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November 5, 1997

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

HAND DELIVERY

Re: Docket No. 920199-WS

Dear Ms. Bayo:

Enclosed herewith for filing in the above-referenced docket on behalf of Florida Water Services, Inc. ("Florida Water") are the following documents:

1. Original and fifteen copies of Florida Water's Brief on Remand Addressing Potential Refunds and Surcharges; and

2. A copy of the Brief in Word Perfect 6.0.

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

Thank you for your assistance with this filing.

Sincerely,

Kenneth A. Hoffman

ACK ____
AFA 1
APP 1
CAF ____
CMU ____
CTR ____
EAG ____
LEG 1
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Enclosures
cc: All Parties of Record

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ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application of Southern States Utilities, Inc. and Deltona Utilities, Inc. for Increased Water and 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
	)	Filed: November 5, 1997

FLORIDA WATER SERVICES CORPORATION'S BRIEF ON REMAND ADDRESSING POTENTIAL REFUNDS AND SURCHARGES

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FLORIDA WATER SERVICES CORPORATION'S BRIEF ON REMAND ADDRESSING POTENTIAL REFUNDS AND SURCHARGES

Florida Water Services Corporation ("Florida Water"), by and through its undersigned counsel, and pursuant to Order No. PSC-97-1033-PCO-WS, hereby submits its Brief addressing the action the Commission should take on remand in the First District Court of Appeal's decision in Southern States Utilities, Inc. v. Florida Public Service Commission, 22 Fla.L.Weekly D1492, Fla. 1st DCA, June 17, 1997 ("Southern States"). This Brief also will address refund and surcharge issues pertinent to the Spring Hill service area for the period of January, 1996 through June, 1997. Florida Water files this brief under protest in light of the violation of due process rights which are inherent in any proceeding where a body with judicial authority fails to provide a mechanism where parties and/or interested persons identify and know all of the issues confronting them. The Commission's prior orders on the remand proceeding do address only the tip of the iceberg of issues

which shall be addressed on remand. Without explicit identification of all issues which must be addressed, the parties, not to mention interested persons which may or may not be parties at this time, are forced to proceed under peril that other parties may raise issues not previously raised nor identified in the orders but which may have a material impact on Commission-decision making. To address these infirmities Florida Water respectfully requests an opportunity to file a reply brief and that a date certain be identified by the Commission for filing of such brief.

A. INTRODUCTION

The issues now before the Commission arise as a result of the Commission's willingness to impose itself as a "super board of directors" concerning utility management[1] as well as its demonstrated tendency to respond only to the cries of customers who desire refunds. The Commission repeatedly has ignored the advice of Florida Water (provided since 1993) that rate structure appeals are revenue neutral to a utility and cannot be used as a basis for a one-sided order requiring refunds for "overpaying" customers without also requiring surcharges from "underpaying" customers.

This docket was opened in May, 1992 in response to Florida Water's (f/k/a Southern States Utilities, Inc.) Application for Increased Water and Wastewater Rates. Now, some five and one-half

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[1] See, e.g., Alabama Power Company v. Alabama Public Service Commission, 359 So.2d 776, 780 (Ala. 1978) where the Supreme Court of Alabama reaffirmed the established principle of regulatory law that the function of a regulatory body "is that of regulation, and not of management."

years later, the Commission has issued five orders directly concerning or impacting Florida Water which have been appealed and reversed by the appellate courts. A brief recap of these orders and court reversals is set forth below:

- Docket No. 920199-WS: The Commission grants Florida Water an increase in final revenue requirements but rejects Florida Water's proposed modified stand-alone rate structure for the 127 service areas at issue. Instead, the Commission imposes a statewide uniform rate structure for 127 service areas without any party requesting such a structure. The uniform rate structure is reversed in Citrus County v. Southern States Utilities, 656 So.2d 1307 (Fla. 1st DCA 1995) ("Citrus County").
- Docket No. 930880-WS: The Commission responds to the dissatisfaction expressed by a legislator and customers who desire stand-alone rates (and refunds) by opening a new docket on its own motion to investigate the appropriate rate structure for Florida Water.[2] The Commission again approves a statewide uniform rate structure.[3] The uniform rate structure is again reversed in Sugarmill Woods Civic Association, Inc. v. Southern States Utilities, 687 So.2d 1346 (Fla. 1st DCA 1997).

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[2]In Re: Joint Petition of Citrus County, et. al. for Full Commission Hearing to Set System-by-System, Stand-Alone Rates, 93 F.P.S.C. 9:659 (1993).

[3]In Re: Investigation into the appropriate rate structure for SOUTHERN STATES UTILITIES, INC., 94 F.P.S.C. 9:236 (1994).

- Docket No. 930945-WS: The Commission expresses its dismay that Florida Water would file a petition for declaratory statement pursuant to Section 367.171(7), Florida Statutes, seeking a determination of Commission jurisdiction over its land and facilities in only two nonjurisdictional counties - - Polk and Hillsborough Counties. The Commission rejects Florida Water's request and instead decides to open another investigation docket, on its own motion, to investigate the jurisdictional status of Florida Water's land and facilities statewide.[4] The Commission subsequently determined that Florida Water operates one functionally-related system whose service transverses county boundaries and, thus, declared its jurisdiction over all of Florida Water's land and facilities throughout the state.[5] The court reversed the Commission in Hernando County v. Florida Public Service Commission, 685 So.2d 48 (Fla. 1st DCA 1997).
- Docket No. 920188-TL: On remand from a reversal of a Commission decision, the Commission refuses to permit GTE Florida full recovery of affiliate transaction expenses.[6]

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[4]In Re: Southern States Utilities, Inc.'s Petition for a Declaratory Statement Regarding Commission Jurisdiction Over Its Water and Wastewater Facilities in Hillsborough and Polk Counties, 94 F.P.S.C. 6:66 (1994).

[5]In Re: Investigation into Florida Public Service Commission jurisdiction over SOUTHERN STATES UTILITIES, INC. in Florida, 95 F.P.S.C. 7:256 (1995).

[6]See GTE Florida Incorporated v. Deason, 642 So.2d 545 (Fla. 1994).

The court reverses the Commission again in GTE Florida Incorporated v. Clark, 668 So.2d 971 (Fla. 1996) ("GTE"). The Supreme Court of Florida required the imposition of surcharges sufficient to permit the utility to recover its Commission-approved final revenue requirement, emphasizing that "[e]quity requires that both ratepayers and utilities be treated in a similar manner." 668 So.2d at 972.

- Docket No. 920199-WS (Remand from Citrus County): On remand, the Commission approves the modified stand-alone rate structure which originally was proposed by Florida Water when it filed its rate application in 1992. The Commission then decides that Florida Water should be punished for the Commission's tardy approval of the rate structure originally proposed by Florida Water. The Commission orders refunds for customers who paid more under the Commission's uniform rate structure without also imposing compensating surcharges on customers who paid less under the Commission's uniform rate structure.[7] The Commission again favored customers desiring refunds, denying intervention to customers facing potential surcharges. These actions were taken despite the advice of Commission staff and Florida Water that any refund order must also require the payment of surcharges so that

[7] In Re: Application for rate increase by SOUTHERN STATES UTILITIES, INC., 96 F.P.S.C. 8:198 (1996).

Florida Water's Commission and court-approved final revenue requirement would not be impaired. The Commission's one-sided refund determination and denial of intervention to customers facing potential surcharges were reversed in the Southern States decision.

B. FLORIDA WATER'S BASIC POSITION

The Commission has the opportunity to avoid the controversy, criticism and vast expenditure of resources that have resulted from the above-referenced decisions. The only way to avoid a repeat of the controversy and Commission mistakes which have plagued and prolonged this docket is to order, on remand, that Florida Water is not required to provide refunds to customers who "overpaid" under the uniform rate structure and that no customers who "underpaid" under the uniform rate structure shall be subject to surcharges.

The number and complexity of issues entailed in attempting to pay refunds to and impose surcharges on customers of Florida Water who received service from September 15, 1993 through June 14, 1997, make it almost impossible to fashion a true equitable result. Thousands of individuals and businesses who would be due refunds are no longer customers of Florida Water. Similarly, thousands of individuals and businesses required to pay surcharges are no longer customers of the utility. By the time the Commission first untangles the situation created by the imposition of a uniform rate structure then, subsequently, the imposition of a one-sided refund order, the Commission may be back at it again -- trying to untangle issues concerning refunds and surcharges in the more complicated

scenario involving the recently approved "cap-band"/modified stand-alone rate structure, in the event the cap-band rate structure is reversed by the First District Court of Appeal.[8]

Dating back to November of 1993, this Commission and the First District Court of Appeal have considered numerous issues and arguments surrounding Florida Water's rate structures and the ill-conceived notion that a court reversal of a Commission approved rate structure requires refunds to customers who "overpaid" under the subsequently reversed rate structure. The Invervenors seeking refunds have yet to cite a Commission or court decision which supports the proposition that a reversal of a Commission-approved rate structure requires refunds for the customers who "overpaid" under the rate structure. The Commission now has the opportunity to establish an express, equitable precedent by ordering that the institution of the modified stand-alone rate structure following the reversal of the uniform rate structure in Citrus County shall have prospective effect only and, accordingly, that no refunds or surcharges are required.

Should the Commission choose to pursue the more controversial and inefficient alternative of refunds and surcharges, Florida Water submits that the most equitable solution, given the magnitude of the refunds and surcharges, is to order the payment of refunds

[8]The "cap-band"/modified stand-alone rate structure approved by the Commission in Docket No. 950495-WS, Order No. PSC-96-1320-FOF-WS, has been challenged in an appeal filed by Citrus County currently pending before the First District Court of Appeal (Case No. 96-04227). If reversed, the Commission would be confronted with another surcharge/refund scenario which would likely overlay this one and cause unfathomable complexity and confusion.

and the imposition of surcharges on all customers over a five year period. Customers who received service from September 15, 1993 through June 14, 1997 who are no longer customers of Florida Water should be excluded from the mechanism ordered by the Commission for refunds and surcharges. Refunds and surcharges, determined on a service area by service area basis, should be paid, without interest, by imposing a gallonage charge adjustment to each customer's bill based on each service area's net water and/or wastewater refund or surcharge.[9] Each year's projected refunds and surcharges should be trued up on an annual basis for purposes of establishing refund and surcharge gallonage adjustments for the following year.

