSU petition

that would force Hernando County and other non-PSC counties back under the jurisdiction of the PSC so that their constituents could not escape the payment of uniform rate subsidies. (Tab B,Page 43). Twomey testified that, contrary to what Commissioner Kiesling stated, Senator Brown-Waite's bill did not prohibit uniform rates, but, rather, prohibited the PSC from including in a customer's rates "expenses not incurred in providing them with service" or a "return on investment where that property is not used and useful in providing them service." He added that, as Senator Brown-Waite had stated, the various SSU systems were not interconnected by pipe and, thus, could not provide service to one another. (Tab B, Page 43).

In response to Commissioner Kiesling's statement that some 20 other states had uniform rates, Twomey stated that "[o]ur investigation showed that most of those states, if not all of them, involved rates where there was no difference or a minimal difference in the cost of providing service. Ergo, there were no subsidies or only minimal, not undue discrimination in subsidies. That's not a problem here." (Tab B, Pages 43, 44).

With respect to the potential that Gospel Island and other customers would have astronomical rates under a stand-alone rate structure, Twomey testified to the following:

> .... As Mr. Desjardin told you, if you'll look on page -- if you'll look on Page 5 of 15 in the second part of your handout, and the numbers are in the upper right-hand column, and look at the center top system, Gospel Island Estates. What they've given you is a <u>scare</u>

> tactic that the PSC, the utility has used throughout. They've said to you these four people of Gospel Island will be paying in the neighborhood of $150 per month for a water and sewer system. It's not true because they have they have used a calculation based upon the consumption of 10,000 gallons of water. If you'll look at the page I just showed you, the people of Gospel Island in fact use under 5800 gallons per month, therefore, the rate they would pay under their own stand-alone rates would be dramatically smaller. The $150 is a scare tactic, it's dishonest, it's not true. You shouldn't be sucked in by this.

(Tab B, Page 43) (Emphasis supplied).

Twomey went on to say that uniform rates deprived Mr. Desjardin, and others like him paying forced subsidies, of the relatively low water and sewer rates they were entitled to under Florida law as a result of having paid large "hook-up fees", which are similar to down payments on home mortgages. Twomey said that under uniform rates an industrial park that paid only $15 in hook-up fees, or contributed property, got the same sewer rates as Desjardin and his neighbors who had paid in excess of $2,500 up-front in contributed property. (Tab B, Page 44).

Twomey concluded by saying:

> This agency is a subordinate agency of the Senate and the Florida House. They are here to do what you tell them. What they did in this last case is contrary to the existing laws as we see it, as we know it. The purpose of this statute, the purpose of this bill is to make clear that they can't do it again.

(Tab B, Page 44).

Senator Brown-Waite, presumably sensing the defeat of her bill, then asked that it be temporarily passed. (Tab B, Page

45).[5]

J. According to the Affidavits of Senator Brown-Waite and Mike Twomey, Commissioner Kiesling, immediately after the Senate committee hearing and in a crowded elevator lobby of the Senate, called Mike Twomey to her side, stuck her finger in his face and, in an extremely loud voice, stated he had "three times called her a liar" and that "she would use every means available to her to stop [him] if [he] ever called her a liar again." According to his affidavit, Twomey, who had been invited by Senator Brown-Waite to support her bill, was concerned by the incident. His affidavit concluded, stating:

> I was clearly shaken, embarrassed and humiliated by the experience. Normally reasonably "quick on my feet", I was rendered virtually speechless by what I considered a rude, discourteous, and thoroughly unprovoked public attack by Commissioner Kiesling. I felt the need to defend myself to both Senator Brown-Waite and my clients, who, fortunately, also expressed shock and outrage at Commissioner Kiesling's conduct.
>
> Since that incident, I have questioned and continue to question Commissioner Kiesling's impartiality on the issue of uniform rates, which remains a hotly contested and critical issue in all of SSU's pending and impending rate cases. I have concluded that she is not, and cannot be, impartial on an issue she so forcefully spoke in favor of before the Senate Commerce Committee. Furthermore, I fear that the unprovoked attack on me on March 7, 1995 by Commissioner Kiesling reveals a strong bias against either me, my clients, or both, that will preclude my clients receiving a fair and impartial hearing before

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[5] It should be noted that no utility representatives had an opportunity, or, indeed, the necessity to testify against the bill.

Commissioner Kiesling in Docket Nos. 920199-WS, 930880-WS and 950495-WS.

(Tab C, Page 22 of 25).

K. The Affidavit of Senator Ginny Brown-Waite states that Jim Desjardin and Mike Twomey had spoken in favor of her bill at her request. With respect to Commissioner Kiesling's appearance at the Senate hearing, Senator Brown-Waite states:

> PSC Commissioner Diane Kiesling also addressed the Committee and spoke forcefully against my bill and in favor of the uniform rate structure. She dismissed my concerns and those of my constituents regarding the unfairness of uniform rates and spoke of the necessity of retaining uniform rates as a means to achieving affordable rates and for financing large capital construction projects without imposing rate shock on the customers. I had not solicited Commissioner Kiesling's attendance or comments at the Committee meeting and am not aware that any other Senator invited her to speak on the bill. She was clearly against my bill, for uniform rates, and lent both the prestige and apparent expertise of herself and the PSC to the effort of killing my bill.

Addressing the "incident" between Commissioner Kiesling and Mike Twomey following the Committee meeting, Senator Brown-Waite's Affidavit continues, saying:

> Immediately following the presentation of Senate Bill 298, Mike Twomey, several of my constituents and I were waiting to get an elevator to go to my office when Commissioner Kiesling called Mike Twomey over in a loud voice and began rudely chastising him for calling her a liar during the Committee meeting. Commissioner Kiesling stuck her finger in Mike Twomey's face, and that, combined with her volume, tone of voice and the shrill nature of her accusations caught the attention of virtually everyone in that part of the building and quickly made her confrontation with Twomey the center and only attraction. Her accusations were unprofessional of any lawyer, let lone one charged with being an agency head. Furthermore, her accusations

that Twomey had called her a liar during the Committee meeting were completely unfounded. Twomey was, in my opinion, merely making a strong case for the elimination of the uniform rate concept and in that regard was vigorously representing the interests of his clients and my constituents.

I have great concerns and reservations that I and my constituents will be able to receive a fair and impartial hearing before Commissioner Kiesling while we are represented by Mike Twomey in Docket No. 950495-WS. I am equally fearful and have grave reservations regarding Commissioner Kiesling's apparent lack of impartiality on the issue of uniform rates. The Sugarmill Woods Civic Association, Inc. and Citrus County have obtained a reversal of the PSC's final order imposing uniform rates in Docket No. 920199-WS, and the PSC will soon consider how to comply with the Court's mandate in that case. The PSC staff has recommended that the record of that case be reopened and that SSU be allowed to present new evidence that will allow for the retroactive approval of the existing uniform rates until they were initially imposed in September, 1993. Given Commissioner Kiesling's forceful and unqualified support for uniform rates before the Senate Commerce Committee, I am fearful that she cannot approach the current staff recommendation in Docket No. 920199-WS with an open mind and, thereby, afford my constituents and I a fair and impartial hearing. Likewise, I am fearful that Commissioner Kiesling's public and political support for uniform rates will preclude us from receiving a fair and impartial hearing in Docket No. 950495-WS, in which SSU has again sought uniform rates notwithstanding the First District Court of Appeals' reversal of that rate structure in Docket No. 920199-WS.

(Tab C, Pages 23-25 of 25). (Emphasis supplied).

L. As alluded to in the above quotation from Senator Brown-Waite's Affidavit, this Court, on April 6, 1995, reversed the PSC's imposition of uniform rates in Docket No. 920199-WS in Citrus County v. Southern States Utilities, Inc., 20 Fla. L. Weekly D838 (Fla. 1st DCA 1995), reh'g denied, 20 Fla. L. Weekly

D1518 (1995). This Court's Mandate in the case was issued on July 13, 1995. The PSC did not order new SSU rates consistent with this Court's opinion until September 26, 1995. SSU has refused, to date, to either modify the rates to "modified stand-alone" levels as required by the PSC or to make the customer refunds necessitated by the overcharges from uniform rates. It has, instead, sought reconsideration of the PSC's order on remand, which motion is still pending before the full PSC, Commissioner Kiesling included.

M. As was also alluded to in Senator Brown-Waite's Affidavit, SSU, on June 28, 1995 filed another rate case (assigned Docket No. 950495-WS) requesting some $18.6 million in rate increases for 141 utility plants in 22 counties. Notwithstanding this Court's earlier reversal of uniform rates, SSU has again requested both interim and final rate relief pursuant to uniform rates. This case has been assigned to the full PSC and Commissioner Kiesling has been assigned as the Prehearing Officer and, as such, she is responsible for hearing all procedural disputes in the case prior to the actual evidentiary hearings. (Appendix, Tab A).

N. On September 12, 1995, Citrus County, the Sugarmill Woods Civic Association, Inc. and the Spring Hill Civic Association, Inc. filed with the PSC a Verified Petition To Disqualify Or, In The Alternative, To Abstain, stating that the customer associations: (1) fear that Commissioner Kiesling will

not hear proceedings in [dockets 920199-WS, 930880-WS, and 950495-WS] with an open mind; (2) fear Commissioner Kiesling is biased in favor of SSU in all three dockets and that she is biased in favor of the uniform rate structure SSU is seeking; (3) fear that Commissioner Kiesling has demonstrated her bias publicly by engaging in inappropriate political activity promoting the uniform rate structure so SSU's advantage and the customers' disadvantage, while the dockets in question were either still pending or on judicial review; and (4) fear that Commissioner Kiesling cannot participate in any of the dockets with an open mind and in a fair and impartial manner because she has publicly reproached and berated their counsel, Mike Twomey, in a manner clearly evidencing contempt, disdain, impatience and a lack of courtesy to said counsel and in a manner demonstrating an unprofessional and total lack of judicial temperament on her part. (Appendix, Tab C).

O. In addition to the previously described Affidavits of Senator Ginny Brown-Waite and Mike Twomey the Verified Petition included the Affidavit of Jim Desjardin, a past President of the Sugarmill Woods Civic Association, Inc. and a current member of its Utility Committee. After describing his association's participation in three PSC dockets involving "uniform rates", the unfairness of uniform rates to he and his neighbors, who must pay subsidies to other communities under the rate structure, his testimony in favor of Senator Brown-Waite's bill and Commissioner

Kiesling's testimony in opposition to the bill, Jim Desjardin stated the following concerns about Commissioner Kiesling's continued participation in the three dockets at issue:

> Immediately following the presentation of Senate Bill 298 my wife and I went upstairs to Senator Brown-Waite's office. When Senator Brown-Waite and Mike Twomey arrived a discussion ensued regarding Commissioner Kiesling publicly accusing Mike Twomey of calling her a liar during the committee hearing and several Associations members waiting to catch an elevator when Commissioner Kiesling loudly called Mike to her side. I did not personally witness the Commissioner Kiesling accusing Mike Twomey of calling her a liar, but, if it is true that she did, I have great concerns and reservations that I and Sugarmill Woods Civic Association, Inc. will be able to receive a fair and impartial hearing before Commissioner Kiesling while we are represented by Mike Twomey in Docket No. 950495-WS.
>
> I am equally fearful and have grave reservations regarding Commissioner Kiesling's impartiality on the issue of uniform rates. The Sugarmill Woods Civic Association, Inc. has obtained a reversal of the PSC's final order imposing uniform rates in Docket No. 920199-WS, but the PSC will soon consider how to comply with the Court's mandate in that case. The PSC staff has recommended that the record be reopened and that SSU be allowed to present new evidence that will allow for the retroactive approval of the existing uniform rates until they were initially imposed in September, 1993. Given Commissioner Kiesling's forceful and unqualified support for uniform rates before the Senate Commerce Committee, I am fearful that she cannot approach the current staff recommendation in Docket No. 920199-WS with an open mind and afford my neighbors and I a fair and impartial hearing. Likewise, I am fearful that Commissioner Kiesling's public and political support for uniform rates will preclude us receiving a fair and impartial hearing in Docket No. 950495-WS in which SSU has again sought uniform rates notwithstanding the First District Court of Appeals reversal of that rate structure in Docket No. 920199-WS.

(Tab C, Pages 17-19 of 25).

The Verified Petition stated that the Associations feared that Commissioner Kiesling's actions leave them with the fear that she is biased and impartial and that they cannot receive a fair and impartial hearing from her. The Verified Petition requested that Commissioner Kiesling disqualify herself from the three dockets or that the remaining full PSC remove her pursuant to Section 120.71, Florida Statutes, and Rule 25-21.004, Florida Administrative Code, if she refused to disqualify herself.

P. As noted in Commissioner Kiesling's Order Declining To Withdraw From Proceeding, Order No. PSC-95-1199-PCO-WS, issued September 25, 1995, SSU, a proponent of uniform rates and the customer associations' publicly disclosed adversary in the three proceedings, on September 20, 1995, filed a Memorandum In Opposition To Verified Petition To Disqualify, Or In the Alternative, To Abstain, which alleged that the customers' petition failed to state factual and legal grounds for disqualification. (Tab B, Page 2).

Q. In her September 25, 1995, Order Declining To Withdraw From Proceeding, Commissioner Kiesling, citing to this Court's decision in Bay Bank & Trust Company v. Lewis, 634 So.2d 672 (1994), concluded that

> Accordingly, the limitation of a judge to the bare determination of legal sufficiency in considering a disqualification motion, and the prohibition against his passing on the truth of the facts alleged are not controlling either, in light of Bay Bank, in an agency head's consideration of a disqualification motion. With all of the foregoing in mind, I will apply the

> assertions in the petition to the applicable standards to test whether the petition states a legally sufficient "just cause" requiring disqualification.

She went on to conclude that her testimony before the Senate Commerce Committee was "demonstrably aimed at the administration of justice" and found that

> The fact that petitioners took it differently and had the feeling or perception that the testimony was directed toward supporting the imposition of uniform rates <u>on them</u> is of no moment. That feeling or perception is not a "fact."

(Tab B, Pages 5, 6).

While not denying any of the accusations contained in the Affidavits of Senator Brown-Waite or Mike Twomey regarding the post-hearing encounter, Commissioner Kiesling concluded that Mike Twomey had "recklessly impugned my integrity" and, apparently, made a statement that he knew to be false or with reckless disregard as to its truth or falsity "concerning the . . . integrity of a judge . . ." in violation of Rule 4-8.2 of the Florida Bar's Code of Attorney Conduct. (Tab B, Page 26).

While not suggesting or stating that she had been invited to testify on Senator Brown-Waite's bill before the Senate Commerce Committee, Commissioner Kiesling rejected Petitioners' claim that her testimony was "unsolicited" as being "unsupported because Senator Brown-Waite's affidavit is based on a <u>lack</u> of knowledge and is therefore legally insufficient." (Tab B, Page 7).

Lastly, Commissioner Kiesling found that the Verified Petition was untimely as well. (Tab B, Pages 11, 12). She

declined to withdraw from the proceedings saying that the Verified Petition was conclusory, untimely and not legally sufficient to support disqualification. (Tab B, Page 13).

R. On November 27, 1995, the remaining four Commissioners of the PSC, having considered Commissioner Kiesling's refusal to disqualify herself, issued Order No. PSC-95-1438-FOF-WS, Order Deciding Against The Disqualification Of Commissioner Diane K. Kiesling In Dockets Nos. 950495-WS, 930880-WS, and 920199-WS In reaching its decision not to disqualify Commissioner Kiesling, the remainder of the PSC discussed at length both Petitioners' Verified Petition, as well as SSU's response in support of Commissioner Kiesling.

In reaching its conclusion, the PSC found that this Court in Bay Bank & Trust Co. v. Lewis, supra, set forth a different disqualification standard applicable to agency heads than to judges. Apparently agreeing with Commissioner Kiesling that Bay Bank meant an agency head could challenge the facts contained in a petition for disqualification and not merely its legal sufficiency, the remainder of the Commissioners adopted the rationale of Kiesling's order and determined that the petition was legally insufficient on the basis of the judicial standard enunciated in Bundy v. Rudd, 366 So.2d 440 (Fla. 1978). The PSC also concluded, without providing any evidence of collegial authorization, that Commissioner Kiesling appeared before the Senate Commerce Committee as "an authorized spokesperson for the

Commission", that her testimony was consistent with Canon 4C of the Code of Judicial Conduct and that her testimony was confined to articulating PSC policy regarding uniform rates. The PSC also concluded, despite the affidavits' assertions to the contrary, "that Commissioner Kiesling's confrontation with Mr. Twomey following the committee hearing would not prompt a reasonably prudent person to fear that he could not get a fair and impartial trail. Accordingly, the PSC decided against the disqualification of Commissioner Kiesling. (Tab A, Page 16)

NATURE OF RELIEF SOUGHT

3. Petitioners request that this Court find that Commissioner Kiesling by her actions and words has evidenced bias and prejudice against the Petitioners sufficient to have her recused from the three-described dockets pursuant to the provisions of Section 120.71, Florida Statutes, and that the Court reverse the PSC's non-final order refusing to so disqualify Commissioner Kiesling.

ARGUMENT

4. The Florida Supreme Court has held:

> Prejudice of a judge is a delicate question to raise, but when raised as a bar to the trial of a cause, if predicated on grounds with a modicum of reason, the judge against whom raised should be prompt to recuse himself. No judge under any circumstances is warranted in sitting in the trial of a cause whose neutrality is shadowed or even questioned.

Dickenson v. Parks, 140 So. 459, 462 (1932). (Emphasis supplied).

5. Florida Public Service Commissioners are bound, as "agency heads", by the provisions of Section 120.71, Florida Statutes, which states, in relevant part:

> **120.71 Disqualification of agency personnel.-**
> (1) Notwithstanding the provisions of s. 112.3143, any individual serving alone or with others as an agency head may be disqualified from serving in an agency proceeding for bias, prejudice, or interest where any party to the agency proceeding shows just cause by a suggestion filed within a reasonable period of time prior to the agency proceeding.

6. The Rules of the Florida Public Service Commission, Rule 25-21.004, Florida Administrative Code, is consistent with the statute and provides that a commissioner may be disqualified from hearing or deciding any matter where it can be shown that the commissioner has a bias or prejudice for or against any party to the proceeding or a financial interest in its outcome.

7. Until 1983 the procedures and standards for disqualifying a judge applied to deputy commissioners for workers' compensation. Hewitt v. Hurt, 411 So.2d 266 (Fla. 1st DCA 1982). The same procedures were found to be applicable to PSC commissioners as found by the Florida Supreme Court in City of Tallahassee v. Florida Public Service Commission, 441 So.2d 620 (1983), wherein the Court stated:

> [t]he standard to be used in disqualifying an individual serving as an agency head is the same as the standard used in disqualifying a judge. S. 120.71, Fla.Stat. (1981).

8. However, as correctly noted by SSU in its defense of Commissioner Kiesling, between the briefing and the rendition of

the Supreme Court's opinion in City of Tallahassee v. Florida Public Service Commission, supra., someone got the Florida Legislature to delete the phrase "or other causes for which a judge may be recused" from Section 120.71, Florida Statutes.[6] Consequently, this Court in 1994 in the case of Bay Bank & Trust Co. v. Lewis, supra., recognized that the legislative change in language had to be given some effect, when it said:

> The 1983 Florida Legislature deleted the phrase "or other causes for which a judge may be recused" from section 120.71, Florida Statutes, so we must assume that the statute was intended to have a different meaning after its amendment. Seddon v. Harpster, 403 So.2d 409, 411 (Fla. 1981). Thus, while a moving party may still disqualify an agency head upon a proper showing of "just cause" under section 120.71, the standards for disqualifying an agency head differ from the standards for disqualifying a judge. This change gives recognition to the fact that agency heads have significantly different functions and duties than do judges. Were we to give section 120.71 the same meaning as that given it in City of Tallahassee v. Florida Public Service Commission, the 1983 amendment to section 120.71 would serve no purpose whatsoever.

9. While this Court recognized in Bay Bank, supra., that the standards for disqualification of an agency head differ from the standards for disqualifying a judge, the Court did not clearly state what the specific differentiation was. Instead, the Court found that the petitioners' failure to show any connection

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[6] It is with no small measure of chagrin and embarrassment that the undersigned counsel must concede that he failed to find the subsequent decision of this Court interpreting the revision to Section 120.71, F.S. Nonetheless, it is Petitioners' position that their Verified Petition still stated sufficient grounds to cause a responsive agency head to recuse herself.

between their cessation of campaign support for state comptroller Gerald Lewis and the Department of Banking and Finance's commencement of regulatory proceedings against the petitioners was too tenuous and speculative to establish just cause for disqualification of Lewis under Section 120.71, Florida Statutes.

10. Importantly, this Court in Bay Bank, supra., did not suggest that agency heads could not be disqualified. Even as recognized by the PSC and SSU, Section 120.71, F.S. still provides for disqualification for "bias, prejudice, or interest", as does the PSC's own rule, Rule 25-21.004, F.A.C. Thus, the operative question here should be whether or not the Petitioners satisfactorily demonstrated bias, prejudice, or interest sufficient to require Commissioner Kiesling to be disqualified.

11. In considering a motion to disqualify, a judge is limited to the bare determination of legal sufficiency and may not pass on the truth of the facts alleged. Bundy v. Rudd, supra. In turn, the test for legal sufficiency is whether the facts alleged would prompt a reasonably prudent person to fear that he could not get a fair and impartial trial. And, a party need not have personal knowledge of the facts set forth in the motion. Hayslip v. Douglas, 400 So.2d 553 (Fla. 1st DCA 1982). Petitioners can find nothing in this Court's Bay Bank, supra., decision that allows an agency head to go beyond the "bare determination of legal sufficiency" and, in turn, "pass on the truth of the facts alleged." Yet, this is precisely what Commissioner Kiesling has

done.

