ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for rate increase in Brevard, Charlotte/Lee, Citrus, Clay, Duval, Highlands, Lake, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, Volusia, and Washington Counties by SOUTHERN STATES UTILITIES, INC.; Collier County by MARCO SHORES UTILITIES (Deltona); Hernando County by SPRING HILL UTILITIES (Deltona); and Volusia County by DELTONA LAKES UTILITIES (Deltona)	)	DOCKET NO. 920199-WS FILED: November 5, 1997

JOINT BRIEF OF SENATOR GINNY BROWN-WAITE, MORTY MILLER, SPRING HILL CIVIC ASSOCIATION, INC., SUGARMILL MANOR, INC., CYPRESS VILLAGE PROPERTY OWNERS ASSOCIATION, INC., HARBOUR WOODS CIVIC ASSOCIATION, INC., HIDDEN HILLS COUNTRY CLUB HOMEOWNERS ASSOCIATION, INC., CITRUS COUNTY, AMELIA ISLAND COMMUNITY ASSOCIATION, RESIDENT CONDOMINIUM, RESIDENCE PROPERTY OWNERS ASSOCIATION, AMELIA SURF AND RACQUET PROPERTY OWNERS ASSOCIATION AND SANDPIPER ASSOCIATION

Senator Ginny Brown-Waite, Morty Miller, Spring Hill Civic Association, Inc., Sugarmill Manor, Inc., Cypress Village Property Owners Association, Inc., Harbour Woods Civic Association, Inc., Hidden Hills Country Club Homeowners Association, Inc., Citrus County, Amelia Island Community Association, Resident Condominium, Residence Property Owners Association, Amelia Surf And Racquet Property Owners Association and Sandpiper Association (collectively the "Associations"), by and through their undersigned attorneys, file their Joint Brief in response to the schedule contained in Order No. PSC-97-1290-PCO-WS.

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

Willis

DOCUMENT NUMBER-DATE
11447 NOV-5 7246
FPSC-RECORDS/REPORTING

Prologue

COMMISSIONER BEARD: Well, another fine mess we've gotten ourselves into. (Laughter) I don't know any way to do but jump in on this.

Page 73. Attached as Appendix A. Transcript of the February 17, 1993 Special Agenda Conference in Docket No. 920199. Commissioner Beard's now prophetic comment opening the rate structure discussion that led to he and Commissioner Clark approving a uniform rate structure for SSU as recommended in Staff's Alternative Recommendation.

Summary of Associations' Position

The Commission has few, if any, options in complying with and implementing the First District Court of Appeal's Mandate following the reversal of the Commission's order requiring SSU shareholders to pay for the customer refunds necessitated by the erroneous uniform rate structure in Southern States Utils., Inc. v. Florida Public Service Comm'n,, 22 Fla. L. Weekly D1492 (Fla. 1st DCA 1997). The fairness and equity mandated by Southern States Utils. and the Florida Supreme Court's decision in GTE v. Clark, 668 So. 2d 971 (1996) directs that such fairness and equity be observed amongst competing customer groups and not merely to "protect" utilities from their customers as suggested by SSU.[1] These appellate decisions compel the

[1] Page 8, Southern States Utilities, Inc.'s Brief on Reconsideration of Order No. PSC-95-1292-FOF-WS, in which SSU lists four principles iterated in GTE v. Clark as being:

(I) that a rate making proceeding is a continuum, from the Commission's initial decision to allow or disallow a rate increase until the conclusion of appellate and any resulting remand proceedings. GTE Florida stands four-square for the proposition that a utility company's decision to take advantage of procedures for a stay, or not, has nothing whatever to do with the utility company's entitlement to be made while as if the proper rates had been established by the Commission in the first instance, even if surcharges are required to accomplish that result (emphasis supplied here;

payment of refunds to those customers overcharged by the erroneous order approving the illegal uniform rate structure. The First District Court of Appeal's determination that SSU did not benefit from the Commission's erroneous order approving uniform rates and the Court's conclusion that the utility could not be made to finance the customer refunds is clearly disappointing but understandable given that SSU did not "keep" any of the excessive uniform rates but merely passed them along to the "surcharged" customers in the form of below cost rates. While letting SSU off the hook for the refunds, the First District's opinion unmistakably notes that the "surcharged" customers obtained an unlawful and undeserved benefit from the uniform rate structure and clearly directs that the refunds be financed by them. Accordingly, the First District's opinion and Mandate compel the Commission to approve "surcharges" from those customers who wrongfully benefitted from the uniform rate structure in order to finance the refunds to customers overcharged under uniform rates.

Commission Rule dictates that customer refunds be made with interest and prescribes the specific manner in which the interest is to be calculated. Persons, whether customers or utilities, deprived of the "time value" of their money must be made whole by the payment of interest.