C. STATEMENT OF THE CASE AND FACTS

The tortured history of this case goes back to 1992. On May 11, 1992, Florida Water filed an Application for Increased Water and Wastewater Rates and Establishment of AFUDC and AFPI Charges. The official date of filing was established as June 17, 1992. In the rate case, Florida Water requested a modified stand-alone rate structure which would cap monthly residential water bills at $52.00 per month and wastewater bills at $65.00 per month based on

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[9]If the Commission inappropriately abandons the prior precedent from the GTE remand proceeding, discussed infra, and imposes surcharges and refunds on a "per customer" basis, then surcharges and refunds should be imposed pursuant to flat charges phased in over a sixty month period. Attempting to implement surcharges and refunds on a per customer basis through a gallonage charge adjustment would result in each customer having his or her own individual gallonage charge -- clearly an administrative nightmare.

monthly consumption of 10,000 gallons of water. The Commission rejected Florida Water's modified stand-alone rate structure proposal and, instead, imposed a uniform rate structure for the 127 service areas in the case.[10]

Florida Water filed its final rate tariffs reflecting the uniform structure in August, 1993. The tariffs were approved effective September 15, 1993. Florida Water implemented and began billing under the Commission approved uniform rate structure in September, 1993. In October, 1993, Citrus County and Sugarmill Woods Civic Association, Inc. (f/k/a Cypress and Oaks Villages Association) filed a Notice of Appeal of the Final Order. Citrus County's appeal triggered an automatic stay. See Fla.R.App.P. 9.310(b)(2); Fla. Admin. Code R. 25-22.061(3)(a). Thus, on October 18, 1993, in order to continue collection of the final revenue requirement the Commission had found Florida Water was entitled to, and eliminate the mounting interim refund liability, and pursuant to Commission rules, Florida Water moved to vacate the automatic stay. On October 26, 1993, Citrus County filed a Motion for Reduced Interim Rates, Recalculated Bills, Refunds and Penalties.

Oral argument was heard on the two motions at the November 23, 1993 Agenda Conference. The transcript of that argument reflects three pertinent points. First, Florida Water's counsel advised the Commission that Florida Water was not assuming and could not assume any risk by moving to vacate the stay because the appeal of the

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[10] In Re: Application for Rate Increase by SOUTHERN STATES UTILITIES, INC., 93 F.P.S.C. 3:504, 596-599 (1993).

uniform rate structure was revenue neutral to Florida Water and, accordingly, the Commission could not order refunds (without commensurate surcharges) in the event the uniform rate structure was reversed. In this regard, the following exchange between Florida Water's counsel and then Chairman Deason is noteworthy:

> CHAIRMAN DEASON: Let me ask you this. If the stay is vacated, do you agree that Southern States is putting itself at risk to make those customers whole whose rates are higher under statewide rates?
>
> MR. HOFFMAN: No, I don't. But I don't think that the Commission needs to resolve that issue today. Because in our opinion, Mr. Chairman, we believe that on a rate structure appeal, where we are implementing the rates authorized by the Commission, in an appeal which would be strictly revenue neutral, that the Company does not place itself at risk.
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> * * *
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> CHAIRMAN DEASON: And if the stay is vacated and the appeal is successive on COVA and Citrus County's part, you're saying there is not going to be a refund to those customers who are paying more?
>
> MR. HOFFMAN: Our position that we have taken, Mr. Chairman, is that there is not a refund. And I think I have already explained to you why. But what I'm saying to you is we do not dispute, particularly now that Public Counsel has filed an appeal and they are going to put revenue requirements at issue, we do not dispute the need for (a) corporate undertaking or bond at this point of this proceeding and we are willing to make sure that it's posted.
>
> CHAIRMAN DEASON: But that is a question of overall revenue requirements, not customer-specific rates?
>
> MR. HOFFMAN: That's correct.

CHAIRMAN DEASON: Does Staff agree with that?

MS. BEDELL: Yes.

See Exhibit A, transcript of November 23, 1993 Agenda Conference, at pp. 52-54.

Second, after two of the three commissioners on the panel voted to vacate the stay and require that a bond be posted, the lone dissenter voted against the lifting of the stay on the basis that the bond would secure refund payments only if revenue requirements determinations were reversed. Commissioner Deason acknowledged that the bond was not being posted "for the purposes of making individual customers whole...." Exhibit A, at pp. 60-61.

Third, it is clear from the Commissioners' comments at the Agenda that no decision was made concerning whether refunds would be required in the event the uniform rate structure was reversed. To demonstrate, Commissioner Clark noted as follows:

> I have moved Staff recommendation. Now, the issue of whether or not a refund will be due to the customers I don't think is before us right now.

Exhibit A, at p. 63. On December 14, 1993, the Commission issued its Order Vacating the Automatic Stay and denying Citrus County's Motion for Reduced Interim Rates, Recalculated Bills, Refunds and Penalties.[11]

The Final Order also was appealed by the Office of Public Counsel ("OPC"). Citrus County and Sugarmill Woods challenged the

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[11] In Re: Application for Rate Increase by SOUTHERN STATES UTILITIES, INC., 93 F.P.S.C. 12:280 (1993).

uniform rate structure. OPC challenged Florida Water's final approved revenue requirement asserting that the Commission erred by not recognizing Florida Water's gain on the sale of its St. Augustine Shores and University Shores facilities. In Citrus County, the court affirmed Florida Water's final revenue requirement but reversed the Commission imposed uniform rate structure and remanded for further proceedings.

On remand, the staff initially issued a primary recommendation recommending approval of Florida Water's originally proposed modified-stand alone rate structure and that no refunds be ordered for customers who "overpaid" under the uniform rate structure. The staff noted that the customers who "overpaid" under the uniform rate structure would receive a prospective benefit through reduced rates. The staff also emphasized that "it would be inappropriate to require the utility to make refunds with the inability to recover those revenues from other sources."[12]

In its October 19, 1995 Refund Order, the Commission approved the modified stand-alone rate structure. However, it ignored the advice of the staff and ordered Florida Water to pay refunds to

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[12]August 31, 1995 Staff Recommendation, at pp. 33-34. Staff was simply following Commission precedent which recognized that in a revenue neutral rate restructuring, as was the case here, payment of a refund to some customers is unjust to the utility. *In Re: Complaint of Benson's Inc against Forest Utilities, Inc.*, 94 F.P.S.C. 11:498, 502 (1994) ("... it would not be fair and equitable for the Utility to have to make refunds to all such customers without allowing it to recover revenues lost as a consequence in some way").

customers who had "overpaid" under the uniform rate structure.[13] The Commission concluded it could not order offsetting surcharges on customers who had "underpaid" under the uniform rate structure because to do so would violate the prohibition against retroactive ratemaking. The Commission also determined that refunds without surcharges were appropriate on the unfounded notion that Florida Water had accepted the risk of refunds by moving to vacate the stay - - a notion which was always in direct conflict with: (a) Florida Water's unwavering position ever since the November, 1993 agenda that the Commission could not order refunds (without commensurate surcharges) due to the revenue-neutral nature of the rate structure appeal; (b) the Commissioners' comments at the November, 1993 Agenda Conference that the issue of refunds was not being decided at that time; and (c) the legal requirement that Florida Water's Commission and court-approved final revenue requirement could not be impaired in the event of a rate structure reversal.

The modified stand-alone rate structure was implemented on January 23, 1996 -- not in this docket but rather in Docket No. 950495-WS -- as a predicate for securing interim rate relief in that docket.[14] Modified stand-alone rates were not implemented for the Spring Hill facilities because: (a) the Hernando County Board of County Commissioners had taken jurisdiction over the Spring Hill

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[13] In Re: Application for Rate Increase by SOUTHERN STATES UTILITIES, INC., 95 F.P.S.C. 10:371 (1995).

[14] In re: Application by Southern States Utilities, Inc. for Rate Increase, 96 F.P.S.C. 1:475 (1996).

land and facilities away from the Commission[15]; and (b) the Commission, on its own motion, had removed the Spring Hill land and facilities from Docket No 950495-WS (the 1995 rate case).[16] Thus, Florida Water continued to utilize the only available approved and effective tariffed rates, the uniform rates, for the provision of service to the Spring Hill customers.

On November 3, 1995, Florida Water moved for reconsideration of the October 19, 1995 Refund Order requesting that the Commission rescind any refund requirement and, alternatively, requesting that any refund requirement be coupled with authority to impose surcharges so that Florida Water's Commission and court approved final revenue requirement would not be impaired. Florida Water also requested, inter alia, that the Commission eliminate any requirement that Florida Water accrue and pay interest on refunds.

At the February 20, 1996 Agenda Conference, the Commission

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[15]In Re: Request for acknowledgement of resolution rescinding Florida Public Service Commission jurisdiction over private water and wastewater utilities in Hernando County, 94 F.P.S.C. 6:172 (1994).

[16]In re: Application for Rate Increase by Southern States Utilities, Inc., 95 F.P.S.C. 11:301 (1995). Florida Water's original rate application did not include the Spring Hill land and facilities. The Commission refused to accept Florida Water's application until it was amended to include the Spring Hill land and facilities. See e.g., Order No. PSC-95-0942-PCO-WS issued August 4, 1995; 95 F.P.S.C. 8:43. Florida Water's recovery of interim rates was thus delayed. Before the Commission ordered that the Spring Hill land and facilities be included, Florida Water advised the Commission that such action would be fruitless since the parties had been advised that the Counties who were parties to the Docket No. 930945-WS jurisdictional investigation would appeal the Commission's order asserting statewide jurisdiction over Florida Water. The filing of the appeal(s) by the Counties invoked the automatic stay under Rule 9.310(b)(2), Florida Rules of Appellate Procedure.

voted on Florida Water's Motion for Reconsideration and other pending motions. At the agenda, Commission Staff counsel reiterated her view that Florida Water did not assume a risk of refunds by moving to vacate the automatic stay. See Exhibit B, Transcript from February 20, 1996 Agenda Conference at p. 34. The Commission voted to deny Florida Water's Motion for Reconsideration requesting the reaffirmation of the uniform rate structure, the rescission of the refund requirement, that any refunds be accompanied by offsetting surcharges, and that interest be eliminated from any refund payments. However, on February 29, 1996, the Supreme Court of Florida issued its opinion in GTE Florida Inc. v. Clark, 668 So.2d 971 (Fla. 1996).

The GTE decision articulated three principles of significance to this case. First, equity and fairness require that a utility and its ratepayers stand equally before the Commission so that Commission orders which ignore the legal rights and equities of either a utility or its ratepayers will not withstand judicial scrutiny. Second, GTE's failure to request a stay of the rate decrease ordered in that case could not be used as a shield to deny GTE its rightful recovery of the erroneously disallowed affiliated expenses dating back to the date of the Commission's final agency action. Third, the imposition of surcharges to ensure that GTE would be made whole in light of the court's reversal of the Commission's disallowance of GTE's affiliate transaction expenses did not violate the prohibition against retroactive ratemaking.

On March 4, 1996, Florida Water filed the GTE decision with the Commission requesting that the Commission vacate the October 19, 1995 Refund Order. On March 21, 1996, the Commission reconsidered its October 19, 1995 Refund Order, sua sponte and in toto, and ordered the parties to file briefs addressing what action the Commission should take in light of the GTE decision.[17]

Following the submission of briefs, the staff once again recommended that no refunds be ordered. Staff properly recognized that the GTE decision had rejected the notion that the imposition of surcharges violates the prohibition against retroactive ratemaking. Staff also agreed with Florida Water's repeated contention that its court-approved final revenue requirement represented the "law of the case" and could not be disturbed on remand. Grounding its recommendation on the principles of equity and fairness applicable to both a utility and its ratepayers discussed in GTE, staff concluded:

> Upon reviewing the GTE decision, the briefs filed by the parties, and previous recommendations, Staff believes that the utility and the customers could be treated in a "similar" manner by the Commission choosing to allow SSU to apply the modified stand alone rate structure prospectively and not ordering a refund. Under this approach the customers that paid more with the uniform rate will not get a refund but will get a prospective rate reduction. No surcharge is thus necessary or appropriate. In terms of fairness and equity, the customers who paid "too much" will have a prospective rate reduction and the utility maintains its revenue requirement.

