MACFARLANE FERGUSON & MCMULLEN

ORIGINAL

ATTORNEYS AND COUNSELORS AT LAW

400 NORTH TAMPA STREET, SUITE 2300
P. O. BOX 1531 (ZIP 33601)
TAMPA, FLORIDA 33602
(813) 273-4200 FAX (813) 273-4396

400 CLEVELAND STREET
P. O. BOX 1669 (ZIP 34617)
CLEARWATER, FLORIDA 34615
(813) 441-8966 FAX (813) 442-8470

IN REPLY REFER TO:

November 4, 1997

Tampa Office

VIA FEDERAL EXPRESS

Public Service Commission
Records and Reportings
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Application of Southern States Utilities, Inc., et al.
Docket No. 920199-WS

Gentlemen:

Enclosed please find the following for proper filing in the above-captioned case:

BRIEF OF SUGARMILL WOODS CIVIC ASSOCIATION, INC.
AS TO ORDER ON REMAND
(Original plus 15 copies, plus diskette)

Would you please be so kind as to stamp the enclosed copy of this transmittal letter when received and return same to this office in the enclosed stamped self-addressed envelope. Thank you.

Very truly yours,

Susan W. Fox

Susan W. Fox
(Signed for attorney to avoid delay)

SWF/ce

Enclosures

ACK 1
AFA 1
APP 1
CAF
CMU
CTR
EAG
LEG 1
LIN 5
OPC
RCH
SEC 1
WAS
OTH

RECEIVED & FILED
FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE
11344 NOV-5 97
FPSC-RECORDS/REPORTING

004603

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

BRIEF OF
SUGARMILL WOODS CIVIC ASSOCIATION, INC.
AS TO ORDER ON REMAND

As a result of the recent notice to customers of the already incurred impact of uniform rates, this Commission will receive, without doubt, a variety of comments concerning the wisdom and fairness of the refunds it has already ordered. Moreover, by the wording of the notice to customers and the five "options" listed, the Commission has, as will be demonstrated below, incorrectly implied that refunds might not be required and that the surcharges would not be necessary if refunds were not made.

This memorandum will demonstrate that the Commission has no alternative but to implement the refunds already ordered and make the necessary surcharges to pay for them.

I.

THE APPELLATE COURT AFFIRMED THE COMMISSION'S PRIOR ORDER REQUIRING REFUNDS WITH INTEREST; THIS IS THE LAW OF THE CASE.

The First District, in its Opinion reversing the prior Order on Remand states:

> "Because the PSC erred, however, in its consideration of GTE Florida, Inc. v. Clark, 668 So.2d 971 (Fla. 1996), *with regard to the issue of whether SSU may surcharge the customers who underpaid under the erroneously approved uniform rate*, we reverse and remand this case for further proceedings.
>
> * * *
>
> ...[T]he 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 Utilities, Inc. v. Florida Public Service Commission, 22 Fla. L. Weekly D1492 (Fla. 1st DCA., June 17, 1997). (emphasis added)

The First District found error only "with regard to... surcharge [of] the customers who underpaid under the erroneously approved uniform rate." Id.

The First District in no way criticized or even inferred that the portion of the Order requiring refunds was in any way incorrect.[1]

The right to refunds cannot be rationally contested. The residents of Sugarmill Woods were people who were forced to pay

[1] SSU as much as conceded the correctness of the refund order at Oral Argument. Counsel for the Commission was present and can attest to this concession, or a tape of the argument can be obtained from the Court of Appeal.

money under the terms of an erroneous order of the Commission. Just as the customers who underpaid could not benefit from the erroneous order, the ones who overpaid pending their appeal cannot be penalized by it. They are now entitled to get it back as a matter of due process.

> "The general rule is that one who surrenders property under an erroneous judgment is entitled to be restored to all that he has lost in the event of a reversal of the judgment." Baum v. Heiman, 528 So.2d 63 (Fla. 3d DCA 1988).

See also, Sheriff of Alachua County v. Hardee, 433 So.2d 15 (Fla. 1st DCA 1983) (restitution may be necessary to restore parties to positions before erroneous judgment); Mann v. Thompson, 118 So.2d 112 (Fla. 1st DCA 1960) (money paid under erroneous judgment is subject to restitution with interest); Silverman v. Lichtman, 296 So.2d 495 (Fla. 1974) (following reversal and remand of judgment in which garnishee paid sums into court and court paid counter-claimant, successful party was entitled to restitution; trial court acted unreasonably in allowing 180 days for restitution, funds should have been restored within 10 days).

Under the "law of the case" doctrine, the Commission now lacks any authority to retract the refund order or to require the successful opponents of uniform rates to bear the full brunt of the Commission's error. Such would simultaneously give the customers illegally subsidized pending the appeal a windfall while penalizing those overcharged.

> "The doctrine of the law of the case... requires adherence to the principle that questions of law decided on an appeal to a

> court of ultimate resort must govern the case in the same court and the trial court throughout all subsequent stages of the proceeding... so long as the facts in which the decision was predicated continue to be the facts in the case." Barrett Hinnant, Inc. v. Spottswood, 481 So.2d 80, 82 (Fla. 1st DCA 1986).

Accordingly, the Commission must leave the un-reversed refund order in place on this remand.

A refusal to award refunds would still allow the customers who underpaid to benefit at someone else's expense; a proposition which the First District says "will not hold water". Southern States, 22 F. Law Weekly D1492.

II.

THE NOTICE ISSUE IS A RED-HERRING.

Sugarmill Woods anticipates that the customers paying surcharges will now contend that they are not bound by the prior proceedings in this docket because they were not specifically named parties to them. However, they had just as much notice as the customers who were required to pay the erroneous uniform rate while these were in effect during the pendency of the appeal -- the general notice of the proposed rate increase sent out in Docket No. 920199, which this Commission ruled in its order denying reconsideration of the adoption of uniform rates was sufficient.

> "We find that adequate notice was provided to all parties. The MFRs and the notice to customers contained schedules which indicated that the utility was requesting a change in rate design...
>
> * * *

In the City of Plant City v. Mayo, 337 So.2d 966 (Fla. 1976), the Florida Supreme Court addressed the issue of adequate notice and found as follows:

> While we are inclined to view the notice given to customers in this case as inadequate for actual notice of the precise adjustment made, we must agree with the Commission that more precision is probably not possible and in any event not required. To do so would either confine the Commission unreasonably in approving rate changes, or require a pre-hearing proceeding to tailor the notice to the matters which would later be developed. We conclude, therefore, that the Commission's standard form of notice for rate hearings imparts sufficient information for interested persons to avail themselves of participation. Id. at 971

We find that in the instant case, as in all rate case proceedings, rate structure or rate design is and always has been an open issue. In addition, we find that the customer notices were sufficient for interested parties to avail themselves of participation." Order No. PSC 93-1598-FOF-WS (copy attached at Tab 1).

