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November 5, 1997

HAND-DELIVERED

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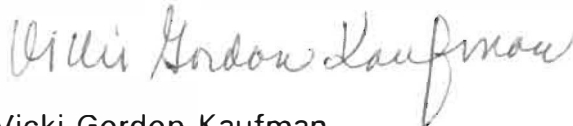
Re: Docket No. 920199-WS

Dear Ms. Bayo:

Enclosed for filing are the original and 15 copies of the Brief of the City of Keystone Heights and the Marion Oaks Civic Association On the Issue of Potential Refunds/Surcharges in the above docket.

Please acknowledge receipt of the above on the extra copy enclosed herein and return it to me. Thank you for your assistance.

Sincerely



Vicki Gordon Kaufman

VGK/pw
Encls.

DOCUMENT NO. DATE

11354-97 11/5/97
TPSC - COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL

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

Filed: November 5, 1997

BRIEF OF THE CITY OF KEYSTONE HEIGHTS AND THE MARION OAKS CIVIC ASSOCIATION ON THE ISSUE OF POTENTIAL REFUNDS/SURCHARGES

The City of Keystone Heights and the Marion Oaks Civic Association (Keystone/Marion) hereby file their brief on the issue of the appropriateness of a surcharge/refund pursuant to Order No. PSC-97-1033-PCO-WS, Order No. PSC-97-1033-PCO-WS and Order No. PSC-97-1290-PCO-WS. Keystone/Marion's basic position is that, given the unique circumstances of this case, no refund should be

made and no surcharge should be levied. Instead, the Commission should continue the current rate structure on a prospective basis.

I.

PROCEDURAL BACKGROUND

As a result of the Court's mandate in Southern States Utilities, Inc. v. Florida Public Service Commission, 22 Fla. L. Weekly D. 1492 (Fla. 1st DCA 1997)¹, the

¹ Hereinafter referred to as Southern States.

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Commission requested briefs addressing the action it should take, if any, as a result of the Court's decision. Keystone/Marion's positions on the issues are set out in detail below. However, it is the basic position of Keystone/Marion that this case involves very unique circumstances which make a surcharge on any customer group fundamentally unfair. There should be no surcharge or refund. The rates in place now should simply continue on a prospective basis.

II.

PRELIMINARY STATEMENT

The history of this case is highly unusual and unique. It is set out in some detail below to illustrate two points. First, the merits of the case have been dramatically affected by the sheer length of time the matter has been in litigation.² Second, affected customers have been unable to predict the outcome of the litigation (including the appeals) and to adjust their consumption accordingly so as not to be liable for a huge surcharge at some unknown point in the future. Keystone/Marion urge the Commission to carefully review the history of this case, and the impact of that history on individual customers, when making a decision on the refund/surcharge issue.

III.

HISTORY OF THE CASE

This case began on May 11, 1992, when Florida Water Services Corporation, formerly Southern States Utilities, Inc. (FWSC), filed a petition for authority to increase

² The litigation includes two appeals to the First District Court of Appeal and two reversals of the Commission's orders.

the rates and charges applicable to the service it provides to over 120 water and wastewater systems. Interim rates were approved on September 8, 1992 and adjusted in March 1993. On March 22, 1993, the Commission approved a rate increase for FWSC and ordered the utility to implement a uniform rate structure. Order No. PSC-93-0423-FOF-WS.

Several parties, including a governmental entity, appealed the order. The Commission lifted the automatic stay associated with Citrus County's appeal on October 19, 1993. Order No. PSC-93-1788-FOF-WS. FWSC then placed the uniform rates into effect. In April 1995, the Court reversed the Commission's uniform rate decision. It found that the Commission could not lawfully adopt uniform rates for FWSC without first explicitly finding that FWSC's service areas were functionally related. Citrus County v. Southern States Utilities, Inc.³, 656 So.2d 1307 (Fla. 1st DCA 1995).

The Court's mandate in Citrus County was issued on July 13, 1995. On October 19, 1995, to comply with the Citrus County decision, the Commission ordered FWSC to implement "modified stand-alone" rates and to make a refund to those customers who overpaid under the uniform rate structure. Order No. PSC-95-1292-FOF-WS. FWSC sought reconsideration of this order. The Commission voted to deny its motion.

