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May 2, 1996

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

HAND DELIVERY

Re: Docket No. 950495-WS

Dear Ms. Bayo:

Enclosed herewith for filing in the above-referenced docket on behalf of Southern States Utilities, Inc. are the original and one copy of SSU's Notice of Service of Analysis of Revised Rate Case Expense.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely,


Kenneth A. Hoffman

ACK _____

AFA _____

APP KAH/rl

CAF _____

cc: All Parties of Record

CMU Trib.3

CTR _____

EAG _____

LEG _____

LIN _____

OPC _____

RCH _____

16
TALLAHASSEE BUREAU OF RECORDS

SEC _____

WAS _____

OTH _____

DOCUMENT NUMBER-DATE

04954 MAY-28

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application by Southern)
States Utilities, Inc. for rate)
increase and increase in service)
availability charges for Orange-)
Osceola Utilities, Inc. in)
Osceola County, and in Bradford,)
Brevard, Charlotte, Citrus, Clay,)
Collier, Duval, Highlands,)
Lake, Lee, Marion, Martin,)
Nassau, Orange, Osceola, Pasco,)
Polk, Putnam, Seminole, St. Johns,)
St. Lucie, Volusia and Washington)
Counties.)
_____)

Docket No. 950495-WS

Filed: May 2, 1996

**SOUTHERN STATES UTILITIES, INC.'S
NOTICE OF SERVICE OF
ANALYSIS OF REVISED RATE CASE EXPENSE**

SOUTHERN STATES UTILITIES, INC., by and through its undersigned counsel, hereby files Notice that it has served its Analysis of Revised Rate Case Expense to the Commission Staff by hand delivery to Lila Jaber, Esq., Florida Public Service Commission, 2540 Shumard Oak Boulevard, Room 370, Tallahassee, Florida 32399-1400, on this 2nd day of May, 1996.

Copies of the Analysis of Revised Rate Case Expense also have been served on all other parties of record in the manner reflected on the attached Certificate of Service on this same date.


DOCUMENT NUMBER-DATE

04954 MAY-28

FPSC-RECORDS/REPORTING

8791

Respectfully submitted,


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Tallahassee, FL 32302-0551
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and

BRIAN P. ARMSTRONG, ESQ.
MATTHEW FEIL, ESQ.
Southern States Utilities, Inc.
1000 Color Place
Apopka, Florida 32703
(407) 880-0058

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Southern States Utilities, Inc.'s Notice of Service of Analysis of Revised Rate Case Expense was furnished by U. S. Mail and/or hand delivery(*) to the following on this 2nd day of May, 1996:

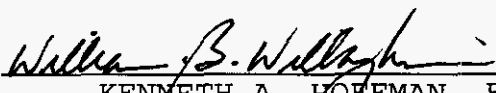
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KENNETH A. HOFFMAN, ESQ.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application by Southern)
States Utilities, Inc. for rate)
increase and increase in service)
availability charges for Orange-)
Osceola Utilities, Inc. in Osceola)
and in Bradford, Brevard, Charlotte,))
Citrus, Clay, Collier, Duval,)
Highlands, Lake, Lee, Marion,)
Martin, Nassau, Orange, Osceola,)
Pasco, Polk, Putnam, Seminole,)
St. Johns, St. Lucie, Volusia,)
and Washington Counties.)

Docket No. 950495-WS
Filed: May 6, 1996

**ORIGINAL
FILE COPY**

JOINT RESPONSE IN OPPOSITION TO
SSU'S MOTION FOR ATTORNEYS' FEES AND COSTS

The Citizens of the State of Florida, through the Office of Public Counsel; Marco Island Civic Association, Sugarmill Woods Civic Association, Inc., Spring Hill Civic Association, Concerned Citizens of Lehigh Acres, East County Water Control District, and the Harbour Woods Civic Association, through their attorney, Mr. Michael B. Twomey; and Amelia Island Community Association, Residence Condominium, Residence Property Owners Association, Amelia Retreat Condominium Association, Amelia Surf and Racquet Property Owners Association, and Sandpiper Association, through their attorney, Mr. Arthur I. Jacobs, pursuant to Rule 25-22.037(2)(b), Florida Administrative Code, respond in opposition to SSU's Motion for Attorneys' Fees and Costs which should be denied for the following reasons:

1. The nature of SSU's motion invites rejoinder to each of its claims. However, the inadequacy of SSU's legal reasoning makes

such an endeavor unnecessary: SSU's entire argument is premised upon a statutory provision which does not apply in a case such as this where the Commission sits as the trier of fact.

2. Section 120.57(1)(b)5., Florida Statutes (1995), allows a "hearing officer," under certain circumstances, to award a party reasonable expenses, including a reasonable attorney's fee.¹ But SSU does not even attempt to explain how such an explicit reference to a hearing officer can be construed to mean the Commission, itself. Yet, it is fundamental that a party invoking a statute must demonstrate its applicability to the controversy at hand. Even if the Commission should be reluctant to conclude it can never award attorney's fees pursuant to Section 120.57(1)(b)5., it should not be reluctant to conclude that SSU has failed to demonstrate how the statutory reference to "hearing officer" applies to the Commission.

3. SSU's failure to elucidate the statutory bounds may be understandable. Research shows that a hearing officer is never defined in the Administrative Procedure Act to include the agency head or its members.² See, e.g., § 120.52(15), Fla. Stat. (1995)

¹Section 120.57(1)(b)5. reads, in pertinent part: ". . . If a pleading, motion, or other paper is signed in violation of these requirements, the hearing officer, upon motion or the officer's own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."

