



JACK SHREVE
PUBLIC COUNSEL

STATE OF FLORIDA
OFFICE OF THE PUBLIC COUNSEL

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

ORIGINAL
FILE COPY

March 12, 1996

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

Re: Docket No. 950495-WS

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket are the original and 15 copies of Citizens' Motion to Dismiss and Citizens' Request to Schedule Evidentiary Hearing.

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

Sincerely,

Charles J. Beck

Charles J. Beck
Deputy Public Counsel

- ACK 1
- AFA 2
- APP _____
- CAF _____
- CMU _____
- CTR _____
- EAG _____
- LEG 1
- LIN 5
- OPC _____
- RCH _____
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- WAS _____

RECEIVED & FILED

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FPSC-BUREAU OF RECORDS

Request *motion*
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FPSC-RECORDS/REPORTING FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL
FILE COPY

In re: Application for a 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: March 12, 1996

MOTION TO DISMISS

The Citizens of Florida ("Citizens"), by and through Jack Shreve, Public Counsel, joined by Amelia Island Community Association, Residence Condominium, Residence Property Owners Association, Amelia Retreat Condominium Association, Amelia Surf and Racquet Property Owners Association and Sandpiper Association ("Nassau Associations"), by and through Arthur I. Jacobs, their attorney, the Concerned Citizens of Lehigh Acres ("Lehigh Acres") Sugarmill Woods Civic Association, Inc. ("Sugarmill Woods"), Spring Hill Civic Association, Inc. ("Spring Hill"), Marco Island Civic Association, Inc. ("Marco Island"), Harbour Woods Civic Association ("Harbour Woods"), and the Board of Supervisors of the East County Water Control District ("East County Water Control District"), by and through Michael B. Twomey, their attorney, move the Commission to dismiss the application for a rate increase of Southern States Utilities, Inc. ("Southern States") because of misconduct by

Southern States interfering with due process rights of the parties. This misconduct includes (1) soliciting ex parte communications intended to influence the Commission, (2) interference with the notice to customers, and (3) interference with the Citizens' right to counsel.

SOLICITING EX PARTE COMMUNICATIONS INTENDED TO INFLUENCE THE COMMISSION

1. Public documents obtained by Michael B. Twomey, attorney for Lehigh Acres, Sugarmill Woods, Marco Island and Harbour Woods, show that Southern States' lobbyist Jeff Sharkey solicited both the Lieutenant Governor and the Secretary of Commerce to contact the Florida Public Service Commission. A draft letter faxed from Mr. Sharkey to the Lieutenant Governor on December 13, 1995, expressed concern about the regulatory environment at the Commission which resulted in a year-to-date loss for the utility. It also expressed concern if the Commission were to place Southern States in serious financial jeopardy. The draft letter sent by Mr. Sharkey to the Lieutenant Governor asked the Chairman of the Commission to respond to the Lieutenant Governor about the overall economic and financial consequences facing Southern States, as outlined in a letter sent by Mr. Arend Sandbolte, chairman of Southern States' parent company Minnesota Power & Light, to the Governor.

2. As the paid lobbyist of Southern States, it was well known to Mr. Sharkey that both this case and a case on remand from

the First District Court of Appeals were matters pending before the Commission. Mr. Sharkey's intent, on behalf of Southern States, was to influence the Commission on pending matters, whether or not those matters were known to the Lieutenant Governor, to the prejudice of other parties in the case.

3. Members of the Florida Public Service Commission are nominated to the Governor by the Florida Public Service Commission Nominating Council. The Governor appoints members of the Florida Public Service Commission from those nominated by the Florida Public Service Commission Nominating Council. Section 350.031, Florida Statutes (1995). The power of the Governor over appointments to the Florida Public Service Commission was known to Mr. Sharkey and Southern States.