However, before the Commission could issue a written order, the Florida Supreme Court issued its opinion in GTE Florida, Inc. v. Clark, 668 So.2d 971 (Fla.

³ Hereinafter referred to as Citrus County.

1996).⁴ Concerned with the impact of GTE, the Commission requested briefs on the effect of the GTE decision on the FWSC case. Order No. 96-0406-FOF-WS.

On August 14, 1996, the Commission issued Order No. PSC-96-1046-FOF-WS. In that order the Commission determined that a surcharge on other customers to finance a refund was not required by the GTE decision and was inappropriate under the circumstances of this case. It ordered FWSC to make a refund to customers who had overpaid and affirmed the modified stand-alone rate structure.

FWSC appealed the refund order. On June 17, 1997, the Court issued its decision in Southern States. The Court reversed the order of the Commission that implemented the remand of the Citrus County decision. Specifically, the Court reversed the Commission's decision to require FWSC to make a refund to some customers without authorizing a corresponding surcharge on other customers. It also reversed the Commission's decision to deny intervention to Keystone/Marion and directed the Commission to reconsider petitions to intervene by groups who might be subject to a "potential surcharge."

As a result of the second remand, the Commission requested briefs on several refund/surcharge issues.

⁴ Hereinafter referred to as GTE.

IV.

COMMISSION OPTIONS⁵

A.

DO NOT REQUIRE REFUNDS/DO NOT ALLOW SURCHARGES BECAUSE THE RATES HAVE BEEN CHANGED PROSPECTIVELY

The decision of the Court in Southern States establishes that the Commission is not required to authorize refunds/surcharges in this case. The plain language of the Court's order speaks in terms of "potential" surcharges. The Court thus recognized that the Commission has discretion in determining the appropriate course of action to take from this point.

To surcharge one group of customers in order to finance a refund to another customer group in the circumstances of this case would be patently unfair. Such an outcome is not required by GTE, Southern States, or any other requirement of law.

1. The GTE Decision

This case differs fundamentally from the facts of the GTE case. In GTE, the Court reversed a Commission order which denied GTE the ability to recover certain expenses. On remand, the Commission permitted GTE to recover those expenses on a prospective basis only. GTE appealed the Commission's decision regarding the time period for which it could collect for the disallowed expenses. The Court reversed and required the Commission to allow GTE to collect the disallowed expenses via a

⁵ The Commission set out five options it requested the parties to discuss. Because Keystone/Marion believe that no surcharges or refunds should be made, it will discuss that option first. It will also address the problem of accurately identifying customers subject to a surcharge.

surcharge to customers on the GTE system during the time the expense was disallowed. In GTE, there was no issue regarding whether one group of customers should be surcharged to fund a refund to other customers of the same utility who had overpaid during the period at issue. In fact, in the GTE case there was never an issue concerning a refund, period. Thus, the precedent of the GTE case does not require the Commission to order a refund in the very different circumstances of this case.

2. The Southern States Decision

There is nothing in the Southern States decision that requires this Commission to impose a refund/surcharge. First, while finding GTE applicable in this instance, the Court remanded the case for "further proceedings." Second, in discussing which parties should be permitted to intervene on remand, the Court specifically spoke in terms of those parties subject to a "potential surcharge." Clearly, the Court considered the issue of a surcharge to be an open question. It directed the Commission to conduct further proceedings on the issue. If the Court had definitively decided that refunds and surcharges were required, it would have simply directed the Commission to proceed accordingly.

3. In Exercising its Discretion, the Commission Must Consider Equity to ALL Customers

Keystone/Marion acknowledge that the Commission is in a difficult position as it considers the action it should take on remand in this case. However, as the Southern States Court said: "equity applies to both utilities and ratepayers. . . ." ⁶

⁶ Southern States at 1493.

Keystone /Marion submit that the Commission must balance the equities of the situation in a manner that takes into account all of the potentially affected ratepayers. On remand, the Commission's task is to gauge all of the equities anew. When the Commission considers the equities of the situation, as discussed below, it should conclude that no refund should be made and no surcharge should be levied.