Sugarmill Woods disagreed and appealed that ruling to the First District which found it unnecessary to deal with it and reversed the uniform rates based on the Commission's lack of statutory authority to adopt them, which according to the court's opinion, rendered the notice issue irrelevant. See Citrus County v. Southern States Utilities, Inc., 656 So.2d 1307 (Fla. 1st DCA 1995).

To be consistent, the Commission will have to find that the notice that was sufficient to force Sugarmill Woods and other

subsidy-paying customers to pay a surcharge under uniform rates during the appeal was also sufficient to allow reversal of the erroneous payments once the order has been set aside.

III.

BASIC FAIRNESS REQUIRES REFUNDS AND SURCHARGES TO RESTORE THE STATUS QUO.

Every customer has the right to be charged final legal rates that are fair, just, and reasonable. Here, in the Citrus County decision, the court held that uniform rates were illegal, and thus that Sugarmill Woods had been wrongfully charged them. To argue that one group of customers can be left with known overcharges, while the other receives a known windfall, is not only absurd, but contrary to GTE Florida, Inc. v. Clark, 668 So.2d 971 (Fla. 1996) and the First District's opinion in Southern States. If "ratemaking is a matter of fairness" between the utility and the customers, requiring that they be treated in a "similar manner", then this Commission has no choice but to balance the scales between customer groups. The refunds and surcharges would only result in each group of customers paying their proper level of rates in the end.

Although Sugarmill Woods has consistently maintained that SSU should bear the brunt of these refunds, the fairness of requiring refunds at the expense of those who underpaid is equally compelling. To refuse recourse to the customers who overpaid would be a denial of due process, in effect, giving them no recourse for the funds they were required wrongfully to pay during the pendency of the appeal.

Moreover, to refuse refunds would be inconsistent with the positions taken by SSU and this Commission in (1) allowing implementation of uniform rates pending the appeal, and (2) refusing a stay pending appeal, on the promise that the customers would be protected. Denial of refunds would be a breach of good faith, a betrayal of the assurances made to the customers who were wronged.

This Commission recognized its commitment to refund any overcharges in its "Final Order on Remand and Requiring Refund" issued August 14, 1996, Order No. PSC 96-1046-FOF-WS at p.11, "We clearly expressed our concern... that the customers be adequately protected...".

Refusal to refund would also appear punitive against Sugarmill Woods and others who have agressively protested uniform rates. While the legal contest was unpopular and contrary to the stated positions of Commissioners, staff, and the utility, the battle was hard fought and sentiment ran high on all sides, but ultimately, the illegality and unfairness of uniform rates was demonstrated through Sugarmill's advocacy. It is a rare customer civic association who can mount such a challenge. A successful challenge should never be punished.

IV.

PRENTICE PRUITT WAS RIGHT.

The simple wisdom of Mr. Pruitt's advice as counsel to the Commissioners after the Citrus County decision now seems prophetic:

> "It is my judgment that Southern States Utilities (SSU) should be required to make a

full refund to customers who paid more than the amount they would have paid on stand alone rates. The utility can have absolutely no valid argument against this. This action has been anticipated by the Commission because a bond was required of SSU to ensure the payment of such refunds.

As to those customers who have paid less than stand alone rates as well as to those who have paid more under stand alone, it is my judgment that a utility can only charge under valid tariffs. Since the Court has rendered the uniform rates null and void, the only valid rates in existence has been the stand alone tariffs. This has to be true since a utility cannot charge any rates except those approved by the Commission, and the only approved rates are the previously approved stand alone tariff rates.

* * *

It is my opinion that SSU should be allowed to recover from customers who paid less under the uniform rates than they would have paid on the old stand alone rate structure." See Memorandum dated September 1, 1995 attached as Tab 2.

CONCLUSION

As to the options listed by the Commission in its order requiring briefs and in the customer notice, the only remaining choice is Option 1: "require refunds with interest and allow surcharges with interest". Refunds should be made within 90 days consistent with Commission rules. SSU has the ability to obtain

financing to manage this while collecting the surcharges over a more extended period.

Respectfully submitted,

SUSAN W. FOX
Florida Bar No. 241547
MACFARLANE FERGUSON & McMULLEN
P. O. Box 1531
Tampa, Florida 33601
(813) 273-4200
Attorneys for Sugarmill Woods
Civic Association, Inc., f/k/a
Cypress and Oaks Villages
Association, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished via U.S. Mail, postage prepaid, this 5th day of November, 1997 to the following persons:

Brian P. Armstrong, Esquire
Southern States Utilities, Inc.
1000 Color Place
Apopka, Florida 32703

Arthur J. England, Jr., Esq.
Greenberg, Traurig, Hoffman,
Lipoff, Rosen & Quentel, P.A.
1221 Brickell Avenue
Miami, Florida 33131

Kenneth A. Hoffman, Esquire
William B. Willingham, Esq.
Rutledge, Ecenia, Underwood,
Purnell & Hoffman, P.A.
Post Office Box 551
Tallahassee, Florida 32302

Robert A. Butterworth, Esquire
Attorney General
Michael A. Gross, Esquire
Assistant Attorney General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399

Michael B. Twomey, Esquire
Route 28, Box 1264
Tallahassee, Florida 32310

Larry M. Haag, Esquire
County Attorney
2nd Floor, Suite B
111 West Main Street
Inverness, Florida 34450

Jack Shreve, Esquire
Public Counsel
Harold McLean, Esquire
Office of the Public Counsel
c/o The Florida Legislature
111 West Madison Street - Room 812
Tallahassee, Florida 32399

Robert D. Vandiver, Esquire
General Counsel
Christina T. Moore, Esq.
Associate General Counsel
Lila Jaber, Esq.
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard - Room 370
Tallahassee, Florida 32399-0862

Michael S. Millin, Esq.
P. O. Box 1563
Fernandina Beach, Florida 32034

Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin
Davidson, Rief & Bakas
117 South Gadsden Street
Tallahassee, Florida 32301

Darol H. M. Carr
Farr, Farr, Emerich, Sifrit
Hackett and Carr, P.A.
P. O. Box 2159
Port Charlotte, Florida 33949

Charles R. Forman
Forman, Krehl & Montgomery
320 Northwest 3rd Avenue
Ocala, Florida 34475

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

Attorney

1

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 ORDER NO. PSC-93-1598-FOF-WS ISSUED: November 2, 1993

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
THOMAS M. BEARD
SUSAN F. CLARK
JULIA L. JOHNSON

ORDER ON RECONSIDERATION

BY THE COMMISSION:

BACKGROUND

Southern States Utilities, Inc., and Deltona Utilities, Inc. (hereinafter referred to as the utility or SSU) are collectively a class A water and wastewater utility operating in various counties in the State of Florida. By Order No. PSC-93-0423-FOF-WS (also referred to as the Final Order), issued on March 22, 1993, the Commission approved an increase in the utility's rates and charges which set rates based on a uniform statewide rate structure. On April 6, 1993, SSU, the Office of Public Counsel (OPC), Citrus County, and Cyprus and Oak Villages Association (COVA) timely filed Motions for Reconsideration of Order No. PSC-93-0423-FOF-WS. Also on that day, Sugarmill Manor filed a Petition for Intervention and Reconsideration of the Final Order. On April 13, 1993, OPC filed a Response to SSU's motion for reconsideration and SSU filed a Response to Sugarmill Manor's Petition for Intervention and Reconsideration. On April 14, 1993, SSU filed a Response to OPC's, COVA's, and Citrus County's Motions for Reconsideration. On June 28, 1993, COVA filed a Motion for Correction of Property Taxes and

on July 6, 1993, SSU filed a Motion to Strike that motion as untimely. Also, on July 8, 1993 COVA filed a Supplemental Motion for Reconsideration which SSU moved to strike by motion filed on July 14, 1993. All of the above-described motions for reconsideration and intervention and all other requests for review by non-parties are the subject of this Order.