²This is not to say that the term "hearing officer" is not used in various contexts to refer to individuals other than the hearing officers from the Division of Administrative Hearings.
(continued...)

("'Recommended order' means the official recommendation of a hearing officer assigned by the division to an agency or any other duly authorized presiding officer, other than an agency head or member thereof, for the final resolution of a proceeding under s. 120.57. [Emphasis added.]"); § 120.57(1)(a)1. ("A hearing officer assigned by the division shall conduct all hearings under this subsection, except for: 1. Hearings before agency heads or a member thereof . . ."); § 120.65, entitled "Hearing Officers."

4. The Commission has successfully argued to the Florida Supreme Court that reference to a hearing officer in the Administrative Procedure Act means exactly what it says and has no applicability to the Commission when it chooses not to refer a matter to DOAH for hearing. Citizens of the State of Florida v. Wilson, 569 So. 2d 1268, 1270 (Fla. 1990) ("[Section 120.66, Florida Statutes (1989)] is wholly inapplicable because it is directed toward ex parte communications to a hearing officer or to an agency head after receipt of a recommended order. There was no hearing officer involved in these proceedings.")

5. SSU is not entitled to attorney's fees in the absence of explicit statutory authority. See, e.g., Dade County v. Peña, 664

²(...continued)

See, England, Levinson, Florida Administrative Practice Manual, § 6.05. It is just that the term is never used to mean the agency head or one of its members. The scope of the 1986 amendment to Section 120.57(1)(b)5. is explained by England, Levinson, supra, in § 13.12, note 145, as follows: "Clearly, a DOAH hearing officer (or any other non-DOAH hearing officer) now has the statutory authority to impose significant penalties against those who abuse the processes of the APA." PSC Commissioners, however, are neither DOAH hearing officers nor non-DOAH hearing officers under the APA.

So. 2d 959, 960 (Fla. 1995) ("This Court follows the 'American Rule' that attorney's fees may only be awarded by a court pursuant to an entitling statute or an agreement of the parties. [Citation omitted] . . . A general rule of statutory construction in Florida is that courts should not depart from the plain and unambiguous language of the statute. Citizens of State v. Public Serv. Comm'n, 425 So.2d 534, 541-42 (Fla. 1982). Moreover, it is also a well-established rule in Florida that 'statutes awarding attorney's fees must by strictly construed.' [Citation omitted].")

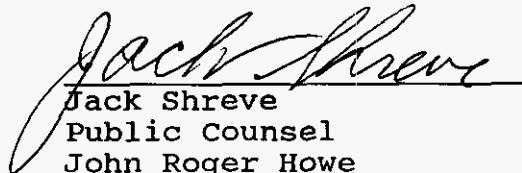
6. If the Legislature intended to allow the agency head (the term is defined in Section 120.52(3)), as well as a hearing officer, to award costs and fees in administrative proceedings, it would have referred to both in Section 120.57(1)(b)5. The events associated with the case of Dept. of Professional Regulation v. LeBaron, 443 So. 2d 225 (Fla. 1st DCA 1984), are illustrative. DPR had charged a licensed dentist, Dr. LeBaron, with professional incompetence. A hearing officer from DOAH, however, dismissed the complaint without prejudice. The department appealed. The appellate court dismissed the appeal because, although Section 120.68(1), Florida Statutes (1981), allowed for appeals of preliminary, procedural, or intermediate "agency action" if review of the final order did not provide an adequate remedy, the statute did not allow for review of non-final orders of hearing officers. 443 So. 2d at 226. The Legislature responded in the next legislative session by amending Section 120.68(1) to allow for appeals of "[a] preliminary, procedural, or intermediate agency action or ruling,

including any order of a hearing officer. [Emphasis added.]" See, Chapter 84-173, § 4, Laws of Florida; Charter Medical-Jacksonville, Inc. v. Community Psychiatric Centers of Florida, Inc., 482 So. 2d 437 (Fla. 1st DCA 1985).

7. SSU has failed to identify any authority explicitly allowing the Commission to award attorney's fees and costs against the Office of Public Counsel or any other party. It has also failed to demonstrate that Section 120.57(1)(b)5. applies to the Commission when it sits as the trier of fact. SSU's statement, at page 3, that attorney fees are recoverable in connection with "any motion filed by an opposing party in a Section 120.57(1), Florida Statutes[,] proceeding" is inaccurate under the statute SSU relies upon. The only case SSU cites on this issue, Mercedes Lighting v. Dept. of General Services, 560 SO. 2d 262 (Fla. 1st DCA), was an appeal of a hearing officer's final order awarding attorney fees. Moreover, Mercedes Lighting, which reversed the hearing officer's order, would not support SSU's motion even if this case were being heard by a hearing officer. SSU's motion suffers from deficiencies which would justify the award of fees and costs associated with this response, if such were available. SSU's motion must be denied.


WHEREFORE, joint respondents urge the Florida Public Service Commission to issue an order denying SSU's Motion for Attorneys' Fees and Costs.

Respectfully submitted,



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**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 party representatives on this 6th day of May, 1996.

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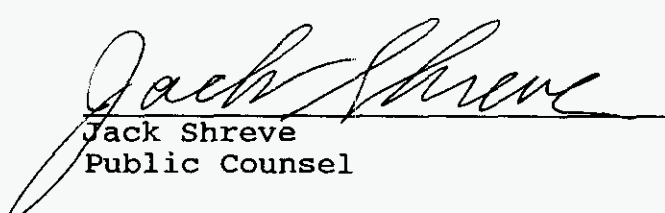
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