(ii) that there is no requirement of special notification to utility ratepayers as to the amounts they will pay during the course of appellate review from a rate order. GTE Florida stands for the sound principle that notification of the commencement of a rate proceeding (and indisputably one in which Public Counsel has chosen to participate) is adequate and sufficient advice that no particular level of rates is guaranteed during the ratemaking processing from its start until the conclusion of appellate review;

(iii) that a surcharge imposed after appellate review, to recoup undercollection during the pendency of review by virtue of an erroneous order, does not constitute retroactive ratemaking;

(iv) that the Commission must be fair to the utility company. This is not a new principle, of course, as Southern has earlier noted. [cites omitted].

Notwithstanding the apparent SSU position that the aggrieved customers should be satisfied with the mere return of principal of their rate overcharges, if they are to receive any refund at all, there is no legal or equitable basis for deviating from the Commission's long-standing interest requirement, which, by rule, has the force of law.[2]

"Justice delayed is justice denied." There is no basis for altering the Commission's earlier requirement that refunds be made to deserving customers within 90 days of the entry of the Final Order. SSU's early proposition that refunds, if any, should be made over the course of four years is preposterous on its face and would simply heap insult on the injury already suffered by the Associations and similarly situated customers wrongfully overcharged under uniform rates. The Commission should require SSU to borrow the money necessary to make the immediate refunds. "Surcharged" customers should then be allowed to pay back the total of their individual unwarranted benefits over the course of 28 months, which is the same period over which they received them. Alternatively, the Commission could establish a longer period of surcharge repayment if it finds doing so will reduce the economic inconvenience occasioned by the surcharges. SSU's costs and interests associated with borrowing the initial refund monies should be recovered from the surcharged customers over the 28 month surcharge period. Under

[2] Ibid. At page 9. Not surprisingly, SSU waffles on this position stating, without any citation whatsoever, that the Commission has the authority "under the circumstances of this case" (question what circumstances are present that would warrant the Commission heaping more abuse on the long suffering customers who have been deprived of their monies under uniform rates) to provide refunds without interest. Alternatively, SSU says that "the Commission could allow refunds with interest to some customers and add an offsetting surcharge in the amount of that interest to others. Thus, any interest on refunds would be paid by the customers who had underpaid." The constant, of course, is that SSU not be made to pay anything.

no circumstances should the lengthening of the time for surcharge payments be used as an excuse for extending the 90 day refund requirement.

Background

By Order No. PSC-93-0423-FOF-WS issued in this docket on March 22, 1993, the Commission approved uniform rates for some 127 SSU water and wastewater systems throughout Florida. The uniform rate structure charged all water and wastewater customers, respectively, the same rates irrespective of what the stand-alone revenue requirement was at each of the individual, non-connected systems. Consequently, the customers of some systems were forced to pay higher rates than dictated by their cost-of-service so that the customers of other systems could receive subsidies and enjoy rates at a lower level than if they were required to bear the full costs of the service being provided to them. For example, under uniform rates the residents of Spring Hill were forced to pay subsidies of approximately $1.8 million annually based on the then current number of customers and their consumption. Total subsidy transfers under uniform rates were approximately $4 million a year.

Ultimately, on April 6, 1995, the uniform rates were found unlawful by the First District Court of Appeal in the case of Citrus County v. Southern States Utilities, Inc., 656 So. 2d 1307 (1995) and the March 22, 1993 rate order was reversed. On October 19, 1995, the Commission issued its Order No. PSC-95-1292-FOF-WS, Order Complying with Mandate, Requiring Refund, and Disposing of Joint Petition, which order established a "modified stand-alone" rate structure for SSU and ordered the utility to pay refunds with interest to those customers who had been overcharged by uniform rates during the pendency of the appeal. This Order establishing the modified stand-alone rates was applicable to all 127 systems involved in Docket No. 920199,

including the Spring Hill systems. SSU did not implement the provisions of Order No. PSC-95-1292-FOF-WS because it sought reconsideration of that order. However, prior to the Commission considering SSU's motion for reconsideration, it granted SSU an interim rate increase in its new rate case in Docket No. 950495-WS. This interim increase, approved in Order No. PSC-96-0125-FOF-WS, was also based on a "modified stand-alone" rate structure containing "subsidies" not related to cost-of-service. SSU implemented the modified stand-alone interim rates approved in the new rate case for the systems included in that case, but, because the Spring Hill systems were not included in the new rate case, SSU continued charging the customers of those systems the uniform rates and continued collecting the forced subsidies inherent in them. SSU did not implement the modified stand-alone rates ordered in this docket for Spring Hill, but, rather, simply continued charging the higher, illegal rates and "pocketed" the rate subsidy portion of the Spring Hill rates since there were no longer any other of its systems being charged uniform rates and, thus, capable of receiving the now unlawful subsidies.