This Order also addresses Commissioner Clark's August 17, 1993, motion for reconsideration of the calculation of the interim refund in the Final Order. Commissioner Clark's motion was heard at the September 28, 1993 Agenda Conference.

PETITIONS FOR INTERVENTION AND RECONSIDERATION BY NON-PARTIES

After hearing and the time for filing for reconsideration had passed, the following entities or individuals requested either intervention in Docket No. 920199-WS, reconsideration of Order No. PSC-93-0423-FOF-WS, or both:

1. Sugarmill Manor, Inc. filed a petition for intervention in Docket No. 920199-WS and reconsideration of Order No. PSC-93-0423-FOF-WS on April 14, 1993.

2. By letter received April 7, 1993, Volusia County Council Member Richard McCoy requested reconsideration of Order No. PSC-93-0423-FOF-WS.

3. By letter dated April 16, 1993, Volusia County Council Member at-Large Phil Giorno reiterated the position taken by Mr. McCoy.

4. By letter received May 21, 1993, Volusia County Council Member Patricia Northey expressed her support of fellow Council Member Richard McCoy's petition for reconsideration of the rate increase granted to SSU.

5. Hernando County Board of Commissioners' Resolution No. 93-62, dated May 17, 1993, and received May 20, 1993, requests that the PSC reconsider its position in Order No. PSC-93-0423-FOF-WS.

6. Florida State Senator Ginny Brown-Waite's petition for intervention in Docket No. 920199-WS and for reconsideration of Order No. PSC-93-0423-FOF-WS was filed on May 26, 1993. In her petition, Senator Brown-Waite

states that she represents herself together with her fellow SSU customers.

7. On May 28, 1993, Spring Hill Civic Association, Inc., filed a petition for intervention in Docket No. 920199-WS and for reconsideration of Order No. PSC-93-0423-FOF-WS.

On June 10, 1993, Cypress Village Property Owners Association (Cypress Village) filed a petition for intervention in Docket No. 920199-WS and reconsideration of Order No. PSC-93-0423-FOF-WS.

In response to these petitions, SSU states that, pursuant to Rules 25-22.037, 25-22.039 and 25-22.056, Florida Administrative Code, the petitions are untimely and should be denied. We agree. First, in regard to intervention, Rule 25-22.039, Florida Administrative Code, provides that a petition to intervene must be filed at least five days before final hearing. Sugarmill Manor, Inc., Senator Brown-Waite, Spring Hill Civic Association, Inc., Cypress Village Property Owners Association, Hernando County Board of County Commissioners, and Volusia County Council Members Phil Giorno, Richard McCoy and Patricia Northey filed their petitions for intervention five months or more after the final hearing. Pursuant to Rule 25-22.039, the petitions were not timely. Therefore, we find the petitioners' requests for intervention to be untimely. Accordingly, the requests for intervention are hereby denied.

As to the petitions for reconsideration, we find that the applicable rules do not afford non-parties leave to file post-hearing pleadings. Further, even if the petitions had been filed by parties, they were not filed within the 15 day period required by Rule 25-22.060(3)(a), Florida Administrative Code. Therefore, the petitions for reconsideration filed by the above-referenced individuals are hereby denied as untimely. We note, however, that all of the issues raised by the petitioners have been addressed in the body of this Order, as they were raised by parties in timely filed petitions for reconsideration.

On April 2, 1993, OPC filed a Motion for Waiver of Rule 25-22.060(3)(a), Florida Administrative Code, requesting additional time to file its motion for reconsideration. On April 5, 1993, SSU filed a response in opposition to OPC's motion. However, OPC subsequently timely filed its motion for reconsideration on April 6, 1993. Therefore, we find OPC's motion for waiver of Rule 25-22.060 (3)(a) to be moot.

UNIFORM, STATEWIDE RATES

COVA and Citrus County filed timely motions for reconsideration requesting reconsideration of the uniform, statewide rates established in Order No. PSC-93-0423-FOF-WS, and raising many of the same points in their motions. Therefore, for purposes of this Order the arguments of the two motions have been combined.

The standard for determining whether reconsideration is appropriate is set forth in Diamond Cab Company of Miami v. King, 146 So.2d 089 (Fla. 1962). In Diamond Cab, the Court held that the purpose for a petition for reconsideration is to bring to an Agency's attention a point which was overlooked or which the agency failed to consider when it rendered its order. In Stewart Bonded Warehouses v. Bevis, 294 So.2d 315 (Fla. 1974), the Court held that a petition for reconsideration should be based upon specific factual matters set forth in the record and susceptible to review. We have relied on the standard set forth in the above-referenced cases in reaching our decisions herein.

Notice

As the first point on reconsideration of uniform statewide rates, COVA and Citrus County argue that the customers of SSU were deprived of due process in this proceeding because they did not receive fair or adequate notice that uniform statewide rates would be considered. Citrus County argues that failure to provide adequate notice violates the provisions of Chapter 120, Florida Statutes, which contemplate reasonable notice and an opportunity to be heard. As further basis for reconsideration, both COVA and Citrus County allege that the utility did not request uniform rates, therefore the customers were not given notice of uniform rates from the utility's filing for rate relief. In addition, Citrus County alleges that the Public Service Commission (PSC) customer service hearings did not alert customers of the possibility of uniform rates. Both parties allege that information in the PSC press release was misleading. They further argue that no party to this case, other than PSC staff, advocated uniform rates and that staff did not give notice that it would advocate

uniform rates at the hearing. In addition, COVA argues that it received the recommendation with rate schedules showing the impact of uniform rates only after the hearing was complete and briefs had been filed.

In its response to these arguments, SSU argues that Issue 92 of the Prehearing Order puts the parties on notice that statewide rates would be considered; that COVA took a position in favor of stand-alone rates in the Prehearing Order; that Citrus County failed to participate in the Prehearing conference; that COVA presented direct testimony in opposition to uniform rates; that both parties seeking reconsideration cross-examined witnesses on the issue of statewide rates; that during the hearing, Citrus County raised for the first time, the issue of the Commission's authority to implement uniform rates; and that the issue of statewide rates was addressed in both parties' posthearing briefs. SSU further argues that it is irrelevant that the utility did not request uniform rates in the MFRs because rate design is at issue in a rate proceeding, just as rate base or expenses are. In addition, SSU states that the customer notices complied with Commission rules and were not raised as an issue at the hearing or in the parties' briefs.