[17] In Re: Application for Rate Increase by SOUTHERN STATES UTILITIES, INC., 96 F.P.S.C. 3:324 (1996).

Accordingly, Staff recommends that the Commission not require a refund or surcharge.

On August 14, 1996, the Commission entered its Final Refund Order.[18] Despite the GTE decision, the recommendation of its staff, and the loss of its theory of retroactive ratemaking, the Commission clung to the notion that Florida Water had "assumed the risk" of refunds by moving to vacate the automatic stay and ordered Florida Water to make a one-sided refund to customers who had paid more under a uniform rate than they would have if the modified stand-alone rates requested by Florida Water had been approved. At the urging of OPC and counsel for potential refund customers, the Commission ignored the GTE decision and the "law of the case" doctrine. The Commission thus placed all customers who would not receive refunds at risk of paying surcharges. However, the Commission refused to authorize Florida Water to collect such surcharges (so that Florida Water's final approved revenue requirement would remain whole). Ignoring the GTE mandate that utilities and ratepayers stand equally before the Commission, the Commission responded only to the clamor of ratepayers requesting refunds[19], denying intervention and participation to customers who faced potential surcharges and ordering again that Florida Water provide refunds without surcharges. The Commission also reaffirmed

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[18]See In Re: Application for Rate Increase by SOUTHERN STATES UTILITIES, INC., 96 F.P.S.C. 8:198 (1996).

[19]Composite Exhibit C contains copies of correspondence received by the Commission from a state legislator during the period at issue. The correspondence reflects an implicit threat of legislation requiring an elected Commission and advocacy for refunds.

and incorporated its previous findings in the October, 1995 Refund Order, including, inter alia, the rejection of the uniform rate structure in favor of the modified stand-alone rate structure. Of course, by that time, modified stand-alone rates had been implemented in Docket No. 950495-WS for all of the affected service areas -- except Spring Hill, because the Commission had removed Spring Hill from Florida Water's 1995 rate case.

Florida Water appealed the Final Refund Order. Florida Water's appeal challenged both the refund component of the Final Refund Order and the decision to implement modified stand-alone rates. Appeals also were filed by customers who advocated the uniform rate structure and who would be potentially surcharged. These customers, who included the City of Keystone Heights, were denied intervention. Just as occurred when Citrus County appealed the Final Order in Docket No. 920199-WS, and the Counties appealed the Commission's Jurisdictional Order in Docket No. 930945-WS, the appeal lodged by the City of Keystone Heights on September 12, 1996 triggered an automatic stay of the Final Refund Order in its entirety under Rule 9.310(b)(2), Florida Rules of Appellate Procedure.[20] No party ever sought to modify or vacate the stay

[20]Under Rule 9.310(b)(2), Florida Rules of Appellate Procedure, an automatic stay is invoked, except in criminal cases, upon the timely filing of a notice of appeal by "the state, any public officer in an official capacity, board, commission, or other public body...." Florida Water independently moved for a stay of its own pursuant to Commission Rule 25-22.061(1)(a), Florida Administrative Code. The motion was granted, but subsequently modified in response to a motion filed by OPC, to stay only the refund requirement of the Final Refund Order. The activity regarding Florida Water's requested stay under the Commission rule had no impact or legal effect on the automatic stay triggered by the

automatically invoked by the appeal filed by the City of Keystone Heights. As a result of this stay, Florida Water possessed no authority to implement the refund requirement or the modified stand-alone rates while the appeal was pending. Consequently, refunds were not made and modified stand-alone rates were not implemented for Spring Hill during the pendency of the appeal.

On June 17, 1997, the court issued the Southern States opinion reversing the refund requirement. The court relied, in large part, on the principles set forth by the Florida Supreme Court in the GTE decision. The court found that the Commission's rationale for imposing a one-sided refund requirement "[did] not hold water." 22 Fla.L.Weekly D1492 at D1493. Thus, the court rejected the notion that Florida Water had "assumed the risk" of providing refunds when it moved to lift the automatic stay. The court agreed with Florida Water that any refund ordered by the Commission must be offset by surcharges imposed on customers who underpaid under the uniform rate structure. The court also reversed the Commission's decision to deny intervention to customers who faced a potential surcharge.[21]

A short time later, the Hernando County Board of County Commissioners settled a rate case which Florida Water had filed in

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notice of appeal filed by the City of Keystone Heights pursuant to the Florida Rules of Appellate Procedure. By filing the appeal and securing an automatic stay of the Final Refund Order, Keystone Heights precluded the Commission from: (a) implementing the refund requirement; (b) implementing modified stand-alone rates for the Spring Hill land and facilities; and (c) implementing higher modified stand-alone rates for Keystone Heights in the event of withdrawal or dismissal of the Docket No. 950495-WS rate case.

[21]The court did not rule on that portion of Florida Water's appeal challenging the imposition of modified stand-alone rates.

Hernando County. The settlement established stand-alone rates for the Spring Hill service area which became effective on June 14, 1997. The revenue requirements reflected in the June 14, 1997 rates ($7.9 million) were higher than the revenue requirements which Florida Water had been receiving from the Spring Hill land and facilities.[22]

This case is currently before the Commission on remand from the Southern States decision. At the August 5, 1997 Agenda Conference, Florida Water requested the Commission to order it to provide notices to all customers of potential refunds or surcharges. The Commission denied Florida Water's request. Over a month after Florida Water's original request, OPC filed a motion to provide notice to customers, substantially mirroring Florida Water's request. A similar motion to provide customer notice and allow customer input was filed on September 25, 1997 by customers facing potential surcharges. The Commission reversed field and appropriately granted the motions concerning customer notice.[23] Customer-specific notices reflecting potential refunds or surcharges and containing the language set forth in the Commission

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[22]The Hernando County/Florida Water settlement agreement provided a bargained for concession to Spring Hill customers reflected in a subsequent decrease in rates reflecting a $6.3 million revenue requirement effective September 1, 1997 through January 1, 1999. Effective January 1, 1999, rates will be increased to achieve a $7.2 million revenue requirement.

[23]Order No. PSC-97-1290-PCO-WS issued October 17, 1997.

drafted customer notice[24] were mailed by Florida Water on or before October 22, 1997.

The Commission has requested that the parties file briefs addressing possible options concerning refunds and surcharges for the final disposition of this case.[25] The Commission has refused to permit evidentiary hearings. The Commission has not provided for comprehensive issue identification. The remainder of this brief is dedicated to such issues.

D. FLORIDA WATER'S PRIMARY POSITION -- THE COMMISSION SHOULD DECLINE TO ORDER REFUNDS AND SURCHARGES

In Order No. PSC-97-1033-PCO-WS, the Commission outlined five options it may pursue "in light of the Southern States decision."[26] The Commission should support option 2 and not require refunds or surcharges because rates have been changed prospectively.

It should first be noted that the August 27, 1997 Order referred to above properly recognizes that a decision of no refunds and surcharges is contemplated by the Southern States decision. In Southern States, the court reversed the Commission's denial of intervention for potentially surcharged customers, stating:

> 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

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[24] Id., at Attachment A.

[25] Order No. PSC-97-1033-PCO-WS issued August 27, 1997.

[26] Order No. PSC-97-1033-PCO-WS, at 6.

> 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, 22 Fla.L.Weekly D1492 at D1493 (emphasis added).

It is apparent from the court's repeated use of the words "potential surcharge" that the court authorized intervention by customers who could, as opposed to would, face a surcharge so that such customers would have the opportunity to contest refunds and thereby avoid potential surcharges. Attempts to construe the Southern States decision to foreclose the option of no refunds and surcharges are frivolous. The only logical and meaningful interpretation of the court's decision in Southern States is that the court intended to give potentially surcharged customers an opportunity for meaningful, substantive participation on the issue of refunds and surcharges on remand. If the potentially surcharged customers are precluded from opposing refunds on remand, their court-mandated intervention is rendered meaningless and futile. Certainly the court had no such intention in the Southern States decision.

The Commission's decision on remand in this proceeding potentially affects rate cases in every industry regulated by the Commission. By ordering refunds and surcharges, rather than no refunds and surcharges, every rate case before the Commission presents the potential for a rate structure appeal and reversal, and the dilemma of refunds and surcharges. The Florida Public

Service Commission will face the risk of becoming known as the Florida Public Surcharge Commission.

Florida Water and Commission Staff have repeatedly advised the Commission against such an eventuality. Nobody has identified statutory or case law that requires refunds in a rate structure reversal such as that confronting this Commission. There is a reason why nobody can cite such precedent.

The Commission's choices are clear. The Commission can and should establish an express precedent that a change in rate structure occasioned by a court's reversal of a Commission-imposed rate structure is prospective only and thereby avoid continued litigation and controversy over refunds and surcharges for Florida Water, other water and wastewater utilities, and investor-owned electric and gas utilities regulated by the Commission. In light of the Citrus County decision, it is only in this way that the Commission can effectively preserve some level of adjudicatory discretion when establishing rate structures in future rate proceedings. The alternative is refunds and surcharges - - a "solution" which (1) compounds the burden of potentially surcharged customers who would have to bear the cost of the refunds; (2) severely restricts the Commission's discretionary authority to establish rate structures; and (3) adversely impacts Florida Water which -- through no fault of its own -- will be required to bear the strain on customer relations which are sure to come under a refund/surcharge scenario.

Establishing a mechanism for the payment of refunds and the imposition of surcharges clearly creates more questions than answers. Among those questions are:

- Should former customers who received service between September 15, 1993 and June 15, 1997 be included in the refund/surcharge mechanism?
- If a refund/surcharge mechanism is ordered, should it include interest, and, if so, at what interest rate?
- If a refund/surcharge is ordered by the Commission, should the refunds and surcharges be phased in, and, if so, over how many years?
- If surcharges are inequitably extended over a period of time longer than the period for providing refunds, what is the appropriate rate of return which should be recovered on the unamortized balance of surcharges?
- If a refund/surcharge mechanism is established, what is the income tax effect on the utility depending on the mechanism established?
- If a refund/surcharge mechanism is ordered, what is the impact on regulatory assessment fees depending on the mechanism established?[27]

These issues can be avoided by an order that a change in rate structure has prospective effect only and, therefore, that no

[27]As indicated previously, these are only several of the issues which may be raised concerning this remand. The Commission's failure to provide parties an opportunity to identify and be informed of all issues to be addressed constitutes a violation of due process.

refunds or surcharges are appropriate. The Commission must consider the long term effect of a refund/surcharge requirement on utility ratemaking. Certainly no utility will be willing to propose any deviation in rate structures -- i.e., conservation rate structures -- if the risk is an abominable refund/surcharge scenario in the event a court subsequently finds fault, even on a technicality, with such structure. Any utility which is granted a rate increase will face the potential perils, questions, complexities and protracted litigation associated with refund/surcharge scenarios if final rates are implemented to obtain higher revenues and the Commission-approved rate structure, common cost allocation, base facility charge/gallonage charge allocation, etc. is reversed.