SSU's motion for reconsideration of the Order Complying with Mandate, Requiring Refund, and Disposing of Joint Petition was denied at the Commission's February 20, 1996 Agenda Conference. However, the Florida Supreme Court's decision in GTE, Inc. v. Clark, 668 So. 2d 971 (1996) was published prior to the order memorializing the Commission's denial of SSU's motion for reconsideration. Briefs were filed on the impact of Clark on the SSU case and a number of other customer organizations sought intervention in the docket.

On August 14, 1996 the Commission issued Order No. PSC-96-1046-FOF-WS, Final Order On Remand And Requiring Refund, denying the petitions to intervene of Senator Brown-Waite and the others and ordering SSU to calculate refunds based on the difference between the

uniform rates and the modified stand-alone rates from the date the uniform rate was implemented until the date the interim rate in Docket No. 950495-WS was implemented and to make those refunds without charging the earlier recipients of the subsidies rate surcharges. SSU sought review of the refund provision at the First District Court of Appeal and the Commission, on October 28, 1996, issued Order No. PSC-96-1311-FOF-WS, Order Granting Stay of Order No. PSC-96-1046-FOF-WS, staying the refund requirement pending the outcome of the appeal.

Through apparent oversight on the part of the Commission, SSU was allowed to continue charging the uniform rates at Spring Hill, in violation of the Commission's order, until the Office of the Public Counsel and Senator Brown-Waite sought to have the Commission correct the oversight by the elimination of the uniform rates at Spring Hill. On November 12, 1996 the Office of Public Counsel filed a Motion for Reconsideration and Clarification or, in the Alternative, Motion to Modify Stay, which essentially sought an order of the Commission compelling SSU to begin charging modified stand-alone rates at Spring Hill and to cease charging the unlawful uniform rates there. The Commission, by its entry of Order No. PSC-97-0175-FOF-WS, on February 14, 1997, specifically lifted the stay with respect to the issue of rates at Spring Hill and directed that SSU should cease the uniform rates and begin charging the lower rates, stating:

> SSU shall implement the modified stand-alone rate structure for the Spring Hill customers consistent with Orders Nos. PSC-95-1292-FOF-WS and PSC-96-1046-FOF-WS.

SSU sought appeal of the stay issue at the First District Court of Appeal, which denied SSU any relief. Thus, there was an unstayed provision of an outstanding Commission order

directing SSU to lower rates at Spring Hill. SSU ignored the Commission's order and never implemented the modified stand-alone rate structure at Spring Hill pending the outcome of the appeal of the Refund Order. Consistent with its earlier practice, the utility continued charging the illegal rates and continued pocketing the subsidy overcharges along with the regulatory assessment fees it was collecting from the Spring Hill customers. SSU has purportedly subsequently entered into a settlement agreement with Hernando County, which agreement allegedly leaves the resolution of all refund issues to this Commission.

On June 17, 1997 the First District Court of Appeal reversed that portion of the Commission's order requiring that SSU pay for the refunds as opposed to being allowed to surcharge the other customers who "underpaid under the erroneously approved uniform rates" and remanded the case to the Commission for further proceedings on the issue of surcharges. The Court also directed the Commission to reconsider its decision denying intervention to the three customer groups that had sought late intervention in the case. The First District has since issued its Mandate in that case.

ISSUES

QUESTION: SHOULD THE COMMISSION ORDER REFUNDS?

ANSWER: THERE IS NO LEGAL ALTERNATIVE!

Wishful thinking to the contrary, this proceeding is not a de novo opportunity for this Commission can make a la carte decisions affecting the substantial interests related to "refund/no refund", "interest/no interest", as if it were ordering from a Chinese menu. It is far too late for such an option which would purport to reexamine the relative equities of the various parties to this case. Rather, five full years of contentious litigation and the First District Court of Appeal's

reversal (or Commission confession of error) of every final order entered in this docket and every major SSU docket related to this case, has severely constrained the options remaining to this Commission in implementing the Court's Mandate. It is now time for the Commission to fully recognize its responsibilities to the customers wronged by uniform rates, to the Florida Statutes, and to the decisions of the appellate courts. It is time, by far, for the Commission to "get the pot right" for the customers economically wronged by its 1993 decision and to put an end to this case.

While additional parties have been allowed to brief these issues, no new evidence has been taken. New evidence and new facts would not have been appropriate. The Commission's goal, therefore, must be the full and complete implementation of the First District Court of Appeal's Mandate reached through full compliance with the controlling appellate court decisions, as well as the holdings of the Commission's prior orders in this docket, to the extent those orders have not otherwise been reversed. The controlling appellate decisions are GTE Florida, Inc. v. Clark, 668 So. 2d 971 (Fla. 1996) and Southern States Utils., Inc. v. Florida Public Service Comm'n, 22 Fla. L. Weekly D1492 (Fla. 1st DCA 1997). The unaltered provisions of the Commission's previous final orders that must now be observed are those mandating refunds within 90 days and, most importantly the payment of interest pursuant to Commission Rule. This is the law of the case. Barrett Hinnant, Inc. v. Spottswood, 481 So.2d 80, 82 (Fla. 1st DCA 1986).