We find that adequate notice was provided to all parties. The MFRs and the notice to customers contained schedules which indicated that the utility was requesting a change in rate design by requesting a rate structure with a maximum bill for customers at a 10,000 gallon level of consumption. This request was a departure from the previously approved rate structure. This request also contained the element of sharing costs between systems.

In response to Citrus County's allegation that the customer hearings failed to alert the customers to the possibility of uniform statewide rates, it is important to note that the primary purpose of the customer hearings is to determine the quality of service provided by a utility and to hear other testimony of customers. The record of the ten customer hearings held in this docket contains testimony of numerous customers concerned that the rate increase requested by the utility was too high. This compelling concern of the customers was reflected on page 95 of the Order where we weighed the impact of stand-alone rates against uniform, statewide rates and determined that, "the wide disparity of rates calculated on a stand alone basis, coupled with the ... benefits of uniform, statewide rates, outweighs the benefits of the traditional approach of setting rates on a stand-alone basis."

Thus, it was the concerns raised by customers at the customer hearings that was part of the driving force behind our decision to approve uniform, statewide rates.

In the City of Plant City v. Mayo, 337 So.2d 966 (Fla. 1976), the Florida Supreme Court addressed the issue of adequate notice and found as follows:

> While we are inclined to view the notice given to customers in this case as inadequate for actual notice of the precise adjustment made, we must agree with the Commission that more precision is probably not possible and in any event not required. To do so would either confine the Commission unreasonably in approving rate changes, or require a pre-hearing proceeding to tailor the notice to the matters which would later be developed. We conclude, therefore, that the Commission's standard form of notice for rate hearings imparts sufficient information for interested persons to avail themselves of participation.
>
> Id. at 971

We find that in the instant case, as in all rate case proceedings, rate structure or rate design is and always has been an open issue. In addition, we find that the customer notices were sufficient for interested parties to avail themselves of participation.

We find that press releases are not designed to inform the public of all possible outcomes of a proceeding. Press releases are not part of the Chapter 120, Florida Statutes, process and do not serve as formal notice of agency proceedings. Although COVA's witness testified that COVA intended to show that the newspapers were provided inaccurate information concerning the rate increase, we find that no evidence was presented on this matter.

Further, in the Section 120.57, Florida Statutes, hearing process, the issue of statewide rates was clearly put before the public in Order No. PSC-92-1265-PHO-WS, issued November 4, 1992, the Prehearing Order in this Docket. Issue 92 of that Order states: "Should SSU's final rates be uniform within counties,

regions, or statewide?" In that Order, COVA took the following position on Issue 92:

> COVA firmly believes that the best way to establish rates is on a stand-alone basis. It is not realistic to combine all systems regardless of their historical evolvement. Even SSU states that CIAC is only relevant to Sugar Mill Woods and Burnt Store, both part of the Twin County Utilities Acquisition. Yet all prepaid CIAC is lumped into one account penalizing all those SMW customers who have invested and are still investing more than $2000 each in their utility.
>
> Order No. PSC-92-1265-PHO-WS, p. 60

COVA presented no witness on this issue. SSU took the following position on Issue 92:

> If uniform rates are to be established, the benefits of such a rate structure could best be achieved only on a statewide basis. Neither County geographical boundaries nor the utility's own "regional" boundaries would recognize the factors previously identified as being critical to a proper uniform rate structure. The statewide rates could be developed using one of three proposed methods: (1) a method similar to the "rate caps" proposed by the utility in this proceeding; (2) cost of service and other pertinent factors would be considered together; and (3) the utility's preferred method, a statewide rate for standard and advanced treatment processes.

Utility witness Ludsen was listed as a witness for this issue yet Citrus County never asked a question of him on this issue during cross-examination. Staff took no position on this issue pending further development of the record. However, it should be noted that Issue 92 was an issue raised by staff in its Prehearing Statement. Further, staff offered the expert testimony of John Williams who provided his opinion on this issue. Citrus County did not intervene in this proceeding prior to the due date of

Prehearing Statements; it took no position at the Prehearing Conference; and it provided the Commission with no expert testimony on this issue.

At hearing, COVA inquired of Mr. Ludsen concerning uniform rates but did not inquire about the position taken by the utility in Issue 92. COVA's own pre-filed testimony did not address uniform rates but did address COVA's opposition to SSU's proposed rate structure. At the hearing, Citrus County addressed questions concerning uniform statewide rates to staff's witness Williams.

We find that the substance of COVA's and Citrus County's argument against uniform rates is substantially the same as their argument against the utility's initial proposal. Put most fundamentally, their position is that anything other than a stand alone basis for setting rates is unfair to the COVA and Citrus County residents who are customers of SSU. Many of the same arguments made against the utility's proposal apply to the imposition of statewide rates. We find that all of these arguments were addressed in Order No. PSC-93-0423-FOF-WS.

In the posthearing briefs, Citrus County argued that the Commission was without jurisdiction to implement uniform rates. (BR pp. 2-5) We find that this argument, which forms the bulk of the County's six page brief, establishes that the County was in fact on notice that uniform rates were truly at issue in this proceeding.

In summary, we find that there was adequate notice of uniform rates where it was an issue set forth in the prehearing order, where there was an opportunity to present testimony and cross-examine witnesses on this issue, and where there was an opportunity to address this issue in the posthearing briefs. It is no error on the Commission's part that these parties failed to fully explore the issue of uniform rates. We find that the parties have failed to show any mistake of fact, law or policy related to notice.

Based on the foregoing, we find it appropriate to deny that portion of COVA's and Citrus County's Motions for Reconsideration of uniform, statewide rates concerning inadequate notice.

Jurisdiction

COVA's motion for reconsideration questions our authority to set uniform, statewide rates. This issue was fully addressed on

page 93 of Order No. PSC-93-0423-FOF-WS and is not properly raised in COVA's motion for reconsideration. As part of its argument that the PSC is without authority to set uniform, statewide rates in this proceeding, Citrus County argues certain matters which are outside the record (that staff coerced SSU to undertake "certain expensive projects" to enable the utility to acquire small water and wastewater systems), matters previously raised and addressed in the Order and matters argued in its brief (that uniform rates are an illegal tax). We find that these are not appropriate points for reconsideration. The parties have failed to show any error on the part of the Commission regarding exercise of its jurisdiction. Accordingly, we find it appropriate to deny that portion of Cova and Citrus County's motions for reconsideration concerning jurisdiction.

