FLORIDA PUBLIC SERVICE COMMISSION
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M E M O R A N D U M

JULY 24, 1997

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (JABER)
DIVISION OF WATER & WASTEWATER (WILLIS, CHASE, RENDELL)

RE: DOCKET NO. 920199-WS - 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)

AGENDA: AUGUST 5, 1997 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE ON ISSUES 1 AND 2; PARTICIPATION ON ISSUE 4 IS DEPENDENT UPON COMMISSION VOTE ON ISSUE 3

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\LEG\WP\920199WS.RCM

CASE BACKGROUND

On May 11, 1992, Florida Water Services Corporation, formerly known as Southern States Utilities, Inc. (FWSC, SSU, or utility), filed an application to increase the rates and charges for 127 of its water and wastewater service areas regulated by this Commission. By Order No. PSC-93-0423-FOF-WS, issued March 22, 1993, the Commission approved an increase in the utility's final rates and charges, basing the rates on a uniform rate structure. On September 15, 1993, Commission staff approved the revised tariff sheets and the utility proceeded to implement the final rates.

Notices of appeal of Order No. PSC-93-0423-FOF-WS were filed with the First District Court of Appeal by Citrus County and Cypress and Oak Villages (COVA), now known as Sugarmill Woods Civic

Association (Sugarmill Woods) and the Office of Public Counsel (OPC). On October 19, 1993, the utility filed a Motion to Vacate Automatic Stay, which the Commission granted by Order No. PSC-93-1788-FOF-WS, issued December 14, 1993.

On April 6, 1995, Order No. PSC-93-0423-FOF-WS was reversed in part and affirmed in part by the First District Court of Appeal. Citrus County v. Southern States Utils., Inc., 656 So. 2d 1307 (Fla. 1st DCA 1995). On October 19, 1995, Order No. PSC-95-1292-FOF-WS was issued, Order Complying with Mandate, Requiring Refund, and Disposing of Joint Petition (decision on remand). By that Order, FWSC was ordered to implement a modified stand-alone rate structure, develop rates based on a water benchmark of $52.00 and a wastewater benchmark of $65.00, and to refund accordingly. On November 3, 1995, FWSC filed a Motion for Reconsideration of Order No. PSC-95-1292-FOF-WS. At the February 20, 1996, Agenda Conference, the Commission voted, inter alia, to deny FWSC's motion for reconsideration.

On February 29, 1996, subsequent to the Commission's vote on the utility's motion for reconsideration but prior to the issuance of the order memorializing the vote, the Supreme Court of Florida issued its opinion in GTE Florida, Inc. v. Clark, 668 So. 2d 971 (Fla. 1996). By Order No. PSC-96-0406-FOF-WS, issued March 21, 1996, after finding that the GTE decision may have an impact on the decision in this case, the Commission voted to reconsider on its own motion, the entire decision on remand.

By Order No. PSC-96-1046-FOF-WS, issued August 14, 1996, the Commission affirmed its earlier determination that FWSC was required to implement the modified stand-alone rate structure and make refunds to customers. However, the Commission found that FWSC could not impose a surcharge to those customers who paid less under the uniform rate structure. The utility was ordered to make refunds to its customers for the period between the implementation of final rates in September, 1993, and the date that interim rates were placed into effect in Docket No. 950495-WS. The refunds were to be made within 90 days of the issuance of the order.

On September 3, 1996, FWSC notified the Commission that it had appealed Order No. PSC-96-1046-FOF-WS to the First District Court of Appeal. On that same date, FWSC filed a motion for Stay of Order No. PSC-96-1046-FOF-WS. By Order No. PSC-96-1311-FOF-WS, issued October 28, 1996, the Commission granted FWSC's motion for

stay. FWSC implemented the modified stand-alone rate structure for the facilities that were included in the recent rate case, Docket No. 950495-WS, during interim. However, the Spring Hill facilities were not included in Docket No. 950495-WS and the rate structure for those facilities was not changed at that time. On November 12, 1996, OPC filed a Motion for Reconsideration and Clarification or, in the Alternative, Motion to Modify Stay, wherein OPC essentially requested that the Commission order the utility to implement modified stand-alone rates for the Spring Hill customers. On November 18, 1996, FWSC timely filed its response to OPC's motion.

The Commission heard oral argument on OPC's motion and FWSC's response during the January 21, 1997 Agenda Conference. By Order No. PSC-97-0175-FOF-WS, issued February 14, 1997, the Commission denied OPC's motion for reconsideration and clarification, but granted OPC's alternative motion to modify the stay. The Commission modified Order No. PSC-96-1046-FOF-WS to reflect that only FWSC's refund obligation was stayed pending appeal, and that FWSC was required to implement the modified stand-alone rate structure for FWSC's Spring Hill facility in Hernando County, consistent with prior Commission Orders Nos. PSC-95-1292-FOF-WS and PSC-96-1046-FOF-WS.