Understanding GTE Florida v. Clark

In GTE Florida, Inc. v. Deason, 642 So. 2d 545 (1994), the Florida Supreme Court reversed this Commission's decision denying GTE Florida, Inc. the recovery of certain corporate

expenses because the expenses were related to goods or services provided by GTE affiliates. The Commission order denying the expenses was issued May 27, 1993, while the Supreme Court's Mandate in the case was issued July 7, 1994. In implementing the Supreme Court's First Mandate, the Commission determined that it would allow GTE to collect rates including the affiliate expenses, but that it would only do so on a prospective basis beginning with the date of its order implementing the Court's remand, which order was effective May 3, 1995. GTE Florida objected to the denial of its recovery of the expenses between May 27, 1993 and May 3, 1995 by, again, seeking review from the Florida Supreme Court.

On the second review, the Supreme Court, again, reversed the Commission. The Court did so for the Commission's failure to allow GTE Florida to recover the disallowed expenses for the full period the erroneous Commission order was in effect. The Supreme Court's logic in reaching this result is critical to the Commission reaching the correct result here.

Ignoring the issue of seeking or failing to seek a stay, which issue the First District Court of Appeal has put to rest in Southern States Utils., Inc. v. Florida Public Service Comm'n, the GTE v. Clark Court focused on the necessity for all round fairness in utility ratemaking, stating:

> We view utility ratemaking as a matter of fairness. Equity requires that both ratepayers and utilities be treated in a similar manner.

On this point, the Supreme Court approvingly quoted Justice O'Connell's opinion in the case of Village of North Palm Beach v. Mason, 188 So. 2d 778 (Fla. 1966). The Court found a necessity for a multi-lateral relationship of fairness and equity in Justice O'Connell's words, interpreting his words in this fashion:

> Justice O'Connell was stating that equity was applying to both utilities and ratepayers when an erroneous order is entered. It would clearly be inequitable for

> either utilities or ratepayers to benefit, thereby receiving a windfall, from an erroneous PSC order.

668 So. 2d at 972. (Emphasis supplied).

The Associations would urge this Commission to note that the Florida Supreme Court clearly and unequivocally said that it "would clearly be inequitable for either utilities or ratepayers to benefit . . . from an erroneous PSC order." The simple plain language of the opinion means that ratepayers, as a body, cannot benefit from an erroneous order at the expense of the utility, and, conversely, that the utility cannot benefit from an erroneous order at the expense of the ratepayers, as a body. The opinion also clearly states that it would be inequitable for either group to benefit from an erroneous order. There is nothing in this opinion to suggest that, in the face of a clearly erroneous/illegal PSC order, it would be equitable or otherwise permissible for one group of customers to benefit at the expense of another. No such interpretation can rationally be entertained. GTE v. Clark clearly proscribes such a result, as do both the First District's opinion and the surviving portions of this Commission's orders. Just think how incongruous and indefensible it would appear to suggest that regulated utilities cannot be harmed by an erroneous Commission order to the advantage of their customers, but that ratepayers cannot rely on the same equity and protection amongst each other.

GTE v. Clark not only established a "level playing field" of equity amongst parties to Commission cases, it also clearly rejected the notion that surcharges to collect the improperly denied expenses would constitute "retroactive ratemaking." The Court specifically stated:

> We also reject the contention that GTE's requested surcharge constitutes retroactive ratemaking. This is not a case where a new rate is requested and then applied retroactively. The surcharge we sanction is implemented to allow GTE to recover costs already expended that should have been lawfully recoverable in the

> PSC's first order. In this respect, this case is analogous to Mason. Additional support for our position is found by examining the method by which the PSC addresses the reciprocal situation.

Id.

Beginning virtually from Day One in this case, the customers represented by the Sugarmill Woods Civic Association, Inc. have protested the illegality of the uniform rate structure and decried the frailties of the supposed bond and refund protections offered while their "sure loss" on appeal was pending. Other customer groups protested uniform rates as they became aware of their provisions, but were initially denied party status. On too many occasions to recount, this Commission has recited to these customers that they would be protected by the appropriate appeal bonds in the event uniform rates were reversed. Given the repeated and strong assurances of security in this case, it is incomprehensible that any party to this case, especially the Commission Staff, would now suggest that any customer suffering an economic detriment under uniform rates, should have to "eat" their losses while the unfairly benefitted customers are allowed to retain their illegal "windfalls." Stated differently, the Commission has promised for some five years that customers paying higher rates under the uniform rate structure would be economically protected in the event they won their appeal. Properly implementing the First District's Mandate by ordering the payment of refunds and the collection of surcharges is the only way to fulfill that commitment.