12. At Page 4 of her order, Commissioner Kiesling makes the following statement:

> Accordingly, the limitation of a judge to the bare determination of legal sufficiency in considering a disqualification motion, [footnote to Bundy v. Rudd] and the prohibition against his passing on the truth of the facts alleged are not controlling either, in light of Bay Bank, in an agency head's consideration of a disqualification motion.

She then goes on to refute Petitioners' sworn assertions that she was testifying against their interests by trying to "kill" Senator Brown-Waite's bill and, thus, protect the uniform rates, which Petitioners are opposed to in all three dockets. Dismissing Petitioners' stated fears that her vocal and public support for uniform rates will prejudice their ability to have a fair and impartial hearing in three cases in which uniform rates is the single most disputed issue, Commissioner Kiesling passes her testimony off as acceptable comments regarding the "administration of justice."

13. "Administration of justice" may mean many things, but it cannot include arguing against a state senator's bill in order to preserve a controversial regulatory methodology that is the central issue in a case then on appeal, and a second case just decided and pending appeal. Arguing to a legislative committee for a new building, new computer equipment, additional staff or more commissioners might be considered "administration of justice" issues, but uniform rates cannot be. This Court's

earlier reversal of the PSC's order granting uniform rates in Docket No. 920199-WS should be sufficient to put the Court on notice that the issue of "uniform rates" is one of substance and highly controversial as well. Commissioner Kiesling was not invited to speak by the bill's sponsor and has cited no invitation by other senators eliciting either hers or the PSC's views on Senator Brown-Waite's bill. Furthermore, Commissioner Kiesling is a member of a collegial, five-member body, whose individual members are not authorized to speak for the agency without prior approval of the other members at their so-called "internal affairs" conferences. Neither Commissioner Kiesling nor the PSC have evidenced any authorization for her to express the views she did at the Senate Commerce Committee hearing. Furthermore, even if she had received agency authority to present her testimony, Commissioner Kiesling's testimony to the Senate Commerce Committee was biased and prejudice in favor of uniform rates and against Senator Brown-Waite's bill. One only need read the entire transcript of the Senate Committee meeting to see that Commissioner Kiesling dominated the Committee's time and was unrelenting in her bias in favor of uniform rates, notwithstanding her ineffectual protests that neither she nor the PSC had a position on the bill.

14. On the issue of her testimony before the Senate Commerce Committee, Commissioner Kiesling has clearly gone beyond a bare determination of the legal sufficiency of the petition and, in

fact, with the assistance of the adversary utility, SSU, has argued with and ruled adversely on the truth of the facts alleged.

15. This Court should find and clearly state that Bay Bank, supra., does not stand for the proposition that an agency head can go beyond the bare determination of legal sufficiency of a petition seeking disqualification and that she, or he, cannot argue with and pass on the truth of the facts alleged.

16. Petitioners also alleged in their petition seeking disqualification that Commissioner Kiesling's loud and public verbal attack on their attorney following the Senate Commerce Committee hearing caused them to fear that they could not receive a fair and impartial hearing from her. Again, Commissioner Kiesling has gone beyond the test of "whether the facts alleged would prompt a reasonably prudent person to fear that he could not get a fair and impartial trail", and, instead, has chosen to argue with whether her comments or actions (she does not deny them) were provoked by the undersigned counsel. Petitioners would submit to this Court that the sworn statements of a state senator and a civic association representative that they fear they can not get a fair and impartial hearing as a result of the "public confrontation" incident should be sufficient for any judge and any agency head or hearing officer to step down.

17. It should not be necessary to argue with the trier of fact in these cases as to whether or not the undersigned "provoked"

Commissioner Kiesling to a degree that warranted her outburst. If such a defense is necessary, Petitioners would simply request that the Court read the full transcript of the Senate Commerce Committee hearing and consider the "offensive" comments that "The $150 is a scare tactic, it's dishonest, it's not true. You shouldn't be sucked in by this." in the total context of all the testimony, including Commissioner Kiesling's remarks that uniform rates were necessary to preclude $153 monthly water bills. Quite simply, as reflected by the transcript, Petitioners' attorney's comments were directed to the fact that the $153 a month water bills proclaimed loudly for Gospel Island were based on those customers using 10,000 gallons of water a month while the evidence showed that they used less than 6,000 gallons and, thus, would not have the higher monthly bills. (Tab D, Page 2 of 2).

Petitioners submit that, taken in the context of a legislative hearing, the "offensive" comments were not as objectionable as they might seem taken out of context. Furthermore, the comments were intended as a general commentary on the PSC's use of "red herring" high customer bills as a sales tool for uniform rates and were not intended as a commentary on Commissioner Kiesling's personal veracity or integrity. In any event, this Court should find that the allegations of the Verified Petition were legally sufficient to warrant disqualification, and that the provisions of Section 120.71, Florida Statutes, do not allow an agency head to go behind the

allegations and argue with a party as to whether they are warranted or not warranted in their expressed belief that they can not receive a fair and impartial hearing.

CONCLUSION

IN VIEW OF THE ABOVE, Petitioners respectfully request that this Court find that Commissioner Kiesling erred in declining to disqualify herself from the three PSC dockets involved and, furthermore, find that the full PSC erred in declining to disqualify Commissioner Kiesling when she refused to do so herself. Accordingly, the Court should reverse Order No. PSC-95-1438-FOF-WS and enter an order requiring that Commissioner Kiesling be immediately disqualified from further participation in Docket Nos. 920199-WS, 930880-WS and 950495-WS.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished via U.S. Mail, postage prepaid, this 27th day of December, 1995 to the following:

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Southern States Utilities, Inc. Application 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, Highlands, Lake, Lee, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, St. Johns, St. Lucie, Volusia, and Washington Counties.	DOCKET NO. 950495-WS
In Re: Investigation into the Appropriate Rate Structure for Southern States Utilities, Inc. for All Regulated Systems in Bradford, Brevard, Citrus, Clay, Collier, Duval, Hernando, Highlands, Lake, Lee/Charlotte, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, St. Lucie, Volusia, and Washington Counties.	DOCKET NO. 930880-WS
In Re: Application for Rate Increase in Brevard, Charlotte/Lee, Citrus, Clay, Duval, Highlands, Lake, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, Volusia, and Washington Counties by Southern States Utilities, Inc.; Collier County by Marco Shores Utilities (Deltona); Hernando County by Spring Hill Utilities (Deltona); and Volusia County by Deltona Lakes Utilities (Deltona).	DOCKET NO. 920199-WS ORDER NO. PSC-95-1438-FOF-WS ISSUED: November 27, 1995

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK, Chairman
J. TERRY DEASON
JOE GARCIA
JULIA L. JOHNSON

ORDER DECIDING AGAINST THE DISQUALIFICATION OF COMMISSIONER DIANE K. KIESLING IN DOCKETS NOS. 950495-WS, 930880-WS, AND 920199-WS

BY THE COMMISSION:

BACKGROUND

Southern States Utilities, Inc. (SSU or utility) is a Class A utility, which provides water and wastewater service to 152 service areas in 25 counties. On June 28, 1995, SSU filed an application for approval of interim and final water and wastewater rate increases for 141 service areas in 22 counties, pursuant to Sections 367.081 and 367.082, Florida Statutes. The utility also requested an increase in service availability charges, approval of an allowance for funds used during construction and an allowance for funds prudently invested. On August 2, 1995, the utility corrected deficiencies in its minimum filing requirements and that date was established as the official date of filing.

The Office of the Public Counsel (OPC), the Sugarmill Woods Civic Association, Inc. (Sugarmill Woods), the Spring Hill Civic Association, Inc. (Spring Hill), and the Marco Island Civic Association, Inc. (Marco Island), have intervened in this docket. Fifteen customer service hearings are scheduled throughout the state. Technical hearings have been scheduled for January 29-31, and February 1-2, 5, and 7-9, 1996.

On March 7, 1995, Commissioner Diane K. Kiesling appeared before the Florida Senate Commerce Committee and offered testimony on behalf of the Commission on Senate Bill 298, sponsored by Senator Ginny Brown-Waite, District 10. Michael B. Twomey, counsel for petitioners in the aforementioned dockets, followed Commissioner Kiesling before the committee. Senate Bill No. 298 was a bill to be entitled "An act relating to water and wastewater utility rates; amending s. 367.081, F.S.; prohibiting the Florida Public Service Commission from including in a utility customer's rates or charges certain expenses or returns on investments related to certain property ...."

On September 13, 1995, Citrus County, Sugarmill Woods, and Spring Hill (petitioners) filed a Verified Petition to Disqualify or, in the Alternative, to Abstain (petition), together with affidavits. The petitioners moved Commissioner Kiesling to disqualify herself from this docket; from Docket No. 920199-WS, In Re: Application for Rate Increase in Brevard, Charlotte/Lee, Citrus, Clay, Duval, Highlands, Lake, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, Volusia, and Washington Counties by Southern States Utilities, Inc.; Collier County by Marco Shores Utilities (Deltona); Hernando County by Spring Hill Utilities (Deltona); and Volusia County by Deltona Lakes Utilities (Deltona); and from Docket No. 930880-WS, In Re: Investigation into the Appropriate Rate Structure for Southern States Utilities, Inc., for All Regulated Systems in Bradford, Brevard, Citrus, Clay, Collier, Duval, Hernando, Highlands, Lake, Lee/Charlotte, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, St. Lucie, Volusia, and Washington Counties. Commissioner Kiesling is the Prehearing Officer in Docket No. 950495-WS.

On September 20, 1995, SSU filed a Memorandum in Opposition to Verified Petition to Disqualify or in the Alternative, to Abstain. By Order No. PSC-95-1199-PCO-WS, Order Declining to Withdraw from Proceeding (Order), issued on September 25, 1995, Commissioner Kiesling declined to withdraw from the aforementioned three dockets. Commissioner Kiesling's Order, Order Declining to Withdraw from Proceeding, is attached hereto as Appendix A, and is incorporated herein by reference as we adopt her rationale as well as expand upon it as set forth in the body of this Order.

REVIEW OF COMMISSIONER KIESLING'S ORDER

Rule 25-21.004(1), Florida Administrative Code, provides that:

> A commissioner may be disqualified from hearing or deciding any matter where it can be shown that the commissioner has a bias or a prejudice for or against any party to the proceeding or a financial interest in the outcome.

Furthermore, Rule 25-21.004(3), Florida Administrative Code, provides that:

> where the commissioner declines to withdraw from the proceeding, a majority vote of a quorum of the full commission, absent the affected commissioner, shall decide the issue of disqualification.

We believe that the rule by its literal terms requires the full Commission's determination of the issue of disqualification without the need for any type of further implementation action, such as a motion for review or reconsideration by the petitioners. In other words, appeal to the full Commission, absent the challenged commissioner, is self-executing. In contrast, Rule 25-22.038, Florida Administrative Code, provides that "[a] party who is adversely affected by [an order of the prehearing officer] may seek reconsideration by the prehearing officer, or review by the Commission panel ... by filing a motion in support ... within ten days of service of the ... order." This rule sets forth the recourse generally available to the parties with respect to orders of the prehearing officer. However, Rule 25-21.004, Florida Administrative Code, is controlling in the specific context of a petition seeking the prehearing officer's disqualification. Therefore, we have found it appropriate that we decide the matter of Commissioner Kiesling's disqualification in Dockets Nos. 920199-WS, 930880-WS, and 950495-WS.

DECISION

As noted earlier, on March 7, 1995, Commissioner Kiesling testified before the Senate Commerce Committee in behalf of the Commission on Senate Bill 298. On September 13, 1995, the petitioners, Citrus County, Sugarmill Woods, and Spring Hill, moved Commissioner Kiesling to disqualify herself from this docket; from Docket No. 920199-WS; and from Docket No. 930880-WS.

The standard for disqualification is set forth in Section 120.71, Florida Statutes. The statute provides that:

> any individual serving alone or with others as an agency head may be disqualified from serving in an agency proceeding for bias, prejudice, or interest when any party to the agency proceeding shows just cause by a suggestion filed within a reasonable period of time prior to the agency proceeding.

Furthermore, Rule 25-21.004(1), Florida Administrative Code, requires a commissioner's self-disqualification upon a showing of bias, prejudice or financial interest. Moreover by the provisions of Sections 350.041 and 350.05, Florida Statutes, a commissioner is required to carry out her duties in a professional, independent, objective, and nonpartisan manner, and to abide by the standards of conduct of Chapters 112 and 350, Florida Statutes.

Position of Citrus County, Sugarmill Woods, and Spring Hill

Petitioners set forth two grounds for Commissioner Kiesling's disqualification in the aforementioned dockets. First, petitioners alleged that Commissioner Kiesling's testimony before the Commerce Committee on Senate Bill 298 was "impermissible political activity and political comment." Senate Bill 298 contained provisions that would have required the setting of water and wastewater rates on the basis of system-specific plant in service and cost of service. Petitioners further alleged that Commissioner Kiesling supported the position of SSU in opposing the bill, thereby destroying her impartiality on issues of uniform rates.

Second, petitioners alleged that, following the committee hearing, which considered Senate Bill 298, Commissioner Kiesling "loud[ly] and public[ly] reprimand[ed] and threatened" Mr. Twomey, who had also testified on the bill. Petitioners alleged that Commissioner Kiesling was angered by Mr. Twomey's characterization to the committee of her testimony. As a result, Mr. Twomey questioned the ability of his clients (the petitioners herein) to receive a fair and impartial hearing before Commissioner Kiesling on any matter related to either the uniform rate structure or SSU.

Petitioners relied upon Chapter 112, Part III, Code of Ethics for Public Officers and Employees, Florida Statutes, Chapter 350, Florida Statutes, Section 120.71, Florida Statutes, Rule 25-21.004, Florida Administrative Code, as well as canons of the Florida Code of Judicial Conduct (Code), particularly Canon 1, *A Judge Shall Uphold the Integrity and Independence of the Judiciary*; Canon 2, *A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities*; and Canon 3, *A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently.*

Petitioners further relied on the holding in *City of Tallahassee v. FPSC*, 441 So.2d 620 (Fla. 1983), that "[t]he standard to be used in disqualifying an individual serving as an agency head is the same standard used in disqualifying a judge." Moreover, petitioners asserted that "[i]n considering a motion to disqualify[,] the judge is limited to the bare determination of legal sufficiency and may not pass on the truth of the facts alleged," *Bundy v. Rudd*, 366 So.2d 440, 442 (Fla. 1978), and that "the test for legal sufficiency is whether the facts would prompt a reasonably prudent person to fear that he could not get a fair and impartial trial," *Hayslip v. Douglas*, 400 So.2d 553, 556 (Fla. 1st DCA 1982). The court, in *Bundy v. Rudd, supra*, concluded that "[w]hen a judge has looked beyond the mere legal sufficiency of a suggestion of prejudice and attempted to refute the charges of partiality, he has then exceeded the proper scope of his inquiry

and on that basis alone established grounds for his disqualification." *Id.* at 442. What is necessary to prevent, the court admonished, is an intolerable adversary atmosphere between the trial judge and the litigant. *Id.*

Concluding that the integrity of the Commission's decisions in the three dockets would be undermined should Commissioner Kiesling participate in them, petitioners requested that she disqualify herself from further proceedings in these dockets, or, should she decline to disqualify herself, that the Commission, absent Commissioner Kiesling, disqualify her pursuant to Section 120.71, Florida Statutes, and Rule 25-21.004, Florida Administrative Code.

Position of Southern States Utilities, Inc.

In its opposition to the petition, SSU characterized the petition as "an abusive litigation tactic employed ... for the purpose of gaining ... advantage." According to SSU, Commissioner Kiesling testified on Senate Bill 298 on behalf of the Commission, and "attempted to present as much information as possible concerning uniform rate structures, offered the Commission's position that the bill would eliminate one of many ratemaking tools historically used by the Commission, and repeatedly emphasized that the Commission is taking no position on the bill."

In addition, SSU maintained that petitioners' grounds for requesting Commissioner Kiesling's disqualification are alleged violations of the Code of Judicial Conduct, and that the Code is not applicable to agency heads. SSU noted that in the revision of the Code effective January 1, 1995, 643 So.2d 1037 (Fla. 1994), *Application of the Code of Judicial Conduct* reads:

> This Code applies to justices of the Supreme Court and judges of the District Courts of Appeal, Circuit Courts, and County Courts.
>
> Anyone, whether or not a lawyer, who performs judicial functions, including but not limited to a magistrate, court commissioner, special master, general master, domestic relations commissioner, child support hearing officer, or judge of compensation claims, shall while performing judicial functions, conform with Canons 1, 2A, and 3, and such other provisions of this Code that might reasonably be applicable depending on the nature of the judicial function performed.

The utility further pointed out that petitioners rely on the superseded statement of the Code effective September 30, 1973, 281 So.2d 21 (Fla. 1973).

Next, SSU asserted that petitioners rely erroneously on *City of Tallahassee v. FPSC, supra,* in advancing as the standard applicable to Commissioner Kiesling, as an agency head, the same standard to be used in disqualifying a judge. SSU offered that the correct, and more stringent, standard to be applied to agency heads is enunciated in *Bay Bank & Trust Co. v. Lewis,* 634 So.2d 672 (Fla. 1st DCA 1994). Construing Section 120.71, Florida Statutes, as last amended, the court stated that:

> The 1983 Florida Legislature deleted the phrase "or other causes for which a judge may be recused" from section 120.71, Florida Statutes, so we must assume that the statute was intended to have a different meaning after its amendment. (citation omitted) Thus, while a moving party may still disqualify an agency head upon a proper showing of "just cause" under section 120.71, the standards for disqualifying an agency head differ from the standards for disqualifying a judge. This change gives recognition to the fact that agency heads have significantly different functions and duties than do judges. Were we to give section 120.71 the same meaning as that given it in City of Tallahassee v. Florida Public Service Commission, the 1983 amendment to section 120.71 would serve no purpose whatsoever.

Id. at 633-34. Petitioners in *Bay Bank & Trust Co. v. Lewis, supra,* failed to establish "just cause" in alleging that the commencement of regulatory proceedings against them was vindictive, and linked to their ceasing campaign support for the comptroller. Similarly, SSU contended, petitioners, in alleging Commissioner Kiesling to be biased in favor of the utility and of uniform rates and to be prejudiced against Mr. Twomey, failed to establish just cause for Commissioner Kiesling's disqualification. SSU characterized Mr. Twomey's testimony before the Commerce Committee as provocative, and Commissioner Kiesling's reaction, therefore, defensible. For support, SSU cited *State ex rel Fuente v. Himes,* 36 So.2d 433 (Fla. 1948) (lawyer cannot deliberately provoke an incident rendering the court disqualified), and *Oates v. State,* 619 So.2d 23 (Fla 4th DCA 1993) (judge justified in publicly stating criminal defendant was being an obstinate jerk).

Order No. PSC-95-1199-PCO-WS

As earlier noted, Commissioner Kiesling, in Order No. PSC-95-1199-PCO-WS, declined to withdraw from the proceeding. She concluded that "[a]pplying applicable standards, the petition is conclusory, untimely and is not legally sufficient to support disqualification." Order at 13. Commissioner Kiesling determined the applicable standards to be Section 120.71, Florida Statutes, as construed in *Bay Bank & Trust Co. v. Lewis, supra*; Rule 25-21.004, Florida Administrative Code; and Sections 350.041(2)(g) and 350.05 Florida Statutes. She noted that, in *Bay Bank & Trust Co. v. Lewis, supra*, the court concluded that the standard for disqualifying an agency head was different from that applicable to a judge in recognition of the differences in their responsibilities. Nonetheless, Commissioner Kiesling stated that she addressed the petition requesting her disqualification in reliance upon the judicial standard, as set forth in *Bundy v. Rudd, supra*. She maintained that she applied "the assertions in the petition to the applicable standards to test whether the petition states a legally sufficient 'just cause' requiring disqualification." Order at 4. She concluded that the petition could "be disposed of based only on the facts alleged in the petition," and that, accordingly, she applied "the more stringent standards." Order at 4, n.4.

Commissioner Kiesling described her testimony on Senate Bill 298 before the Commerce Committee as "demonstrably aimed at the administration of justice in the context of the Commission's economic regulation of water resources." The testimony did not, she asserted, "speak at all to the application or non-application of uniform rates to <u>any</u> specific ratepayers or to litigation concerning any ratepayers." Order at 7. She reasoned that to consider her testimony to be just cause for disqualification would be to preclude commissioners from responding to the invitation of legislators to address matters affecting the regulation of public utilities, a result inimical to the administration of justice. Commissioner Kiesling concluded that "no fact had been adduced demonstrating the testimony to be other than a neutral discussion about the administration of justice." *Id.*

Recognizing the "strained relations" case law in extra-judicial occurrences requiring disqualification, *e.g., McDermott v. Grossman*, 429 So.2d 393 (Fla 3d DCA 1983) and *Town Center of Islamorada, Inc. v. Overby*, 592 So.2d 774 (Fla. 3d DCA 1992), Commissioner Kiesling concluded that her encounter with Mr. Twomey following the committee hearing was distinguishable on the grounds that Mr. Twomey recklessly impugned her integrity in his testimony,

in contravention of Rule 4-8.2, Rules Regulating The Florida Bar. Order at 9. She noted that the supreme court, in *The Florida Bar, in re: Shimek*, 284 So.2d 686 (Fla. 1973), observed that:

> while a lawyer as a citizen has a right to criticize [a judge] publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system.