4. On behalf of Southern States, Mr. Sharkey made a request to the Secretary of Commerce similar to the request made to the Lieutenant Governor. A fax dated December 13, 1995, forwarding a draft letter to the Secretary of Commerce, states that "the situation is critical." Another fax dated December 21, 1995, displays handwritten notes stating "Deadline is Jan 3rd," the day before the Commission voted to increase the rates charged customers by Southern States on an interim basis. The inscription stating "Deadline is Jan 3rd" came from a communication from Mr. Sharkey's office to the executive secretary for the Secretary of Commerce.

5. Based on the solicitations made by Southern States' lobbyist, both the Lieutenant Governor and the Secretary of Commerce sent letters to the Commission while this case was pending.¹

6. The gravity of Southern States' misconduct can be seen by an analogy to a civil suit in circuit court. Suppose that Southern States had brought a multi-million dollar law suit in circuit court. Their action in soliciting the Lieutenant Governor to contact the Commission in this case is tantamount to contacting the employers of jurors in a civil suit and asking the employers to influence the jurors. No circuit court judge would condone this sort of behavior, and neither should the Commission.

7. Jennings v. Dade County, 589 So.2d 1337 (Fla. 3d D.C.A. 1991) sets the standard for a court's review of the effect of ex parte communications on quasi-judicial proceedings, such as this proceeding under section 120.57(1), Florida Statutes (1995). The allegation of prejudice resulting from ex parte contacts with the decision makers in a quasi-judicial proceeding states a cause of action. Upon the aggrieved party's proof that an ex parte contact occurred, its effect is presumed to be prejudicial unless the defendant proves the contrary by competent evidence. In determining the prejudicial effect of an ex parte communication,

¹ Copies of the letters are attached to this motion as exhibit 1.

the trial court considers whether, as a result of improper ex parte communications, the agency's decision making process was irrevocably tainted so as to make the ultimate judgment of the agency unfair, either as to an innocent party or to the public interest that the agency was obliged to protect.

8. In making this determination, a number of considerations may be relevant: the gravity of the ex parte communication; whether the contacts may have influenced the agency's ultimate decision; whether the party making the improper contacts benefitted from the agency's ultimate decision; whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond; and whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose.

9. The criteria set forth in Jennings applies to an ordinary ex parte contact, but the ex parte contact procured by Southern States was anything but ordinary. Southern States deliberately procured the ex parte contact through the office that appoints Commissioners to their position. It thus carried a significance far beyond an ex parte contact coming directly from Southern States. While the Jennings case focuses on the effect of the ex parte communication on the decision maker, this motion focuses instead on the misconduct of Southern States in attempting to influence the Commission, whether those actions by Southern States

were successful or not.

10. A deliberate and contumacious disregard of a court's authority warrant dismissal, as will bad faith, willful disregard or gross indifference to an order of a court, or conduct which evinces deliberate callousness. Watson v. Peskoe, 407 So.2d 954, 956 (Fla. 3d D.C.A. 1981); Bedflower v. Cushman & Wakefield of Florida, Inc., 510 So.2d 1130, 1131 (Fla. 2d D.C.A. 1987); Morales v. Perez, 445 So.2d 393 (Fla. 3d D.C.A. 1984); Merrill Lynch Pierce Fenner & Smith, Inc., v. Haydu, 413 So.2d 102 (Fla. 3d D.C.A. 1982). Southern States' efforts to influence the Commission reflect a deliberate and contumacious disregard of the Commission's authority, show bad faith, and evince deliberate callousness. Their request for a rate increase should therefore be dismissed.

11. The broad authority conferred by section 367.121(1)(g), Florida Statutes (1995) empowers the Commission to dismiss Southern States' application for a rate increase on account of this misconduct. This section provides the Commission the power, in the exercise of its jurisdiction, to exercise all judicial powers, issue all writs, and do all things necessary or convenient to the full and complete exercise of its jurisdiction and the enforcement of its order and requirements.