Lastly, the Supreme Court in GTE v. Clark addressed a final point that has relevance here, namely, whether "new" customers should be charged the surcharge. The Supreme Court concluded that "no new customers should be required to pay a surcharge."

Id.

In terms of relevant precedence, this Commission's implementation of the second GTE reversal on remand is every bit as instructive here as the GTE v. Clark opinion. That is to say, on remand, the Commission constructed a surcharge methodology that allowed GTE to recover all of its affiliated expenses "lost" during the interim between the entry of the erroneous order and the later order approving a rate including these costs. That it did so, while simultaneously not charging "new" customers a surcharge and while allowing departing GTE customers to "escape" their "liability" is important to the resolution of this case. This aspect is important because it is incumbent upon this Commission to see that every dollar of uniform rate overcharges, plus interest, is returned to the customers who were overcharged. This is true, even if customers who benefitted from the uniform rate subsidies have left the system and cannot be found and made to bear their portion of the refunds. Such was the case in the second remand in the GTE cases, where the remaining, non-new, customers were required to make GTE whole for the entire amount of its "lost" expenses notwithstanding that they had, individually, benefitted less by the Commission's erroneous error than they were ultimately forced to refund. If a regulated telephone company was made completely whole in this fashion, SSU's customers should not be asked to expect less.

Holding of GTE v. Clark

It appears clear from GTE v. Clark that if: (1) there is an erroneous PSC order, (2) providing an inequitable benefit or windfall to one ratemaking party at the expense of another, (3) the entire windfall or unwarranted benefit will be returned through the ratemaking device of "surcharges", so long as those surcharges are not levied on "new" customers, who did not receive or otherwise "enjoy" the windfalls.

Is there an "Erroneous PSC Order?"

Every Final Order in this docket and every associated SSU docket has been found erroneous and reversed. However, the truly relevant erroneous order is the final order entered in this docket approving the uniform rate structure and reversed in the case of Citrus County v. Southern States Utilities, Inc., 656 So. 2d 1307 (Fla. 1st DCA), review denied, 663 So. 2d 631 (Fla. 1995). That opinion reversed the uniform rate structure as unlawful and prohibited the rate subsidies inherent in the rate structure.

Are there undeserved economic windfalls and what are they?

That this erroneous order would provide undeserved economic windfalls to certain customers at the expense of others was recognized from the outset given that this was the underlying goal of the uniform rate structure. The specific economic windfalls obtained by certain customers, as well as the economic detriment suffered by other SSU customers, under uniform rates have now been individually calculated by SSU pursuant to order of this Commission. The result, provided to the Commission and parties on October 17, 1997, details the amounts individual customers either were benefitted or harmed by the uniform rate structure. Necessarily, each customer's experience or "account balance" is the result of the level of subsidy taken or given at his or her system, combined with his or her respective consumption levels.

There is clearly an erroneous PSC order and this Commission, by its first attempt at implementing the First District's remand in Citrus County, specifically found that the customers who were charged above their cost of service, or stand-alone rates (modified stand-alone rates in this case) had been improperly overcharged and were due refunds. While the Commission's attempt to make SSU pay for the refunds was unfortunately reversed, there was no reversal of the

requirement that refunds were, in fact, required. More importantly, the First District's opinion in Citrus County makes abundantly clear not only that the refunds are appropriate, but, further, that they must come from the customers undeservedly benefitted by uniform rates.

Holding in Southern States Utils.

In reversing the Commission's requirement that SSU fund the customer refunds, the First District quoted with approval the Florida Supreme Court's statement in GTE v. Clark that

> "equity applies to both utilities and ratepayers when an erroneous rate order is entered" and "[i]t would clearly be inequitable for either utilities or ratepayers to benefit, thereby receiving a windfall, from an erroneous PSC order."

668 So. 2d at 973. The First District continued, squarely addressing the fact that one group of customers should not be allowed a financial advantage at the expense of another group, saying:

> Contrary to this principle, the PSC in this case has allowed those customers who underpaid for services they received under the uniform rates to benefit from its erroneous order adopting uniform rates. As a legal position, this will not hold water.

"As a legal position, this will not hold water." What part of that statement can be difficult to understand? It is clear that the First District intends that this Commission once again order SSU to make refunds to all the customers overcharged by the uniform rates, but that, this time, it allow the utility to recoup the refund monies from those customers who underpaid for their service through the erroneous uniform rates. It is clear that the Associations and their member customers, and all other customers who were forced to pay rate subsidies through the operation of the uniform rates, are entitled to receive refunds paid for by surcharges paid for by the other SSU customers who underpaid under the uniform rates. The period for which surcharges should be applicable shall only be from the initial date of the uniform rates on March 22, 1993 to the date that interim rates were placed in effect in Docket No. 950495-WS. The

additional special refunds owing to customers at Spring Hill as the result of SSU's failure to implement the Commission's order that modified stand-alone rates be implemented upon the reversal of the uniform rate structure must be financed solely by the shareholders of SSU, which retained those overcharges for its own purposes. (On this issue, the Spring Hill Civic Association, Senator Brown-Waite and Morty Miller adopt and rely upon the Office of Public Counsel's brief).