Id. at 688-89. Commissioner Kiesling concluded that her remonstrance cannot give rise to a charge of prejudice, and that it was proper "given [Mr. Twomey's] misconduct." Furthermore, she noted that for a trial judge to display anger and displeasure to a defendant is not to necessarily indicate a prejudice against the defendant if the display is caused by the defendant's conduct. Order at 10-11, quoting *Dempsey v. State*, 415 So.2d 1351 (Fla. 1st DCA 1982). The post-meeting encounter, she concluded, "does not constitute just cause for disqualification on the grounds of bias, prejudice or interest." Order at 8.

Finally, Commissioner Kiesling, in reliance upon Section 120.71, Florida Statutes, requiring that a petition for disqualification be filed within a reasonable time prior to the proceeding, concluded that the petition is untimely in respect to Dockets Nos. 920199-WS and 930880-WS, having been brought subsequent to final hearing. Moreover, she concluded that it is untimely in respect to Docket No. 950495-WS, because it is brought, without justification, at an advanced stage in the proceedings and would have, therefore, a significantly disruptive effect upon the Commission's ratemaking process, endangering the integrity of its outcome.

Applicable Law

First, we believe that the court's holding in *Bay Bank & Trust Co. v. Lewis, supra*, correctly construes Section 120.71, Florida Statutes, in setting forth a different disqualification standard applicable to agency heads, than to judges. The 1983 amendment of Section 120.71, Florida Statutes, renders the holding in *City of Tallahassee v. FPSC, supra*, inapposite. We note that the holding of *Bundy v. Rudd, supra*, still states the law with respect to a motion for the disqualification of a trial judge, *i.e.*, a judge presented with a motion for his disqualification shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification, but shall limit his inquiry to the legal sufficiency of the motion. *See, e.g., Time-Warner Entertainment*

Co., L.P. v. Baker, 647 So.2d 1070 (Fla 5th DCA 1994); *Mitchell v. State*, 642 So.2d 1108 (Fla. 4th DCA 1994); *Dura-Stress, Inc. v. Law*, 634 So.2d (Fla. 5th DCA 1994).

The court in *Bay Bank & Trust Co. v. Lewis, supra*, did not elucidate the difference in standards, and no other court has thus far construed Section 120.71, Florida Statutes, as amended in 1983. However, the court's opinion may be fairly read to affirm the applicability to agency heads of the standard requiring the bare determination of legal sufficiency. The court stated that, "We do not decide disputed issues of fact in such a proceeding, but assume, *as must the agency head*, that all allegations of fact in the motion [for disqualification] are true." (emphasis supplied) *Id.* at 633. Nevertheless, a petitioner seeking the recusal of a commissioner is faced with satisfying a more stringent standard than is one seeking the recusal of a trial judge. The standard applicable to a commissioner contemplates "the fact that agency heads have significantly different functions and duties than do judges." *Id.* at 634. The applicable test for legal sufficiency for recusal in any event is enunciated in *Hayslip v. Douglas, supra, i.e.*, whether the facts alleged would prompt a reasonably prudent person to fear that he could not get a fair and impartial trial.

Rule 1.432, Florida Rules of Civil Procedure, and Section 38.10, Florida Statutes

Furthermore, petitioners have improperly brought their petition pursuant to Rule 1.432, Florida Rules of Civil Procedure, *Disqualification of Judge*, and Section 38.10, Florida Statutes. Rule 1.432, Florida Rules of Civil Procedure, was repealed effective January 1, 1993, 609 So.2d 465 (Fla. 1992), and replaced by Rule 2.160, Florida Rules of Judicial Administration, *Disqualification of Trial Judges.* In any case, by its terms, its application is limited to county and circuit judges. Similarly, Section 38.10, Florida Statutes, *Disqualification of judge for prejudice; application; affidavits; etc.*, applies only to the judges of this state. Chapter 38, Florida Statutes, appears in Title V, *Judicial Branch*.

Timeliness

Finally, in *Bay Bank & Trust v. Lewis, supra*, the court was unwilling to reach the conclusion that the motion for disqualification was untimely. *Id.* at 678. The court noted that there is no statutory or rule definition of "agency proceeding" for purposes of Section 120.71, Florida Statutes. *Id.* Commissioner Kiesling posits, with respect to Dockets Nos. 920199-WS and 930880-

WS, that for present purposes "agency proceeding" means final hearing. The court in *Bay Bank & Trust v. Lewis, supra*, refused to accept respondents' similar contention that an "agency proceeding" commenced upon the filing of the petition for a Section 120.57, Florida Statutes, evidentiary hearing. *Id.* The motion for disqualification was filed eight and ten months after two petitions for formal hearing were filed. The court instead denied the petition for a writ of prohibition on other grounds.

Furthermore, at this stage of Docket 950495-WS, the effects of our decision in this matter are independent of the time of the petition's filing. Giving consideration to all of the circumstances of recent months, we do not believe that it follows necessarily that petitioners bypassed earlier opportunities to file a petition seeking Commissioner Kiesling's disqualification. As we have earlier noted, technical hearings are scheduled for January 29-31, and February 1-2, 5, and 7-9, 1996. We will consider SSU's revenue requirements and rates at special Agenda Conferences, April 29, 1996, and May 6, 1996. Moreover, we do not believe that at this time a finding of untimeliness in Docket No. 950495-WS would have sufficient force to trump a finding of bias, prejudice, or interest. The legal sufficiency of the petition seeking Commissioner Kiesling's disqualification can be decided on other grounds, and we have done so.[1]

Testimony by Commissioner

The opinion of the court in *United States v. Morgan*, 313 U.S. 409, 85 L. Ed. 1429 (1940), is an appropriate basis for the Commission's determination of whether petitioners have shown just cause for Commissioner Kiesling's disqualification as to their first grounds. In that case, the Secretary of Agriculture wrote a letter to the New York Times in which he vigorously criticized the decision of the district court to return impounded funds to Kansas City Stockyards market agencies. The impounded funds were those charged by the market agencies in excess of maximum rates set by the Secretary. The market agencies moved to disqualify the Secretary from proceedings reopened by him to fix reasonable rates during the impounding period. The court held:

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[1]Rule 2.160(e), Rules of Judicial Administration, requires that a motion to disqualify "be made within a reasonable time not to exceed 10 days after discovery of the facts constituting the grounds for the motion," and that it "be promptly presented to the court for an immediate ruling." If it is argued that this Rule provides guidance for ruling the petition untimely, we have already noted that the rule is applicable only to county and circuit judges. We believe, accordingly, that the instant petition may not be defeated by the application of this rule.

> That he not merely held but expressed strong views on matters believed by him to have been in issue, did not unfit him for exercising his duty in subsequent proceedings ordered by this Court ... Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.

Id. at 421.

In *Re Area Rate Proceeding*, 57 PUR3d 58 (FPC 1965), the Federal Power Commission concluded that it would not be a violation of procedural due process for a judge to sit in on a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. *Id.* at 62. Accordingly, the Commission found that:

> [E]ven if this were an adjudicatory proceeding in which the issue presented was whether the respondents had violated some provision of the law which would require the imposition of sanctions, a commissioner's prior expression of his views on a general question of fact, policy, or law which might be involved in the determination ... would not disqualify him from further participation. Similarly expression of opposition to the respondents' efforts to change the law would not show disqualifying personal bias. *A fortiori*, in a rate-making proceeding like the present one, which Congress has recognized as an essentially legislative function and, as such, part of our rule-making activities, an expression of views on a general question which may be in issue in the proceeding or opposition to amendatory legislation could not be disqualifying.

Id. The Commission further found that:

> In administrative agencies where commissioners are selected for their expertise, or their ability to acquire expertise with experience, it would be most surprising if a commissioner did not develop opinions on the major issues confronting his agency ....

> The public interest would hardly be served if the commission could be silenced on the question of whether its work is necessary and important merely by the regulated industry raising a related question as an issue in a proceeding before the commission. The commission is not merely determining the private rights of litigants but is charged with protecting the overall public interest. It has a duty and obligation to inform the Congress and the general public of its programs and policies ....
>
> There is also a basic difference between an informed mind and a closed one. An opinion is not a prejudice or a prejudgment, at least when held by someone required and accustomed to hold all opinions subject to confirmation or rejection in light of the proof. Ignorance of the problems involved in the regulatory process or lack of views thereon is not the touchstone to effective and impartial exercise of regulatory judgment. The regulatory process assumes that intelligent and fair decisions will be reached by the commissioners because of their familiarity with the special field in which they operate and not despite it.

Id. at 62-63. *See also, Federal Trade Comm'n v. Cement Inst.*, 333 U.S. 683, 702, 92 L.Ed. 1010, 1035, *reh. den.* 334 U.S. 839, 92 L.Ed. 1764 (1947) (mere formation and expression of opinion does not disqualify administrative officer from passing on merits of the case).

In an unpublished opinion, the Colorado Supreme Court held that the fact that a member of the state public utilities commission had issued a statement in an affidavit that ratepayers would be harmed by the transfer of telephone directory publishing assets did not prejudice a subsequent decision by the commission denying authority for the transfer, where there was no showing that the challenged commissioner was incapable of judging the controversy on the merits. *Mountain Tel. & Tel. Co. v. CPUC*, 98 PUR4th 534, 763 P.2d 1020 (1980).

Furthermore, in *Re Arkla, Inc.*, 111 PUR4th 151 (Ark. PSC 1990), the Arkansas Public Service Commission, rejecting allegations of impartiality as insufficient to warrant disqualification of its chairman, held that:

> A decision maker has an obligation not to recuse without valid reasons ... The Commission finds that neither the statements made by the Chairman before the Joint Interim

> committee or his past employment as legal counsel for the Governor warrant his recusal in this matter. A Commissioner has a policy making role as well as a judicial one. A Commissioner's expertise and insight are lost to the collective decision making process if he or she recuses.

Id. at 159.

Finally, Canon 4C of the Code of Judicial Conduct permits a judge to appear at a public hearing before, or otherwise consult with, an executive or legislative body or official on matters concerning the law, the legal system or the administration of justice. Giving effect to the second provision of the *Application of the Code of Judicial Conduct*[2] (quoted in full above), we believe the Code is applicable to agency heads, and may be made to apply to the Commission.

Thus, we find that Commissioner Kiesling's testimony before the Senate Commerce Committee was fully consistent with her obligations to discharge her policy making responsibility. Her testimony was not designed to advance the interests of SSU or to thwart the interests of the petitioners.[3] The thrust of her testimony is captured in the following excerpts:

> Kiesling: We would urge you not to take away one tool in our tool chest that allows us as economic regulators to deal with the significant water problems that are coming.
>
> * * *

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[2]The September 30, 1973, version of the Code provided, in *Compliance With the Code of Judicial Conduct*, that:

> Anyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions, including an officer such as a referee in bankruptcy, special master, court commissioner, or magistrate, is a judge for the purpose of this Code.

The phrase, "who is an officer of a judicial system," is not employed in the current version. Nevertheless, both this and the current version of the Code seem meant to apply to agency heads.

[3] A Commissioner, during his term of office, may not make any public comment regarding the *merits of any proceeding* under Section 120.57 currently pending before the Commission. FPSC Administrative Procedures Manual, Section 5.01 E. (emphasis supplied)

> Unidentified: So, in other words, unified rates is the commission policy where the commission thinks it's a good policy, and is not their policy where they don't think it's a good policy.
>
> Kiesling: That's right. It's one form of ratemaking that we view as part of our arsenal.

Order at 6. There is nothing to suggest to us that Commissioner Kiesling's testimony should be characterized as having escaped from the boundaries of the administration of justice, as petitioners contend. Accordingly, we find it appropriate to conclude that Commissioner Kiesling's testimony cannot be a legally sufficient basis for her disqualification in the aforementioned dockets.

Confrontational Encounters

As to petitioners' second grounds for disqualification, their fears that they will not receive a fair and impartial hearing before Commissioner Kiesling as a result of her exchange of words with Mr. Twomey following the committee hearing, we do not find sufficient representation in the petition to believe the exchange can be construed as evidence of prejudice to the interests of the petitioners before the Commission. Petitioners do not allege facts that would cause a reasonable person to believe her conduct was prompted by prejudice or that it caused her to harbor a present bias or prejudice.[4]

Petitioners, in their second grounds, allege that Commissioner Kiesling's "public display of anger directed at [petitioners'] attorney directly violated the provisions of Canon [3B(4)]." Canon 3B(4) provides that "[a] judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity." The statements of Mr. Twomey with which Commissioner Kiesling presumably took issue would reasonably appear to strain the Florida Bar's *Rules of*

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[4]In the Commentary to Canon 2A of the Code, it is said that:

> A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

Professional Conduct.[5] We do not find that Commissioner Kiesling's conduct can be interpreted to be a violation of Canon 3B(4) prejudicial to the petitioners' interests, applying the test of *Hayslip v. Douglas, supra*. Accordingly, we find it appropriate to conclude that neither can Commissioner Kiesling's exchange of words with Mr. Twomey following the March 7, 1995, Senate Commerce Committee hearing on Senate Bill 298 be a legally sufficient basis for her disqualification in the aforementioned dockets.

CONCLUSION

Upon consideration, we conclude that Commissioner Kiesling correctly declined to recuse herself from Dockets Nos. 920199-WS, 930880-WS, and 950495-WS, petitioners' having failed in their burden to make a proper showing of just cause, pursuant to Section 120.71, Florida Statutes. We agree with Commissioner Kiesling that the petition is legally insufficient on the basis of the judicial standard enunciated in *Bundy v. Rudd, supra*. Accordingly, we adopt the rationale of Order No. PSC-95-1199-PCO-WS.

Further, we find that Commissioner Kiesling's appearance before the Senate Commerce Committee on March 7, 1995, was consistent with Canon 4C of the Code of Judicial Conduct. She appeared as an authorized spokesperson for the Commission, and her testimony was confined to articulating the Commission's policy regarding uniform rates. In addition, we find that Commissioner Kiesling's confrontation with Mr. Twomey following the committee hearing would not prompt a reasonably prudent person to fear that he could not get a fair and impartial trial and that it was not a prejudicial violation of Canon 3B(4) of the Code. Therefore, sitting in the absence of Commissioner Kiesling, we decide against Commissioner Kiesling's disqualification from further participation in Docket Nos. 920199-WS, 930880-WS, and 950495-WS.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Commissioner Diane K. Kiesling shall not be disqualified from participation in Dockets Nos. 950495-WS, 930880-WS, and 920199-WS. It is further

ORDERED that Order No. PSC-95-1199-PCO-WS is by reference incorporated herein. It is further

[5]See Rule 4-8.2(a), Rules Regulating the Florida Bar.

ORDERED that Dockets Nos. 930945-WS, 930880-WS, and 920199-WS shall remain open.

By ORDER of the Florida Public Service Commission, this 27th day of November, 1995.

Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

CJP

CONCURRING OPINION

Commissioner J. Terry Deason concurs only in the result and writes separately, as follows:

I concur in the result reached only. Because I have reached my decision based solely on the untimeliness of the filing, I do not express any opinion as to the merits of the Petition. Although, I am unsure of the status of the order issued by Commissioner Kiesling, I find the timeliness analysis contained therein to be persuasive and hereby adopt it in this concurrence. Furthermore I would note that the Petition cites to former Rule 1.432, FRCP as binding authority on the Commission in matters of disqualification. While expressing no opinion as to the applicability of this Rule on the Commission's decision making in this matter, I note that the rule was transferred to the Florida Rules of Judicial Administration as Rule 2.160. Subsection (e) of that Rule requires that such pleading shall be filed within 10 days after discovery of the facts constituting the grounds for the motion. This Rule as cited by the Petitioner provides further support for the "reasonable time" analysis contained in Order No. PSC-95-1199-PCO-WS.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for rate increase in Brevard, Charlotte/Lee, Citrus, Clay, Duval, Highlands, Lake, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Semionole, Volusia, and Washington Counties by SOUTHERN STATES UTILITIES, INC.; Collier County by MARCO SHORES UTILITIES (Deltona); Hernando County by SPRING HILL UTILITIES (Deltona); and Volusia County by DELTONA LAKES UTILITIES (Deltona).	DOCKET NO. 920199-WS ORDER NO. PSC-95-1199-PCO-WS ISSUED: September 25, 1995
In Re: Investigation into the appropriate rate structure for SOUTHERN STATES UTILITIES, INC. for all regulated systems in Bradford, Brevard, Citrus, Clay, Collier, Duval, Hernando, Highlands, Lake, Lee/Charlotte, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, St. Johns, St. Lucie, Volusia, and Washington Counties.	DOCKET NO. 930880-WS
In Re: Application for rate increase and increase in service availability charges by Southern States Utilities, Inc. 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.	DOCKET NO. 950495-WS

ORDER DECLINING TO WITHDRAW FROM PROCEEDING

This cause comes on for consideration on a Verified Petition to Disqualify or, In The Alternative, To Abstain (petition) with accompanying affidavits which was filed on September 13, 1995, by

APPENDIX A

Citrus County, the Sugar Mill Woods Civic Association, Inc., and the Spring Hill Civic Association, Inc. (Petitioners), in those of the above dockets in which the aforesaid County and Civic Associations are respectively parties. The petition seeks disqualification or abstention from proceeding further in these docketed proceedings based on facts and law alleged to require that result. This petition post-dated by some six weeks the commencement of petitioners' participation in Docket No. 950495-WS and by two and three years, respectively, the commencement of the other two dockets.

On September 20, 1995, Southern States Utilities, Inc. (Utility), filed a Memorandum In Opposition To Verified Petition To Disqualify, Or In The Alternative, To Abstain (opposition). The Utility's opposition alleged that the petition failed to state factual and legal grounds for disqualification.

Petitioners set out the facts relied on most succinctly at pages 8-11 of the petition. Therein, reference is made to a March 7, 1995 meeting of the Commerce Committee of the Florida Senate in which Senate Bill 298 was heard. Senate Bill 298 is described as legislation which would have prohibited "uniform rates." Testifying in support of the bill were its sponsor, Senator Ginny Brown-Waite, Jim Desjardin, a member of the utility committee of a petitioner association, and Michael B. Twomey, petitioners' attorney. The petition also references my presence at the meeting and testimony about SB 298, with specific reference to my concern about "the elimination of uniform rates as a 'tool' [the commission] could use." Petition p. 9. The petition further describes an incident following the consideration of SB 298 in which I am said to have "loudly, and publicly" accused petitioner attorney Michael B. Twomey of calling me a "liar" during his committee testimony on SB 298 and threatening to "get him" with every legal means at my disposal if the alleged behavior occurred again. The recitation by petitioner of the facts concludes with summaries of the affidavits of Mr. Desjardin, Mr. Twomey and Senator Brown-Waite. These affidavits are said to verify that, based on my testimony re: SB 298 and the post-meeting incident described above, petitioners have a well-founded belief that, absent my disqualification, they will be unable to obtain fair and impartial adjudication in the dockets at issue, all of which concern the application of uniform rates to those they represent.

DISCUSSION

Applicable Standards

Between pages 2 and 7 of the petition, petitioners set out extensive citations of legal authority in support of their theory that disqualification is required. However, as noted by the Utility, significant portions of the authority relied on by petitioners have been repealed or superseded. Repealed provisions include Rule 1.432, Florida Rules of Civil Procedure,[1] and the Canons of the prior Code of Judicial Conduct.[2] Moreover, petitioners' conclusion that "[t]he standard to be used in disqualifying an individual serving as an agency head is the same as the standard used in disqualifying a judge. . ." is no longer correct. The case that conclusion relied on, City of Tallahassee v. Florida Public Service Commission, 441 So.2d 620 (Fla. 1983), has been superseded by Bay Bank & Trust Company v. Lewis, 634 So.2d 672 (Fla. 1st DCA 1994). Therein, the Court stated:

> The 1983 Florida Legislature deleted the phrase "or other causes for which a judge may be recused" from section 120.71, Florida Statutes, so we must assume that the statute was intended to have a different meaning after its amendment [citation omitted]. Thus, while a moving party may still disqualify an agency head upon a proper showing of "just cause" under section 120.71, the standards for disqualifying an agency head differ from the standards for disqualifying a judge. This change gives recognition to the fact that agency heads have significantly different functions and duties than do judges. Were we to give section 120.71 the same meaning as that given it in City of Tallahassee v. Florida Public Service Commission, the 1983 amendment to section 120.71 would serve no purpose whatsoever.

Bay Bank, supra, at 678-9.

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[1]See, The Florida Bar Re: Amendment to Rules of Judicial Administration, 609 So.2d 465 (Fla. 1992).

[2]See, In re: Code of Judicial Conduct, 643 So.2d 1037 (Fla. 1994).

APPENDIX A

Thus, the standards that are directly applicable to this matter include Section 120.71, Florida Statutes, as construed by the Court in Bay Bank, and Rule 25-21.004, Florida Administrative Code, promulgated by the Commission. Section 120.71, Florida Statutes, states in pertinent part that:

> (1) . . . any individual serving alone or with others as an agency head may be disqualified from serving in an agency proceeding for bias, prejudice, or interest when any party to the agency proceeding shows just cause by a suggestion filed within a reasonable period of time prior to the agency proceeding.

Rule 25-21.004, in turn states, in pertinent part:

> (1) A commissioner may be disqualified from hearing or deciding any matter where it can be shown that the commissioner has a bias or a prejudice for or against any party to the proceeding or a financial interest in its outcome.
>
> (3) A petition for disqualification of a commissioner shall state the grounds for disqualification and shall allege facts supportive of those grounds.