Free Wheeling Policy Making

Both COVA and Citrus County characterize our decision to approve uniform, statewide rates as "free wheeling policy making." COVA bases its argument on a prior Commission decision set forth in Order No. 21202, issued May 8, 1989, which directed staff to initiate rulemaking on uniform rates. We note that Order No. 21202 also states:

> We believe there is merit to the concept of statewide uniform rates. Cost savings due to a reduction in accounting, data processing and rate case expense can be passed on to the ratepayers.
>
> Order No. 21202 at 186

Order No. 21202 was the culmination of a docket opened by the Commission to investigate possible alternatives to existing rate-setting procedures for water and wastewater utilities. A broad range of issues and changes recommended by the docket have been implemented through statutory revisions or rulemaking. Although no rule has been developed regarding the requirements for implementing uniform rates, there has been insufficient data on which to base such a rule, and there has not been a pressing need to go forward with a rule on uniform rates that would have a general, industry-wide application.

We find that the decision in this case to implement uniform statewide rates is consistent with McDonald v. Dept. of Banking and

Finance, 346 So.2d 569 (1st DCA 1977), which states in pertinent part:

> While the Florida APA thus requires rulemaking for policy statements of general applicability, it also recognizes the inevitability and desirability of refining incipient agency policy through adjudication of individual cases. There are quantitative limits to the detail of policy that can effectively be promulgated as rules, or assimilated; and even the agency that knows its policy may wisely sharpen its purposes through adjudication before casting rules.
>
> Id. at 581

> The agency's Final Order in 120.57 proceedings must describe its "policy within the agency's exercise of delegated discretion" sufficiently for judicial review. Section 120.68(7). By requiring agency explanation of any deviation from "an agency rule, an officially stated policy, or a prior agency practice," Section 120.68(12)(b) recognizes there may be "officially stated agency policy" otherwise than in "an agency rule"; and, since all agency action tends under the APA to become either a rule or an order, such other "officially stated agency policy", is necessarily recorded in agency orders.
>
> Id. at 582

We find that we have explained our decision in this case sufficiently for judicial review. We further find that by setting uniform, statewide rates for this utility, we have not unlawfully established a rule or policy for developing uniform rates for all water and wastewater utilities. We have determined, based on the record before us in this docket, that in this rate proceeding uniform, statewide rates are appropriate.

Based on the foregoing, we find that we have properly acted within our discretion in approving statewide rates and that no basis for reconsideration has been shown by the parties.

Record Evidence

Citrus County and COVA both assert that the record does not support our findings in Order No. PSC-93-0423-FOF-WS. Specifically, Citrus County alleges that staff witness Williams' testimony concerning statewide rates putting water and wastewater ilities on par with electric and telephone cases is "false"; that testimony concerning rate stability is "only remotely true"; that a conclusion that statewide rates recognize economies of le is "obviously false." Citrus County also asserts that witness Williams' testimony that uniform rates would be more simply derived, easily understood and economically implemented is irrelevant, self serving and "legally unacceptable." COVA also asserts that our findings on the benefits of statewide rates are not supported by the record and are self-serving. In addition, COVA states that there is no evidence to support our conclusion that no customers would be harmed by the imposition of uniform rates.

SSU's response states that the Commission relied on competent and substantial evidence in reaching its decision and that the parties are merely expressing their disagreement with the Commission's decision.

To the extent the parties seek to have this Commission reweigh the evidence or receive new evidence, their argument is not appropriate for reconsideration. The parties did not refute staff witness Williams' testimony at hearing using the arguments now raised on reconsideration. For example, Citrus County argues that it is wrong to compare non-interconnected water and wastewater plants to fully interconnected electric and telephone companies. Had the testimony of witness Williams been properly challenged during the hearing on cross-examination, Citrus County's allegations could have been addressed in the Final Order. The County is apparently unaware of previous Commission decisions that physical interconnection of water and wastewater plants is not required for rate setting. See Orders Nos. 22794, issued April 10, 1990; 23111, issued June 25, 1990; and 23834, issued December 4, 1990.

We find that the findings and conclusions of the Final Order are supported by competent and substantial evidence. We also find that the parties have failed to show that we overlooked or failed to consider any evidence with regard to witness Williams' testimony. Based on the foregoing, the motions to reconsider, as they relate to the sufficiency of the evidence, are hereby denied.

Unfair Rates

COVA alleges in its motion that the rates set by the Final Order are unfair, unreasonable and discriminatory because the uniform statewide rates are significantly higher than stand-alone rates for the customers of Sugarmill Woods. In the Final Order, we explain that in determining the appropriate rates, we compared the uniform rates against stand-alone rates. The Final Order states that, of the one hundred twenty seven systems, only seven would have had lower water and wastewater rates on a stand-alone basis. In the Order's conclusory paragraph at page 95 the Commission found as follows:

> Based on that comparison, we find that the wide disparity of rates calculated on a stand-alone basis, coupled with the above cited benefits of uniform, statewide rates, outweigh the benefits of the traditional approach of setting rates on a stand-alone basis.
>
> Order No. PSC-93-0423-FOF-WS, p. 95

In Utilities Operating Co. v. Mayo, 264 So.2d 321 (Fla. 1967), the Supreme Court determined that what is fair and reasonable is a conclusion to be formed by the regulatory body on the basis of the facts presented. That is what we have done by comparing the benefits of statewide rates against those of stand-alone rates and by measuring the impact of those rates across the entire customer base of SSU. The rates set forth in the Final Order are neither arbitrary nor unreasonable. Based on the foregoing, we find it appropriate to deny this portion of COVA's motion for reconsideration based on COVA's failure to show any error in fact, law, or policy or to show any point which the Commission overlooked or failed to consider.

Additional Arguments

COVA also argues that Order No. PSC-93-0423-FOF-WS impairs contracts, denies effective representation, and allows disincentives to efficiency. These new arguments are all arguments against the implementation of uniform rates which could have and should have been raised during the hearing process. Therefore, we find that COVA's petition on these issues does not raise any point that we overlooked or failed to consider. Accordingly, we find it

appropriate to deny that portion of COVA's motion raising the issues of impairment of contracts, denial of effective representation and disincentives to efficiency.

Conclusion

Based on the foregoing, both COVA's and Citrus County's tions for Reconsideration are denied.

OPEBS

In its motion for reconsideration, the utility argues that the Commission erred in adjusting the utility's Financial Accounting Standard (FAS) 106 costs to reflect costs associated with an "other post-retirement benefits" (OPEBs) plan referred to as Proposed Plan 2. The utility argues that our decision to base OPEB costs on the lowest cost plan proposal rather than on the utility's "substantive" plan is inconsistent with Commission policy. In its response to this motion, OPC argues that the utility is merely rearguing its case and impermissibly seeking to bolster its case with evidence from another docket. Each issue raised by the utility is discussed separately below.

The first issue raised by SSU is that the Final Order mischaracterized witness Gangnon's testimony about the OPEB plan. We find that the record supports a finding that witness Gangnon's testimony was contradictory in that he acknowledged that SSU was considering several plans in its actuarial study as a way to reduce OPEB costs (EX 38, p 36), while also stating that, "there are no present plans to reduce either the kinds or level of post-retirement benefits now or in the future." (TR 452)

The second issue of SSU's Motion is a request by the utility hat the Commission take official recognition of certain rebuttal estimony and exhibits which were filed in the record in Docket No. 920655-WS. As grounds for this request, the utility relies on our decision in Order No. 20489, issued December 21, 1988 (Docket No. 871394-TP - Review of the Requirements Appropriate for Alternative Operator Services and Public Telephones).