While it is technically correct that SSU did not "formally request" a uniform rate structure in this case, its conduct in insisting upon the implementation of the rate structure (lifting of the stay) and its conduct in the related dockets regarding the appropriateness of a uniform rate structure and the Commission's ability to strip non-jurisdictional counties of authority over the utility have greatly lengthened this entire process and exacerbated the economic loss suffered by customers forced to pay subsidies under uniform rates, as well as the inconvenience that will be borne by customers now forced to pay surcharges. In this regard, it should not be overlooked that SSU, when on the hook for financing the refunds through shareholder dollars, took the position that refunds were permissible so long as they were borne by the customers who undeservedly benefitted by the uniform rates subsidies. SSU's text from its April 1, 1996 Brief on Reconsideration of ORDER No. PSC-95-1292-FOF-WS is relatively short and is attached in its entirety as Appendix B. The Commission should take particular note of SSU's position regarding the appropriateness of refunds, so long as the utility is not forced to finance them. First, at page 9 of its brief, SSU states:

> GTE Florida establishes that any refund remedy adopted on remand here must include an offsetting surcharge or comparable rate adjustment, so that

Southern will be kept whole in connection with any rate adjustment among customers. Such a balanced remand remedy will not constitute retroactive ratemaking, but would meet the GTE Florida requirement that the Commission accommodate the legitimate interests of Southern as well as ratepayers.

And further at page 10:

The Commission, Southern believes, is free to provide refunds to those who overpaid pending appeal, and whose efforts secured prospective benefits through implementation of modified stand-alone rates, so long as the Commission draws the revenue for any refunds from those who underpaid during the period of time for which refunds are calculated.

This SSU view is in apparent sharp contrast to its new position that the Associations and others should be denied refunds. It places in context SSU's reprehensible and condemnable behavior in securing a surrogate law firm to now represent that portion of its customers it was so eager to abandon earlier to its own economic advantage.

QUESTION: SHOULD THE COMMISSION ORDER INTEREST?

ANSWER: THERE IS NO LEGAL ALTERNATIVE!

The Commission's original order requiring SSU to finance the customer refunds required that interest be paid pursuant to Rule 25-30.360, Florida Administrative Code, which provision has the effect and force of law. There are no applicable exceptions or waivers that would excuse the payment of interest in this case. The interest is to compensate for the lost time value of the money wrongfully taken. Is the Commission to believe that the "special circumstances" of this case, whatever they are, warrants the disallowance of interest? The mere suggestion that interest

is not compelled by rule under these circumstances reveals a lack of understanding of the applicable law. Utilities are routinely granted interest when customers are found to owe them money, as are customers when utilities retain their monies. Look for cases in which the Commission denied a utility the interest it was due from a customer under the rule. Are the Associations and their members to be merely satisfied with the return of the principal of their overcharges after being deprived of those monies for some five years? The Commission properly ordered the payment of interest when the refunds were expected to be paid by SSU; it can do no different now that the refunds are to be borne by other customers.

QUESTION: HOW SOON SHOULD THE REFUNDS BE MADE?

ANSWER: WITHIN 90 DAYS AS PREVIOUSLY ORDERED!

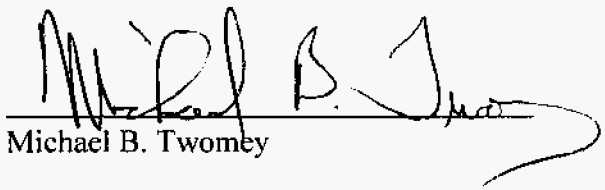
There is no basis for changing the earlier provision requiring refunds to be made within 90 days of the Final Order. This is the law of the case. The Associations and their members have been wrongfully deprived of their monies for some five full years now. Can SSU's earlier suggestion that refunds be strung out an additional four years truly be taken as anything but a joke?