Other statutes which bear on these matters include Section 350.041(2)(g) and Section 350.05, Florida Statutes, which speak to the professional conduct of commissioners and the independent, objective and non-partisan manner in which they are to perform their duties. The rest of the authority cited by petitioner, whether repealed or superseded, is not directly applicable or controlling.

Accordingly, the limitation of a judge to the bare determination of legal sufficiency in considering a disqualification motion,[3] and the prohibition against his passing on the truth of the facts alleged are not controlling either, in light of Bay Bank, in an agency head's consideration of a

[3] See, e.g., Bundy v. Rudd, 366 So.2d 440 (Fla. 1978).

disqualification motion.[4] With all of the foregoing in mind, I will apply the assertions in the petition to the applicable standards to test whether the petition states a legally sufficient "just cause" requiring disqualification.

Remarks at the March 7, 1995, Senate Commerce Committee Meeting

Based on the petition and accompanying affidavits, I conclude that my testimony at the committee meeting does not constitute just cause for disqualification. There is not a single fact presented relevant to the actual testimony I presented which demonstrates it to be beyond the "discussion of the administration of justice" explicitly permitted by the very judicial canon, formerly Canon 4(B) of the Code of Judicial Conduct, relied upon by petitioners. That canon, even though relevant to the stricter standard applicable to judges, allows those judges, and therefore, a fortiori, an agency head:

> [T]o appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and [to] otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice.[5]

As to whether my testimony was limited to discussing the administration of justice, the petition offers no facts whatsoever, but only a legal conclusion unsupported by facts:

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[4]Because this motion can be disposed of based only on the facts alleged in the petition, the more stringent standards are applied herein.

[5]The repealed canon is quoted herein because petitioners rely on it. However, it should be noted that the revised canon, although somewhat changed, retains the ability of agency heads to discuss with legislative bodies matters on the law, the legal system or the administration of justice. See, Canon 4(C), Code of Judicial Conduct.

> She was clearly engaging in consulting with a legislative body, but on matters that clearly could not be characterized as "only concerning the administration of justice."

Petition, p. 11.

However, only a single word of my testimony is cited by petitioners, the word "tool," cited at page 9 of the petition. The sentence of testimony containing that word appears at page 15 of the transcript:[6]

> We would urge you not to take away one tool in our tool chest that allows us as economic regulators to deal with the significant water problems that are coming. [emphasis supplied]

This testimony is demonstrably aimed at the administration of justice in the context of the Commission's economic regulation of water resources. It does not speak at all to the application or non-application of uniform rates to any specific ratepayers or to litigation concerning any ratepayers, including petitioners. Moreover, the listener reaction reflected an understanding of the limited scope of the testimony:

> **Unidentified Speaker:** So, in other words, unified rates is the commission policy where the commission thinks it's a good policy, and is not their policy where they don't think it's a good policy.
>
> **Commissioner Kiesling:** That's right. It's one form of ratemaking that we view as part of our arsenal.

Transcript, p. 25.

The fact that petitioners took it differently and had the feeling or perception that the testimony was directed toward supporting the imposition of uniform rates on them is of no moment. That feeling or perception is not a "fact." See, e.g., City of

[6]Petitioners quotation should have referenced the tape or a transcript of the Committee Meeting, a copy of which is attached.

Palatka v. Frederick, 174 So. 826, 828 (Fla. 1937). If there was anything about petitioners' cases that was impermissibly addressed in the testimony it should have been cited as constituting a fact in support of just cause for disqualification. Conversely, where only the single word "tool" was cited, and the context of the testimony containing that word did not concern the imposition of uniform rates on any specific ratepayers, let alone petitioners, or litigation involving petitioners, no fact has been adduced demonstrating the testimony to be other than a neutral discussion about the administration of justice. The testimony cited above specifically allowed for the possibility that a given application of uniform rates might be found to be "bad," a determination which was in the Court's jurisdiction as to petitioners, not the Commission's. Moreover, concern that the testimony was presented "forcefully" assumes that discussions which are forceful cannot be limited to the administration of justice. These assumptions and conclusions are arrived at:

> . . . from a tone of voice or a manner which [is] conceived to be indicative of bias or prejudice against the parties in the case.

As such, they are not facts indicating a just cause for disqualification under Section 120.71, Florida Statutes, for bias, prejudice or interest. City of Palatka, supra. To conclude otherwise would result in a ban on the ability of commissioners to respond to the invitations of legislators to address such matters.[7] That result would be inimical to the administration of justice which is the very subject of the judicial conduct canon petitioners claim to rely on.

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[7]Petitioner's claim that the testimony was "unsolicited" is unsupported because Senator Brown-Waite's affidavit is based on a lack of knowledge and is therefore legally insufficient:

> I had not solicited Commissioner Kiesling's attendance or comments at the Committee meeting and am not aware that any other Senator invited her to speak on the bill. [emphasis supplied]

See, e.g., Gieseke v. Grossman, 418 So.2d 1055, 57 (Fla. 4th DCA 1982).

The Post-Meeting Encounter

There are numerous cases in which extra-judicial occurrences involving judges and attorneys have resulted in disqualification of the judge.[8] For example, a judge's tirade about a lawyer's failure to support that judge for other judicial positions was held to merit disqualification in McDermott v. Grossman, 429 So.2d 393 (Fla. 3rd DCA 1983). Again in Town Center of Islamorada, Inc. v. Overby, 592 So.2d 774 (Fla. 3rd DCA 1992), an extrajudicial dispute which began at a bar luncheon at which an attorney offended the judge by announcing his intent to sue the judges of that circuit warranted disqualification.

However, upon careful reflection, I conclude that even under the more stringent standard applicable to judges, the so-called "strained relations" cases are distinguishable from this matter. As a result, I further conclude that the post-meeting encounter does not constitute just cause for disqualification on the grounds of bias, prejudice or interest. Section 120.71, Fla. Stat.; Rule 25-21.004, Fla. Admin. Code.

The difference between this case and those just cited is that there is nothing wrong with an attorney choosing not to support a judge for a different judicial position. Therefore, being on the receiving end of a tirade about it may cause legitimate concern that the judge is prejudiced. Likewise, suing the judges in the circuit is not improper, and the fact that a judge was offended by it may reflect prejudice against the attorney for his having sued the judge and the judge's colleagues.

In contrast, an attorney that makes a statement that he knows to be false or with reckless disregard as to its truth or falsity "concerning the . . . integrity of a judge . . ." violates Rule 4-8.2 of the Florida Bar's Code of Attorney Conduct. This is true whether or not the statements are made extra-judicially. See, The Florida Bar v. Stokes, 186 So.2d 499 (Fla. 1966) (disparaging and unfair comments about a local judge made by attorney during radio program which judge had no opportunity to rebut required that attorney make a public apology).

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[8]Even though the disqualification of judges is arguably not a standard which must be met, Bay Bank, supra, consideration of that more stringent standard adds by that stringency to the confidence with which these issues are addressed here pursuant to Section 120.71 and Rule 25-21.004.

The Florida Supreme Court expounded at length on the issue of recklessly impugning the integrity of judges in In re: Shimek, 284 So.2d 686 (Fla. 1973). In that case, the attorney filed a memorandum in federal court which claimed that:

> The state trial judge avoided the performance of his sworn duty. . . . A product of [the prosecutorial] system who works close with Sheriffs and who must depend on political support and re-election to the bench is not going to do justice.

The District Court judge concluded that this language was:

> A scurrilous attack upon members of the state judiciary, completely unwarranted by the record before it.

284 So.2d 686.

The Florida Supreme Court then noted the following:

> Nothing is more sacred to man and particularly, to a member of the judiciary, than his integrity. Once the integrity of a judge is in doubt, the efficacy of his decisions are (sic) likely to be questioned. . . . While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system.

284 So.2d 688-9.

Several statements of Mr. Twomey, at page 31, lines 23-25 and page 32, lines 1-20, recklessly impugned my integrity. For example, on page 32 of the transcript beginning at line 19, Mr. Twomey states:

> The $150 is a scare tactic, it's dishonest, it's not true. You shouldn't be sucked in by this.

This hardly comports with either the requirements of Rule 4-8.2 or Shimek. The point is not that an attorney may not disagree, but that the disagreement could have been accomplished without violating these precepts, just as my testimony was accomplished without personally abusing anyone else.

As stated by the Court in Shimek:

> Judges are subject to fair criticism. The attorney is bound to use restraint. His statements must be prudent, not rash, irresponsible, and without foundation.

The petitioners' own characterization of the post-meeting encounter confirms that these concerns, rather than any substantive issue involving the clients or their cases, were the subject of the encounter:

> Commissioner Kiesling berated Mike Twomey for calling her a "liar" and publicly threatened to "get him" with "every legal means at her disposal" if the alleged behavior occurred again. [emphasis supplied]

Unlike the "strained relations" cases, petitioners cannot deduce prejudice from this encounter because, given the attorney's misconduct, it would be proper for the remonstrance and warning to be given at the hearing, should the same conduct occur there. In contrast, it obviously would not be any more proper for the judge in McDermott to lambaste the attorney at the hearing for his failure to support her for other judicial positions than it was to do so extra-judicially.

Finally, as to this issue, showing anger and displeasure has not been found to be a just cause for disqualification if caused by the misbehavior of the defendant himself, let alone that of his attorney:

> For a trial judge to indicate anger and displeasure in a direct criminal contempt proceeding in which the defendant was found guilty does not in and of itself indicate that the trial judge is prejudiced against the defendant. The record in this case reflects that if the trial judge was angry and displeased, it was caused by the defendant's

> conduct. Further, there is nothing in the record to reflect any prejudice of the trial judge during the . . . later proceedings. .

Dempsey v. State, 415 So.2d 1351 (Fla. 1st DCA 1982). Similarly, in Oates v. State, 619 So.2d 23 (Fla. 4th DCA 1993), rev. denied, 629 So.2d 134 (Fla. 1993), the court found that the judge's remark calling defendant an "obstinate jerk" did not require disqualification where defendant persisted in engaging in argumentative exchanges with the judge. The same is true of this case as well.

Timeliness

Section 120.71, Florida Statutes, requires that a petition be filed within a reasonable time prior to the proceeding. There are no rules or case law defining "prior to the proceeding." Rule 25-5.108 of the Model Rules requires a petition to be filed 5 days prior to final hearing. The final proceeding in Docket No. 920199-WS was held November 6 through 11, 1992, prior to my appointment to the Commission. A decision on remand was made on September 12, 1995, before the filing of the subject petition. The subsequent decision of the Commission on August 12, 1995, was not a separate or new proceeding, and the decision scheduled for September 26, 1995, is merely the conclusion of the deliberations from September 12, 1995. Therefore, the petition as applied to Docket No. 920199-WS is untimely as it was filed after the final hearing. Even if it were not untimely, petitioners have clearly waived their right to seek recusal in this case by filing after the subsequent Agenda Conference decision.[9]

The final hearing in Docket No. 930880-WS was held on April 14, 1994. The case is currently pending on appeal. On August 29, 1995, the Commission requested the appellate court to relinquish jurisdiction in order to allow the Commission to re-open the record for the purpose of conforming the Commission's decision on appeal to the appellate court's opinion in Commission Docket No. 920199-WS. If jurisdiction is relinquished, the Commission will not conduct a new proceeding. The full Commission will merely be

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[9]On September 12, 1995, at the beginning of argument at the Agenda Conference, attorney for the petitioners did state that he would be filing a petition for recusal. He did not make an oral motion for recusal or seek a continuance based on his imminent motion. Commissioner Kiesling made no comments on the motion.

taking limited evidence to amplify the trial record. Therefore, the petition is untimely having been filed after the final hearing, inappropriate to the extent the appellate court has jurisdiction over the case, and unfounded as to any future amplification of the record.

In the third case in which petitioners seek recusal, Docket No. 950945-WS, the final hearing has not occurred. However, petitioners knew that this Commissioner was assigned as prehearing officer as early as July 24, 1995, when counsel for petitioners filed a request for full commission review of Procedural Order PSC-95-08290-PCO-WS. Also at that time, counsel for petitioners knew or should have known the dates set for numerous customer service hearings, as well as those for agenda conferences on such matters as the setting of interim rates. Counsel for petitioners has requested other commissioners to order Commissioner Kiesling recused at two of the public hearings held on September 14, and September 20, 1995, where no decisions are made by the Commission, where counsel for petitioners did not allege any further bias or prejudice has occurred, and where those hearings were scheduled prior to the filing of the petition. In fact, it was the scheduling of these hearings to which petitioners objected in their July 24, 1995 motion for full commission review of that procedural order.

The nature of the operation of the Commission constituted with five members is significantly different from the operation of the circuit or county courts and even different from the operation of the Division of Administrative Hearings where such courts have a pool of judges or hearing officers from which to draw. Unlike the recusal of a Commissioner, the recusal of one judge among a pool of judges may be accomplished without a significant danger of permitting the intended or unintended manipulation of the decision-making process.[10] It is disruptive of the orderly process of the Commission, particularly when proceeding to hearing with all five commissioners in their quasi-legislative role of rate making,[11] to fail to bring the matter of recusal to the attention of the Commission at the earliest practical moment.

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[10]In City of Palatka, supra, at 827-828, the Florida Supreme Court held that it would have been improper for the judge to disqualify himself based on a legally insufficient pleading. This decision has higher significance in view of my responsibilities as a part of this collective agency head. Bay Bank, supra.

[11]United Telephone Co. v. Mayo, 345 So.2d 648 (Fla. 1977), at 654 (the fixing of rates is not a judicial function).

APPENDIX A

Further, petitioners are customer intervenors to this rate proceeding. Counsel for petitioners knew or should have known that the full commission would be assigned to hear Docket No. 950495-WS. Therefore, counsel for petitioners knew or should have known prior to representing his clients that this commissioner would be hearing this case. In Town Center of Islamarada v. Overby, supra, the court held that ordinarily a party may not bring an attorney into a case after it has been assigned to a judge and then move to disqualify on the grounds of bias against the attorney. So here, where Rule 25-22.039, Florida Administrative Code, provides that an intervenor takes the case as he finds it, where counsel for petitioners knew of his belief of bias prior to representing petitioners in this cause, and where counsel had an opportunity to raise this issue at least upon their first filings in this case, petitioners have waived their right to seek recusal.

CONCLUSION

As discussed above, the standards relied on by petitioners are inapposite. Applying applicable standards, the petition is conclusory, untimely and is not legally sufficient to support disqualification. Based on the foregoing, I hereby decline to withdraw from the proceeding.

By ORDER of Commissioner Diane K. Kiesling, as Prehearing Officer, this 25th day of September, 1995.

/s/ Diane K. Kiesling
DIANE K. KIESLING, Commissioner and Prehearing Officer

This is a facsimile copy. A signed copy of the order may be obtained by calling 1-904-413-6770.

(S E A L)

APPENDIX A

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Further review of this interlocutory order shall be pursuant to Rule 25-21.004, Florida Administrative Code.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for rate increase in Brevard, Charlotte/Lee, Citrus, Clay, Duval, Highlands, Lake, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Semionole, Volusia, and Washington Counties by SOUTHERN STATES UTILITIES, INC.; Collier County by MARCO SHORES UTILITIES (Deltona); Hernando County by SPRING HILL UTILITIES (Deltona); and Volusia County by DELTONA LAKES UTILITIES (Deltona).	DOCKET NO. 920199-WS ORDER NO. PSC-95-1199-PCO-WS ISSUED: September 25, 1995
In Re: Investigation into the appropriate rate structure for SOUTHERN STATES UTILITIES, INC. for all regulated systems in Bradford, Brevard, Citrus, Clay, Collier, Duval, Hernando, Highlands, Lake, Lee/Charlotte, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, St. Johns, St. Lucie, Volusia, and Washington Counties.	DOCKET NO. 930880-WS
In Re: Application for rate increase and increase in service availability charges by Southern States Utilities, Inc. 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.	DOCKET NO. 950495-WS

ORDER DECLINING TO WITHDRAW FROM PROCEEDING

This cause comes on for consideration on a Verified Petition to Disqualify or, In The Alternative, To Abstain (petition) with accompanying affidavits which was filed on September 13, 1995, by

Citrus County, the Sugar Mill Woods Civic Association, Inc., and the Spring Hill Civic Association, Inc. (Petitioners), in those of the above dockets in which the aforesaid County and Civic Associations are respectively parties. The petition seeks disqualification or abstention from proceeding further in these docketed proceedings based on facts and law alleged to require that result. This petition post-dated by some six weeks the commencement of petitioners' participation in Docket No. 950495-WS and by two and three years, respectively, the commencement of the other two dockets.

On September 20, 1995, Southern States Utilities, Inc. (Utility), filed a Memorandum In Opposition To Verified Petition To Disqualify, Or In The Alternative, To Abstain (opposition). The Utility's opposition alleged that the petition failed to state factual and legal grounds for disqualification.

Petitioners set out the facts relied on most succinctly at pages 8-11 of the petition. Therein, reference is made to a March 7, 1995 meeting of the Commerce Committee of the Florida Senate in which Senate Bill 298 was heard. Senate Bill 298 is described as legislation which would have prohibited "uniform rates." Testifying in support of the bill were its sponsor, Senator Ginny Brown-Waite, Jim Desjardin, a member of the utility committee of a petitioner association, and Michael B. Twomey, petitioners' attorney. The petition also references my presence at the meeting and testimony about SB 298, with specific reference to my concern about "the elimination of uniform rates as a 'tool' [the commission] could use." Petition p. 9. The petition further describes an incident following the consideration of SB 298 in which I am said to have "loudly, and publicly" accused petitioner attorney Michael B. Twomey of calling me a "liar" during his committee testimony on SB 298 and threatening to "get him" with every legal means at my disposal if the alleged behavior occurred again. The recitation by petitioner of the facts concludes with summaries of the affidavits of Mr. Desjardin, Mr. Twomey and Senator Brown-Waite. These affidavits are said to verify that, based on my testimony re: SB 298 and the post-meeting incident described above, petitioners have a well-founded belief that, absent my disqualification, they will be unable to obtain fair and impartial adjudication in the dockets at issue, all of which concern the application of uniform rates to those they represent.

DISCUSSION

Applicable Standards

Between pages 2 and 7 of the petition, petitioners set out extensive citations of legal authority in support of their theory that disqualification is required. However, as noted by the Utility, significant portions of the authority relied on by petitioners have been repealed or superseded. Repealed provisions include Rule 1.432, Florida Rules of Civil Procedure,[1] and the Canons of the prior Code of Judicial Conduct.[2] Moreover, petitioners' conclusion that "[t]he standard to be used in disqualifying an individual serving as an agency head is the same as the standard used in disqualifying a judge. . ." is no longer correct. The case that conclusion relied on, City of Tallahassee v. Florida Public Service Commission, 441 So.2d 620 (Fla. 1983), has been superseded by Bay Bank & Trust Company v. Lewis, 634 So.2d 672 (Fla. 1st DCA 1994). Therein, the Court stated:

> The 1983 Florida Legislature deleted the phrase "or other causes for which a judge may be recused" from section 120.71, Florida Statutes, so we must assume that the statute was intended to have a different meaning after its amendment [citation omitted]. Thus, while a moving party may still disqualify an agency head upon a proper showing of "just cause" under section 120.71, the standards for disqualifying an agency head differ from the standards for disqualifying a judge. This change gives recognition to the fact that agency heads have significantly different functions and duties than do judges. Were we to give section 120.71 the same meaning as that given it in City of Tallahassee v. Florida Public Service Commission, the 1983 amendment to section 120.71 would serve no purpose whatsoever.

Bay Bank, supra, at 678-9.

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[1]See, The Florida Bar Re: Amendment to Rules of Judicial Administration, 609 So.2d 465 (Fla. 1992).

[2]See, In re: Code of Judicial Conduct, 643 So.2d 1037 (Fla. 1994).

Thus, the standards that are directly applicable to this matter include Section 120.71, Florida Statutes, as construed by the Court in Bay Bank, and Rule 25-21.004, Florida Administrative Code, promulgated by the Commission. Section 120.71, Florida Statutes, states in pertinent part that:

> (1) . . . any individual serving alone or with others as an agency head may be disqualified from serving in an agency proceeding for bias, prejudice, or interest when any party to the agency proceeding shows just cause by a suggestion filed within a reasonable period of time prior to the agency proceeding.

Rule 25-21.004, in turn states, in pertinent part:

> (1) A commissioner may be disqualified from hearing or deciding any matter where it can be shown that the commissioner has a bias or a prejudice for or against any party to the proceeding or a financial interest in its outcome.
>
> (3) A petition for disqualification of a commissioner shall state the grounds for disqualification and shall allege facts supportive of those grounds.

Other statutes which bear on these matters include Section 350.041(2)(g) and Section 350.05, Florida Statutes, which speak to the professional conduct of commissioners and the independent, objective and non-partisan manner in which they are to perform their duties. The rest of the authority cited by petitioner, whether repealed or superseded, is not directly applicable or controlling.

Accordingly, the limitation of a judge to the bare determination of legal sufficiency in considering a disqualification motion,[3] and the prohibition against his passing on the truth of the facts alleged are not controlling either, in light of Bay Bank, in an agency head's consideration of a

[3] See, e.g., Bundy v. Rudd, 366 So.2d 440 (Fla. 1978).

disqualification motion.[4] With all of the foregoing in mind, I will apply the assertions in the petition to the applicable standards to test whether the petition states a legally sufficient "just cause" requiring disqualification.