Equity Consideration No. 1: At the time the Commission first voted to require FWSC to refund to certain customers, it regarded the idea of a surcharge, not only as inappropriate, but as illegal and therefore an impossibility. Keystone/Marion submit that the entire premise of a refund during the early stages of the case was based, in significant measure, upon the Commission's belief that any refund would not be accompanied by a surcharge on other customers. In other words, the Court's introduction of a surcharge scenario changes the entire basis for the earlier inclination of the Commission to order a refund. Said differently, had the Commissioners known at the time that a refund would trigger a surcharge, and in the absence of a legal requirement to do so, would the Commission have ordered a refund in the first place? Keystone/Marion submit the Commission would have gauged the merits of the situation very differently, even before the matter was exacerbated by the passage of time.

On remand, the Commission cannot simply begin at the point of treating a refund proposition as a given and adding surcharge. Instead, the Commission must conduct its analysis of the situation anew and factor into that analysis a full consideration of the impact of a surcharge upon customers exposed to that possibility.

Keystone/Marion submit that when this analysis of all equities is performed, one reaches a far different conclusion as to the appropriate course of action than the Commission reached at the time it regarded a surcharge as an illegal impossibility.

Equity Consideration No. 2: The magnitude of the surcharge that the Commission would have to impose on certain customer groups is enormous and astounding! For example, according to FWSC's revised analysis⁷, filed on September 16, 1997, the customers of the Marion Oaks' system would be required to pay a water and wastewater surcharge of almost \$2.3 million (without interest).⁸ Keystone Heights customers would have to pay a water and wastewater surcharge of over \$168,000 (without interest). The per customer amounts are equally dramatic.⁹

It is beyond doubt that water and wastewater services are essential services. It is also beyond dispute that FWSC customers have had no alternative but to take these essential services from FWSC. Asking customers to take on the burden of these huge surcharges at this late point in the process would be grossly unfair and would impose a dramatic hardship on many.

Equity Consideration No. 3: During the five-plus years this proceeding has been pending, customers have paid Commission-approved rates. They have had no ability

⁷ Keystone/Marion finds the second analysis submitted by FWSC less than clear; however, it believes that it has appropriately interpreted it, at least as to the order of magnitude.

⁸ Of course, the surcharge would be even greater if interest were added to it. For Marion Oaks, for example, the interest amount would increase the total surcharge by over \$300,000.

⁹FWSC's individual customer calculations show that some Marion Oaks residential customers would be responsible for surcharges in excess of \$2,000.00!

to adjust consumption to offset increased additional charges in the future, to pay for service rendered many years ago. The customers have had no way to budget their resources to pay increased rates dating back five years. The imposition of surcharges of this magnitude at this late date would impose a grave financial hardship on many customers.

Equity Consideration No. 4: This case has been pending for over five years. No party will dispute the fact that this case has had a long and tortured history, including two appellate proceedings resulting in two remands to the Commission. During this time customers, through no fault of their own, have been extremely confused regarding the rate structure that was in place at any given time and how that rate structure was applicable to their particular service area and usage. To tell certain customer groups now that they must pay tremendous surcharges for service rendered over five years ago will lead to more customer confusion and outrage.

Equity Consideration No. 5: Many customers who "benefitted" from uniform rates five years ago are no longer on the FWSC system. Similarly, there may be many present customers who were not the beneficiaries of uniform rates during the full time they were in effect. Any refund/surcharge scenario would have to be administered in a way that does not unfairly penalize or unduly reward any customer or group of customers. Such precision will be impossible.

B.

**REQUIRE REFUNDS WITH INTEREST/
ALLOW SURCHARGES WITH INTEREST**

OR

**ORDER REFUNDS WITHOUT INTEREST/
ALLOW SURCHARGES WITHOUT INTEREST**

As discussed above, it is Keystone/Marion's position that no refunds or surcharges should be authorized. Further, given the circumstances of this case, if the Commission were to order a surcharge it would be an abuse of discretion. By discussing the options that follow Keystone/Marion in no way acquiesce to the view that even a "mitigated" surcharge is appropriate.

In the event that the Commission does impose some type of surcharge, it should certainly be without interest. At all times during this lengthy proceeding, customers were paying the rates which this Commission had ordered. There was no effort on their part to wrongfully withhold money due; they are simply the victims of circumstances beyond their control. If a surcharge is ordered, customers should not be required to pay interest and, in effect, be penalized twice for following the Commission's orders.