We find that Order No. 20489 merely demonstrates that the Commission took official recognition of a federal court decision entered into after the final hearing in the docket, but prior to the Commission's final decision. Here the utility is requesting that we take official recognition of testimony from another docket

after we rendered our final decision in this docket. Further review of Order No. 20489 also shows that the Commission denied, as untimely, GTE's motion for official recognition of another order where the motion for official recognition was filed on the day of the Special Agenda Conference. SSU also cites as authority for its position, Sections 90.202 (6) and 120. 61, Florida Statutes. While these statutory provisions allow sworn testimony from the record of one case to be entered into the record of another case, none of these statutes provides that it is appropriate to supplement the record either posthearing or after entry of a Final Order. Therefore, we find it appropriate to deny as untimely the utility's request to supplement the record.

The third issue raised by SSU as basis for reconsideration of the FAS 106 cost adjustments is the reference in the Final Order to witness Gangnon's lack of knowledge concerning the OPEB plan. SSU's argument in this regard attempts to make a factual issue out of the Commission's discretion to give evidence whatever weight that it deserves. In this case, Mr. Gangnon's testimony was not given the weight the utility desired. We find that this is not an issue concerning a mistake in fact, law or policy.

The fourth issue raised by the utility is that there is no competent substantial evidence to support the Commission's conclusion that there is a trend to reduce FAS 106 costs and that, therefore, the OPEB Proposed Plan 2 is appropriate. Again the utility raises the issue of the competency of the evidence which is not an appropriate basis for reconsideration. We find that the utility has shown no mistake of fact, law or policy.

The fifth issue raised by SSU is that there is no competent substantial evidence supporting witness Montanaro's testimony that, "SSU may restructure its benefits plan to reduce costs in the future." Our decision was based on the evidence in the record which shows that SSU was considering various alternative plans that might reduce its OPEB expenses, as well as all the other evidence in the record that does not support the level of OPEB expenses SSU requested. Therefore, we find that this argument does not support reconsideration.

SSU's sixth argument for reconsideration of our FAS 106 adjustments is that use of FAS 106 requires reliance on the utility's substantive plan over any other plan. SSU asserts that our decision to base OPEB costs on the lowest cost plan proposal rather than the utility's "substantive" plan is inconsistent with

Commission policy. We disagree. Adjustments to OPEB plans have been made in several dockets. For example, in rate cases for both the United Telephone Company of Florida and the Florida Power Corporation, the Commission approved FAS 106 for ratemaking purposes. The Commission also made adjustments to the FAS 106 costs requested by the companies in those cases. (See Orders Nos. PSC-92-0708-FOF-TL, p. 36 and PSC-92-1197-FOF-EI, p. 11) We find it appropriate substituting Proposed Plan 2 for SSU's current OPEB plan is an appropriate regulatory adjustment given the probability that SSU will reduce its OPEB costs in the future and the weaknesses and inconsistencies in SSU's case. We also note that, for regulatory purposes, this Commission is not bound by the substantive plan.

Finally, the last argument raised by SSU is similar to its first. In its petition for reconsideration, the utility asserts that Issue 50 of Staff's Recommendation contains no discussion of inconsistencies in Mr. Gangnon's testimony. We find the utility's argument to be without merit. In Issue 50, the recommendation states as follows:

> Staff notes that witness Gangnon was unfamiliar with the history of SSU's OPEB plan. For example, when initially asked at his deposition, he did not know how long SSU had offered OPEBs, he did not know if the benefits had increased, decreased, or remained the same, and he did not know how many employees were enrolled in the benefits plan. (EX 38, pp. 5-6) Further, witness Gangnon was not familiar with SSU's policy decisions behind its decision to provide OPEBs. (EX 38, p. 12) He provided a late-filed deposition exhibit stating that SSU informally offered OPEBs beginning in the early 1980's and that a formal OPEB policy was adopted on January 1, 1991. (EX 38, p. 51)

Therefore, we find that the late-filed deposition exhibit was consistent with Mr. Gangnon's testimony. Accordingly, we find that the utility has failed to show any mistake in fact, law or policy on this point.

Implicit in the Commission's adjustment in Order No. PSC-93-0423-FOF-WS to the requested OPEB expense was the Commission's determination that the utility failed to prove that the OPEB plan requested in the MFRs is prudent. However, since the record supports a finding that SSU will provide OPEBs and will incur an OPEB expense at some level, we found it appropriate in the Final

Order to allow the utility to recover an OPEB expense based on the lowest cost plan.

In conclusion, we find it appropriate to deny the utility's motion for reconsideration of the FAS 106 cost adjustments based on our findings, discussed above, that the utility has not shown any mistake of law, fact or policy in its motion.

HERNANDO COUNTY BULK WASTEWATER SERVICE RATES

In its motion for reconsideration, SSU also alleges that this Commission violated the utility's due process rights by increasing the gallonage and base facility charge (BFC) rates for the Hernando County bulk wastewater service rates. SSU states that no issue was raised on these rates, that there has been no opportunity to address these rates, and that nothing was introduced into the record on which the Commission could rely when determining the rates.

According to the utility's motion, if the Commission's final rates are implemented, Hernando County may reduce the amount of wastewater sent to SSU for treatment or may find alternative treatment sources altogether. In response to SSU's motion, COVA again raises its arguments in opposition to statewide rates. In addition, COVA argues that Hernando County should not be treated differently from other customers similarly situated.

In its MFRs, the utility requested the same rates for residential, general service and bulk wastewater service customers. The utility did not request special rate consideration for its bulk service customer, Hernando County. Nothing in the utility's application or in the record establishes that Hernando County, as a bulk wastewater service customer, should be treated differently than any other general service customer in this proceeding. We find that the utility has failed to show any error we have made in setting the bulk wastewater service customer's rate where there was no distinction among general service customers and where rates were set for the Spring Hill System's general service customers in the same manner all general service customers' rates were set, as explained at pp. 93-105 of the Final Order. Further, we find that the threat of the loss of a portion of Hernando County's wastewater described in the utility's motion is not in the record and may not be relied on for reconsideration.

The Commission did not overlook or fail to consider the Hernando County rates; the utility failed to request specific consideration of the Hernando County wastewater bulk service rates separate or apart from those for any other general service customers. The Commission is under no obligation to ferret out "special" consideration for individual customers, particularly where neither the utility nor any other party brings such a request efore the Commission. Based on the foregoing, we find it ppropriate to deny the motion for reconsideration of bulk astewater rates for Hernando County.