Remarks at the March 7, 1995, Senate Commerce Committee Meeting

Based on the petition and accompanying affidavits, I conclude that my testimony at the committee meeting does not constitute just cause for disqualification. There is not a single fact presented relevant to the actual testimony I presented which demonstrates it to be beyond the "discussion of the administration of justice" explicitly permitted by the very judicial canon, formerly Canon 4(B) of the Code of Judicial Conduct, relied upon by petitioners. That canon, even though relevant to the stricter standard applicable to judges, allows those judges, and therefore, a fortiori, an agency head:

> [T]o appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and [to] otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice.[5]

As to whether my testimony was limited to discussing the administration of justice, the petition offers no facts whatsoever, but only a legal conclusion unsupported by facts:

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[4]Because this motion can be disposed of based only on the facts alleged in the petition, the more stringent standards are applied herein.

[5]The repealed canon is quoted herein because petitioners rely on it. However, it should be noted that the revised canon, although somewhat changed, retains the ability of agency heads to discuss with legislative bodies matters on the law, the legal system or the administration of justice. See, Canon 4(C), Code of Judicial Conduct.

> She was clearly engaging in consulting with a legislative body, but on matters that clearly could not be characterized as "only concerning the administration of justice."

Petition, p. 11.

However, only a single word of my testimony is cited by petitioners, the word "tool," cited at page 9 of the petition. The sentence of testimony containing that word appears at page 15 of the transcript:[6]

> We would urge you not to take away one tool in our tool chest that allows us as economic regulators to deal with the significant water problems that are coming. [emphasis supplied]

This testimony is demonstrably aimed at the administration of justice in the context of the Commission's economic regulation of water resources. It does not speak at all to the application or non-application of uniform rates to any specific ratepayers or to litigation concerning any ratepayers, including petitioners. Moreover, the listener reaction reflected an understanding of the limited scope of the testimony:

> **Unidentified Speaker:** So, in other words, unified rates is the commission policy where the commission thinks it's a good policy, and is not their policy where they don't think it's a good policy.
>
> **Commissioner Kiesling:** That's right. It's one form of ratemaking that we view as part of our arsenal.

Transcript, p. 25.

The fact that petitioners took it differently and had the feeling or perception that the testimony was directed toward supporting the imposition of uniform rates on them is of no moment. That feeling or perception is not a "fact." See, e.g., City of

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[6]Petitioners quotation should have referenced the tape or a transcript of the Committee Meeting, a copy of which is attached.

Palatka v. Frederick, 174 So. 826, 828 (Fla. 1937). If there was anything about petitioners' cases that was impermissibly addressed in the testimony it should have been cited as constituting a fact in support of just cause for disqualification. Conversely, where only the single word "tool" was cited, and the context of the testimony containing that word did not concern the imposition of uniform rates on any specific ratepayers, let alone petitioners, or litigation involving petitioners, no fact has been adduced demonstrating the testimony to be other than a neutral discussion about the administration of justice. The testimony cited above specifically allowed for the possibility that a given application of uniform rates might be found to be "bad," a determination which was in the Court's jurisdiction as to petitioners, not the Commission's. Moreover, concern that the testimony was presented "forcefully" assumes that discussions which are forceful cannot be limited to the administration of justice. These assumptions and conclusions are arrived at:

> . . . from a tone of voice or a manner which [is] conceived to be indicative of bias or prejudice against the parties in the case.

As such, they are not facts indicating a just cause for disqualification under Section 120.71, Florida Statutes, for bias, prejudice or interest. City of Palatka, supra. To conclude otherwise would result in a ban on the ability of commissioners to respond to the invitations of legislators to address such matters.[7] That result would be inimical to the administration of justice which is the very subject of the judicial conduct canon petitioners claim to rely on.

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[7]Petitioner's claim that the testimony was "unsolicited" is unsupported because Senator Brown-Waite's affidavit is based on a lack of knowledge and is therefore legally insufficient:

> I had not solicited Commissioner Kiesling's attendance or comments at the Committee meeting and am not aware that any other Senator invited her to speak on the bill. [emphasis supplied]

See, e.g., Gieseke v. Grossman, 418 So.2d 1055, 57 (Fla. 4th DCA 1982).

The Post-Meeting Encounter

There are numerous cases in which extra-judicial occurrences involving judges and attorneys have resulted in disqualification of the judge.[8] For example, a judge's tirade about a lawyer's failure to support that judge for other judicial positions was held to merit disqualification in McDermott v. Grossman, 429 So.2d 393 (Fla. 3rd DCA 1983). Again in Town Center of Islamorada, Inc. v. Overby, 592 So.2d 774 (Fla. 3rd DCA 1992), an extrajudicial dispute which began at a bar luncheon at which an attorney offended the judge by announcing his intent to sue the judges of that circuit warranted disqualification.

However, upon careful reflection, I conclude that even under the more stringent standard applicable to judges, the so-called "strained relations" cases are distinguishable from this matter. As a result, I further conclude that the post-meeting encounter does not constitute just cause for disqualification on the grounds of bias, prejudice or interest. Section 120.71, Fla. Stat.; Rule 25-21.004, Fla. Admin. Code.

The difference between this case and those just cited is that there is nothing wrong with an attorney choosing not to support a judge for a different judicial position. Therefore, being on the receiving end of a tirade about it may cause legitimate concern that the judge is prejudiced. Likewise, suing the judges in the circuit is not improper, and the fact that a judge was offended by it may reflect prejudice against the attorney for his having sued the judge and the judge's colleagues.

In contrast, an attorney that makes a statement that he knows to be false or with reckless disregard as to its truth or falsity "concerning the . . . integrity of a judge . . ." violates Rule 4-8.2 of the Florida Bar's Code of Attorney Conduct. This is true whether or not the statements are made extra-judicially. See, The Florida Bar v. Stokes, 186 So.2d 499 (Fla. 1966) (disparaging and unfair comments about a local judge made by attorney during radio program which judge had no opportunity to rebut required that attorney make a public apology).

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[8]Even though the disqualification of judges is arguably not a standard which must be met, Bay Bank, supra, consideration of that more stringent standard adds by that stringency to the confidence with which these issues are addressed here pursuant to Section 120.71 and Rule 25-21.004.

The Florida Supreme Court expounded at length on the issue of recklessly impugning the integrity of judges in In re: Shimek, 284 So.2d 686 (Fla. 1973). In that case, the attorney filed a memorandum in federal court which claimed that:

> The state trial judge avoided the performance of his sworn duty. . . . . A product of [the prosecutorial] system who works close with Sheriffs and who must depend on political support and re-election to the bench is not going to do justice.

The District Court judge concluded that this language was:

> A scurrilous attack upon members of the state judiciary, completely unwarranted by the record before it.

284 So.2d 686.

The Florida Supreme Court then noted the following:

> Nothing is more sacred to man and particularly, to a member of the judiciary, than his integrity. Once the integrity of a judge is in doubt, the efficacy of his decisions are (sic) likely to be questioned. . . . While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system.

284 So.2d 688-9.

Several statements of Mr. Twomey, at page 31, lines 23-25 and page 32, lines 1-20, recklessly impugned my integrity. For example, on page 32 of the transcript beginning at line 19, Mr. Twomey states:

> The $150 is a scare tactic, it's dishonest, it's not true. You shouldn't be sucked in by this.

This hardly comports with either the requirements of Rule 4-8.2 or Shimek. The point is not that an attorney may not disagree, but that the disagreement could have been accomplished without violating these precepts, just as my testimony was accomplished without personally abusing anyone else.

As stated by the Court in Shimek:

> Judges are subject to fair criticism. The attorney is bound to use restraint. His statements must be prudent, not rash, irresponsible, and without foundation.

The petitioners' own characterization of the post-meeting encounter confirms that these concerns, rather than any substantive issue involving the clients or their cases, were the subject of the encounter:

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Unlike the "strained relations" cases, petitioners cannot deduce prejudice from this encounter because, given the attorney's misconduct, it would be proper for the remonstrance and warning to be given at the hearing, should the same conduct occur there. In contrast, it obviously would not be any more proper for the judge in McDermott to lambaste the attorney at the hearing for his failure to support her for other judicial positions than it was to do so extra-judicially.

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taking limited evidence to amplify the trial record. Therefore, the petition is untimely having been filed after the final hearing, inappropriate to the extent the appellate court has jurisdiction over the case, and unfounded as to any future amplification of the record.

In the third case in which petitioners seek recusal, Docket No. 950945-WS, the final hearing has not occurred. However, petitioners knew that this Commissioner was assigned as prehearing officer as early as July 24, 1995, when counsel for petitioners filed a request for full commission review of Procedural Order PSC-95-08290-PCO-WS. Also at that time, counsel for petitioners knew or should have known the dates set for numerous customer service hearings, as well as those for agenda conferences on such matters as the setting of interim rates. Counsel for petitioners has requested other commissioners to order Commissioner Kiesling recused at two of the public hearings held on September 14, and September 20, 1995, where no decisions are made by the Commission, where counsel for petitioners did not allege any further bias or prejudice has occurred, and where those hearings were scheduled prior to the filing of the petition. In fact, it was the scheduling of these hearings to which petitioners objected in their July 24, 1995 motion for full commission review of that procedural order.

The nature of the operation of the Commission constituted with five members is significantly different from the operation of the circuit or county courts and even different from the operation of the Division of Administrative Hearings where such courts have a pool of judges or hearing officers from which to draw. Unlike the recusal of a Commissioner, the recusal of one judge among a pool of judges may be accomplished without a significant danger of permitting the intended or unintended manipulation of the decision-making process.[10] It is disruptive of the orderly process of the Commission, particularly when proceeding to hearing with all five commissioners in their quasi-legislative role of rate making,[11] to fail to bring the matter of recusal to the attention of the Commission at the earliest practical moment.

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[10]In City of Palatka, supra, at 827-828, the Florida Supreme Court held that it would have been improper for the judge to disqualify himself based on a legally insufficient pleading. This decision has higher significance in view of my responsibilities as a part of this collective agency head. Bay Bank, supra.

[11]United Telephone Co. v. Mayo, 345 So.2d 648 (Fla. 1977), at 654 (the fixing of rates is not a judicial function).

Further, petitioners are customer intervenors to this rate proceeding. Counsel for petitioners knew or should have known that the full commission would be assigned to hear Docket No. 950495-WS. Therefore, counsel for petitioners knew or should have known prior to representing his clients that this commissioner would be hearing this case. In Town Center of Islamarada v. Overby, supra, the court held that ordinarily a party may not bring an attorney into a case after it has been assigned to a judge and then move to disqualify on the grounds of bias against the attorney. So here, where Rule 25-22.039, Florida Administrative Code, provides that an intervenor takes the case as he finds it, where counsel for petitioners knew of his belief of bias prior to representing petitioners in this cause, and where counsel had an opportunity to raise this issue at least upon their first filings in this case, petitioners have waived their right to seek recusal.

CONCLUSION

As discussed above, the standards relied on by petitioners are inapposite. Applying applicable standards, the petition is conclusory, untimely and is not legally sufficient to support disqualification. Based on the foregoing, I hereby decline to withdraw from the proceeding.

By ORDER of Commissioner Diane K. Kiesling, as Prehearing Officer, this 25th day of September, 1995.

DIANE K. KIESLING, Commissioner and
Prehearing Officer

(S E A L)

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Further review of this interlocutory order shall be pursuant to Rule 25-21.004, Florida Administrative Code.

(Tape 2 or 3, March 7, 19 , Senate Commerce and Economic Opportunity.)

UNIDENTIFIED SPEAKER: Senator Brown-Waite, you're recognized to discuss an explain Senate Bill 298.

SENATOR BROWN-WAITE: Thank you very much.

Senate Bill 298 came about because of the Public Service Commission action.

The Public Service Commission in 1992 went around the state indicating to customers that SSU, which is a water and wastewater company, it was seeking a rate increase; that they needed a rate increase. The customers were told what the company was asking for. The company originally applied for stand-alone rates. The point at which it was taken back to the Public Service Commission after all of the public hearings, the Public Service Commission decided that they were going to combine all of the water and wastewater companies into a uniform rate.

Now, what this meant was that we had some major subsidization of one utility customer subsidizing another utility customer. And that might work in the traditional electric generating facilities, and certainly in the telephone business they work. But when you have stand-alone water systems which are not interconnected and stand-alone water treatment systems which are not interconnected, it doesn't

make a whole lot of sense.

Let me just indicate to you that this subsidization doesn't set real well with people, and one of the reasons being because they are stand-alone units, if one system goes down, for example a system in Citrus County, the system which is to the south in Hernando County is not connected in any way, shape or form. So there is not any reason why this subsidization should take place. There's no benefit being received.

Additionally -- so they're paying and they don't even get a backup system. In SSU's case, in Hernando County -- and I have someone here from Citrus County who would like to speak to you -- in Hernando County alone over and above the cost to operate the system, had it been treated as a stand-alone system, it was $1.8 million that was taken out of the county to subsidize other systems.

There's some problems with uniform rates where there's no uniform connection with the system. Customers who paid significant connection charges to a utility lose the benefit of the lower monthly rates because they are then grouped for ratemaking purposes with systems with either lower initial contributions or no contributions at all.

Additionally, and Chairman, we're talking about water conservation, if one group of customers receiving one benefit is subsidizing another group of customers, there's no

incentive there to preserve water. I we also have those concerns.

Jim Desjardin from Citrus County is here. He's from Sugarmill Woods. Their system was negatively impacted also. And I'd like to ask Mr. Desjardin if he would come up.

UNIDENTIFIED SPEAKER: Let's see if there are any questions for you. Are there any questions for Senator Brown-Waite at this time? Senator Holzendorf.

SENATOR HOLZENDORF: Thank you, Mr. Chairman.

Having several in my district, and I've not heard of this complaint -- Senator Brown-Waite, what generated this? Is there some specific problem that is being caused by this, or is it just happening in this specific area and should we be doing this statewide, or is it restricted to a local area and could be done that way?

SENATOR BROWN-WAITE: In this particular case, Senator Holzendorf, it was the SSU rate case which was before the Public Service Commission. They were known for -- they applied for stand-alone rates, and it was the Public Service Commission that decided that they were going to lump them all into a statewide rate for uniform treatment of all of the water and wastewater systems.

One of the problems with this is first of all the public wasn't notified. You can't go back and remedy that, but this whole issue is currently in court. But more

importantly is the fact that there's no benefit derived, and certainly we're not encouraging water conservation if this subsidization is taking place. If you're not paying the true cost of the water production in your area, then you really don't have a relationship to any conservation goals that we, as a state, or the counties may be setting up.

So to answer your question, it was statewide. There were some winners and some losers, quite honestly. But if we continue this, even those areas that, quote, "running from this" may be losers in the future. These are stand-alone systems. They are not interconnected.

SENATOR HOLZENDORF: What will this do to the rate of those systems if we were to take up this bill? What would it do to the customer rates?

SENATOR BROWN-WAITE: This isn't retroactive so it won't impact the -- it will not impact the decision that currently is before the Courts. And one of the attorneys, I think, from the Attorney General's office is here to speak to that.

UNIDENTIFIED SPEAKER: Thank you, Mr. Chairman.

Senator Brown-Waite, to follow along with Senator Holzendorf's question, I can understand how the winners would be upset with having to pay some subsidy here, but I'm also told that were it not for the subsidy, some of those payers who are now paying about $30 a month, would have to begin

paying about $150 a month. I mean that's a real significant job. And I'm just wondering if this isn't one of those cases where there might ought to be a little subsidy just so more of those rural remote areas can have an affordable rate.

SENATOR BROWN-WAITE: Senator, it doesn't tend to be the rural worry among areas. There's some very wealthy areas that benefitted from it. They have a small customer base. So it's not -- it's not the horror story that may have been told. There are some small water utility companies out there that have been bought up by SSU and the rates have gone up. They would have gone up regardless of who purchased them.

SSU didn't even apply for the uniform rate. They were originally applying for the stand-alone rates. So, will some rates will go up? Yes, some rates will go up. Customers who paid a substantial amount into the construction of the utilities which are in their own areas, residents who paid substantial amounts for the construction of the plants, they're the ones who are really paying twice because they are also subsidizing those water systems out there where they take little or no payment as the construction was continuing.

UNIDENTIFIED SPEAKER: Just a follow up, Chairman.

So you believe the $30 to $150 is not accurate?

SENATOR BROWN-WAITE: I don't have those figures so I can neither substantiate nor can I confirm nor deny those figures.

UNIDENTIFIED SPEAKER: Maybe somebody could speak to that because, you know, that's significant.

UNIDENTIFIED SPEAKER: We have a number of folks that are going to want to come forward, Senator Danzer. Senator Beard.

SENATOR BEARD: Senator, did you say this issue is in the courts at this time?

SENATOR BROWN-WAITE: This particular case that the Public Service Commission had already ruled on, yes, it is in the courts. This is not retroactive.

UNIDENTIFIED SPEAKER: Senator Burke.

SENATOR BURKE: What's the public policy reason for the legislator overruling a decision by the Public Service Commission?

SENATOR BROWN-WAITE: Senator, I don't say here overruling it, I'm saying that they shouldn't do this in the future.

I think if the utility company said, "Give us uniform rates," that would be one thing. But the Public Service Commission took it upon themselves; the constituency out there was not properly notified that this was going to be a rate that they would be raised to. At the public hearings -- and I attended some of the public hearings -- they were told the rate that the company was asking for and they were told the interim rate that the Public Service Commission

electricty or like telephone lines. There isn't a backup there. They're totally stand alone, separate systems.

Senator Danzer, did I answer your questions?

UNIDENTIFIED SPEAKER: I just wanted to ask you, how far would you -- how much would you extend the legislature into managing that utility? I think the questions are sort of -- most of us are lucky to get into that issue of directly trying to legislate on issues that the Public Service Commission is disposing of. To do so, we stand here inundated -- I had a phone note in my own county I think Tom sent, they said wanted area wide service. And they got it and handling that -- my mother's phone bill went up $3. (Unintelligible) rate and have a telephone company and they say you get to talk to your son. (Laughter) Beneficially to that would be I (unintelligible) and then -- I'd ask that if we were sitting freshmans I should maybe file a bill and say we can't do that. (Unintelligible)

SENATOR BROWN-WAITE: Senator, there's a little difference with telephone rates because, you know, you call the different places and while you may be subsidizing they cost you more for calling one area, there's a subsidization from another, but everyone benefits depending on what their calling patterns are.

Let me kind of compare this to a legislative decision that all of the professions would pay their own way.

If you'll recall, we set a legislative policy that all of the professional regulation groups out there, that they were going to be paying their own way. This really isn't a paying-their-own-way system which had been in existence for a very long time.

I have a handout which I think (overtalking here) will be one of the people speaking later, and Senator Danzer, when you get the handout, it does have in there the list of what the charges would be. And some -- the largest increases are to industrial development parks, they're not residential. So what you have is a lot of residential customers who are not just subsidizing other residential customers, there are also some strip shopping centers and areas such as that. So if you were given those figures that may be the area that does. I'm looking down here but none of them equal that much.

UNIDENTIFIED SPEAKER: Senator Dudley and then Senator Meadows who has been waiting.

UNIDENTIFIED SPEAKER: Mr. Chairman, since Jack Shreve is here, he's the Public Counsel, I'd like to ask him a couple of questions on this issue either now or when we get into the testimony.

UNIDENTIFIED SPEAKER: Why don't we ask him to come up when we start taking --

UNIDENTIFIED SPEAKER: I'd like to ask him some questions.

UNIDENTIFIED SPEAKER: Okay. Senator Meadows.

SENATOR MEADOWS: Yes. I was just thinking, even though they're subsidizing, you know, to some degree, if we take them out in individual units, stand on their own and there are other environmental regulations that come up, wouldn't they experience, you know, a dramatic increase in order to meet those requirements if they're not under the large umbrella?

SENATOR BROWN-WAITE: Senator, that's an excellent point that you make and each of those environmental regulations apply down to the local plant. So the people at the local level, regardless of whether it is one of the plants that is receiving the subsidy or giving a subsidy, that would be affected at the local level, which is -- those plants which are better maintained, where people pay more money in for the initial start-up of it and there were some of the original plants. As various small developers have gone out of business, SSU has bought up many of these systems, the small systems out there. And many of them were not very well maintained. Now, did those people have artificially low rates for many years? Yes, they probably did, Senator. And if DEP comes in and imposed new regulations, it will be on a -- if you need the state of the art you wouldn't have to comply with it system by system, which at this point I can't tell you whether it's those that receive the subsidy or those that

didn't receive the subsidy. And I think until we looked at the regulations we couldn't tell either.

UNIDENTIFIED SPEAKER: I just have a concern about that.

UNIDENTIFIED SPEAKER: We have a number of folks come in before us to testify on the bill. Senator Meadows hopefully that will give you some more opportunities.

The first person is Diane Kiesling. Ms. Kiesling.

COMMISSIONER KIESLING: Thank you, Mr. Chairman, members of the committee, I'm Diane Kiesling and I'm a Commissioner on the Public Service Commission.

I think initially I need to clarify something that yes, in fact, that was a case in 1992 that was decided in 1993 that of imposed uniform rates, and that is the case that is on appeal. However, only two Commissioners voted on that case because of a -- some quirks of fate that ended up with some Commissioners leaving, and as a result the Public Service Commission made a decision to reopen this matter and to do a thorough investigation of uniform rates. The Commission reached its decision to approve uniform rates or single tariff pricing as it's more commonly called, for Southern States Utilities after months of research and fact-finding, and a great deal of input from customers who are the ultimate stakeholders in the decision.