C.

**ALLOW THE UTILITY TO MAKE REFUNDS AND COLLECT
SURCHARGES OVER AN EXTENDED PERIOD OF TIME TO
MITIGATE FINANCIAL IMPACTS**

OR

**ALLOW UTILITY TO MAKE REFUNDS AND COLLECT
SURCHARGES OVER DIFFERENT PERIODS OF TIME**

For the reasons discussed above, it is Keystone/Marion's primary position that it would be patently unfair to subject them to any type of surcharge. This is especially the case given the fact that current customers had no opportunity to adjust their consumption and that the customers to be surcharged may, in many instances, not be the ones who "benefitted" from uniform rates. However, in the event that the Commission does order any type of surcharge, it should ensure that such surcharge is collected in a way which will have the least impact on customers, who are merely victims in this entire situation.

Allowing an extended period of time for collection of the surcharge will mitigate the impact for some customers. The Commission should explore all ways to mitigate the hardship a surcharge will cause customers.

D.

LIMITED SURCHARGE/REFUND

As discussed earlier, no refunds or surcharges should be made given the circumstances of this case. In addition to the reasons discussed above, the complications of accurately and fairly administering a refund/surcharge also argue against such an action.

The GTE Court made it clear that surcharges must be closely tailored and accurately administered. It also stated that:

[N]o customer should be subjected to a surcharge unless that customer received GTE services during the disputed period of time.¹⁰

Given the length of time and the number of customers involved here, it may be impossible to appropriately administer a surcharge.

As discussed earlier, Southern States requires this Commission to consider equity for all concerned. The Commission should not sanction the idea that some customers should be "over" surcharged to fund the surcharge for those customers no longer on the system.¹¹ It would be highly inequitable to attempt to, in effect, "overcharge" some customers¹² to fund surcharges due from others.¹³ As two Commissioners noted in dissent in the GTE order:

Administrative convenience should not prevail over fairness and equity, as the Court's decision instructs. We need to acknowledge that the surcharge method of restoring equity to this case may be difficult to achieve. Fairness dictates that all customers who benefitted from the rate reductions be identified so that they may pay a fair share of the revenue deficiency. We should not heap the entire burden of the surcharge on those customers who have not either discontinued service or who were deemed in April 1995 to

¹⁰GTE at 972.

¹¹Keystone/Marion suggest that such action would be unconstitutional.

¹²Customers may have left the system for a variety of reasons -- for example, they may have moved out of the service area, they may have died or they may have voluntarily disconnected from the system to avoid the surcharge.

¹³All these problems point to the wisdom of dispensing with any refunds or surcharges and moving forward prospectively.

be deserving of a further (effective) rate reduction. Under our decision here both toll and access customers as well as customers who have discontinued service will receive the windfall that the Court cautioned against.

Order No. PSC-96-0667-FOF-TL at 4, emphasis added. Similarly, a surcharge in this case which is not appropriately tailored to recover funds in the amount of the "benefit" received will create a windfall to customers who received services under uniform rates, but are no longer on the FWSC system.¹⁴

If the Commission imposes a surcharge, it should determine that the utility has the ability to refund/surcharge with the requisite precision as a precondition to any decision to proceed in that manner.¹⁵ If there is any surcharge, only those customers who actually received service during that time period should be assessed and they should not be assessed for any portion of any other customer's surcharge.

Currently, rates have been changed in accordance with the Court's order. All customers are paying the correct rates on a prospective basis. That is the fairest remedy for all customers.

¹⁴It would be ironic indeed if, in trying to right a "windfall" to one customer group, the Commission created a "windfall" for another group.

¹⁵FWSC may argue that it is entitled to a "guarantee" that it will actually collect the entire surcharge. However, the "risk of collection" is like any other business risk. FWSC is adequately compensated for business risk through its approved rate of return and the provision for bad debt in its rate base. See Order No. PSC-96-1320-FOF-WS at 192-193.

WHEREFORE, given the circumstances of this case, no refund or surcharge should be instituted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the **City of Keystone Heights' and the Marion Oaks Civic Association's** foregoing **Brief on the Issue of Potential Refunds/Surcharges** has been served by U.S. Mail or hand-delivery* to the following on this **5th** day of **November, 1997**:

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