12. Another area expressly reflects the Commission's power to dismiss this case for the type of abuse committed by Southern

States. Commission rules authorize dismissal for discovery abuses. Rule 25-22.034, Florida Administrative Code. Presumably, this rule is based on the notion that such abuses can deprive parties of due process in a proceeding. The attempts of Southern States to gain an advantage through outside influence are far more egregious than a discovery abuse. Such attempts subvert the fundamental notion of a fair process and deprive parties of due process. If dismissal is permitted for discovery abuse, certainly it is compelled for knowing and intentional efforts to exert ex parte influence on the Commission. The rule of law demands that such behavior be answered with grave consequences. The Commission cannot condone this type of behavior.

INTERFERENCE WITH THE NOTICE TO CUSTOMERS

13. Rule 25-22.0047, Florida Administrative Code, requires a notice to be sent to customers concerning the rate increase request. After considerable controversy, the Commission required Southern States to send out a second notice to customers about the rate increase request and held a second series of hearings throughout the state.

14. The notice carries a purpose similar to a summons in a civil court proceeding. It appraises the party being sued of the nature of the suit and lets that party know the extent to which

their interests may be affected.

15. Southern States directly interfered with that notice, and attempted to nullify its effect, by sending postcards to customers shortly after customers received the Commission's notice and shortly before the Commission's scheduled customer hearings.² The postcards boldly insinuated that the notice required by the Commission was inadequate. The first sentence on the post card asked "Are you confused about all the literature you've received about the upcoming FPSC hearing concerning statewide uniform rate structure?" It followed that question by stating, "If so, you are invited to attend an informative meeting with SSU representatives to discuss uniform rates and any of your concerns." It then followed that statement with only its side of an argument on which there are two sides.

16. Even worse, the postcards led customers to believe that the only issue affecting their rates in this case is the uniform rates vs. stand-alone rates issue. No mention is made of the amount of increased revenue Southern States seeks in this case.

17. At the meetings held by Southern States shortly before the Commission's meetings, Southern States claimed either that they already knew how much additional revenue the Commission would give

² An example of the postcards is attached to this motion as exhibit 2.

them in this case or that the Commission routinely gives the company 70% of what they ask. With the publicity surrounding Southern States' attempts to influence the Commission through ex parte communications, this claim may have given customers the impression that the company's ex parte attempts at influence were successful and that customers therefore need be concerned only with the issue of uniform rates vs. stand-alone rates.

18. Southern States subverted the purpose of the second notice to customers. At best, it tried to discount the importance of revenue requirements to customers' rates. At worst, it confirmed citizens' fears that Southern States successfully influenced the Commission through ex parte contacts and that the amount of additional revenue the Commission will give to Southern States from customers is a foregone conclusion. Either way, it was an improper attempt to obstruct the notice required by the Commission and further interfere with the due process rights of the citizens in this case.

INTERFERENCE WITH THE CITIZENS' RIGHT TO COUNSEL

19. Section 350.0611, Florida Statutes (1995) states that it is the duty of the Public Counsel to represent the Citizens of Florida before the Florida Public Service Commission. In the process of interfering with the notice to customers required by the Commission, Southern States has also attempted to interfere with

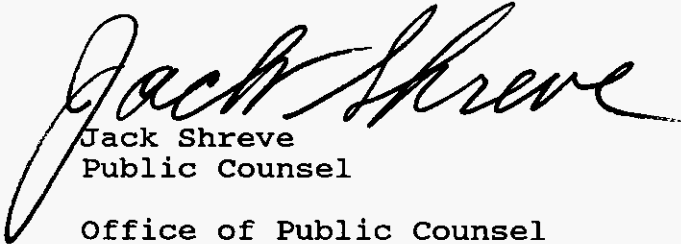
the Citizens' right to representation by the Public Counsel.

20. At the private meetings described in the postcards sent to customers, Southern States repeatedly advised the Citizens that the amount of increased revenue the utility would receive from customers was a foregone conclusion. When asked about public representation, the company advised customers that the Public Counsel had a conflict with what, according to Southern States, was the only important remaining issue in the case: uniform rates vs. stand-alone rates. Southern States thereby attempted to prejudice the representation of customers by the Public Counsel by attempting to persuade customers that the Public Counsel could do nothing for them.