GAIN ON SALE

In its petition for reconsideration, OPC argues that we ignored several facts in the record relating to the gain on sale of the St. Augustine Shores System (SAS). Specifically, OPC refers to Exhibit 24, Order No. 17168, issued February 10, 1987, concerning SSU's request for a rate increase in Lake County. In that Order, the Commission found that the gain or loss on the sale of a system should be recognized in setting rates for the remaining systems. OPC states that by failing to treat the gain on sale of SAS consistently with the loss on the sale in Order No. 17168, the Commission has erred in its treatment of the gain on sale associated with SAS. OPC contends that the Commission's decision did not address Exhibit 24 and did not make any distinction between the two cases that would justify the differing treatments. In addition, OPC argues that it is inconsistent to allow recognition of the loss on the abandonment of the Salt Springs water system in this docket.

OPC also argues that the Final Order requires the customers of SSU to pay for utility expenses related to the utility's ondemnation-resisting efforts. OPC asserts that Exhibit 140 shows hat, during the test year, the utility included approximately 21,000 of expense associated with an attempted condemnation of Deltona Lakes by Volusia County. OPC argues that if the customers have no stake in the outcome, they ought not foot the bill for the utility's insuring that the outcome is as expensive for the condemning authority as possible.

SSU, in its response to OPC's petition, states that the Final Order is consistent with the rationale applied by the Commission in numerous past proceedings involving the ratemaking treatment of a gain on the sale of assets. It argues that in past proceedings where the Commission has required utilities to share a gain, the

facts demonstrate that the gains were realized on the sale of assets, as distinguished from a condemnation. SSU distinguishes those cases in which this Commission has allowed a gain on sale from a gain on the condemnation of assets. SSU also argues that OPC, by referring to Order No. 17168 (Ex 24), has impermissibly raised a new argument and has failed to show any error in not addressing Order No. 17168 in the Final Order because OPC's brief makes no mention of Order No. 17168.

SSU further argues that the decision on the gain on sale in Order No. 17168 is an aberration and is inconsistent with the position of the parties on losses on sales or condemnations in this proceeding. SSU states in its response that OPC raises a new argument when it attempts to draw a parallel between the accounting treatment of an abandonment and a condemnation. The utility argues that OPC's initial premise for comparison of an abandonment loss and a condemnation gain is faulty in that the ratepayers in this proceeding shoulder no additional expense as a result of the abandoned Salt Springs system. The utility also argues that, consistent with the Mad Hatter case (Order No. PSC-93-0295-FOF-W, issued February 24, 1993), if the decision to abandon plant was prudent, any resulting loss should be borne by the ratepayers. The utility argues that this standard presents an entirely different set of circumstances than those arising out of a condemnation of an entire non-Commission regulated system with stand-alone rates.

The utility concludes with a summation of items that distinguish an abandonment of property from a condemnation of an entire system: (1) an abandonment is an ordinary part of doing business -- a condemnation is not; (2) an abandonment only becomes extraordinary if the utility does not have sufficient reserves to accommodate the abandonment -- condemnations are not part of the normal course of a utility's operations; (3) customers formerly served by abandoned plant remain customers of the utility -- when an entire system is condemned, the affected customers no longer are customers of the utility; and (4) since customers remain with the utility in the abandonment situation, the utility's investment can be recovered from them -- when an entire system is condemned, no customers remain from whom the utility can recover any losses of its investment in utility assets.

We find that our decision in the Final Order was based on the record evidence presented. OPC has failed to show that the Final Order is inconsistent with other Commission decisions based on the same record evidence where the gain was the result of a

condemnation. We have reviewed the 1987 rate case Order No. 17168 cited by OPC. We find that it is the fact that SAS customers never contributed to the recovery of any return on investment which distinguishes this case from Order No. 17168. Because the facts of Order No. 17168 were not fully explored at the hearing in Docket No. 920199, we find that it is impossible to determine whether the cts in that case were the same as presented in this docket. Even the circumstances were the same, we find that the order in that e was a proposed agency action, which was not based on evidence uced through the hearing process.

OPC's argument that the customers of SSU should not have to foot the bill for condemnation-resisting efforts is an entirely new issue not previously raised in this case or addressed in its brief. The expenses OPC refers to are expenses incurred in condemnation proceedings which do not result in condemnation. Expenses incurred in condemnation proceedings which do result in condemnation are not included in the rate case. (TR 606 and EX 47)

As OPC's petition for reconsideration of this issue does not present any arguments regarding the sale of utility assets which we overlooked or failed to consider, or show any error in fact, law or policy, we find it appropriate to deny OPC's request for reconsideration.

ACQUISITION ADJUSTMENT

In its petition for reconsideration, OPC argues that the Commission overlooked and failed to consider evidence which contradicts our conclusion that no extraordinary circumstances had been shown to support an acquisition adjustment. OPC further rgues that the Commission failed to address the Deltona high cost bt in the acquisition adjustment issue and that purchasing a stem with such high cost debt is an extraordinary circumstance.

We find that OPC misapprehends the meaning of the reference to the acquisition adjustment issue made on page 49 of the Final Order. OPC's position on the cost of debt issue was that the cost of debt should be adjusted to reflect the utility's failure to take the cost of debt into consideration when determining a purchase price. In the Final Order, we found that this was not an appropriate basis for a cost of debt adjustment. We confirm that it was not our intention in the Final Order, nor was it our obligation, to apply OPC's position on one issue to another issue, as inferred by OPC.

OPC did not argue in its brief, nor did it present evidence or arguments, that extraordinary circumstances existed to justify a negative acquisition adjustment. We agree with OPC that facts are in the record dealing with the purchase price, the high cost of debt and the subject of a negative acquisition adjustment. However, OPC's position and argument on the negative acquisition adjustment issue were that, "the Commission cannot allow a return on investment which was not already made in providing utility service to customers."

We find that OPC is rearguing its case. Having failed to win its point on the cost of debt issue, it appears that OPC is now taking a new position on the negative acquisition issue, while at the same time employing evidence presented for other issues in support of it. We find that OPC has failed to show that the Commission overlooked or failed to consider any point made with regard to the negative acquisition adjustment issue. Therefore, OPC's petition for reconsideration is denied.

COVA'S MOTION FOR CORRECTION OF PROPERTY TAXES

As discussed in an earlier portion of this Order, on June 28, 1993, COVA filed a motion seeking to correct the tax projections used for the projected test year to the actual 1991 tax amounts. On July 7, 1993, SSU filed a Motion to Strike the Motion for Correction of Property Taxes as an untimely request. We agree and further note that COVA's motion sought to have the Commission consider evidence not included in the record and failed to show any error in the Final Order. In addition, we find that any necessary adjustments to tax amounts may be made in pass-through requests. Accordingly, COVA's Motion is denied as untimely.

COVA'S SUPPLEMENTAL MOTION FOR RECONSIDERATION

As discussed in an earlier portion of this Order on July 8, 1993, COVA filed a motion for reconsideration alleging that a staff attorney responsible for the recommendation in this docket accepted employment with SSU and had applied for employment prior to preparation of the recommendation. On July 14, 1993, SSU filed a Motion to Strike COVA's motion as untimely. We find it appropriate to deny COVA's motion as untimely, having been filed several months late, and as factually inaccurate. As we have previously determined through an internal investigation, the staff attorney who accepted employment with SSU did not seek employment with SSU prior to the recommendation being filed, was not solely responsible

for the preparation of the recommendation and did follow all Commission procedures when seeking employment with a regulated utility. Accordingly, COVA's motion is denied.