The Commission should order SSU to borrow the monies necessary to make full and complete refunds, including interest required by Rule, within 90 days of the entry of the Final Order in this case. The refunds should then be made as ordered, which will make the Associations and their members economically whole and remove them from this equation as "lenders." It should be recognized that the "debt" owing from each customer benefitting under the erroneous uniform rate structure is likely to be unique in amount and that it is not entirely rationale to attempt to recover this amount through a usage-sensitive surcharge. It should be

clear that no single usage-sensitive surcharge rate can be appropriate for all benefitted systems and, further, that no common surcharge is likely to be appropriate for any two customers, even within the same system. In view of this, the Commission should consider requiring SSU to monthly bill each individual customer a pro rata portion of his or her total debt. The number of months could be based on a number of factors and be different by system, depending upon the amount of debt owed at each. In no event should the Commission consider requiring the repayment of the surcharge amounts in less than the period of months over which they were received (in this case about 28 months). So long as the Commission orders the refunds made within 90 days, it can adjust the period of repayment though surcharges over whatever period of years or months it thinks appropriate to avoid undue inconvenience to those required to make repayments. SSU can be made whole by being reimbursed for its interests charges associated with initially borrowing the refund principal. Naturally, all costs associated with the refunds should be borne by either the utility or, more likely, the customers required to make the surcharge payments. Again, in no event should the timing of surcharge installments be used as an excuse to further deprive customers of the refunds they are due.

WHEREFORE, the Associations respectfully request that the Commission order the refunds, with appropriate interest, within 90 days of the date of the final order entered in this docket.

Respectfully submitted,



Michael B. Twomey

Attorney for Senator Ginny Brown-Waite, Morty Miller, Spring Hill Civic Association, Inc., Sugarmill Manor, Inc., Cypress Village Property Owners Association, Inc., Harbour Woods Civic Association, Inc., Hidden Hills Country Club Homeowners Association, Inc., and Citrus County.

Post Office Box 5256
Tallahassee, Florida 32314-5256

(850) 421-9530

Arthur I. Jacobs, Esquire
Post Office Box 1110
Fernandina Beach, Florida 32305-1110

Attorney for Amelia Island Community Association, Resident Condominium, Residence Property Owners Association, Amelia Surf And Racquet Property Owners Association and Sandpiper Association

(904) 261-3693

CERTIFICATE OF SERVICE

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

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

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

Lila A. Jaber, Esquire
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0862

Harold McLean, Esquire
Associate Public Counsel
Office of the Public Counsel
c/o The Florida Legislature
111 West Madison Street, Suite 812
Tallahassee, Florida 32399-1400

Larry M. Haag, Esquire
County Attorney Citrus County
107 North Park Avenue, Suite 8
Inverness, Florida 34450

Christiana T. Moore, Esquire
Associate General Counsel
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32399-0850

Vicki Kaufman, Esquire
McWhirter Law Firm
117 S. Gadsden Street
Tallahassee, Florida 32301

Darol H. N. Carr, Esquire
Farr, Farr, Emerich, Sifrit,
Hackett & Carr, P.A.
Post Office Drawer 2159
Port Charlotte, Florida 33949

Charles r. Forman, Esquire
320 Northwest 3rd Avenue
Ocala, Florida 34475

Attorney

APPENDIX A

where I'm thinking out of the bag, perhaps, but nonetheless --

MS. MESSER: Well, would you like to revisit this after we continue on --

COMMISSIONER BEARD: I think that would be the thing to do. Then at least we'd know what we were talking about and the magnitude of it, as well.

COMMISSIONER CLARK: Okay.

COMMISSIONER BEARD: Well, another fine mess we've gotten ourselves into. (Laughter)

I don't know any way to do but jump in on this.

COMMISSIONER CLARK: I don't know either.

COMMISSIONER BEARD: I've looked at it. I've scratched and pondered and fretted about stand-alone rates, regional, statewide. And when it boils down to it, when I look at -- and, quite frankly, look at what is termed "Staff Alternative 1," it just makes sense. It makes sense from the standpoint of what I see happening system-by-system against interim. It makes sense in what I see happening system-by-system against the original rates in almost every instance.

It makes sense from the standpoint of not doing Mega III or giga-whatever the next one is, that we begin to do some consolidation. It's not something that is foreign to utility regulation. Granted, that

APPENDIX B

On October 19, 1995, the Commission entered an order on remand from the First District Court of Appeal that replaced "uniform" rates established by the Commission for Southern States Utilities, Inc. (Southern) in 1993 and in effect during the pendency of appeals, substituting "modified stand alone" rates. The Commission's order also directed a refund of charges paid by some of Southern's customers. (For convenience, the Commission's order will be referenced in this memorandum as "the Refund Order".)

On March 21, the Commission entered Order No. PSC-96-0406-FOF-WS, memorializing its decision to reconsider the Refund Order and authorizing the parties to file briefs "to address the generic issue of what is the appropriate action the Commission should take upon the remand of the SSU decision in light of [*GTE Florida, Inc. v. Clark*, 21 Fla. L. Weekly S101 (Fla. Feb. 29, 1996)]" (referenced here as "*GTE Florida*" and attached as Appendix 1). This brief is filed by Southern in response to the March 21 order.