The Commission imposed the uniform rate structure - - it was not requested by Florida Water, it was not supported by the customers who desire refunds nor was it advocated in this proceeding by the customers who face potential surcharges. The Commission then compounded its error by ordering refunds without surcharges. As the staff emphasized in its May 30, 1996 recommendation, an equitable solution for all concerned is to order no refunds or surcharges - - the customers who desire refunds enjoy a rate decrease and the customers who now face surcharges, some in very significant amounts, are relieved of such liability.

The Commission must recognize that the impact of the Southern States decision coupled with the current representation of customers desiring refunds and customers facing surcharges

eliminate every ground offered by the Commission in support of refunds in the Final Refund Order. Simply put, there is no other factual or legal basis available to the Commission to support an order requiring refunds. Going back to the Final Refund Order, the Commission clung to the following arguments in support of refunds without compensating surcharges:

1. First, the Commission contended that the factual differences between GTE and the instant case "make the GTE decision inapplicable to the instant docket." 96 F.P.S.C. 8:198 at 204. The court, to the contrary, found the GTE decision controlling in the disposition of the instant case.

2. The Commission contended in the Final Refund Order that the instant case was distinguishable because potentially surcharged customers were not represented by OPC. 96 F.P.S.C. 8:198 at 204. That contention is inaccurate because OPC filed pleadings and participated in oral argument on behalf of customers facing potential surcharges after Florida Water filed its Motion for Reconsideration of the October 19, 1995 initial Refund Order. In any event, the issue is now moot. Customers facing potential surcharges are now parties to this docket, have been or will be provided notice, and will be adequately represented before the Commission.

3. Third, the Commission attempted to distinguish GTE on the basis that this case, on remand, involves issues concerning rate structure. 96 F.P.S.C. 8:198 at 204. Such an alleged distinction was rejected by the court which held that the fairness and equity

requirements applicable to both utilities and their ratepayers under GTE was violated by a one-sided order requiring refunds without commensurate surcharges.

4. Fourth, the Commission also predicated its Final Refund Order on the notion that Florida Water had assumed the risk of a one-sided refund order by moving to vacate the automatic stay. 96 F.P.S.C. 8:198 at 204-206. That dubious notion also was rejected by the court.

Perhaps the last rationale articulated by the Commission in the Final Refund Order for ordering refunds without surcharges provides the most compelling basis, on remand, to order no refunds and surcharges. In attempting to distinguish the GTE decision, and discussing the issue of surcharges, the Commission concluded that the inequities that would be wrought on potentially surcharged customers as a result of the Commission's decision to impose a uniform rate structure would be too great to bear:

> In GTE the proposed surcharge would be a one-time charge of less than $10 on the flat-rated monthly bills of the telephone customers. While not an insignificant amount, it may well pale in comparison to the potential surcharge any one individual customer might be required to make in this case. Also, any surcharge on the water and wastewater customers would be based on their consumption which has already occurred and for which no notice was given so that they might adjust their consumption. At this point customers have no way of adjusting their usage that occurred over a two-plus year period.

96 F.P.S.C. 8:198 at 207.

The Southern States decision confirmed Florida Water's position maintained since 1993 that if refunds are ordered, the

surcharges which the Commission sought to avoid must be paid so that Florida Water's final revenue requirement will remain intact. The Commission did not want to impose surcharges in its Final Refund Order. It need not now.

The Commission should balance the equities in this case and avoid an onerous precedent by determining that no refunds or surcharges are appropriate. Customers who "overpaid" under the uniform rate structure have enjoyed a rate decrease under the modified stand-alone rate structure dating back to January 1996. By virtue of the settlement with Hernando County, Spring Hill customers now have received a rate decrease under a stand-alone rate structure and are being charged rates below the cost of service. Customers who face surcharges, some in significant amounts, would be relieved of that unprecedented obligation, and Florida Water would retain its final approved revenue requirement as required under the Southern States decision. Under these most difficult circumstances, Florida Water respectfully submits that this is the most equitable and fair solution for all concerned.

E. FLORIDA WATER'S ALTERNATIVE PROPOSAL -- THE IMPLEMENTATION OF REFUNDS AND SURCHARGES, WITHOUT INTEREST, OVER A FIVE YEAR PERIOD

Should the Commission continue its one-sided appeasement of customers desiring refunds, then the Southern States decision requires that commensurate surcharges be imposed on customers who "underpaid" under the uniform rate structure. The court and Commission precedent reflected in the GTE proceeding confirm that regardless of the mechanics employed, Florida Water must be made

whole -- any refunds made by Florida Water must be recovered by Florida Water. Having considered the available options for establishing a mechanism for refunds and surcharges, Florida Water submits that the most equitable solution for all of its customers would be to provide refunds and impose surcharges over a five year period, without interest. Refunds and surcharges would be imposed on all existing customers of Florida Water, as they may change from month-to-month, based on adjustments to the gallonage charge on a service area basis. True-up accounts would need to be established so that Florida Water could true-up refunds and surcharges on an annual basis for the establishment of the applicable gallonage charge adjustments for the following year.

This mechanism would avoid extreme complications which would arise when Florida Water attempts to identify, contact, collect from or pay to former customers no longer served by Florida Water. Since Florida Water must be made whole, existing, remaining customers would have to assume the additional burden of surcharges. Florida Water notes that as of this date, approximately 114,000 notices have been mailed to customers, and that Florida Water's current number of active customers in the Docket No. 920199-WS service areas is approximately 84,000 customers. This would indicate that there may be as many as 30,000 former customers. As of this date, approximately 12,000 of the notices mailed to customers have been returned to Florida Water, and Florida Water

anticipates this number to be significantly higher, with a potential for approximately 30,000 returned notices.[28]

Intervenors, including OPC, may contend that only customers who received service from September 15, 1993 through January 23, 1996 should be subject to refunds and surcharges.[29] Such a "per customer" approach was advocated by OPC but rejected by the Commission as not being legally required in the remand proceeding following the GTE decision. See In Re: Application for a Rate Increase by GTE Florida Incorporated, 96 F.P.S.C. 10:165, 169 (1996). As in the GTE remand, a "per customer" undertaking would be burdensome and expensive and, more importantly, fails to provide a reasonable assurance that Florida Water's final revenue requirement would not be impaired. See 96 F.P.S.C. 10:165 at 169. Such a result would violate the Southern States decision.[30]

A "per customer" approach will only further complicate and exacerbate the impacts of the surcharges on remand. Customers subject to surcharges who received service during the applicable

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[28]Moreover, Florida Water notes that additional notices would be required to customers who first received service on or after January 23, 1996 if Florida Water's alternative surcharge proposal is approved.

[29]Florida Water anticipates that intervenors may also contend that the Spring Hill customers who received service under the uniform rate structure through June 14, 1997 should also receive refunds.

[30]Although Rule 25-30.360(3), Florida Administrative Code, permits refunds on a per customer basis, the rule clearly does not apply to appellate reversals of rate structure as occurred in this case. The PSC rejected application of a similar rule for telephone companies (Rule 25-4.114, Florida Administrative Code) in establishing a mechanism for surcharges in the GTE remand proceeding.

time period will be required to bear the surcharge expense associated with individuals and businesses who are no longer customers of Florida Water or who may discontinue service during the period surcharges are being collected so as to make Florida Water whole. The impacts could be staggering for some of the remaining customers facing surcharges. Indeed, there are 44 water and wastewater service areas where the total amount of the surcharges for each service area is more than 100% of the amount of such service area's annual revenue, and 9 areas where the surcharges would be in excess of 200% of the annual revenue. Therefore, even using a five year amortization, customers in these areas would experience minimum annual increases of 20% and 40%, respectively.

The better approach is to impose surcharges or provide refunds to "existing" customers subject to surcharges and refunds on a specific service area basis by adjusting the applicable gallonage charge.[31] "Existing" customers would include customers in the service area subject to surcharges or refunds who initiated service after January 23, 1996. Such an approach mirrors the approach taken by the Commission in the GTE remand for the collection of

[31]The Commission should refrain from using a gallonage charge adjustment if it abandons the precedent established in the GTE remand proceeding and assesses surcharges on a per customer basis. A per customer approach could only utilize a flat charge for surcharges and refunds spread over the five year period. The amount of the flat charge would have to be recalculated annually to ensure that Florida Water's approved final revenue requirement remains whole. Any attempt by the Commission to impose a per customer gallonage charge adjustment would result in thousands of different individual gallonage charges for customers which would be administratively infeasible.

surcharges. From a fairness perspective, the approach is similar to the Commission's fuel adjustment charge for customers of investor-owned electric utilities. With the fuel adjustment charge, true-up increases and decreases are applied on a prospective basis whether or not the customers paying the increased or decreased fuel adjustment charge were customers during the prior (six months) period used as the basis for the true-up.[32]

F. ANY REFUND ORDER SHOULD EXCLUDE INTEREST AND UTILIZE EQUAL TIME PERIODS FOR REFUNDS AND SURCHARGES

If the Commission orders refunds and surcharges, interest should be excluded from such amounts. At no time during Florida Water's collection of revenue under the uniform rate structure did Florida Water overearn. The addition of interest would only increase the burden on customers facing surcharges. Equitable considerations mitigate against providing refunds, lower modified stand-alone rates and interest to customers who seek refunds.

In addition, a refund/surcharge order should employ equal time periods for the refunds and surcharges. Florida Water proposes five years for each. The Commission should resist the temptation to again appease customers seeking refunds with a lump sum refund and a protracted surcharge period. An order of this nature would contain deficiencies similar to the unlawful Final Refund Order as it would plug an immediate $13.5 million dent in Florida Water's

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[32] See, e.g., In Re: Fuel and purchase power cost recovery clause and generating performance incentive factor, 97 F.P.S.C. 3:529 (1997).

revenues while restricting Florida Water from recoupment of such revenues, with interest, for a five year period (if five years were used for the collection of surcharges).[33] There is no equitable basis to again trample on Florida Water's efforts to operate a financially-viable utility. Different refund/surcharge periods also will cost the surcharge customers more as Florida Water will be required to earn its rate of return on the unamortized balance of the surcharge amount. This would not be the case if refunds and surcharges occur over the same period. An order attempting to do otherwise would constitute a flagrant rejection of the GTE and Southern States decisions requiring equity and fairness for utilities and their ratepayers.

Florida Water cannot know whether any other party, or the Commission, intends to argue that refunds should be made over a period different than the period over which surcharges are collected. Florida Water does not favor this approach. In the event that the Commission considers ordering refunds to be paid in a shorter time period than surcharges are to be collected, the Commission must understand the following:

(1) Such a mechanism results in higher surcharges to be paid by surcharge customers;

(2) Florida Water must be permitted to recover its authorized rate of return on the unrecovered balance of the surcharges given

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[33]Any such order should at least permit Florida Water to recover its authorized overall rate of return on the unamortized balance of surcharges.

the magnitude of the refund expense and length of period over which the surcharge would be recovered;

(3) The interest rate which applies to interest paid on revenue requirement refunds pursuant to Rule 25-30.360, F.A.C., is inadequate to compensate Florida Water for the funds required to make refunds; and

(4) To the extent that interest of any amount is to be provided to refund customers, such interest expense simply increases the amount of funds upon which Florida Water must be permitted to earn the last authorized rate of return (unaffected by any penalty to return on equity which was imposed in Docket No. 950495-WS which expires on August 15, 1998).