COMMISSIONER CLARK'S MOTION TO RECONSIDER THE CALCULATION OF THE INTERIM REFUND AMOUNTS

In Docket No. 921301-WS the utility requested deferred covery of OPEB expenses incurred by SSU from January through the mplementation of final rates in this docket. This request was addressed at the Agenda Conference on August 17, 1993. During the discussion at Agenda, it became apparent that although the Final Order included approval of OPEB expenses, those expenses were specifically excluded from the calculation of the appropriate amount of refund for interim rates in the Final Order. Therefore, Commissioner Clark, on her own motion, moved for reconsideration of the interim refund calculation in Order No. PSC-93-0423-FOF-WS to determine whether there had been an error in the Final Order by excluding the OPEB expense from the interim refund calculation.

Page 105 of the Final Order states that in order to calculate the proper interim refund amount, the Commission calculated a revised interim revenue requirement using the same data used to establish final rates, but excluding the pro forma provisions for rate case expense and FAS 106 costs. The order states that those pro forma charges were excluded since they were not actual expenses during the interim collection period. The interim collection period began in November, 1992 and was in effect through October, 1993.

Because FAS 106 required compliance by January 1, 1993 for ompanies providing OPEBs, the increased expense for OPEBs was curred during the time interim rates were collected. Therefore, ose amounts should not have been removed from the calculation of ne revised interim revenue requirement. Therefore, we find it appropriate to grant Commissioner Clark's motion for reconsideration.

Based on this reconsideration, we find the appropriate revised interim revenue requirements to be $15,596,621 and $10,101,174 for water and wastewater, respectively. This results in a refund of $750,975 for water and $169,432 for wastewater. The reconsideration reduces the refund required in the Final Order by $319,396 and $110,465, respectively. The recalculated refund

percent, after removal of other revenues, is 4.69 percent for water and 1.65 percent for wastewater.

In order to monitor the completion of the refund, this docket shall remain open. If no appeal is pending in this docket, the docket may be closed administratively after staff has verified that the refund was made consistent with the Commission's order and with applicable rules regarding refunds. This docket shall remain open pending the resolution of any appeals.

Based on the foregoing it is, therefore,

ORDERED by the Florida Public Service Commission that petitions for intervention filed by Sugarmill Manor, Inc., Florida State Senator Ginny Brown-Waite, Spring Hill Civic Association, Inc., and Cypress Village Property Owners Association are denied. It is further

ORDERED that the petitions and motions for reconsideration filed by Sugarmill Manor, Inc., Richard McCoy, Phil Giorno, Hernando County Board of Commissioners, Patricia Northey, Florida State Senator Ginny Brown-Waite, Spring Hill Civic Association, Inc., Cypress Village Property Owners Association, Southern States Utilities, Inc., the Office of Public Counsel (OPC), Citrus County, and Cyprus and Oak Villages Association (COVA) are denied. It is further

ORDERED that the interim revenue requirements and the interim refund amounts have been reconsidered and the revised amounts are set forth in the body of this Order. It is further

ORDERED that this docket shall remain open until the refund is completed and staff has verified the refund and pending the resolution of any appeals.

By ORDER of the Florida Public Service Commission, this 2nd day of November, 1993.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)
CB

by: Kay Flynn
Chief, Bureau of Records

NOTE: On the issue of OPEBs, there was a split vote by the panel consisting of Commissioners Clark and Beard; Chairman Deason cast the deciding vote after reviewing the record. On the issue of Commissioner Clark's motion for reconsideration, Commissioners Clark and Johnson voted for reconsideration and Chairman Deason voted not to reconsider.

NOTICE OF 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 the Commission's final action in this matter may request 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 by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

2

State of Florida

Public Service Commission

-M-E-M-O-R-A-N-D-U-M-

DATE: September 1, 1995
TO: ROBERT D. VANDIVER, GENERAL COUNSEL
FROM: PRENTICE P. PRUITT, SENIOR ATTORNEY
RE: SOUTHERN STATES UTILITY RATE STRUCTURE PROBLEMS

In response to your memorandum of August 23, 1995, concerning the referenced matter, I submit the following.

It is my judgment that Southern States Utilities (SSU) should be required to make a full refund to customers who paid more than the amount they would have paid on stand alone rates. The utility can have absolutely no valid argument against this. This action has been anticipated by the Commission because a bond was required of SSU to ensure the payment of such refunds.

As to those customers who have paid less than stand alone rates as well as to those who have paid more under stand alone, it is my judgment that a utility can only charge under valid tariffs. Since the Court has rendered the uniform rates null and void, the only valid rates in existence has been the stand alone tariffs. This has to be true since a utility cannot charge any rates except those approved by the Commission, and the only approved rates are the previously approved stand alone tariff rates.

It is my judgment that there is no retroactive ratemaking involved. The Supreme Court of Florida has held that retroactive ratemaking only occurs when new rates are applied to prior consumption. Gulf Power Co. v. Cresse, 410 So. 2d 492 (Fla. 1980). Here, in the SSU case, the Commission would be applying the old, approved rates, to prior consumption.

The foregoing is true for the reason that a commission approved tariff has the force and effect of law. Maddalina v. So. Bell Tel. Co., 380 So. 2d 1246 (Fla. 1980). Further, a tariff is a law, not a contract, and has the force and effect of a statute. ACL Ry. Co. v. Atlantic Bridge Co., 577 2d 654 (Fla. 1932).

It is my opinion that SSU should be allowed to recover from customers who paid less under the uniform rates than they would have paid on the old stand alone rate structure.

It appears to me that the Commission should notify SSU that the stand alone tariffs are still in full force and effect and that they have the right to petition at any time for rate relief thereunder, or to propose and ask for approval of grouping of any number of individual functionally related systems into groups as single systems.

7127

I have reviewed the August 17, 1995, memorandum of law by Chris Moore and I agree with her conclusion that nothing remains to be done by the Commission in Docket No. 920199-WS

My agreement is bolstered by a 1974 Supreme Court of Florida case relating to mandates. There the Court said that "It is well settled that the judgment of an appellate court, where it issues a mandate, is a final judgment in the cause and compliance therewith by this lower court (in this case the Commission) is a purely ministerial act requiring the consent of the reviewing Court permitting presentations of new matters affecting the cause." O.P. Corporation v. Village of North Palm Beach, 302 So. 2d 130 (Fla. 1974).

This would not preclude SSU from seeking rate relief on a stand alone basis or attempt to demonstrate existence of functionally related systems. This would have the "ball in their court" and have a pretty good idea of what they need to establish at the Commission level in order to satisfy the Court that the statutory requirements have been met.

PPP/jb
cc: Lila Jaber
Chris Moore