On February 28, 1997, FWSC filed a Motion For Reconsideration of Order No. PSC-97-0175-FOF-WS and Motion For Stay of Order No. PSC-97-0175-FOF-WS Pending Disposition of Motion for Reconsideration, which the Commission denied by Order No. PSC-97-0552-FOF-WS, issued May 14, 1997. On June 17, 1997, the First District Court of Appeal issued its opinion in Southern States Utils., Inc. v. Florida Public Service Comm'n, reversing the Commission's order implementing the remand of the Citrus County decision.

On July 16, 1997, Senator Ginny Browne-Waite and Mr. Morty Miller filed a Petition to Intervene and Motion to Compel Rate Reductions and Rate Refunds and for Maximum Penalty. This recommendation addresses the Court's reversal of the Commission's Order and the petitions to intervene.

DISCUSSION OF ISSUES

ISSUE 1: In light of Southern States Utils., Inc. v. Florida Public Service Comm'n, should the Commission reconsider the portion of Order No. PSC-96-1046-FOF-WS denying intervention to the City of Keystone Heights, Marion Oaks Civic Association, and Burnt Store Marina?

RECOMMENDATION: Yes, the Commission should reconsider the portion of Order No. PSC-96-1046-FOF-WS denying intervention to the City of Keystone Heights, Marion Oaks Civic Association, and Burnt Store Marina. Intervention should be granted at this time. All parties should furnish copies of future pleadings and other documents that are hereafter filed in this proceeding to Joe McGlothlin, Esquire. (JABER)

STAFF ANALYSIS: By Order No. PSC-96-1046-FOF-WS, the Commission denied petitions to intervene filed on May 9, 1996 by the City of Keystone Heights, the Marion Oaks Homeowners Association, and the Burnt Store Marina (petitioners), as untimely. In denying the petitions to intervene, the Commission relied on Rule 25-22.039, Florida Administrative Code, which states that petitions to intervene must be filed 5 days prior to hearing.

In their petitions, the petitioners argued that they were customers of FWSC; that Public Counsel could not advocate on behalf of all customers on refund and rate design issues; that the Commission permitted petitioners' petition to intervene in Docket No. 950495-WS; and that outside counsel had only recently been retained to represent petitioners. The petitioners further asserted that "certain groups of customers will have no representation on the issue of whether they will be backbilled to effectuate a refund to other customers," and that the Commission's disposition of the implementation of a refund, if any, and other rate structure issues will affect the substantial interests of petitioners.

In the Southern States opinion, the Court has directed the Commission to reconsider its decision denying intervention to petitioners. The Court states:

> We find that the PSC erred in denying these petitions as untimely in the circumstances of this case where the issue of a potential

> surcharge and the applicability of the Clark case did not arise until the remand proceeding. Accordingly, on remand, we direct the PSC to reconsider its decision denying intervention by these groups and to consider any petitions for intervention that may be filed by other such groups subject to a potential surcharge in this case. Southern States Utils., Inc., 22 Fla. L. Weekly D1492, D1493 (Fla. 1st DCA 1997).

It is apparent that the Court considered the surcharge issue as an issue that arose out of the Commission's action addressing the remand of the first opinion and therefore found that it could not have been contemplated by a customer group from the very beginning of this docket. In that regard, it appears that the Court believes that these potential surcharge payers did not have notice of the issue and therefore could not have sought intervention prior to the time that they did.

Based upon review of the Southern States opinion, staff recommends that the Commission reconsider the portion of Order No. PSC-96-1046-FOF-WS denying intervention to the City of Keystone Heights, Marion Oaks Civic Association, and Burnt Store Marina. Intervention should be granted to those petitioners at this time. All parties should furnish copies of future pleadings and other documents that are hereafter filed in this proceeding to Joe McGlothlin, Esquire, McWhirter, Reeves, McGlothlin, Davidson, Rief & Bakas, 117 South Gadsden Street, Tallahassee, Florida 32301.

ISSUE 2: Should the petition to intervene filed by Senator Ginny Browne-Waite and Mr. Morty Miller be granted?

RECOMMENDATION: No. The petition to intervene should be denied. (JABER)

STAFF ANALYSIS: On July 16, 1997, Senator Ginny Browne-Waite and Mr. Morty Miller filed a Petition to Intervene and Motion to Compel Rate Reductions and Rate Refunds and for Maximum Penalty (Petition). The time for filing responses has not expired as of the writing of this recommendation. However, because staff recommends in the next issue that parties be allowed to file briefs, staff believes that the Commission should consider this petition to intervene at this time. Staff will address any responses filed to the petition at the agenda conference. The only portion of the petition which should be addressed at this time is the intervention. Staff recommends that the other portions should be addressed after the parties file briefs as set forth in the next issue if intervention is granted.