Should the Commission fail to provide relief as indicated, Florida Water would not be made whole and, thus, such Commission action would be unlawful, unconstitutional and subject to appeal.

G. IF REFUNDS ARE ORDERED FOR THE SPRING HILL CUSTOMERS FOR THE STAY PERIOD OF JANUARY 23, 1996 THROUGH JUNE 14, 1997, THE COMMISSION MUST PERMIT FLORIDA WATER TO RECOVER COMMENSURATE SURCHARGES

As previously discussed, the Commission-imposed uniform rates remained in effect for the Spring Hill customers through June 14, 1997. OPC (and possibly others) contends that Florida Water should bear the financial burden of any refunds ordered for the Spring Hill customers for the period beginning January 23, 1996 and throughout the period in which the Keystone Heights automatic stay remained in effect ("Stay Period"). Such a decision has no basis

in fact or law. The Commission ignored the equity and fairness principles of the GTE decision in attempting to fashion a one-sided remedy for customers desiring refunds in its Final Refund Order. The Southern States court properly admonished the Commission for its action. The Commission must not make the same mistake again.

Requiring Florida Water to bear the financial burden of refunds for the Stay Period is no different than the unlawful attempt by the Commission to penalize Florida Water with a one-sided refund. The unlawful Final Refund Order resulted from: (a) the Commission's imposition of the uniform rate structure; and (b) the Commission's attempt to impose a refund requirement on Florida Water because Florida Water moved to vacate the automatic stay to maintain its higher (than interim) final revenue requirement and to terminate a mounting interim refund liability.

The facts underlying the Spring Hill Stay Period are remarkably similar. The Hernando County Board of County Commissioners rescinded Commission authority to regulate the Spring Hill land and facilities. It was the Commission, sua sponte, that removed the Spring Hill facilities from the Docket No. 950495-WS rate case.[34] Consequently, as previously explained, modified stand-alone rates were not implemented for the Spring Hill facilities on January 23, 1996 pursuant to the Interim Rate Order in Docket No. 950495-WS. It was the City of Keystone Heights which triggered the automatic stay barring implementation of the modified stand-alone

[34] In Re: Southern States Utilities, Inc., 95 F.P.S.C. 11:301, 302 (1995).

rate structure for all 127 service areas, including Spring Hill, in this docket when it appealed the Final Refund Order. No party moved to modify or vacate the City's automatic stay. Florida Water had no authority to implement the modified stand-alone rates for the Spring Hill land and facilities during the Stay Period. The effect of the automatic stay was to confirm that Florida Water had no choice but to charge Spring Hill customers the approved and effective tariffed uniform rates[35] while the Final Refund Order was on appeal by Keystone Heights until either disposition of the appeal, withdrawal of the appeal filed by Keystone Heights, or modification or vacation of the automatic stay which never occurred.

The other service areas only experienced a change to modified stand-alone rates in a separate docket, not this docket. Had Florida Water not filed the 1995 rate application, the uniform rate structure would be in place to this day absent some modification or vacation of Keystone Heights' automatic stay. Keystone Heights, which would be and was adversely affected by a reversion to the modified stand-alone rates, obviously would have opposed such action. In any event, the automatic stay never was modified or vacated.[36]

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[35]See §367.081(1), Fla. Stat. (1995).

[36]Keystone Heights' automatic stay was separate and apart from the stay granted to Florida Water pursuant to Commission rule, which subsequently was modified by the Commission.

Perhaps most important, had the Commission adhered to the law as recommended by its Staff and Florida Water, instead of assuming a "let the court decide" posture, no one-sided refund order would have been issued. By October 19, 1995, the Commission could have crdered Florida Water to make refunds with surcharges, in which event the refunds would have been made, interest accruals would have been lower, modified stand-alone rates would have been in place, even for Spring Hill, and this case would not be in the posture it is in now. There is no justification for making Florida Water pay the price for the Commission's actions.

The Commission has no factual or legal basis to again attempt to cast "blame" on Florida Water for actions taken by Hernando County, the Commission and Keystone Heights over which Florida Water had absolutely no control. OPC's transparent attempts to stick Florida Water with the financial burden of refunds for the Stay Period are specious.

In its Response to Florida Water's Motion for Reconsideration and Clarification of Order No. PSC-97-1033-PCO-WS, OPC cites City of Plant City v. Mann, 400 So.2d 952 (Fla. 1981) for the proposition that a stay merely suspends the substantive effect of the underlying order.[37] The underlying Final Refund Order was reversed in Southern States. The action to be taken by the Commission on remand from the Southern States decision is either no refunds or refunds and surcharges. OPC is effectively arguing that

[37]OPC Response to Florida Water's Motion for Reconsideration and Clarification of Order No. PSC-97-1033-PCO-WS, at par. 8.

the Southern States decision mandates a repeat of the reversed, one-sided Final Refund Order, which of course, is a ludicrous proposition. If the Commission orders refunds, there is no basis -- factual, legal or equitable -- to impose the financial burden of any such refunds on Florida Water.

OPC never disputes the fact that the uniform rates were the only rates Florida Water could lawfully charge the Spring Hill customers during the Stay Period. OPC mischaracterizes the charging of such rates as a "windfall" to Florida Water.[38] Florida Water did not overearn in 1996. Florida Water experienced an overall rate of return in 1996 of 9.62% on a total company basis and 9.79% for the 127 service areas (including Spring Hill) at issue in this proceeding. See Affidavit of Forrest L. Ludsen, attached hereto as Exhibit D. If OPC truly disputes this fact,[39] then an evidentiary hearing should be held for confirmation of same. Moreover, effective September 1, 1997, Florida Water reduced the stand-alone rates for the Spring Hill customers in an amount which totals a $1.6 million revenue requirement decrease -- well below the cost of service. This decision constitutes a material reparation for any alleged overpayments based on a modified stand-alone rate structure dating back to 1993. In light of these facts, refunds for the Stay Period would clearly be duplicative. See Affidavit of Forrest L. Ludsen attached as Exhibit D.

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[38] Id., at par. 6, 8 and 10.

[39] Id., at 10.

While Florida Water is aware of no Florida case law addressing facts similar to those concerning the Spring Hill Stay Period, Florida Water refers the Commission to Straube v. Bowling Green Gas Co., 227 S.W.2d 666 (Miss. 1950), a case involving a parallel set of facts. In Straube, Bowling Green Gas Company, a gas distribution company subject to regulation by the Public Service Commission of Missouri, filed a petition with the Federal Power Commission requesting a reduction in rates paid by Bowling Green to its wholesale gas supplier, Panhandle Eastern Pipe Line Company. The FPC granted the petition and the United States Circuit Court of Appeals of the Eighth Circuit affirmed the FPC's rate reduction order. Consequently, a refund was paid by Panhandle to Bowling Green. Bowling Green subsequently petitioned the Public Service Commission of Missouri for a prospective retail rate reduction to reflect the reduced rates paid by Bowling Green to Panhandle.

In Straube, Bowling Green's customers alleged that they were entitled to their share of two pots of money -- one consisting of the refund paid by Panhandle to Bowling Green and the other consisting of the "overcollection" of rates collected by Bowling Green between the time the Eighth Circuit affirmed the FPC order and the effective date of the Missouri Public Service Commission order reducing the retail rates. The customers in Straube alleged, inter alia, that without such refunds, Bowling Green would be unjustly enriched.

The trial court dismissed the petition filed by the customers. The Supreme Court of Missouri affirmed. Like OPC in this case,

the customers in Straube alleged that permitting Bowling Green to retain the monies would result in a windfall to Bowling Green. The court noted, however, that the customers conceded that the rate charged at all times by Bowling Green was the rate prescribed by the Missouri Commission. As the court stated:

> Respondent (Bowling Green) never collected and appellants (the customers) never paid more than the legally established rate for gas furnished by respondent and appellants' rights were never invaded. The money legally and properly collected from appellants under the established rate schedules became and was the property of respondent. When the established rate of a utility has been followed, the amount so collected becomes the property of the utility, of which it cannot be deprived by either legislative or judicial action without violating the due process provisions of the state and federal constitutions (citations omitted). ... Appellants' rights not having been invaded by the charges and collections made by respondent there was no basis in law or equity for appellants to claim either of the mentioned funds.

227 S.W.2d 666 at 671.

Here, as in Straube, Florida Water continually charged Spring Hill customers the only legally approved, effective and established rates for service. Florida Water complied with its obligation under the law. To confiscate revenue collected by Florida Water from Spring Hill customers during the Stay Period pursuant to the legally established uniform rates would, as recognized in Straube, violate Florida Water's state and federal constitutional rights to due process.[40]

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[40]In Straube, customers alleged that Bowling Green's retention of the funds allowed Bowling Green to earn a return in excess of the maximum return upon investment allowed by the Missouri

The Commission cannot and should not again attempt to penalize Florida Water for complying with the law. The Commission cannot and should not penalize Florida Water for the Commission's decision to attempt to impose an unlawful one-sided refund which has prolonged this proceeding; nor for the Board of County Commissioners of Hernando County's decision to rescind Commission jurisdiction; nor for the Commission's decision to remove Spring Hill from the Docket No. 950495-WS rate case; nor for Keystone Heights' appeal of the Final Refund Order; nor for the failure of OPC or any other party to request a modification of the Keystone Heights automatic stay. The Spring Hill customers now receive service under stand-alone rates artifically established below the cost of service to reflect lower revenue requirements than otherwise would be proper. See Affidavit of Forrest L. Ludsen, Exhibit D.

The principles of equity and fairness emphasized in GTE and Southern States eliminate the option of requiring Florida Water to bear the financial burden of any refunds for the Spring Hill customers for the Stay Period. The optimal and most equitable solution is to decline to order any refunds as discussed above. If the Commission orders refunds for the Stay Period, the surcharges

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Commission. The court did not address that claim because "[n]o maximum or minimum return was determined when the rate was established." 227 S.W.2d at 671. It should be noted that in the instant case, Florida Water's return on its investment in 1996 did not exceed the maximum of the range authorized by the Commission notwithstanding the authorized collection of uniform rates from Spring Hill customers. See Affidavit of Forrest L. Ludsen, attached hereto as Exhibit D.

necessary to recover the cost of such refunds should be borne by all of Florida Water's ratepayers in the remaining 125 service areas in this docket.

H. OTHER ISSUES TO BE ADDRESSED

In the event that surcharges are ordered, Florida Water should not be required to pay regulatory assessment fees ("RAFs") on such amounts since RAFs already have been paid to the Commission when the revenue first was collected by Florida Water under the uniform rate structure. A refund/surcharge order would simply force a refund of the prior revenue to be replaced by identical revenue under a surcharge.