In the investigation docket we completed last

September the Commission held customer hearings in 11 cities. Senator Holzendorf, we held a hearing in Jacksonville, and Senator Dudley, we held one in Fort Myers, we held one in Stuart, and for those of you who represent the Tampa Bay area, we did hold one in Temple Terrace that covered the Tampa Bay area. We held a hearing for customer testimony in Ocala, and Sunny Hills and Homosassa Springs, in Brooksville, and Deltona. Senator Jennings, we held one in Orlando, and we then held one in Sarasota County.

At each of these customer meetings there were customers who testified on either side of the uniform rate issue. The transcript of the customer hearings alone is 1,221 pages. The Commission then held five full days of technical hearings on the issue. We heard from 25 expert witnesses, again on both sides of the issue.

After considering all of the evidence placed into the record, and reviewing briefs that were filed by all of the parties, the Commission voted 3 to 1 to approve the continuation of the statewide uniform rates for Southern States Utilities.

We recognize, and I'm sure by our 3 to 1 vote you can understand that we recognize that there are pros and cons on either side of this issue. Some of the disadvantages of single-tariff pricing are that some customers lose some of the benefit of their contributions in aid of construction which

they pay up front when they were grouped for ratemaking. However, this disadvantage is under study and we are still looking for ways to mitigate this disadvantage.

Another disadvantage is joint rates may not reflect facility-specific cost. Also we looked at, as disadvantages, the possible loss of flexibility to deal with geographic concerns, the subsidies of cross-facilities based on treatment type, cross-subsidies due to phase of development in the service area. And I would also mention that we did look at the possibility of pulling out some of the high cost treatment like reverse osmosis from this formula, and that also is still under study.

Some of the advantages of single tariff pricing are that it insulates customers from rate shock when major capital improvement can be spread over a large customer base. There are also lower rate case expenses when systems are combined for ratemaking. For a large company such as SSU that holds a number of smaller facilities there's economies of scale that are passed on to all of the customers. There's also ease of understanding by the customers, reduced frequency of rate case filings, and a possible lower cost of capital to the entire system.

While Southern States Utilities is the largest water and wastewater utility where uniform rates or single-tariff pricing has been used, there are approximately 20 other water

utilities in the state of Florida that have uniform rates. One utility has had uniform rates in place for 20 years. Also many city and county-owned systems use uniform rates currently. And again, Senator Holzendorf, I would point out one of the significant ones is Jacksonville Suburban which has a number of small systems in Duval, Nassau and St. Johns County, none of which are interconnected, and all of which have had uniform rates for quite some time.

I think getting away from the controversial SSU case for a moment, what we at the Commission want you to consider is the long run ramifications to the water and wastewater industry of the changes that are proposed in this bill.

Single-tariff pricing is currently utilized and in place in 20 other states in the United States. Research shows that only the state of Maine has outlawed the use of this tariff pricing mechanism, and that was quite some time ago, and I would again indicate they're not a growth state that has the problems Florida has.

Presently there are more than 2,000 small systems, water and wastewater systems, in Florida. Most of those because of environmental regulations that are running up high costs and because of deteriorating infrastructure, are going to require some kind of regulatory intervention to continue to provide safe affordable service.

One major contributing factor to their plight is

their small size and their increased expenses under such things as the Safe Drinking Water Act.

The Commission has concerns about the bill being considered here today because it would prohibit us from using single-tariff pricing to help in the consolidation of some of these troubled small systems. The issue of rate equalization must be addressed by regulators as an acquisition incentive, and a means to fully realize the benefits of the larger more viable utilities. We believe this ratemaking concept is a powerful economic incentive to encourage consolidation and restructuring of the water and wastewater industry in Florida. We would urge you not to take away one tool in our tool chest that allows us as economic regulators to deal with the significant water problems that are coming.

UNIDENTIFIED SPEAKER: Senator Hargert (sic).

UNIDENTIFIED SPEAKER: Yes. What's your name again?

COMMISSIONER KIESLING: Diane Kiesling.

UNIDENTIFIED SPEAKER: Monticello?

COMMISSIONER KIESLING: Monticello Used to be, yes, sir. I'm in Monticello now. I used to be in Greensboro, worked at the Quincy State Bank. I knew you then, but be that as it may.

UNIDENTIFIED SPEAKER: Get his credit history.

UNIDENTIFIED SPEAKER: This area of regulation has a history to it. In reading the Staff analysis it seems like

historically it says water and wastewater utility rates has been set on a system-by-system basis. That's what they think the history to be.

COMMISSIONER KIESLING: Historically that is the usual way, although in Florida that are 20 systems that are on uniform rates currently, and some have been for as long as 20 years, so in certain circumstances it is one of the tools that we could use in fashioning appropriate tariffs.

UNIDENTIFIED SPEAKER: Now, also in this whole scheme of things, any county has a right to regulate the water themselves.

COMMISSIONER KIESLING: Yes, sir, they sure do.

UNIDENTIFIED SPEAKER: And wastewater. So that seems to set the spirit that this is not sort of an unified -- the legislature, when it crafted this legislation, I'm just trying to get the legislative intent and then find out where it's going. In other words, in order to get out of the hole I'm trying to figure out how we got in it. The legislation seemingly is one that has options for counties to get in and get out.

COMMISSIONER KIESLING: Yes, sir.

UNIDENTIFIED SPEAKER: Now, if we then start building this statewide system with all of its economies of scale, does that not mitigate against the option for a county or make it very difficult for a county to exercise its option

because we have been put in -- we built something that may not have been intended by the original regulatory scheme, I want to just make -- I may decide to vote with the PSC, but I want to try to figure out whether or not we've gone a little too far and then we've blessed something, or whether we're -- but at the other hand, there's a macro analysis that you can make where it might be fair to everybody, but then when you start going down to the community level and doing a micro analysis it may be totally unfair. I'm trying to find where the equities lie. But from a historical point, I want to figure out where we come from and then whether or not this statewide scheme, even though it may be wise, it might be wise for us to have one uniform school district all across Florida, but its history wouldn't permit us to do that. So I'm just asking what about the historical perspective on it.

COMMISSIONER KIESLING: Well, I'll be happy to give you what I can give you considering I have been on the Commission since the December 1973 -- I mean 1993, I'm sorry, I wish it was '73.

But let me also say that -- let me also say, you know, we're not asking you to bless a PSC position. I think if you look at my sign-up card, we did not take a position pro or con. Our view is that we are a branch of the legislature and we're simply trying to give you information about what will happen as economic regulators if you take one of these

tools away. So to the extent that, you know, you view us as being opposed to this bill, I want to clarify that. We're not happy with it but we're not overtly standing before you to oppose it.

Now, let me get back to the history. The Southern States case involved 127 systems. None of those systems were in a county that has retained the county option. Those systems were all in the counties that have turned regulation over to the PSC.

Now, what I can tell you is that in another case, which is still pending, the question of how to apply another statutory section relating to the interrelationship between counties that cross county boundaries is up for consideration, and it is in that case that there may be -- that the question of what to do with Southern States small systems that are in nonjurisdictional counties will be determined.

So, I heard the premise that underlay your question was that this somehow went contrary to the county option, and, in fact, our decision on uniform rates would not -- did not impact any of the counties that have retained that option.

UNIDENTIFIED SPEAKER: I understand that. But at any day one of those counties can come and say, "We want to regulate our own."

COMMISSIONER KIESLING: Yes, they can.

UNIDENTIFIED SPEAKER: Okay. Well, we set up a

didn't see you sitting out there when I was asking for Mr. Shreve to come forward.

COMMISSIONER KIESLING: No problem.

SENATOR DUDLEY: I'm still going to request that he come forward. But the thing that is a little puzzeling to me, and I'm trying to look beyond the fact that I represent one of two systems here in the two county area whose rates would go up under a stand alone. I'm trying to look purely at the public policy.

I guess my question is -- and I just may have predated -- in fact, I'm sure this did predate your joining the Commission -- but since there was no clear statutory authority, as I understand it -- although I guess that's for the court to decide -- for the Public Service Commission to do an a system-wide rate, probably because they had never had it before. All of these companies used to be owned by little individual developers, in some cases big individual develcpers. And it's a fairly recent advent that I think there's been -- the multiple system operators that have come on line. But in the absence of clear statutory authority I don't recall the Public Service Commission ever coming here in the 12 years I've served here and asking for authority to do this, so I guess my question has to be kind of hypothetical to you, as you read and understand the law, and I've always felt you had an extraordinarily good legal background in your

previous life -- at least you had a lot of opinions that I agreed with, let's put it that way --

COMMISSIONER KIESLING: Thank you.

UNIDENTIFIED SPEAKER: -- to put it honestly, okay?

Wouldn't you think now with hindsight that absent clear statutory authority, that this being a new type of market condition, the Public Service Commission probably ought to have sought some guidance and some direction from the legislature?

COMMISSIONER KIESLING: Well, Senator --

UNIDENTIFIED SPEAKER: That's an unfair question but --

COMMISSIONER KIESLING: I'm willing to answer it, though.

Senator, as I indicated, we've had -- the Commission has been using uniform rates in this state for 20 years. The Jacksonville Suburban case has had uniform rates. That went up on appeal but it didn't go up on the uniform rate question.

UNIDENTIFIED SPEAKER: That's a consolidated system.

COMMISSIONER KIESLING: It went up on something else.

UNIDENTIFIED SPEAKER: Though, isn't it as far as the ownership? I mean didn't --

COMMISSIONER KIESLING: It's no different than Southern States. It has a number of small systems which it

(End of Tape 2 of 3. Tape 3 of 3 starts out in the middle of a different issue, but if you listen further on you will pick up Senate Bill 298 discussion once more.)

UNIDENTIFIED SPEAKER: (Discussion starts in the middle of a response.) So be it. But if we make a decision that unified ratemaking authority ought to be clarified, then we ought to go that way, too. I mean --

COMMISSIONER KIESLING: I agree.

UNIDENTIFIED SPEAKER: By the time the First DCA finishes with the case and then it gets -- this is the type of case where the Supreme Court might very well be inclined to accept jurisdiction on the basis of great statewide public interest and importance, it may be years before we know. Now, in the meantime -- this will be my last question to her, Mr. Chairman -- in the meantime, are these unified rates in effect and being charged now or not?

COMMISSIONER KIESLING: Yes.

UNIDENTIFIED SPEAKER: They are.

COMMISSIONER KIESLING: They are in place. They're being charged --

UNIDENTIFIED SPEAKER: So in your handout it's Alternate 1 statewide rates that are being charged in all of these systems.

COMMISSIONER KIESLING: It's not my handout.

UNIDENTIFIED SPEAKER: Oh, I beg your pardon.

COMMISSIONER KIESLING: So I have no idea what you're referring to.

UNIDENTIFIED SPEAKER: That's from Senator Brown-Waite.

COMMISSIONER KIESLING: I can tell you that, you know, in relationship to specific stand-alone rates --

UNIDENTIFIED SPEAKER: Well, this says $5 for the base --

COMMISSIONER KIESLING: Yes.

UNIDENTIFIED SPEAKER: -- facility charge in all of these systems and a gallonage charge of $1.19, which I assume --

COMMISSIONER KIESLING: It's up to $1.21 based on cost index pass throughs --

UNIDENTIFIED SPEAKER: All of these systems are paying that now?

COMMISSIONER KIESLING: Yes, sir. They are. Every residential customer.

UNIDENTIFIED SPEAKER: And there's no systems that are excluded from the -- there's no systems that have stand-alone rates?

COMMISSIONER KIESLING: Not were on the list and received notice.

UNIDENTIFIED SPEAKER: Are there any of the systems

owned and operated by Southern States that have stand-alone rates?

COMMISSIONER KIESLING: Yes, there are.

UNIDENTIFIED SPEAKER: How many?

COMMISSIONER KIESLING: I don't know that answer. I can tell you they are in the counties that we do not regulate in, and there are some, such as Marco Island, that were not included in this uniform rate because of the high cost. I've got John Williams here with me and I think can probably get that for you.

UNIDENTIFIED SPEAKER: So in other words, unified rates is the Commission policy where the Commission thinks it's a good policy, and is not their policy where they don't think it's a good policy.

COMMISSIONER KIESLING: That's right. It's one form of ratemaking that we view as part of our arsenal.

I would indicate in answer to -- I'm sorry.

UNIDENTIFIED SPEAKER: We've got some other folks that would like to testify, so we'll go on to the next person.

COMMISSIONER KIESLING: Could I at least provide, in response to the question that was asked earlier, what these rates would be when they are not stand-alone?

UNIDENTIFIED SPEAKER: Sure. If you'd be brief, please.

COMMISSIONER KIESLING: I'll be very brief.

UNIDENTIFIED SPEAKER: Thank you.

COMMISSIONER KIESLING: I can give you some examples, and let me indicate that under an EPA standard of affordable rates uses a $30,000 median income, a monthly water bill of $50 is considered affordable. And using the 10,000 gallons a month for SSU under the current uniform rates, the bill is $17.43. Additionally, SSU's monthly wastewater bills are $34.63. If we were to go to stand-alone rates, I can give you some examples at the 10,000 cap, Gospel Island and Citrus County stand-alone. Their monthly water bill just for water would be $155.85. For the Salt Springs system in Marion County the bill would be $117.59. For the wastewater bill at the cap of 6,000 gallons which we have in here, the Chuluota system --

UNIDENTIFIED SPEAKER: Thank you. Okay.

COMMISSIONER KIESLING: -- would be $192 a month.

UNIDENTIFIED SPEAKER: Thank you.

COMMISSIONER KIESLING: All right.

UNIDENTIFIED SPEAKER: I'm sorry to be compelled to ask this, but do I understand that you set rates based on the ability of the people to pay?

COMMISSIONER KIESLING: No, sir. But our charge is to ensure safe and reliable service at fair and reasonable rates, so when terms of rate --

UNIDENTIFIED SPEAKER: So why all the consideration

about what people earn in different areas? Is that part of your ratemaking consideration?

COMMISSIONER KIESLING: No. It is not. What was introduced at the investigative docket that was on a national basis it's viewed that 2% is affordable, and that was the information that was given to us.

UNIDENTIFIED SPEAKER: I think she's saying "yes but no." Thank you very much.

COMMISSIONER KIESLING: You have to consider whether the people can pay it.

UNIDENTIFIED SPEAKER: Thank you very much. James Desjardin.

MR. DESJARDIN: Good afternoon. My name is Jim Desjardin. I'm a consumer. I represent the Sugarmill Woods Civic Association, which has about 2,000 homes and 5800 people in Citrus County. We have been actively involved in rate cases of the PSC for 10, 12 years.

Of course, whether uniform rates are illegal or not as the statute is now written, we hope to hear as soon as all of the written and oral arguments have been completed in the court.

I can just tell you what the impact has been. Our rates have gone up from around $400 a years to $760, somewhere like that, with this. We are paying somewhere in the neighborhood of $300 a year subsidy over what our stand-alone

rates were. And who is receiving them? We have a reverse osmosis system that gets $916 a year for customer on water and 224 for sewer. We have an industrial park that receives $3840 a year subsidy in water. In the seven instances, the recipients of the subsidies receive more subsidy than their operating costs are, and so we're afraid uniform rates discounts two rather critical things: One is the up-front CIAC or up-front money we paid which can prepay for our system and make a better one. And the other one is the operating costs. So those two things have had a big impact.

There are other ways of doing it. The Public Service Commission Staff had something called cap stand-alone rates which again created a cash reserve to handle systems that had a critical problem either through EPA or something happened to their system, and what cap stand-alone rates, the impact on our rates would be 5 or 10% a year, and instead of close to 100%.

So there are other schemes that can be used to cover for the public good. I might say that Gospel Island is nearby where I live and that's eight customers, and their well had collapsed. So if you amortized the fixing of that over eight people, sure, they're going to pay $158 a month if you don't find some way of spreading that around.

So overall when we look at this, there were 86 water companies, and ten of them paid out the subsidies such as one

of ours, but it was 74% of the people. And there were 38 sewer companies and 11 of them paid out a subsidy such as ours, but that was 59% of the households. So it's a way of assessing people who are unfortunate enough to be Southern States utility customers and spreading it around.

In Citrus County where I live there are 70 some water companies and Scuther States Utilities owns 11 and we're one of the 11.

UNIDENTIFIED SPEAKER: Yes, sir. Have you got a card in?

MR. TWOMEY: Yes, I do. Mike Twomey.

UNIDENTIFIED SPEAKER: Mr. Twomey come on up.

MR. TWOMEY: Thank you, Mr. Chairman. Senators, my name is Mike Twomey. I'm appearing on behalf of Spring Hill Civic Association, Inc. which is an association with approximately 1500 families in Hernando County, constituents of Senator Brown-Waite, who generally represent the interest of some 24,000 other families served by SSU, Southern States, in Hernando County.

Senator Hargrett (ph), you only got part of the story on what the problem is here. You asked about the right of counties to elect to govern their own water and sewer rates. And part of the problem here is that as Commissioner Kiesling told you, Hernando County bailed out, opted out after they got hit with these uniform rates they're talking about.

If you'll look at the first page of the handout -- this is my handout -- the first page you'll see why Hernando County opted out, which is their right under the statute. At the very top highlighted line on the sheet, first page, Spring Hill Utilities, their costs to provide service -- their own cost of service is an assisted revenue requirement column which shows that their cost of getting service, including all of the things Commissioner Kiesling told you about to include economies of scale, rate case expense and so forth is $3.749 million.

Now, what the PSC has done in order to achieve the ability to make other people's rates less, that is force these folks to pay subsidies to subsidize the rates for people whose rates would otherwise be larger, they tacked on $1.164 million and they made those people pay almost $5 million a year. Now the $1.164 million is subsidy pure and simple. It's not related to anything that the people in Spring Hill are going to receive in the terms of service.

Consequently, Hernando County decided they didn't want any part of this what amounts to regulatory socialism. They opted out, Senators. They opted out pursuant to Chapter 367 and decided to do it themselves.

Now, what Commissioner Kiesling only alluded to partially is that they, the PSC, are entertaining a proceeding now at the behest of Southern States to decide whether or not

they can force Hernando County back into PSC fold involuntarily and it doesn't just address the right of Hernando County to stay out. They are addressing up front the right of the power to bring back Hillsborough County, all Tampa folks, and take the right of the Hillsborough County Commission away and give it to the PSC so they can slap on these subsidies. Sarasota County and Polk County, for the rest of the senators it potentially affects the right of any county in this state to regulate -- adversely affects the right of any county to regulate their own utilities.

Now, Commissioner Kiesling said to you that this bill would prohibit uniform rates. The fact of the matter is if you read the bill SB 298, it doesn't even mention uniform rates. What it tries to stop is the subsidies in the sense that you can't let the PSC -- or the PSC can't charge any customer for expenses not incurred in providing them with service, nor can they give them rates that includes the return on investment where that property is not used and useful in providing them service. And as the Senator told you, because all of these systems are not interconnected, they are not connected by pipe. The investment, the plant investment in one system cannot constantly be used to serve another.

Now, she gave you examples of -- Commissioner Kiesling gave you examples of some 20 states where they have uniform rates. Our investigation showed that most of those

states, if not all of them, involved rates where there was no difference or a minimal difference in the cost of providing service. Ergo, there were no subsidies or only minimal, not undue discrimination in subsidies. That's not a problem here.

Now, the bottom line is that you're going to hear about conservation. As Mr. Desjardin told you, if you'll look on page -- if you'll look on Page 5 of 15 in the second part of your handout, and the numbers are in the upper right-hand column, and look at the center top system, Gospel Island Estates. What they've given you is a scare tactic that the PSC, the utility has used throughout. They've said to you these four people of Gospel Island will be paying in the neighborhood of $150 per month for a water and sewer system. It's not true because they have used a calculation based upon the consumption of 10,000 gallons of water. If you'll look at the page I just showed you, the people of Gospel Island in fact use under 5800 gallons per month, therefore, the rate they would pay under their own stand-alone rates would be dramatically smaller. The $150 is a scare tactic, it's dishonest, it's not true. You shouldn't be sucked in by this.

Very quickly, if you'll turn to the same exhibit, Page 13 of 15, it shows you one of the disparities that exist, Mr. Chairman.

The Sugarmill Woods people are in the lower right-hand corner, and the line that shows -- the third line

called net CIAC, money they pay up front when you buy a house you have to pay so much for a hook-up fee.

Mr. Desjardin's neighbors and himself paid a little over $1,000 for a hookup fee for water. They paid in excess of $2500 up front, it's like a down payment on your house -- up front for sewer, okay? They're losing that. Those down payments entitled them under Florida law to relatively low water and sewer rate. If you'll contrast that to South 40, which is an industrial park in the upper left-hand side, you have an industrial customer there that paid $15 down in their contributed property. A down payment of $15. They're getting the same rates by receiving subsidies at retired persons at Sugarmill Woods.

The question here is the law. Commissioner Kiesling said they had a second hearing. They did. It's true. More Commissioners heard this case than did the first time. What she didn't tell you is they refused to hear the legal issue. They refused to hear the legal issue. It's before the Court now.

This agency is a subordinate agency of the Senate and the Florida House. They are here to do what you tell them. What they did in this last case is contrary to the existing laws as we see it, as we know it. The purpose of this statute, the purpose of this bill is to make clear that they can't do it again.

I would urge your support of this bill to protect not only the people on that first page you see there, but everybody above the lower yellow line is being hurt. The same with the water. This thing can flip on those of you that have constituents whose systems might be purchased by SSU, so I would urge a favorable consideration of the bill. Thank you.

UNIDENTIFIED SPEAKER: Thank you. Any questions, gentlemen? Thank you very much.

MR. TWOMEY: Yes, sir. Senator Jennings.