In the petition, Senator Browne-Waite asserts that she was a customer of SSU at her former residence in Spring Hill until October 1994 and that she paid the uniform rates approved by the Commission and is entitled to a refund of the difference between the modified stand-alone rates and the uniform rates. Mr. Miller asserts that he is the former president of the Spring Hill Civic Association, resides in Spring Hill, and has continuously been a customer of SSU since the uniform rates were first approved in March 1993. The petitioners assert that they sought intervention shortly after the entry of the March 22, 1993 rate order and the Commission denied their request as untimely by Order No. PSC-93-1598-FOF-WS, issued November 2, 1993. Now, the petitioners assert that the First District Court of Appeal has stated that the Commission erred in denying the petitions to intervene as untimely because the issue of potential surcharge and the applicability of GTE did not arise until the remand proceeding.

By Order No. PSC-93-1598-FOF-WS, the Commission denied petitions for intervention filed by Sugarmill Manor, Inc., Senator Browne-Waite, Spring Hill Civic Association, Inc., and Cypress Village Property Owners Association as untimely pursuant to Rule 25-22.039, Florida Administrative Code. Order No. PSC-93-1598-FOF-WS was not appealed. However, the Division of Appeals has informed staff counsel that some groups (Sugarmill Manor, Inc. and Cypress

Village Property Owners Association) filed a notice of joinder in the appeal. The notice of joinder was dismissed by the Court because these groups were not parties to the Commission proceeding.

Staff's review of the Southern States decision indicates that the Court only directed the Commission to reconsider the petitions to intervene filed by potential surcharge payers. In directing the Commission to reconsider its finding on intervention, the Court directs the Commission "to reconsider its decision denying intervention by these groups (Keystone, Burnt Store, Marion Oaks) and to consider any petitions to intervention filed by other such groups subject to a potential surcharge in this case." (emphasis added). Southern States Utils., Inc., 22 Fla. L. Weekly at D1493.

As stated in the previous issue, it is apparent that the Court considered the surcharge issue as an issue that arose out of the Commission's action addressing the remand of the first opinion and therefore found that it could not have been contemplated by a customer group from the very beginning of this docket. In that regard, it appears that the Court believes that these potential surcharge payers did not have notice of the issue and therefore could not have sought intervention prior to the time that they did.

On the other hand, Senator Browne-Waite and Mr. Miller are not potential surcharge payers but rather are among the group entitled to a refund. The refund group (although not specifically Senator Browne-Waite and Mr. Miller) has always been represented in this proceeding. Some of these ratepayers, for example, Sugarmill Woods, appealed the Commission's final uniform rate order which ultimately resulted in a reversal by the Court and the Commission's requiring SSU to make refunds. As members of the group that paid "too much" under uniform rates, they could have sought intervention prior to the hearing as Rule 25-22.039, Florida Administrative Code, requires.

Therefore, based upon the foregoing, staff recommends that the petitions to intervene filed by Senator Browne-Waite and Mr. Miller should be denied.

ISSUE 3: Should parties be allowed to address the Commission at the August 5, 1997 agenda conference regarding Issue No. 4?

RECOMMENDATION: Yes. Participation should be limited to five minutes for each party. (JABER)

STAFF ANALYSIS: Recommendations which concern the appropriate actions the Commission should take on an order remanded by the Court have traditionally been noticed as "Parties May Not Participate," the rationale being that the proceeding involves a post-hearing decision, and participation should be limited to Commissioners and staff. However, in this case, the Commission has consistently allowed participation because the issues are unique and very complex. It is likely that participation in the discussion on Issue No. 4 will aid the Commission in reaching its decision and evaluating the law in these matters. Therefore, staff recommends that the Commission allow the parties to participate at the August 5, 1997 agenda conference during the discussion of Issue No. 4. In this recommendation, the arguments are not easily identifiable "by side." Accordingly, staff recommends that participation be limited to five minutes for each party.

ISSUE 4: Should the Commission allow parties to file briefs to address the appropriate action the Commission should take in light of the decision in Southern States Utils., Inc. v. Florida Public Service Comm'n?

RECOMMENDATION: Yes. The parties should have an opportunity to file briefs addressing the appropriate action the Commission should take in light of the decision in Southern States Utils., Inc. v. Florida Public Service Comm'n within 20 days of the issuance date of the order. In so doing, the parties should also specifically comment on the options identified by staff in the staff analysis below. (JABER, CHASE, WILLIS, RENDELL)

STAFF ANALYSIS: By Order No. PSC-96-1046-FOF-WS, the Commission required the utility to make refunds to those customers who paid more under the uniform rate structure than under the modified stand-alone rate structure approved on remand. The Commission did not allow the utility to collect a surcharge for undercollections. In that Order, the Commission found that the factual differences between the two cases make the GTE decision inapplicable to the instant docket. In reaching its decision, the Commission relied on the following differences:

1. the potential surcharge payers here were not represented by OPC in the rate structure issue;
2. in the remand phase, this case is one of rate structure only;
3. SSU assumed the risk where GTE did not;
4. SSU did not need to implement the uniform rate structure in order to recover the required revenues; and
5. any individual surcharge in this case would be usage-based and imposed on individual historical consumption (which customers would be unable to adjust) and for which no notice was given.