In the event that surcharges are ordered, the Commission must provide Florida Water additional revenue to reflect income tax liability associated with interest to be paid to Florida Water during the surcharge period. To do otherwise would not make Florida Water whole and, thus, would be unlawful, unconstitutional and subject to appeal.

As previously discussed, to date, Florida Water has received thousands of notices returned by the post office due to customers who have moved or "other inability" to deliver the notice. Should the Commission limit the recipients/payors of refunds/surcharges to customers who received service between September 1993 and January 1996, any refund which cannot be made due to inability to locate such customers after a three (3) month period should be offset against the gross surcharge amount. If customers who otherwise would be surcharged are no longer customers of Florida Water, the

corresponding surcharge either must reduce the refund amount or be recovered as an additional charge to the remaining surcharge customers. Failure to provide for such results would be unlawful and unconstitutional as Florida Water would not be kept whole.

I. CONCLUSION

The Commission is a regulatory body, not a utility board of directors. The issues and decisions confronting the Commission are of the Commission's own making. Regardless of the results or recovery mechanisms advocated by the parties, it is for the Commission to determine the result that is lawful, reasonable and fair. No party, including Florida Water, assumes a "risk" by advocating one result versus another. The Commission must not be swayed by idle threats, so-called "honest" mistakes or other misrepresentations when making its decisions. The Commission should pause to recognize the absence of precedent requiring a refund upon a court reversal of a Commission-approved rate structure. The Commission should not feel compelled to tread where no other state regulatory commission ever has gone before it. No refunds or surcharges should be ordered. If refunds are to be made, Florida Water must be made whole. Florida Water objects to the absence of due process in terms of issue identification, the right to present evidence, notice and the inability to respond to briefs of other parties.

The Commission repeatedly has asked, who assumes the risk of a reversal of a Commission decision when such decision is appealed by a party. The Commission, to this day, has argued that Florida

Water "assumed the risk." Even the premise of the question is dubious. Indeed, the First District Court of Appeal found that the Commission's rationale in support of a one-sided refund did not hold water. Given the litany of events described earlier in this brief, it should be clear that the Commission itself "assumed the risk" that it would be confronting the issues now before it by:

(1) ordering uniform rates despite the absence of record evidence supporting such structure; and

(2) creating an unprecedented "assumption of the risk" theory in an attempt to justify a one-sided refund despite recent Florida Supreme Court precedent which alerted the Commission to the folly of such a theory.

Florida Water further requests that the Commission postpone a decision in this proceeding until:

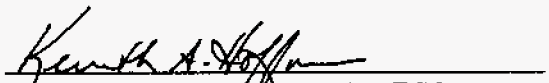
(1) a prehearing conference is ordered so that all issues may be identified;

(2) hearings are scheduled for the introduction of evidence of financial impacts, interest rates, recovery periods, customer base and other issues including those as may be raised by other parties;

(3) all customers, including existing customers, receive notice of the issues being addressed in this proceeding and are given adequate time to prepare for hearing; and

(4) the parties are given an opportunity to file briefs addressing all issues after evidentiary hearings are concluded.

Respectfully submitted,



KENNETH A. HOFFMAN, ESQ.
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Tallahassee, FL 32302-0551
(904) 681-6788

and

BRIAN P. ARMSTRONG, ESQ.
Florida Water Services Corporation
1000 Color Place
Apopka, Florida 32703
(407) 880-0058

Attorneys for Florida Water Services Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Florida Water Services Corporation's Brief on Remand Addressing Potential Refunds and Surcharges was furnished by U. S. Mail to the following this 5th day of November, 1997:

John R. Howe, Esq.
Charles J. Beck, Esq.
Office of Public Counsel
111 West Madison Street
Room 812
Tallahassee, FL 32399-1400

Lila Jaber, Esq.
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Room 370
Tallahassee, FL 32399-0850

Ms. Anne Broadbent
President, Sugarmill Woods Civic Association
91 Cypress Boulevard West
Homasassa, Florida 34446

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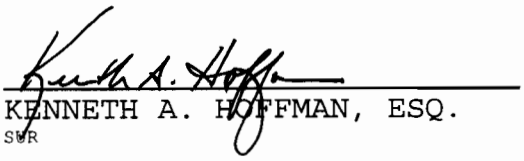
P. O. Box 159
Ocala, Florida 34478

By: 
KENNETH A. HOFFMAN, ESQ.

Giga.SWR

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION
TALLAHASSEE, FLORIDA

IN RE: Application for a rate increase by SOUTHERN STATES UTILITIES, INC.

DOCKET NO. 920199-WS

COPY

BEFORE:	CHAIRMAN J. TERRY DEASON COMMISSIONER SUSAN F. CLARK COMMISSIONER LUIS J. LAUREDO COMMISSIONER JULIA L. JOHNSON
PROCEEDING:	AGENDA CONFERENCE
ITEM NUMBER:	25A**
DATE:	November 23, 1993
PLACE:	106 Fletcher Building Tallahassee, Florida
REPORTED BY:	JANE FAUROT Notary Public in and for the State of Florida at Large

ACCURATE STENOTYPE REPORTERS, INC.
100 SALEM COURT
TALLAHASSEE, FLORIDA 32301
(904) 878-2221

MR. HOFFMAN: If what, if the interim rates are implemented?

CHAIRMAN DEASON: We have before us the question of whether we are going to vacate the stay or not. Regardless of whether the stay is vacated or not, is Southern States going to receive the same dollar of revenue from its customers?

MR. HOFFMAN: There is a difference.

CHAIRMAN DEASON: There is a difference, because if the stay is vacated what rates will you collect?

MR. HOFFMAN: The final rates, which subject to check, Mr. Chairman, amounts to a rate increase of approximately $6.7 million. And if the automatic stay is enforced, if it's not vacated and you then go to our revised interim rates, I believe that, subject to check, that revenue requirement is at 6.4 million. It's a different number. But I would reiterate to you that we do not believe there is any discretion and that the rule is mandatory. But that's my answer to your question, Mr. Chairman.

CHAIRMAN DEASON: Let me ask you this. If the stay is vacated, do you agree that Southern States is putting itself at risk to make those customers whole whose rates are higher under statewide rates?

MR. HOFFMAN: No, I don't. But I don't think that

the Commission needs to resolve that issue today. Because in our opinion, Mr. Chairman, we believe that on a rate structure appeal, where we are implementing the rates authorized by the Commission, in an appeal which would be strictly revenue neutral, that the Company does not place itself at risk. However, if we are wrong in that position, and the first District Court of Appeal reverses the Commission, there will be a corporate undertaking or a bond on file with this Commission to protect the customers in the event we are wrong.

CHAIRMAN DEASON: Now, is that protection just for the difference in revenue amounts and not customer-specific?

MR. HOFFMAN: I think it could be tailored by the Commission, Mr. Chairman. I think that the Staff recommendation recommended a bond amount which would protect the customers of the systems who are currently paying higher rates under the uniform rates.

CHAIRMAN DEASON: Well, do you agree that if the stay is vacated there are going to be customers that are going to be paying more under statewide rates?

MR. HOFFMAN: Yes.

CHAIRMAN DEASON: And if the stay is vacated and the appeal is successful on COVA and Citrus County's

part, you're saying there is not going to be a refund to those customers who are paying more?

MR. HOFFMAN: Our position that we have taken, Mr. Chairman, is that there is not a refund. And I think I have already explained to you why. But what I'm saying to you is we do not dispute, particularly now that Public Counsel has filed an appeal and they are going to put revenue requirements at issue, we do not dispute the need for corporate undertaking or bond at this point of this proceeding and we are willing to make sure that it's posted.

CHAIRMAN DEASON: But that is a question of overall revenue requirements, not customer-specific rates?

MR. HOFFMAN: That's correct.

CHAIRMAN DEASON: Does Staff agree with that?

MS. BEDELL: Yes.

COMMISSIONER CLARK: Surely this has come up before where we have had a rate design at issue. Maybe it's not come up, maybe not in water and sewer.

MR. WILLIS: Commissioners, I can't remember in the past where we had a rate design at issue after the final decision of the Commission.

COMMISSIONER CLARK: Well, the fact of the matter is it's not at all clear as to whether or not there

quickly as possible. What's your pleasure? In other words, let's move along one way or the other.

COMMISSIONER CLARK: Mr. Chairman, I don't see that we have any discretion, and I agree with Commission Staff on this point. I think we set out the rules that indicate that a posting of a bond will allow us a vacation of the stay, and as Mr. Hoffman pointed out, the Commission order, which did concern me, only provided for a stay of refund of the interim rates, it wasn't with respect to the implementation of the rates. And for that reason I would move Staff on all three issues.

COMMISSIONER JOHNSON: Second.

CHAIRMAN DEASON: It has been moved and seconded. Let me state right now that I'm going to vote against the motion. I am persuaded by the argument that we are moving into a new area here where there are differences between rates for different customers in different areas, and that in my opinion we should keep the status quo, which are interim rates, and let the court give the guidance to the Commission that it sees fit. I don't see where -- even though there is going to be a bond posted, it's not going to be for the purposes of making individual specific customers whole, it's going to be for the purpose of making customers as a total

rate paying body whole. And that's really not the main crux of this appeal, so I would oppose that. But, anyway, we have a motion and a second --

COMMISSIONER CLARK: Mr. Chairman, can I just ask a question? The concern I have is the interim rates don't generate the rates that we concluded they were entitled to. I mean --

CHAIRMAN DEASON: The interim rates, what are the differences between the interim rates and the final rates that have a statewide rate structure? Very minimal, is it not?

MR. TWOMEY: They generate more, Mr. Chairman.

CHAIRMAN DEASON: That's what I thought. I thought it was either minimal or it either generated more. What's the case, Mr. Hoffman?

MR. HOFFMAN: My understanding is that as revised, the interim rates as revised after Commissioner Clark's motion for reconsideration is a total revenue requirement increase of 6.4 million as opposed to 6.7 million final rates.

COMMISSIONER CLARK: Which is the final rates?

MR. HOFFMAN: Yes.

CHAIRMAN DEASON: I consider that difference to be pretty inconsequential given the magnitude of the real issue, which is the rate structure involved. I would

file. We can get the nature of the bond changed to fit what is required in the Staff recommendation, and I think that that dollar amount will be sufficient to meet either consequence. We are sitting here speculating about what may happen on appeal. We simply don't know. I mean, I know the staff has estimated $3 million, but that is based on the rate design issue alone. I don't know what else Public Counsel may raise that may have a revenue requirement impact. And I think this is unnecessary, and I object to it, and I think it makes the issue more cloudy.

CHAIRMAN DEASON: Well, Mr. Hoffman, I think not only is it relevant, it is critical to know what the nature of the motion is and what is being done. Now, I'm not on the winning side of the motion, so I don't know how to clarify it, because I'm not even supporting it. If the Commissioners wish to clarify it, they will have the opportunity now.