SENATOR BROWN-WAITE: Mr. Chairman, we do have some additional speakers here. I believe I will TP the bill today. I will be bringing it back. I think we need to do some work on the bill. But as far as how far some of the other speakers have traveled --

UNIDENTIFIED SPEAKER: I don't have any --

SENATOR BROWN-WAITE: -- before we do TP the bill, I would like to hear Jack Shreve.

UNIDENTIFIED SPEAKER: That will be fine, Senator Brown-Waite. I was looking at the other cards I have, and there's nobody else that has traveled that isn't up here on a regular basis.

SENATOR BROWN-WAITE: Right. If we could, it was such short notice for the bill to be here -- the constituents in the counties we're not aware of it or I could assure you that they would have been here.

ISSUE 3: Should this docket be closed?

RECOMMENDATION: No. (PELLEGRINI)

STAFF ANALYSIS: This docket should remain open for the purposes of completing the rate case. The matters in issue in this recommendation are procedural and are not in any way dispositive of this docket.

ORIGINAL
FILE COPY

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for rate increase in Brevard, Charlotte/Lee, Citrus, Clay, Duval, Highlands, Lake, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, Volusia, and Washington Counties by SOUTHERN STATES UTILITIES, INC.; Collier County by MARCO SHORES UTILITIES (Deltona); Hernando County by SPRING HILL UTILITIES (Deltona); and Volusia County by DELTONA LAKES UTILITIES (Deltona)	DOCKET NO. 920199-WS
In re: Investigation Into the Appropriate Rate Structure for SOUTHERN STATES UTILITIES, INC. for all Regulated Systems in Bradford, Brevard, Citrus, Clay Collier, Duval, Hernando, Highlands, Lake, Lee/Charlotte, Marion, Martin, Nassau, Orange, Pasco, Putnam, Seminole, St. Johns, St. Lucie, Volusia, and Washington Counties.	DOCKET NO. 930880-WS
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.	DOCKET NO. 950495-WS FILED: Sept. 12, 1995

VERIFIED PETITION TO DISQUALIFY OR,
IN THE ALTERNATIVE, TO ABSTAIN

Citrus County, as a party to Docket No. 920199-WS, the Sugarmill Woods Civic Association, Inc., as a party to Docket Nos. 920199-WS and 950495-WS, and the Spring Hill

Civic Association, Inc., as a party to Docket Nos. 930880-WS and 950495-WS, by and through their undersigned counsel, move to disqualify Public Service Commissioner Diane K. Kiesling from proceeding further in the above-described matters, pursuant to Fla.R.Civ.P. 1.432 , Section 38.10, Florida Statutes, and Rule 25-21.004, Florida Administrative Code, and as grounds, state:

1. The Sugarmill Woods Civic Association, Inc. and the Spring Hill Civic Association, Inc. (collectively referred to as "the Associations") fear that Commissioner Kiesling will not hear proceedings in the above-described dockets with an open mind. The Associations fear that Commissioner Kiesling is biased in favor of Southern States Utilities, Inc. ("SSU") in all three dockets ("SSU") and that she is biased in favor of the uniform rate structure SSU is seeking to have sustained in Docket No. 920199-WS and imposed in Docket No. 950495-WS. The Associations fear that Commissioner Kiesling has demonstrated her bias publicly by engaging in inappropriate political activity promoting the uniform rate structure to SSU's advantage and the Associations' disadvantage, while two of the above-styled dockets were either still pending at the Public Service Commission ("PSC") or on judicial review. Lastly, the Associations fear that Commissioner Kiesling cannot participate in any of the above-styled dockets with an open mind and in a fair and impartial manner because she has publicly reproached and berated the Associations' counsel, Michael B. Twomey, in a manner clearly evidencing contempt, disdain, impatience and a lack of courtesy to said counsel and in a manner demonstrating an unprofessional and total lack of judicial temperament on the part of the commissioner.

JUDICIAL STANDARDS

2. In establishing a Code of Ethics for Public Officers and Employees, the Florida Legislature has stated that it "is essential to the proper conduct and operation of government that

public officials be independent and impartial . . ." See Section 112.311(1), Florida Statutes. The Legislature further states "that public officers . . . are agents of the people and hold their positions for the benefit of the public. . . . Such officers and employees are bound to observe, in their official acts, the highest standards of ethics consistent with this Code [Code of Ethics] . . . regardless of personal considerations, recognizing that promoting the public interest and maintaining the respect of the people in their government must be of foremost concern." Section 112.311(6), Florida Statutes.

3. Public Service Commissioners are bound by the standards of conduct contained in Chapter 350, Florida Statutes. Those standards state that a commissioner may not conduct himself in an unprofessional manner at any time during the performance of his official duties. Section 350.041(2)(g), Florida Statutes. Moreover, the oath of office of a Public Service Commissioner requires commissioners to faithfully perform their duties independently, objectively and in a nonpartisan manner. See Section 350.05, Florida Statutes.

4. Public Service Commissioners are also bound, as "agency heads", by the provisions of Section 120.71, Florida Statutes, which states, in relevant part:

> **120.71 Disqualification of agency personnel.–**
> (1) Notwithstanding the provisions of s. 112.3143, any individual serving alone or with others as an agency head may be disqualified from serving in an agency proceeding for bias, prejudice, or interest when any party to the agency proceeding shows just cause by a suggestion filed within a reasonable period of time prior to the agency proceeding.

5. Rules of the Florida Public Service Commission, Rule 25-21.004, Florida Administrative Code, provides that a commissioner may be disqualified from hearing or deciding

any matter where it can be shown that the commissioner has a bias or prejudice for or against any party to the proceeding or a financial interest in its outcome.

6. The Supreme Court of Florida adopted the "Code of Judicial Conduct." It provides the following:

> Anyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions, including an officer such as a referee in bankruptcy, special master, court commissioner, or magistrate, is a judge for the purpose of this code.

Code of Judicial Conduct, "Compliance with the Code of Judicial Conduct."

Canon 1 of the Judicial Code states that an independent and honorable judiciary is indispensable to justice in our society and provides that a judge observe high standards of conduct so that the integrity and independence of the judiciary may be preserved.

Canon 2(A) provides that a judge should respect and comply with the law and conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 2(B) states that a judge should not allow his personal relationships to influence his judicial conduct or judgment, should not lend the prestige of his office to advance the private interests of others, and should not voluntarily testify as a character witness.[1]

---

[1] The Commentary to this Canon states:

> Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on

Canon 3(A)(1) states that a judge "should be unswayed by partisan interests, public clamor, or fear of criticism."

Canon 3(A)(3) provides that a "judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity . . . ."

Canon 3(A)(4) states that a "judge should . . . neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding.

Canon 3(A)(6) directs that:

> (6) A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

Canon 3(C)(1) addresses the disqualification of judges and provides:

> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> > (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> >
> > (b) he served as a lawyer in the matter in

> his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.
>
> The testimony of a judge as a character witness injects the prestige of his office into the proceeding in which he testifies and may be misunderstood to be an official testimonial. This canon, however, does not afford him a privilege against testifying in response to an official summons.

> controversy, . . . or the judge or such lawyer has been a material witness concerning it;

Canon 4 provides that:

> A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him:
>
> B. He may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and he may otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice.

Canon 7 states that a judge should refrain from political activity inappropriate to his judicial office and specifically states:

> 4. A judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice.

LEGAL STANDARDS FOR DISQUALIFICATION

7. The Supreme Court of Florida has held:

> Prejudice of a judge is a delicate question to raise, but when raised as a bar to the trial of a cause, if predicated on grounds with a modicum of reason, the judge against whom raised should be prompt to recuse himself. No judge under any circumstances is warranted in sitting in the trial of a cause whose neutrality is shadowed or even questioned.

Dickenson v. Parks, 140 So. 459, 462 (1932). (Emphasis supplied.)

8. In considering a motion to disqualify the judge is limited to the bare determination of legal sufficiency and may not pass on the truth of the facts alleged. Bundy v. Rudd, 366 So.2d 440 (Fla. 1978). The test for legal sufficiency is whether the facts alleged would prompt a reasonably prudent person to fear that he could not get a fair and impartial trial. A party need not

have personal knowledge of the facts set forth in the motion. Hayslip v. Douglas, 400 So.2d 553 (Fla. 1st DCA 1982).

9. Every litigant is entitled to nothing less than the cold neutrality of an impartial judge. State ex rel. Davis v. Parks, 194 So. 613 (1939).

10. The procedures and standards for disqualification of a judge apply to deputy commissioners for workers' compensation. Hewitt v. Hurt, 411 So.2d 266 (Fla. 1st DCA 1982). More specifically, the Supreme Court of Florida in City of Tallahassee v. Florida Public Service Commission, 441 So.2d 620 (1983) found that:

> [t]he standard to be used in disqualifying an individual serving as an agency head is the same as the standard used in disqualifying a judge. S. 120.71, Fla.Stat. (1981).

The Associations submit that these standards, including the interpretive case law, must likewise apply to Public Service Commissioners sitting in a judicial or quasi-judicial capacity and as implicitly contemplated by virtue of the language chosen in Rule 25-21.004, Florida Administrative Code.[2]

---

[2] 25-21.004 Disqualification.

> (1) A commissioner may be disqualified from hearing or deciding any matter where it can be shown that the commissioner has a bias or a prejudice for or against any party to the proceeding or a financial interest in its outcome.
>
> (3) A petition for disqualification of a commissioner shall state the grounds for disqualification and shall allege facts supportive of those grounds. The petition shall be filed with the Division of Records and Reporting, and where the commissioner declines to withdraw from the proceeding, a majority vote of a quorum of the full commission, absent the affected commissioner, shall decide the issue of disqualification.

FACTS

11. The facts relied on by the Associations for disqualification include, but are not limited to, the following:

A. As reflected in the attached sworn affidavits of Senator Ginny Brown-Waite, Jim Desjardin, and Michael B. Twomey, Senate Bill 298, sponsored by Senator Brown-Waite, was heard by the Commerce Committee of the Florida Senate on March 7, 1995. SB 298, a copy of which is attached, prohibited any water or sewer customer whose rates were set by the PSC from including a return on investment related to plant, other than common plant, not providing service to that customer Likewise, SB 298 prohibited the inclusion of operating expenses in a customers rates, where the expenses, except in the case of common expenses, were not directly necessary to the provision of that customer's water or sewer service In short, Senator Brown-Waite's bill would have prohibited "uniform rates" of the type imposed by the PSC in Docket No. 920199-WS, which case was then pending appeal in the First District Court of Appeals.

B. As reflected in the attached affidavits, Senator Brown-Waite testified before the Commerce Committee in support of her bill. Likewise, Jim Desjardin, a resident of Sugarmill Woods, past president of the associations and current member of its utility committee, at the invitation of Senator Brown-Waite, testified in support of the bill. As noted earlier, the Sugarmill Woods Civic Association, Inc. is a party to Docket Nos. 920199-WS and 950495-WS. Michael B. Twomey, the undersigned, as attorney to the Spring Hill Civic Association, Inc and the

Sugarmill Woods Civic Association, Inc., also testified in support of SB 298 at the invitation of Senator Brown-Waite.

C. Also present at the Commerce Committee meeting on March 7, 1995 were Commissioner Diane K. Kiesling and numerous Florida Public Service Commission staff members. Despite her summary statement that she was neutral on the bill, the clear and obvious thrust of Commissioner Kiesling's testimony was that she, and the entire PSC by implication, were adverse to the Senator Brown-Waite's bill and the elimination of uniform rates as a "tool" they could use. There was no reservation on the part of Senator Brown-Waite, Jim Desjardin or Mike Twomey that Commissioner Kiesling wanted SB 298 "killed" in committee.

D. Immediately following the consideration of SB 298, Commissioner Kiesling summoned Mike Twomey to her side in the crowed elevator lobby of the Senate Office Building and, in the presence of some 50 to 80 persons, including Senator Brown-Waite and several of his consumer clients, began to loudly and publicly accuse him of calling her a "liar" on several occasions during his committee testimony on SB 298. In an extremely loud and shrill voice and with the attention of everyone in the room, Commissioner Kiesling berated Mike Twomey for calling her a "liar" and publicly threatened to "get him" with "every legal means at her disposal" if the alleged behavior occurred again. Mike Twomey denies that he ever has called Commissioner Kiesling a liar, let alone during the Commerce Committee meeting. Rather, he believes he was, as he was professionally required to, only vigorously representing the interests of his clients before the legislative

committee and doing so, not only at the request of his clients, but also at the request of their state senator as well.

E. As a consequence of the public rebuke by Commissioner Kiesling, Mike Twomey felt humiliated and embarrassed and questions the ability of his clients (the Associations) to receive a fair and impartial hearing before Commissioner Kiesling on any matter related to either the uniform rate structure or SSU, an adverse party, whose case she seemed to have been pleading before the Senate Commerce Committee on March 7, 1995.

F. Jim Desjardin, as a customer of SSU and a member of the Sugarmill Woods Civic Association, Inc., fears that he and his Association cannot receive a fair and impartial hearing on uniform rates from Commissioner Kiesling, who elected to publicly take the side of the utility before the legislature on an issue that was contested by the Sugarmill Woods Civic Association, Inc. at the PSC, the legislature, and the First District Court of Appeals.

G. Senator Ginny Brown-Waite, who is a customer of SSU and the state senator to some 25,000 customers served by SSU from the Spring Hill systems, fears that both she and her constituents cannot receive a fair and impartial hearing from Commissioner Kiesling because the commissioner improperly interposed herself on one side of a political issue still pending before the PSC and the courts and because she so aggressively publicly attacked Mike Twomey in a manner that was discourteous, rude, impatient and undignified, and clearly unprovoked. Senator Brown-Waite fears that Commissioner Kiesling's testimony and attack on

Mike Twomey demonstrate a clear partisan view toward SSU and the uniform rates the utility is supporting in Docket No. 920199-WS and requesting in Docket No. 950495-WS. She believes Commissioner Kiesling's attack demonstrates a clear bias against Michael B. Twomey that will serve to the detriment of his clients and her constituents.

GROUNDS FOR DISQUALIFICATION

12. Commissioner Kiesling's unsolicited testimony seeking the defeat of Senator Ginny Brown-Waite's SB 298 destroyed any notion of her impartiality as a commissioner on the issue of uniform rates. Her testimony, which directly opposed the interests of the Associations' members as expressed by their elected state representative, their utility committee member and attorney, supported the position being taken by Southern States Utilities, Inc. Her public opposition to Senator Brown-Waite's bill was impermissible political activity and political comment "about a pending or impending proceeding before any court" and was in the nature of testifying as a character witness on behalf of the uniform rate structure concept. She was clearly engaging in consulting with a legislative body, but on matters that clearly could not be characterized as "only . . . concerning the administration of justice. As such, Commissioner Kiesling's unsolicited testimony before the Florida Senate Commerce Committee clearly and unambiguously constituted "political activity inappropriate to [her] judicial office." Her passionate defense of the uniform rate structure, which has since been stricken by the First District Court of Appeals, leaves the painfully clear impression that the Associations' litigants will get far more "than the cold neutrality of an impartial judge." Commissioner Kiesling's actions in testifying against Senator Brown-Waite's bill leave the Associations with the fear that she is biased and partial and that they cannot,

and likely will not, receive a fair and impartial hearing from her. Consequently, she should either disqualify herself from these proceedings or, failing that, be removed by the other commissioners.

13. Commissioner Kiesling's unwarranted and unprovoked March 7, 1995 public attack on the Associations' attorney Mike Twomey causes the Associations further concern, fear and apprehension that they cannot receive a fair and impartial hearing from Commissioner Kiesling. While his defense of the Associations' interest before the legislative committee may have been critical of the PSC, they were not a direct attack on Commissioner Kiesling. However, even if they were a direct reproach of Commissioner Kiesling, her loud and public reprimand of Mike Twomey before dozens of citizens, including at least one state senator and several of his clients, demonstrated an unprofessional and unreasonable "fear of criticism" and constituted "irresponsible or improper conduct" by a judge. As such, her public display of anger directed at the Associations' attorney directly violated the provisions of Canon 3(A)(3) 3(B)(4) requiring that a "judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity." The Associations believe and fear that Commissioner Kiesling's open attack on their attorney reveals a "personal bias or prejudice" on her part against their counsel, and ultimately them, that might reasonably call into question her impartiality. Consequently, she should either disqualify herself from these proceedings or, failing that, be removed by the other commissioners.

CONCLUSION

14. The above facts create concern for the integrity and impartiality of the Public Service Commission's decision process in Docket Nos. 920199-WS, 930880-WS, and 950495-WS should Commissioner Kiesling participate in them. Such concerns undermine the public's and

the Associations' confidence in the regulatory process and cannot be allowed. The prejudice or fear of prejudice on the part of Commissioner Kiesling has been raised and raised with more than a "modicum of reason." Commissioner Kiesling's neutrality in these matters has been questioned and has been shadowed and she, under no circumstances is warranted in sitting in the trial of these causes. She should be prompt to recuse herself.

WHEREFORE, Citrus County, the Sugarmill Woods Civic Association, Inc. and the Spring Hill Civic Association, Inc. respectfully move Commissioner Diane K. Kiesling to disqualify herself from the three above-described dockets. Alternatively, failing Commissioner Kiesling's own disqualification, the Associations would respectfully request that the remaining full Commission remove her pursuant to the provisions of Section 120.71, Florida Statutes, and Rule 25-21.004, Florida Administrative Code.

Respectfully submitted,

Michael B. Twomey
Attorney for the Sugarmill Woods Civic Association, Inc. and the Spring Hill Civic Association, Inc., and Citrus County

(904) 421-9530

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U.S. Mail, postage prepaid, this 12th day of Oct., 1995 to the following persons:

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General Counsel
Southern States Utilities, Inc.
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Bruce Snow, Esquire
County Attorney
Hernando County

Attorney

FLORIDA SENATE - 1995 (SB 298

BY Senator Brown-Waite

10-25A-95

A bill to be entitled

An act relating to water and wastewater utility rates; amending s. 367.081, F.S.; prohibiting the Florida Public Service Commission from including in a utility customer's rates or charges certain expenses or returns on investments related to certain property; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (a) of subsection (2) of section 367.081, Florida Statutes, 1994 Supplement, is amended to read:

367.081 Rates; procedure for fixing and changing.--

(2)(a) The commission shall, either upon request or upon its own motion, fix rates that are just, reasonable, compensatory, and not unfairly discriminatory. In every rate-fixing such proceeding, the commission shall consider the value and quality of the service and the cost of providing the service, which cost shall include, but is not be limited to, debt interest; the requirements of the utility for working capital; maintenance, depreciation, tax, and operating expenses incurred in the operation of all property used and useful in the public service; and a fair return on the investment of the utility in property used and useful in the public service. The commission may not include in a customer's rates or charges any operating expenses incurred in the operation of any property that is part of a water or wastewater system that is not interconnected with a system providing utility service to that customer or a return on

CODING: Words stricken are deletions; words underlined are additions.

investment in property that is part of a water or wastewater system that is not interconnected with the system providing utility service to that customer, notwithstanding any common ownership of the non-interconnected systems. However, the commission may shall not allow the inclusion of contributions-in-aid-of-construction in the rate base of any utility during a rate proceeding; and accumulated depreciation on such contributions-in-aid-of-construction may shall not be used to reduce the rate base. Nor may shall depreciation on such contributed assets be considered a cost of providing utility service. The commission shall also consider the investment of the utility in land acquired or facilities constructed or to be constructed in the public interest within a reasonable time in the future, not to exceed, unless extended by the commission, 24 months from the end of the historical test period used to set final rates.

Section 2. This act shall take effect July 1, 1995.

****

SENATE SUMMARY

Prohibits the Florida Public Service Commission from including in a water or wastewater utility customer's rates or charges any operating expenses incurred in the operation of, or a return on investment in, property that is a part of a water or wastewater system that is not interconnected with the system providing utility service to the customer.

CODING: Words stricken are deletions; words underlined are additions

AFFIDAVIT FOR VERIFICATION OF DISQUALIFICATION

State of Florida
County of Leon

BEFORE ME, the undersigned authority, personally appeared Jim Desjardin, who after being first duly sworn, deposes and says according to his personal knowledge as follows:

I am Jim Desjardin, of 14 Balsam Court West, Homosassa, Florida, 34446. I am a member of the Sugarmill Woods Civic Association, Inc., a past president of the association and a member of its Utility Committee. I reside in Sugarmill Woods and am a water and sewer customer of Southern States Utilities, Inc.'s ("SSU") Sugarmill Woods water and sewer operations. The Sugarmill Woods Civic Association, Inc. is a party to Florida Public Service Commission Docket Nos. 920199-WS, 930880-WS and 950495-WS. These dockets directly or implicitly involve SSU's approval to charge its customers, including those of us at Sugarmill Woods, the so-called "uniform rate" structure. The uniform rate structure is a simple cost and rate averaging methodology that charges customers of non-interconnected and geographically dispersed water and sewer systems identical water and/or sewer rates without any regard for the costs associated with serving them. The concept requires SSU's customers at Sugarmill Woods to pay annual subsidies, exceeding the costs of our service, of over $600,000. A uniform rate structure was imposed on 127 SSU water and sewer systems in Docket No. 920199-WS over the objections of the Sugarmill Woods Civic Association, Inc. We appealed the final PSC order approving uniform rates to the First District Court of Appeals and oral arguments were heard by that Court on January 10, 1995.