In its opinion, the Court found that the PSC erred in relying on these reasons for finding GTE inapplicable. Accordingly, the Court has reversed and remanded for reconsideration. The Court states:

> Following the principles set forth by the supreme court in Clark, we find that the PSC erroneously relied on the notion that SSU 'assumed the risk' of providing refunds when it sought to have the automatic stay lifted and therefore should not be allowed to impose surcharges. Just as GTE's failure to request a stay in Clark was not dispositive of the surcharge issue, neither is SSU's action in asking the PSC to lift the automatic stay.
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> We are unable to discern any logic in the PSC's contention that SSU, having merely acted according to the terms of the order establishing uniform rates, assumed the risk of refunds, yet is precluded from recouping charges from customers who underpaid because of the erroneous order. As the supreme court explained in Clark, 'equity applies to both utilities and ratepayers when an erroneous rate order is entered' and it would clearly be inequitable for either utilities or ratepayers to benefit, thereby receiving a windfall, from an erroneous PSC order. 668 So. 2d at 973. Contrary to this principle, the PSC in this case has allowed those customers who underpaid for services they received under the uniform rates to benefit from its erroneous order adopting uniform rates. As a legal position, this will not hold water. Southern States Utils., Inc., 22 Fla. L. Weekly at D1493.

In reading the opinion, it is clear that the Court believes that the GTE decision is applicable. It is also clear that requiring the utility to make refunds and allowing it to impose surcharges is consistent with the Southern States and GTE decisions. There is enough in the opinion to indicate that this would meet the "equity and fairness" principle discussed in both opinions. What is not clear to staff is whether that is the only solution. GTE states that "equity requires that both ratepayers and utilities be treated in a similar manner." (emphasis added). GTE Florida, Inc., 668 So. 2d at 972. As staff stated in its May 30, 1996 recommendation,

from a policy standpoint and now as confirmed by law, the Commission must make its decisions after considering the impact on all customers of the utility. In that regard, staff has preliminarily identified the following options:

1. require refunds with interest/allow surcharges with interest;
2. do not require refunds/do not allow surcharges because the rates have been changed prospectively;
3. order refunds without interest/allow surcharges without interest;
4. allow the utility to make refunds and collect surcharges over an extended period of time to mitigate financial impacts; and
5. allow the utility to make refunds and collect surcharges over different periods of time.

The Commission should note that all of the options identified above have been discussed in some fashion previously and the parties should be aware of all of them. The Commission should further note that whatever option it eventually chooses, consistent with GTE, it should limit the effects of refunds and surcharges to those persons who were customers of the utility during the appeal and remand proceedings.

Rather than recommending one option to the Commission at this time, staff believes that allowing the parties the opportunity to provide input on the options discussed above will benefit the Commission in making its decision in this very unique, complex case. Accordingly, staff recommends that the parties should have an opportunity to file briefs within 20 days from the issuance date of the Order addressing the appropriate action the Commission should take in light of Southern States Utils., Inc. v. Florida Public Service Comm'n. In so doing, the parties should also specifically comment on the options identified by staff above.

Spring Hill Facilities

As mentioned in the case background, FWSC implemented the modified stand-alone rate structure for all of its facilities included in Docket No. 950495-WS during interim. Therefore, the

period of time for determining any refund or surcharge amount for those facilities ends with the implementation of the interim rates. However, the Spring Hill facilities were not included in Docket No. 950495-WS and the Spring Hill rates were not changed at that time. The Commission has ordered FWSC to implement modified stand-alone rates at its Spring Hill facility. To date, this has not been accomplished. However, staff has received a copy of a settlement agreement between Hernando County and the utility wherein they have agreed on a prospective rate change which became effective June 14, 1997.

As a result of these circumstances, the period of time for a refund due to the rate structure change is longer for the Spring Hill facilities than for the others. Of course Spring Hill is part of any decision that is ultimately made regarding refunds and surcharges up to the time modified stand-alone rates were implemented for all other FWSC facilities. However, there is also a separate issue of the appropriate refund for this facility for the period of time since modified stand-alone rates were implemented for the other facilities. In our subsequent recommendation regarding the appropriate action the Commission should take in light of the Southern States decision, staff will address the unique circumstances of the Spring Hill rate structure change and the appropriate refund.