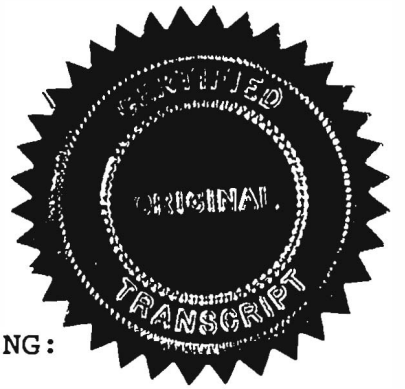
COMMISSIONER CLARK: I have moved Staff recommendation. Now, the issue of whether or not a refund will be due to the customers I don't think is before us right now.

MS. BEDELL: What is before you is a decision about whether there is good and sufficient security for anything that may be coming down the pipeline.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION
TALLAHASSEE, FLORIDA

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); and Volusia County by Deltona Lakes Utilities (Deltona). (Deferred from the 2/6/96 Commission Conference)

DOCKET NO. 920199-WS



BEFORE:	CHAIRMAN SUSAN F. CLARK COMMISSIONER J. TERRY DEASON COMMISSIONER JULIA L. JOHNSON COMMISSIONER DIANE K. KIESLING COMMISSIONER JOE GARCIA
PROCEEDING:	AGENDA CONFERENCE
ITEM NUMBER:	11
DATE:	February 20, 1996
PLACE:	4075 Esplanade Way, Room 148 Tallahassee, Florida
REPORTED BY:	JANE FAUROT, RPR Notary Public in and for the State of Florida at Large

JANE FAUROT, RPR
P.O. BOX 10751
TALLAHASSEE, FLORIDA 32302
(904) 379-8669

order vacating the stay and the transcripts, that the refund that Staff believed would have resulted would have been the difference in the revenue requirement and not a difference in a change in the rate structure. But, again, I think that you fully considered that.

COMMISSIONER JOHNSON: Say that, again, Lila.

MS. JABER: Staff's original recommendation, our recommendation, recommended to you that you not order the utility to refund, and the basis for that was that the court opinion, in my opinion, didn't order you to do that. The court opinion only said that you haven't made a finding, and before you make that finding on functional relatedness you can't implement a uniform rate structure.

When we went back to the order vacating the stay, and the transcript from the agenda that resulted in the order vacating the stay, it was our opinion that a refund that should have resulted would have resulted from a difference in the revenue requirement and not a difference in rate structure. It was our opinion that the utility could not have known that the court would have rejected the rate structure and that the utility did not assume the risk. You did not agree with our recommendation.

CHAIRMAN CLARK: All right. Commissioners --

THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

SENATOR GINNY BROWN-WAITE
10th District

COMMITTEES:
Natural Resources, Chairman
Executive Business, Ethics and Elections
Health Care
Transportation
Ways and Means
Sub. 5 (Education)

JOINT COMMITTEE:
Advisory Council on Intergovernmental Relations, Alternating Chairman

July 10, 1995

Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32399-0850

Attention: Ms. Susan F. Clark, Chair

Dear Ms. Clark

Enclosed is but the latest newspaper article on Southern States Utilities and the uniform rate case issue.

When the public sees the blatant anti-consumer attitude the Public Service Commission has toward the S.S.U. customer it is no wonder we legislators are inundated with calls for an elected Public Service Commission. For a long time I was not in favor of such an elected body fearing a political entity vs. appointed. However, the S.S.U. action has changed my mind and that of many legislators.

Sincerely,

Ginny Brown-Waite
State Senate District 10

GBW:ls

CC: J. Terry Deason, Commissioner
Julia L. Johnson, Commissioner
Diane K. Kiesling, Commissioner
Joe Garcia, Commissioner

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COMPOSITE EXHIBIT C

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REPLY TO:
☐ County Office Building, 20 North Main Street, Room 200, Brooksville, Florida 34601 (904) 344-2344
☐ 318 Senate Office Building, Tallahassee, Florida 32399-1100 (904) 487-5040
1-800-94 WAITE

THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

SENATOR GINNY BROWN-WAITE
10th District

COMMITTEES:
Natural Resources,
Chairman
Executive Business, Ethics and Elections
Health Care
Transportation
Ways and Means,
Sub. B (Education)

JOINT COMMITTEE:
Advisory Council on Intergovernmental Relations,
Alternating Chairman

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Florida Public Service Comm.
Commissioner Clark

August 4, 1995

Susan Clark, Chairman
Public Service Commission
Gerald L. Gunter Building
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Dear Chairman Clark:

I read with interest the July PSC Newsletter highlighting several issues of importance to commission observers.

Ratepayers must be delighted to see that you have a new building (at a cost of over $20 Million) which is described as State-of-the-Art. Certainly Florida's ratepayers are also delighted with the article describing your trip to testify on the Federal Government's nuclear disposal program. Your concern expressed in the quote that "utility ratepayers should not have to pay twice" (for disposal of nuclear fuel) was especially egalitarian!

Also included in the newsletter was a brief description of SSU's latest rate increase. How generous of the Public Service Commission to have pointed out to SSU that their original application of June 28, 1995 was deficient because it did not include SSU's systems in Hernando, Hillsborough and Polk Counties. Those counties are in various stages of having the Counties regulate the SSU rates for facilities within their county boundaries. These facilities are not interconnected and are stand alone water and wastewater plants. They should be treated as such and regulated at the county level where such counties deem it appropriate. Currently that issue is before the District Court of Appeals at least for the Hernando County case.

Hernando and Citrus County residents are still waiting for the rebates from SSU when the 1st District Court of Appeals denied the request by the PSC AND SSU to reconsider the unconscionable rate increase of 1993. To further prove to customers your bias for the utility, the matter is now before the Florida Supreme Court. Instead of challenging the court decision, the Public Service Commission should be ordering SSU to refund the illegal rate hikes in 1993 to the people in Sugarmill Woods and Spring Hill.

REPLY TO:
☐ County Office Building, 20 North Main Street, Room 200, Brooksville, Florida 34601 (904) 544-2344
☐ 316 Senate Office Building, Tallahassee, Florida 32399-1100 (904) 487-5040
1-800-94 WAITE

7235

As I wrote a few weeks ago, the rate paying public has little or no confidence in the Florida Public Service Commission when it is so obviously pro utility. The PSC has a new building; some Spring Hill residents are being forced out of their homes by your ever escalating rate decisions. How nice of you to have expressed concern that rate payers not have to pay twice for nuclear plant waste disposal; my concerns are for the Sugarmill Woods and Spring Hill residents that are paying multiple times for facilities serving other SSU customers.

The newsletter mentions your public hearing schedule on the SSU rate increase request. I am alerting residents to 6 PM September 11th hearing in Spring Hill. As soon as you have the locations selected, please notify my office. I have been informed that the Inverness meeting originally scheduled for August 24th as been cancelled and is in the process of being rescheduled. Please also send information with a firm date, place and time for the Inverness hearing. As of this date, I have checked with the Hernando County Library system and they do not have any material on the rate case for residents to use. Therefore, I am asking that you reschedule the Spring Hill hearing until a later date to insure adequate public notice and the presence of residents who may still be vacationing in September.

I understand that Susan Kiesling has been the Commissioner assigned to the SSU Public Hearings. Having personally witnessed Ms. Kiesling speak against my bill to prohibit uniform rate making and her obvious prejudice toward SSU (including verbally attacking in a most unprofessional manner an attorney for the rate payers outside the Senate Chambers) I do not believe she is the best choice to "hear" the consumer's views. Some of the people who traveled from Citrus and Hernando Counties found her "lobbying" on behalf of SSU to be distasteful. Please assign another Commissioner who is unbiased to be at these public hearings.

Very truly yours,

Ginny Brown-Waite
State Senator District 10

GBW/jw

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application of Southern States Utilities, Inc. and Deltona Utilities, Inc. for Increased Water and 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 Filed: November 5, 1997

STATE OF FLORIDA
COUNTY OF ORANGE

AFFIDAVIT OF FORREST L. LUDSEN

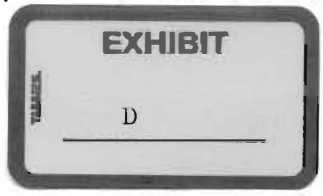
BEFORE ME, the undersigned authority, appeared FORREST L. LUDSEN, personally known to me, who after being duly sworn, deposes and says:

1. I am Vice President of Business Development of Florida Water Services Corporation ("Florida Water"). My business address is 1000 Color Place, Apopka, Florida 32703.

2. I submit this Affidavit in support of Florida Water's brief addressing potential refunds and surcharges filed in this docket on November 5, 1997.

3. As Vice President of Business Development, I have supervisory responsibility for rates and rate-related matters, and as such am familiar with the facts set forth in this Affidavit and in Florida Water's Brief Addressing Potential Refunds and Surcharges.

4. Pursuant to Final Order No. PSC-93-0423-FOF-WS issued in this docket on March 22, 1993, the Commission determined that the



appropriate weighted average cost of capital for Florida Water was 10.67% which included a cost rate for equity of 12.14% with a range of plus or minus 100 basis points. Subsequently, pursuant to Final Order No. PSC-96-1320-FOF-WS issued in Docket No 950495-WS on October 30, 1996, the Commission found the appropriate cost of capital for Florida Water to be 10.13%, based on an 11.88% return on equity. The Commission adjusted Florida Water's return on equity and overall cost of capital to 11.38% and 9.94%, respectively, for a period of two years beginning October 30, 1996.

5. The actual rate of return experienced by Florida Water for 1996 on a total company basis was 9.62%. With respect to the 127 service areas (including the Spring Hill water and wastewater service areas) in Docket No. 920199-WS analyzed on a combined basis, the actual rate of return for 1996 was 9.79%.

6. With respect to the Spring Hill land and facilities, a settlement agreement was reached between Hernando County and Florida Water on July 17, 1997, resolving issues arising out of an application for increased water and wastewater rates filed by Florida Water in Hernando County. The settlement agreement is attached to this Affidavit as Appendix 1. The revenue requirements for Florida Water's Spring Hill land and facilities were addressed under the settlement agreement pursuant to a 1996 cost of service study performed by Florida Water. Based on this cost of service study, Florida Water, which was underearning on its Spring Hill land and facilities for 1996, instituted stand-alone rates effective June 14, 1997 reflecting a revenue requirement increase

of approximately $124,000. The $124,000 revenue requirement increase was intended to permit Florida Water to earn its authorized 11.88% return on equity. On September 1, 1997, pursuant to the settlement agreement, Florida Water reduced the stand-alone rates for the Spring Hill customers in an amount reflecting an approximate $1.6 million revenue requirement decrease -- this decrease constitutes a material reparation for alleged overpayments based on a modified stand alone rate structure dating back to 1993.

Further refunds for the period after January 23, 1996 would be duplicative. Under the settlement agreement, the stand-alone rates implemented effective September 1, 1997 will remain in effect until January 1, 1999, when new stand-alone rates reflecting a revenue requirement increase of approximately $900,000 above the September 1, 1997 level will take effect.

7. FURTHER AFFIANT SAYETH NOT.

FORREST L. LUDSEN
VICE PRESIDENT OF BUSINESS DEVELOPMENT
Florida Water Services Corporation

Sworn to and subscribed before me, this 5th day of November, 1997, by FORREST L. LUDSEN, who is personally known to me.