21. This outrageous interference with the representation of customers by the Public Counsel represents further misconduct which, like the other misconduct, deprives parties of due process in this case and shatters the fairness of the process.

WHEREFORE, the Citizens, Nassau Associations, Lehigh Acres, Sugarmill Woods, Spring Hill, Marco Island, Harbour Woods, and East County Water Control District respectfully request the Commission to dismiss Southern States' application for a rate increase and to order a refund of all increased interim revenue collected so far by Southern States.

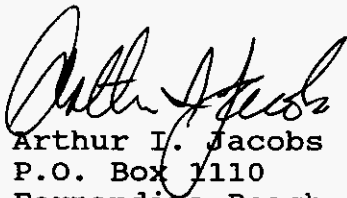
Respectfully submitted,



Jack Shreve
Public Counsel

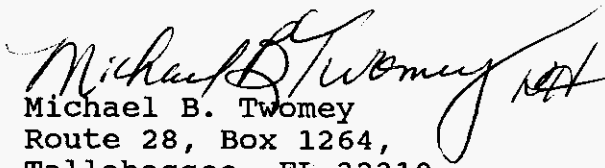
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Attorneys for the Citizens
of the State of Florida



Arthur I. Jacobs
P.O. Box 1110
Fernandina Beach, FL 32035-1110

Attorney for the Nassau Associations



Michael B. Twomey
Route 28, Box 1264,
Tallahassee, FL 32310

Attorney for Lehigh Acres, Sugarmill Woods,
Spring Hill, Marco Island, Harbour Woods, and
East County Water Control District

**CERTIFICATE OF SERVICE
DOCKET NO. 950495-WS**

I HEREBY CERTIFY that a correct copy of the foregoing has been furnished by U.S. Mail or *hand-delivery to the following parties on this 12th day of March, 1996.


*Ken Hoffman, Esq.
William B. Willingham, Esq.
Rutledge, Ecenia, Underwood
Purnell & Hoffman, P.A.
P.O. Box 551
Tallahassee, FL 32302-0551

*Lila Jaber, Esq.
Division of Legal Services
Fla. Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399

Brian Armstrong, Esq.
Matthew Feil, Esq.
Southern States Utilities
General Offices
1000 Color Place
Apopka, FL 32703

Kjell W. Petersen
Director
Marco Island Civic Assoc.
P.O. Box 712
Marco Island, FL 33969

Larry M. Haag, Esq.
County Attorney
111 West Main Street
Suite B
Inverness, Florida 34450



Charles J. Beck
Deputy Public Counsel



OFFICE OF THE LIEUTENANT GOVERNOR

December 21, 1995

Ms. Susan F. Clark, Chair
Public Service Commission
Gunther Building
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0855

Dear Commissioner Clark:

I have had several discussions recently on the direction of the state's water with the president of Southern State Utilities. They are very interested in being part of the dialogue we are having to protect and preserve one of our most valuable resources.

Although they are not a large player in the overall water management policy discussions presently underway through various legislative and executive office forums, as the state's largest private water utility they play a valuable role in preserving the quality of Florida's water by purchasing and upgrading small, often rural, failed water and wastewater systems.

In addition, I have received a copy of a letter sent to Governor Chiles by Mr. Arend Sandbulte, chairman and CEO of Minnesota Power, that details the current economic impact of recent Public Service Commission decisions on Southern States Utilities.

Mr. Sandbulte, who has joined the Florida Council of 100, because of his interest in supporting our efforts to generate a positive economic development and jobs climate in Florida for businesses and citizens, is very concerned about the regulatory environment at the PSC -- which over the last year have resulted in a year-to-date loss of \$453,749 and reduced the utilities rate of return on investment to -.43 percent.

I realize that your rate making decisions are very complicated and our office would not question those detailed, case specific decisions. However, I would be very concerned if we were to place in serious financial jeopardy a unique private water utility that is providing quality water and wastewater treatment facilities throughout the state.

I would appreciate any information you might be able to provide me on the overall economic and financial consequences facing SSU as outlined in the attached letter so I can respond to Mr. Sandbulte's concerns.