On March 7, 1995, at the request of the Associations and at the invitation of Senator Ginny Brown-Waite, I spoke in favor of Senate Bill 298 before the Florida Senate Commerce Committee. Senate Bill 298 effectively proscribed the uniform rate concept by prohibiting the PSC from

including in any customer's water or sewer rates costs, other than allocated "common costs" that were not directly related to, or necessary to, the utility service being provided to that customer. Senator Brown-Waite addressed the Committee and introduced her bill. I spoke in favor of the bill, reciting how uniform rates unfairly forced me and my neighbors, most of whom are either retirees or low-income young families, to pay large subsidies to support the utility services SSU is providing to distant systems.

Commissioner Diane Kiesling addressed the Committee and spoke forcefully against Senator Brown-Waite's bill and in favor of the uniform rate structure. She dismissed my concerns and spoke on the necessity of retaining uniform rates as a means to achieving affordable rates and for financing large capital construction projects without imposing rate shock on the customers.

Mike Twomey, our attorney in Docket No. 950495-WS and an attorney representing the Citrus County Board of County Commissioners in Docket No. 920199-WS, followed Commissioner Kiesling and spoke in favor of Senator Brown-Waite's bill. He stated that the uniform rate concept unfairly forced a portion of SSU's customers to subsidize the utility services of other SSU customers and that such a practice was unconstitutional, illegal, and resulted in undue rate discrimination.

Immediately following the presentation of Senate Bill 298 my wife and I went upstairs to Senator Brown-Waite's office. When Senator Brown-Waite and Mike Twomey arrived a discussion ensued regarding Commissioner Kiesling publicly accusing Mike Twomey of calling her a liar during the committee meeting. and several Associations members waiting to catch an elevator when Commissioner Kiesling loudly called Mike to her side. I did not personally witness the Commissioner Kiesling accusing Mike Twomey of calling her a liar, but, if it is true that she did, I have great concerns and reservations that I and the Sugarmill Woods Civic Association, Inc.

will be able to receive a fair and impartial hearing before Commissioner Kiesling while we are represented by Mike Twomey in Docket No. 950495-WS.

I am equally fearful and have grave reservations regarding Commissioner Kiesling's impartiality on the issue of uniform rates. The Sugarmill Woods Civic Association, Inc. has obtained a reversal of the PSC's final order imposing uniform rates in Docket No. 920199-WS, but the PSC will soon consider how to comply with the Court's mandate in that case. The PSC staff has recommended that the record be reopened and that SSU be allowed to present new evidence that will allow for the retroactive approval of the existing uniform rates until they were initially imposed in September, 1993. Given Commissioner Kiesling's forceful and unqualified support for uniform rates before the Senate Commerce Committee, I am fearful that she cannot approach the current staff recommendation in Docket No. 920199-WS with an open mind and afford my neighbors and I a fair and impartial hearing. Likewise, I am fearful that Commissioner Kiesling's public and political support for uniform rates will preclude us receiving a fair and impartial hearing in Docket No. 950495-WS in which SSU has again sought uniform rates notwithstanding the First District Court of Appeals reversal of that rate structure in Docket No. 920199-WS.

FURTHER, AFFIANT SAYETH NAUGHT.

Jim Desjardin

Sworn to and subscribed before me this 12 day of September, 1995, by Jim Desjardin, who is __ personally known to me, or ✓ by identification, and did take an oath.

DL# D263456251710

Notary Public, State of Florida at Large
My Commission Expires:

DENISE L. GOULD
MY COMMISSION # CC 448252
EXPIRES: April 14, 1999
Bonded Thru Notary Public Underwriters

AFFIDAVIT FOR VERIFICATION OF DISQUALIFICATION

State of Florida
County of Leon

BEFORE ME, the undersigned authority, personally appeared Michael B. Twomey, who after being first duly sworn, deposes and says according to his personal knowledge as follows:

I am Michael B. Twomey of Route 28, Box 1264, Tallahassee, Florida 32310. I am an attorney licensed to practice in the State of Florida and am the attorney of record to the Sugarmill Woods Civic Association, Inc. and the Spring Hill Civic Association, Inc. ("the Associations") in one or more of the following matters before the Florida Public Service Commission: Docket Nos. 920199-WS, 930880-WS, and 950495-WS. Each of these dockets directly involves Southern States Utilities, Inc. ("SSU"), the water and sewer utility serving the members of the Associations, and either directly or implicitly involves the issue of imposing a so-called "uniform rate" structure on SSU's customers, including the members of the Associations. The uniform rate structure is a simple cost and rate averaging methodology that charges customers of non-interconnected and geographically dispersed water and sewer systems identical water and/or sewer rates without any regard for the costs associated with serving them. The concept inherently requires some SSU customers, including the members of the Associations, to subsidize the utility services of other SSU customers at levels that are unduly discriminatory. A uniform rate structure was imposed on 127 SSU water and sewer systems in Docket No. 920199-WS over the objections of the Associations and with the concurrence of SSU. The PSC final order was appealed to the First District Court of Appeals and oral arguments were heard by the Court on January 10, 1995.

On March 7, 1995, at the request of the Associations and at the invitation of Senator Ginny Brown-Waite, I spoke in favor of Senate Bill 298 before the Florida Senate Commerce Committee. Senate Bill 298 effectively proscribed the uniform rate concept by prohibiting the PSC from

including in any customer's water or sewer rates costs, other than allocated "common costs" that were not directly related to, or necessary to, the utility service being provided to that customer. Senator Brown-Waite addressed the Committee and introduced her bill. Jim Desjardin, a past President of the Sugarmill Woods Civic Association, Inc. and a member of its Utility Committee, spoke in favor of the bill, reciting how uniform rates unfairly forced he and his neighbors, most of whom were either retirees or low-income young families, to pay large subsidies to support the utility services SSU was providing to distant systems.

Commissioner Diane Kiesling addressed the Committee and spoke forcefully against Senator Brown-Waite's bill and for the retention of the uniform rate structure as a necessary tool for the PSC to have available. She spoke at some length and in such a forceful manner that she clearly annoyed some members of the Committee.

I followed Commissioner Kiesling and spoke in favor of the bill. I stated that the uniform rate concept unfairly forced a portion of SSU's customers to subsidize the utility services of other SSU customers and that such a practice was unconstitutional, illegal, and resulted in undue rate discrimination.

Immediately following the presentation of Senate Bill 298, I was standing with Senator Brown-Waite and several Associations members waiting to catch an elevator when Commissioner Kiesling loudly called me to her side. When I joined her, she stated in an extremely loud voice that I had "three times called her a liar" and that "she would use every legal means available to her to stop me if I called her a liar again." I denied having called her a liar and a short discussion ensued. By this time, the level of Commissioner Kiesling's voice, her tone and the nature of her accusations had caught the attention of virtually everyone of the dozens of people in the Senate Office Building first floor elevator lobby. After a brief exchange in which I protested my

innocence of her charges, Commissioner Kiesling and her entourage of staff persons departed.

I was clearly shaken, embarrassed and humiliated by the experience. Normally reasonably "quick on my feet", I was rendered virtually speechless by what I considered a rude, discourteous, and thoroughly unprovoked public attack by Commissioner Kiesling. I felt the need to defend myself to both Senator Brown-Waite and my clients, who, fortunately, also expressed shock and outrage at Commissioner Kiesling's conduct.

Since that incident, I have questioned and continue to question Commissioner Kiesling's impartiality on the issue of uniform rates, which remains a hotly contested and critical issue in all of SSU's pending and impending rate cases. I have concluded that she is not, and cannot be, impartial on an issue she so forcefully spoke in favor of before the Senate Commerce Committee. Furthermore, I fear that the unprovoked public attack on me on March 7, 1995 by Commissioner Kiesling reveals a strong bias against either me, my clients, or both, that will preclude my clients receiving a fair and impartial hearing before Commissioner Kiesling in Docket Nos. 920199-WS, 930880-WS and 950495-WS.

FURTHER, AFFIANT SAYETH NAUGHT.

Michael B. Twomey

Sworn to and subscribed before me this 12 day of September, 1995, by Michael B. Twomey, who is ✓ personally known to me, or __ by identification, and did take an oath.

Notary Public, State of Florida at Large
My Commission Expires:

DENISE L. BOULD
MY COMMISSION # CC 448252
EXPIRES: April 14, 1999
Bonded Thru Notary Public Underwriters

AFFIDAVIT FOR VERIFICATION OF DISQUALIFICATION

State of Florida
County of Leon

BEFORE ME, the undersigned authority, personally appeared Ginny Brown-Waite, who after being first duly sworn, deposes and says according to her personal knowledge as follows:

I am Senator Ginny Brown-Waite, Senator, 10th District, The Florida Senate, 20 North Main Street, Room 200, Brooksville, Florida 34601. My constituents include the residents of the Spring Hill community, all of whom are served by Southern States Utilities, Inc. ("SSU"). I own property in Spring Hill, my tenants are customers of SSU, and I remain a member of the Spring Hill Civic Association, Inc.

During the 1995 legislative session, I filed Senate Bill 298 for the purpose of stopping the PSC from charging any customers rate subsidies to support utility services that were being provided to other distant customers at non-interconnected water and sewer systems owned by SSU. On March 7, 1995, Senate Bill 298 was considered before the Senate Commerce Committee. I introduced the bill and spoke in favor of its adoption. At my request Jim Desjardin of the Sugarmill Woods Civic Association, Inc. and Michael B. Twomey, a private attorney representing Citrus County, the Sugarmill Woods Civic Association, Inc. and the Spring Hill Civic Association, Inc. in several PSC dockets concerning SSU and the uniform rates, attended the Committee meeting and spoke in favor of my bill.

PSC Commissioner Diane Kiesling also addressed the Committee and spoke forcefully against my bill and in favor of the uniform rate structure. She dismissed my concerns and those of my constituents regarding the unfairness of uniform rates and spoke on the necessity of retaining uniform rates as a means to achieving affordable rates and for financing large capital construction projects without imposing rate shock on the customers. I had not solicited Commissioner

Kiesling's attendance or comments at the Committee meeting and am not aware that any other Senator invited her to speak on the bill. She was clearly against my bill, for uniform rates, and lent both the prestige and apparent expertise of herself and the PSC to the effort of killing my bill.

Immediately following the presentation of Senate Bill 298, Mike Twomey, several of my constituents and I were waiting to get an elevator to go to my office when Commissioner Kiesling called Mike Twomey over in a loud voice and began rudely chastising him for calling her a liar during the Committee meeting. Commissioner Kiesling stuck her finger in Mike Twomey's face, and that, combined with her volume, tone of voice and the shrill nature of her accusations caught the attention of virtually everyone in that part of the building and quickly made her confrontation with Twomey the center and only attraction. Her accusations were unprofessional of any lawyer, let alone one charged with being an agency head. Furthermore, her accusations that Twomey had called her a liar during the Committee meeting were completely unfounded. Twomey was, in my opinion, merely making a strong case for the elimination of the uniform rate concept and in that regard was vigorously representing the interests of his clients and my constituents.

I have great concerns and reservations that I and my constituents will be able to receive a fair and impartial hearing before Commissioner Kiesling while we are represented by Mike Twomey in Docket No. 950495-WS. I am equally fearful and have grave reservations regarding Commissioner Kiesling's apparent lack of impartiality on the issue of uniform rates. The Sugarmill Woods Civic Association, Inc. and Citrus County have obtained a reversal of the PSC's final order imposing uniform rates in Docket No. 920199-WS, and the PSC will soon consider how to comply with the Court's mandate in that case. The PSC staff has recommended that the record of that case be reopened and that SSU be allowed to present new evidence that will allow for the retroactive approval of the existing uniform rates until they were initially imposed in

September, 1993. Given Commissioner Kiesling's forceful and unqualified support for uniform rates before the Senate Commerce Committee, I am fearful that she cannot approach the current staff recommendation in Docket No. 920199-WS with an open mind and, thereby, afford my constituents and I a fair and impartial hearing. Likewise, I am fearful that Commissioner Kiesling's public and political support for uniform rates will preclude us from receiving a fair and impartial hearing in Docket No. 950495-WS, in which SSU has again sought uniform rates notwithstanding the First District Court of Appeals' reversal of that rate structure in Docket No. 920199-WS.

FURTHER, AFFIANT SAYETH NAUGHT.

Ginny Brown-Waite

Sworn to and subscribed before me this 12th day of September, 1995, by Ginny Brown-Waite, who is ✓ personally known to me, or __ by identification, and did take an oath.

Diane W. Gregg
Notary Public, State of Florida at Large
My Commission Expires:

DIANE W. GREGG
MY COMMISSION # CC378313 EXPIRES
June 29, 1998
BONDED THRU TROY FAIN INSURANCE, INC.

EXCERPT OF HANDOUT TO SENATE COMMERCE COMMITTEE

MARCH 7, 1995

FEBRUARY 3, 1993

Southern States Utilities, Inc

SORTED BY % SUBSIDIZATION

W A

Water System	Avg Number Customers	County	Revenue Requirement: System Revenue Requirement	Revenue Requirement: Statewide Rates (Over) Under	Revenue Requirement: System Revenue Requirement Statewide	Revenue Requirement: % OF Contribution to Subsidy	Present Rates: Base Facility Charge	Present Rates: Gallonage Charge	Alternate One Statewide Rates: Base Facility Charge	Alternate One Statewide Rates: Gallonage Charge	Stand-Alone Rates: Base Facility Charge	Stand-Alone Rates: Gallonage Charge
Spring Hill Utilities	22087	Hernando	$3,749,228	($1,164,814)	$4,914,042	47.26%	$2.75	$0.74	$5.00	$1.19	$3.88	$0.89
Deltona Utilities	21416	Volusia	$4,203,631	($488,555)	$4,692,186	19.82%	$3.18	$0.95	$5.00	$1.19	$4.03	$1.11
Sugar Mill Woods	1769	Citrus	$416,542	($243,967)	$660,509	9.90%	$2.00	$0.58	$5.00	$1.19	$2.57	$0.84
Silver Lake Est./Western Shores	935/278	Lake	$203,782	($201,768)	$405,550	8.19%	$3.22	$0.57	$5.00	$1.19	$3.51	$0.52
Beacon Hills	2529	Duval	$519,413	($155,178)	$674,591	6.30%	$5.03	$0.65	$5.00	$1.19	$5.04	$0.82
University Shores	2752	Orange	$543,984	($65,532)	$609,517	2.66%	$5.62	$1.30	$5.00	$1.19	$4.44	$1.06
A a Island	1006	Nassau	$395,627	($56,940)	$452,567	2.31%	$9.26	$0.97	$5.00	$1.19	$4.72	$1.00
Apple Valley	894	Seminole	$163,064	($44,935)	$207,999	1.82%	$5.39	$1.00	$5.00	$1.19	$4.34	$0.88
Woodmere	1043	Duval	$265,498	($41,179)	$306,677	1.67%	$5.03	$0.65	$5.00	$1.19	$4.75	$0.89
Lollani Heights	391	Martin	$81,784	($1,618)	$83,402	0.07%	$4.77	$0.76	$5.00	$1.19	$5.30	$1.13
Fern Terrace	123	Lake	$21,523	$75	$21,449	-0.00%	$5.88	$1.48	$5.00	$1.19	$4.45	$1.27
Lake Harriet Estates	285	Seminole	$54,033	$507	$53,526	-0.02%	$5.39	$1.00	$5.00	$1.19	$4.91	$1.22
Picciola Island	131	Lake	$25,660	$2,963	$22,697	-0.12%	$5.88	$1.48	$5.00	$1.19	$5.01	$1.44
Fisherman's Haven	135	Martin	$23,278	$3,471	$19,807	-0.14%	$4.12	$0.76	$5.00	$1.19	$4.43	$1.66
Carlton Village	103	Lake	$21,185	$3,648	$17,537	-0.15%	$5.88	$1.48	$5.00	$1.19	$5.18	$1.59
Friendly Center	20	Lake	$6,631	$3,709	$2,922	-0.15%	$5.88	$1.48	$5.00	$1.19	$9.48	$2.90
Samira Villas		Marion	$5,868	$3,718	$2,150	-0.15%	$4.64	$1.03	$5.00	$1.19	$12.04	$3.47
Stone Mountain	6	Lake	$6,379	$4,469	$1,910	-0.18%	$5.88	$1.48	$5.00	$1.19	$14.97	$4.13
Palms Mobile Home Park	61	Lake	$11,048	$4,766	$6,282	-0.19%	$5.88	$1.48	$5.00	$1.19	$9.48	$1.90
Meredith Manor	662	Seminole	$141,281	$4,927	$136,354	-0.20%	$5.39	$1.00	$5.00	$1.19	$4.73	$1.29
Wootens	17	Putnam	$6,937	$5,361	$1,576	-0.22%	$5.59	$2.53	$5.00	$1.19	$17.51	$7.93
Lake Brantley	66	Seminole	$19,128	$6,181	$12,947	-0.25%	$5.39	$1.00	$5.00	$1.19	$7.46	$1.79
Sh rest	115	Lake	$20,479	$6,666	$13,813	-0.27%	$5.88	$1.48	$5.00	$1.19	$7.33	$1.84
M ngview	34	Lake	$13,773	$6,729	$7,044	-0.27%	$5.88	$1.48	$5.00	$1.19	$7.93	$2.64
Quail Ridge	21	Lake	$9,368	$6,841	$2,527	-0.28%	$5.88	$1.48	$5.00	$1.19	$13.11	$5.57
Citrus Park	337	Marion	$61,566	$7,102	$54,464	-0.29%	$6.65	$0.96	$5.00	$1.19	$4.35	$1.59
Venetian Village	131	Lake	$25,481	$7,355	$18,126	-0.30%	$5.88	$1.48	$5.00	$1.19	$6.77	$1.74
Lakeview Villas	13	Clay	$8,662	$7,374	$1,288	-0.30%	$2.93	$0.83	$5.00	$1.19	$35.00	$8.54
Harmony Homes	64	Seminole	$21,916	$7,389	$14,527	-0.30%	$5.39	$1.00	$5.00	$1.19	$8.71	$1.75
Westmont	122	Orange	$29,262	$7,481	$21,781	-0.30%	$9.15	$1.82	$5.00	$1.19	$6.19	$1.69
Holiday Heights	53	Orange	$18,287	$7,667	$10,620	-0.31%	$7.89	$1.29	$5.00	$1.19	$9.12	$2.03
Daetwyler Shores	129	Orange	$33,498	$7,873	$25,625	-0.32%	$4.09	$1.04	$5.00	$1.19	$6.42	$1.58
Kingswood	63	Brevard	$16,693	$8,102	$8,691	-0.33%	$5.47	$2.55	$5.00	$1.19	$9.77	$2.72
Dot Ray Manor	59	Seminole	$24,792	$8,102	$16,690	-0.33%	$5.39	$1.00	$5.00	$1.19	$11.26	$1.63
Palm Port	91	Putnam	$19,386	$8,517	$10,869	-0.35%	$5.59	$2.53	$5.00	$1.19	$17.07	$7.40

* Present Rates Include Minimum Gallonage

SSU SYSTEM ANALY. ON A PER CUSTOMER BASIS

ITEM--PER CUSTOMER BASIS:	GOLDEN TERRACE WATER	GOLDEN TERRACE SEWER	GOSPEL ISLAND ESTATES WATER	GOSPEL ISLAND ESTATES SEWER	GRAND TERRACE WATER	GRAND TERRACE SEWER
1. Customers, Ave. No.	105		8		66	
2. Gallons per month	3,416		5,847		5,676	
3. Net CIAC (Used & Useful)	$ 64 **		$ 1,618 *		$ 223	
4. Rate Base--Per Customer	$ 263		$ 198		$ 1,218 *	
5. Operating Income/yr.	$ 28		$ 21		$ 130	
6. Operating Expense/yr.	$ 209		$ 1,281--High		$ 205	
7. Revenue/yr. Stand-Alone	$ 237		$ 1,302		$ 335	
8. Subsidy/yr. Pay/(Receive)	$ (117)		$ (1,128)		$ (180)	
9. Revenue/yr. Uniform Rates	$ 120		$ 174		$ 155	
10. Return on Rate Base, (5+8)/(4)	0%		0%		0%	
11. CIAC Level per System, % *	20% **		104% *		17% *	
12. Plant, Used & Useful, %	100% *		100%		100%	
13. Mains, Used & Useful, %	100%		30%		100%	

* Net CIAC / Net Plant in Service

* Iron Problem--to be supplied with water by Inverness.

** Low CIAC

Iron Removal at 100%
Manganese Problem.

* Note high CIAC level.

* High Rate Base and low level of CIAC.

ITEM--PER CUSTOMER BASIS:	HARMONY HOMES WATER	HARMONY HOMES SEWER	HERMIT'S COVE WATER	HERMIT'S COVE SEWER	HOBBY HILLS WATER	HOBBY HILLS SEWER
1. Customers, Ave. No.	64		178		102	
2. Gallons per month	10,556		2,850		4,476	
3. Net CIAC (Used & Useful)	$ 6 *		$ 34 *		$ 17 *	
4. Rate Base--Per Customer	$ 677 *		$ 662 *		$ 320	
5. Operating Income/yr.	$ 72		$ 70		$ 34	
6. Operating Expense/yr.	$ 271		$ 181		$ 188	
7. Revenue/yr. Stand-Alone	$ 343		$ 251		$ 222	
8. Subsidy/yr. Pay/(Receive)	$ (116)		$ (147)		$ (87)	
9. Revenue/yr. Uniform Rates	$ 230		$ 104		$ 135	
10. Return on Rate Base, (5+8)/(4)	0%		0%		0%	
11. CIAC Level per System, %	1% *		5% *		5% *	
12. Plant, Used & Useful, %	100%		100%		43%	
13. Mains, Used & Useful, %	100%		49%		100%	

* Low Level of CIAC & high Rate Base.

* Low Level of CIAC & high Rate Base.

* Low Level of CIAC.