DONNA L HENRY
Notary Public - State of Florida
My Commission Expires Jul 6, 2000
Commission # CC 543412

DONNA L. HENRY
NOTARY PUBLIC
STATE OF FLORIDA AT LARGE
My Commission Expires: 7-6-00

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SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT made and entered into this 17 day of JULY, 1997, by and between

HERNANDO COUNTY, FLORIDA (hereinafter called the "County"),

and

FLORIDA WATER SERVICES CORPORATION (hereinafter called "Florida Water"), formerly known as SOUTHERN STATES UTILITIES, INC. (hereinafter called "SSU"),

WITNESSETH:

WHEREAS, the County and Florida Water are currently engaged in litigation in the Circuit Court of the Fifth Judicial Circuit in and for Hernando County, Florida in the cases of: Florida Water Services Corporation vs. Hernando County and its Board of County Commissioners, Case No. 94-769-CA; and Hernando County vs. Southern States Utilities, Case No. 96-192-CA; and

WHEREAS, there is currently pending before the Board of County Commissioners of Hernando County, a Petition to Establish Rates for Florida Water Services Corporation's Spring Hill Service Area in Hernando County Docket No. 97-01-WS; and

WHEREAS, the County has also previously commenced various other regulatory dockets, including Docket No. 94-01, 96-01, and 97-02-WS, which said regulatory dockets address substantially the same issues as addressed in Hernando County Docket No. 97-01-WS.

WHEREAS, the County and Florida Water have engaged in a variety of forms of litigation in various forums over the past several years concerning numerous issues including: the County's jurisdiction to regulate Florida Water within Hernando County; the legality of the County's various regulatory actions; and, the legality of rates being charged in Florida Water's Spring Hill Service Area; and

WHEREAS, the County and Florida Water (collectively called the "parties") desire to

settle the pending litigation, establish an approved rate tariff for Florida Water's Spring Hill Service Area, and resolve the various disputes between the parties.

NOW, THEREFORE, IN CONSIDERATION OF THE MUTUAL PROMISES, COVENANTS AND AGREEMENTS HEREIN CONTAINED, the parties hereto agree as follows:

1. Each party shall dismiss all claims, causes of actions, counterclaims, appeals, petitions for writ of certiorari, and defenses in the following lawsuits:

(a) Florida Water Services Corporation vs. Hernando County, and its Board of County Commissioners, Hernando County Circuit Court Case No. 94-769-CA; and

(b) Hernando County vs. Southern States Utilities, Hernando County Circuit Court Case No. 96-192-CA.

2. By executing this Settlement Agreement, the parties confirm the **County's** jurisdiction to regulate **Florida Water** on water and waste water utility matters within its Spring Hill Service Area pursuant to and consistent with the provisions of: Chapter 367, Florida Statutes, to the extent made specifically applicable by said statute to a county regulatory authority; Hernando County Ordinance No.: 94-07 and 94-14, as amended; and this Settlement Agreement. Notwithstanding anything else contained in this Settlement Agreement, as to issues not specifically addressed by this Settlement Agreement, the parties each reserve the right to enforce, contest, or challenge any proposed and/or asserted application and/or interpretation of said statute and/or ordinances when such party believes such application and/or interpretation to be either incorrect and/or impossible of performance.

3. Each party shall pay their own costs and attorney fees in connection with the lawsuits described in paragraph 1 above and in connection with the other various disputes settled by this agreement. The **County** shall pay its costs and attorney fees, including the reimbursement of incurred costs and attorney fees, out of the RAF to be paid by **Florida Water.**

4. The **County** hereby waives and cancels any administrative fines either heretofore imposed or allegedly imposable for any matter arising prior to the date hereof against **Florida Water** by the **County.**

5. This agreement does not settle any pending case, matter, or proceeding before the Florida Public Service Commission (hereinafter called the "PSC") or any appeals

therefrom.

6. All pending **County** regulatory dockets relating to **Florida Water** are merged into Hernando County's Docket No. 97-01, which Docket shall establish, pursuant to the terms of this agreement, the authorized and approved rate tariff for **Florida Water** to be charged to **Florida Water's** water and waste water customers within Florida Water's Spring Hill Service Area within Hernando County. The rate tariff shall reflect the following:

a. The effective date of the approved rate tariff shall be June 14, 1997;

b. Notwithstanding the fact the **County** disagrees with the propriety of the new rates implemented by **Florida Water** on June 14, 1997, Florida **Water** shall be allowed to charge said rates, as set forth in the attached Attachment "A", through August 31, 1997, without any obligation for refund for the period between June 14, 1997, and August 31, 1997;

c. The previously approved rate tariff for **Florida Water** for its Spring Hill Service Area based on a stand-alone system for the calendar year of 1991 is established as the base line rate tariff for **Florida Water** for purposes of establishing **Florida Water's** authorized and approved rate tariff by the **County** for purposes of this Settlement Agreement (the previously approved rate tariff for a stand-alone system based on the calendar year of 1991 is set forth in the attached Attachment "B");

d. Effective September 1, 1997, the approved and authorized rate tariff for **Florida Water** for its Spring Hill Service Area shall be as set forth in the attached Attachment "C" (the rate tariff in Attachment "C" is established by utilizing the rate tariff in Attachment "B" as the base line rate tariff and by permitting approximately a one percent (1%) per annum cost of living adjustment from the base line tariff until September 1, 1997);

e. Effective January 1, 1999, the approved and authorized rate tariff for **Florida Water** for its Spring Hill Service Area shall be as set forth in Attachment "D" (the rate tariff in Attachment "D" is established by utilizing the rate tariff in Attachment "B" as the base line rate tariff and by permitting an approximately two and seven tenths percent (2.7%) per annum cost of living adjustment from the base line tariff until January 1, 1999, which said cost of living adjustment is inclusive of and not in addition to the one percent (1%) per annum cost of living adjustment set forth in subparagraph "d" above);

f. **Florida Water** will not file any new rate case, petition, or application

prior to September 1, 2000;

g. During the above periods and through September 1, 2000, **Florida Water** shall not receive any adjustments of its approved and authorized rate tariff for any cost of living index adjustments, pass through adjustments, or adjustments of any other kind or nature, except any change in **Florida Water's** obligation to pay RAF, regardless of whether considered a regulatory assessment fee or a franchise fee, and regardless of whether imposed by the **County** or the PSC, shall result in **Florida Water's** approved and authorized rate tariff being automatically adjusted to reflect any such change.

7. The parties acknowledge that there exists a disagreement over whether **Florida Water's** application for a rate increase in Hernando County Docket No. 97-01 meets the "minimum filing requirements" and other requirements of Hernando County Ordinance No. 94-07 and No. 94-14, as well as the requirements of Chapter 367, Florida Statutes, to the extent applicable to Hernando County. The parties agree that this Settlement Agreement settles said disagreements pursuant to the terms of this agreement. However, in settling said disagreements, the parties agree that the application or petition filed by **Florida Water** for a rate increase shall not independently resolve any issues between the parties and shall not be utilized by either party as establishing any fact or precedent in future regulatory proceedings before the Hernando County Board of County Commissioners.

8. On or before September 1, 1997, **Florida Water** shall pay to the **County** the **County's** full Regulatory Assessment Fee (RAF) calculated from the period beginning on the date the **County** acquired regulatory jurisidiction over **Florida Water**, March 29, 1994, through the date of actual payment, but no later than September 1, 1997. In addition to the principal amount of past due RAF, estimated to be approximately one million one hundred thirty nine thousand nine hundred six dollars ($1,139,906) **Florida Water** shall pay interest on the from time to time principal amount from March 29, 1994, until paid, at the legal rate of interest as determined from time-to-time pursuant to the provisions of Section 55.03, Florida Statutes (hereinafter the "Legal Rate"). After payment of the past due RAF, **Florida Water** shall timely pay to the County the RAF established by the **County's** regulatory ordinances and pursuant to the provisions of said regulatory ordinances. The RAF to be paid pursuant to this agreement shall be subject to an adjustment based on an audit of **Florida Water's** books and records to insure that the proper amount of RAF actually

due and owing is paid. In dismissing the litigation described in paragraph 1 above, **Florida Water** waives any dispute or contest concerning the RAF, including the **County's** determination or designation of said fee, either retrospectively or prospectively, as a franchise fee, and further waives any dispute or contest concerning the **County's** determination as to its utilization of said fee.

9. The **County**, on behalf of itself and the Hernando County Water and Sewer District (hereinafter called the "District"), agrees to pay current any disputed bulk rate charges owed by the District to Florida Water, together with interest at the Legal Rate. The amount of disputed bulk rate charges is agreed to be the sum of three hundred three thousand and seventy one dollars ($303,071).

10. This Settlement Agreement does not settle or resolve any refund issue or refund obligation of **Florida Water** during any period of time prior to June 14, 1997. In reaching said agreement, the parties acknowledge that the PSC has the exclusive regulatory jurisdiction to determine any and all refund issues for any period of time prior to June 14, 1997. The parties further agree, as between themselves, to abide by a final, non-appealable order of the PSC on the issue of refunds for any period of time prior to June 14, 1997. However, in so agreeing, each party reserves the right to advocate its position on any refund issue before the PSC or any **Court** reviewing any PSC order on said issue. Furthermore, neither party waives any rights which it may have to seek appropriate remedies before the PSC on any such refund issue. The agreement contained in this paragraph 9 shall be subject to a savings provision to the effect that in the event the PSC, or any court of competent jurisdiction, determines through a final, non-appealable order that the PSC does not have jurisdiction to resolve the refund issue for any time period prior to June 14, 1997, then the **County** shall have reserved the right to affirmatively assert jurisdiction over any period of time in which it is determined that the PSC does not have such jurisdiction. In agreeing to this savings provision, **Florida Water** does not waive any right which it may have to challenge or contest either the **County's** jurisdiction over any refund issue for any period of time prior to June 14, 1997, or the legality of any refund ordered by the County for any such period of time.

11. The **County** will cause to be confirmed **Florida Water's** entitlement to a Certificate of Authorization and will otherwise cause to be issued a duly authorized and executed Certificate of Authorization. As a condition to obtaining a Certificate of

Authorization, **Florida Water** shall pay to the **County** the application fee as required by the **County's** regulatory ordinances, and shall file with the **County** all filings required by the **County's** regulatory ordinances, including the Company's audited financial reports for 1994, 1995, 1996 and all subsequent years.

12. The **County** agrees not to file an eminent domain action to acquire **Florida Water's** Hernando County assets any time prior to September 1, 2000.

AGREED TO AND ENTERED INTO this 17th day of July, 1997.

HERNANDO COUNTY, FLORIDA ON BEHALF OF ITSELF AND THE HERNANDO COUNTY WATER AND SEWER DISTRICT, BY AND THROUGH ITS BOARD OF COUNTY COMMISSIONERS

(SEAL)

Attest: Judy A. Korbus, Deputy
Karen Nicolai, Clerk

By: Ray Lossing
Ray Lossing, Chairman

FLORIDA WATER SERVICES CORPORATION (SEAL)

Attest: Forrest L. Ludsen
Name: FORREST L. LUDSEN
Title: VP

By: John Cirello
Name: John Cirello
Title: President