Sincerely,

A handwritten signature in cursive script that reads "Buddy MacKay".

Buddy MacKay

KHM/kcr

attachment

EXHIBIT 1

THE CAPITOL
TALLAHASSEE, FLORIDA 32399-0001

A RECYCLED PAPER PRODUCT PRINTED WITH SOY INK

7634



FLORIDA DEPARTMENT OF COMMERCE
Secretary Charles Dusseau

GOVERNOR
Lawton Chiles

Office of the
Secretary
(904) 488-3104
Fax (904) 922-9150

Economic
Development
(904) 488-6300
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International Trade
and Development
(904) 488-6124
Fax (904) 487-1407

Tourism
(904) 922-8887
Fax (904) 922-9329

Administrative
Services
(904) 488-9377
Fax (904) 921-2174

January 2, 1996

Susan F. Clark, Chairperson
Florida Public Service Commission
Gunther Building
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0855

Dear Commissioner Clark:

I recently received a copy of a letter sent to Governor Chiles by Mr. Arend Sandbulte, Chairman and CEO of Minnesota Power in Duluth, Minnesota. As you are aware, Minnesota Power owns Southern States Utilities, a water and wastewater utility company based in Apopka. This letter outlined his corporation's concerns regarding the PSC's recent uniform rate ruling pertaining to Southern States Utilities (PSC-95-1292-FOF-WS).

Businesses frequently contact this Department with concerns about regulatory decisions, and the PSC under your leadership has been very supportive of our efforts to ensure a fair and favorable setting for economic development in Florida. Your recent cooperation on the economic development expenditures issue and the telephone area code issue are good examples. However, as you can imagine, one of the basic elements for business survival in any marketplace is a predictable and stable business climate. Without it, business managers are unable to make informed decisions which can often make the difference between business survival and failure. An unpredictable environment, even in a regulated setting, can put tremendous financial pressure on firms such as SSU, which may lead them to rethink their investment in Florida and could cause businesses considering Florida as a site for expansion to go elsewhere.

In this case, I have asked a member of our staff, Nick Leslie, to consult with your staff and with the Water Policy Office in the Department of Environmental Protections. Nick will advise me on the reasoning behind the Commission's order and on what, if any, recourse might be available to Southern States Utilities. Nick can be reached at 487-2568.

FLORIDA

Collins Building
107 West Gaines Street
Tallahassee, Florida 32399-2000

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Susan F. Clark, Chairperson
January 2, 1996
Page Two

As always, I appreciate the cooperation of the Commission and thank you for your attention to this issue.

Sincerely,

A handwritten signature in cursive script that reads "Charles Dusseau".

Charles Dusseau
Secretary of Commerce

CD:ss

cc: Governor Lawton Chiles
Jeff Sharkey

Are you confused about all the literature you've received about the upcoming FPSC hearing concerning a statewide uniform rate structure?

If so, you are invited to attend an informative meeting with SSU representatives to discuss uniform rates and any of your concerns.

What: How This Case Impacts Your Rates

When: January 16, 1996 at 11:00 a.m.

**Where: Dinner Bell
 12084 S. Williams Street (US 41)
 Dunnellon, Florida
 (352) 489-2550**

"Uniform rates" charge each customer the same based on the amount of water used or wastewater treated. They spread the costs of complying with U.S. and statewide environmental means of protecting Florida's precious interconnected water resources and providing greatly improved rate stability for all SSU's customers, as well as reducing costs passed on to customers.

For more information, please call SSU's Communications Department at (407) 880-0058 or (800) 432-4501.

**CERTIFICATE OF SERVICE
DOCKET NO. 950495-WS**

I HEREBY CERTIFY that a correct copy of the foregoing has been furnished by U.S. Mail or *hand-delivery to the following parties on this 12th day of March, 1996.

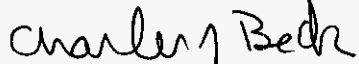
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Charles J. Beck
Deputy Public Counsel