SUMMARY OF THE REFUND ORDER

Insofar as is relevant to reconsideration, the Refund Order has two features: a directive for customer refunds from Southern's general revenues, and a levy of interest on those refunds.[1] The Refund Order provides refunds to customers who paid more under the uniform rate structure than they would pay under a new rate structure adopted in the Refund Order. Despite the fact that Southern was merely a stakeholder as to the rate structure issue and had obtained no funds in excess of its Commission-prescribed and judicially-affirmed revenue requirements, the Commission made no offsetting provision to compensate Southern for the

---

[1] The Refund Order addresses the "rate structure" directive of the First District by replacing the uniform rates that had been established as interim (then final) rates for ratepayers with modified stand alone rates. The Refund Order also ordered the 1-inch meter BFC rates for certain customers reduced to the 5/8-inch x 3/4-inch BFC rates. Neither issue is now before the Commission on reconsideration. The establishment of modified stand-alone rates is not in dispute, and the 1-inch BFC meter order was reconsidered and vacated at the February 28 hearing. Accordingly, Southern does not discuss either issue in this brief.

refund expense. The Commission's rationale for refunds from Southern's general revenues was that the change in rate structure resulted in a rate decrease for some customers and a rate increase for others, and while the Commission believed "the utility cannot collect from the customers who have paid less" it found it "appropriate to order the utility to refund the difference to those customers" who overpaid. (Refund Order at pp. 6-7). This brief addresses that aspect of the Refund Order. It also addresses the additional directive in the Refund Order that Southern pay interest on those refunds.

OVERVIEW OF *GTE FLORIDA, INC. v. CLARK*

GTE initiated a rate case with the Commission to secure a rate increase. The Commission denied a rate increase, and on May 27, 1993 ordered a rate reduction. GTE appealed the Commission's order, but chose not to seek a stay of the effectiveness of the rate reductions.

In due course, the Supreme Court reversed the Commission in part, and held it was error not to allow GTE to recover in its rates certain costs incurred in transactions with affiliates.[2] On remand, the Commission allowed a recovery of those costs but did so only prospectively, dating from the entry of its order on remand in May of 1995. This denied GTE a recovery of allowable costs during the appeal, and during the subsequent remand proceeding before the Commission.

A second appeal by GTE resulted in the *GTE Florida* decision. There the Court reversed the Commission's remand order and held that GTE was entitled to recover affiliate transaction costs dating from May 27, 1993 — the date of the initial rate case order which erroneously denied GTE those costs. In that second appeal, the Court was presented with the issue of "equity and fairness" to customers by the Commission's determination that a rate

---

[2] *GTE Florida, Inc. v. Deason*, 642 So. 2d 545 (Fla. 1994).

recovery pending the appeal was precluded by GTE's failure to ask for a stay pending its appeal. The Court rejected the contention that only customer interests be accommodated in fashioning a proper remand remedy.

> We view utility ratemaking as a matter of fairness. Equity requires that both ratepayers and utilities be treated in a similar manner. . . . It would clearly be inequitable for either utilities or ratepayers to benefit, thereby receiving a windfall, from an erroneous PSC order.

(App. 1 at p. 2).[3]

The Court's decision in *GTE Florida* contained other features that bear directly on the issues before the Commission.

1. **Retroactive ratemaking**. In briefs filed with the Court, counsel for the Commission and Public Counsel had argued that any recovery of revenues previously denied to the utility under an erroneous rate order would require a surcharge to customers who underpaid pending the appeal, and that any such surcharge would constitute "retroactive rate making." (App. 4 at pp. 10-14 and App. 5 at p. 1). The court rejected that contention, stating:

> We also reject the contention that GTE's requested surcharge constitutes retroactive ratemaking. This is not a case where a new rate is requested and then applied retroactively. The surcharge we sanction is implemented to allow GTE to recover costs already expended that should have been lawfully recoverable in the PSC's first order. . . . If the customers can benefit in a refund situation, fairness dictates that a surcharge is proper in this situation.

(App. 1 at p. 2).

---

[3] Southern has previously called to the Commission's attention the well-established ratemaking principle that equitable principles must govern remand remedies in the event of appellate reversal of the decision of a lower tribunal. (*See* Southern's Motion for Reconsideration dated November 3, 1995, at pp. 8-9, 11; and Southern's Motion for Leave to Reply and Proposed Reply dated November 27, 1995, at p. 15). These pleadings, which provide a thorough discussion of the established legal principles and the facts pertinent to a proper remand remedy in this case, are attached as Appendices 2 and 3. The legal principles there discussed are in complete harmony with the *GTE Florida* decision.

2. **Waiver of refunds by "stay" considerations**. In a brief filed by counsel for the Commission, the argument was made that GTE was itself responsible for its dilemma because it had made a "choice" not to obtain a stay of the Commission's original order. (App. 4 at p. 6). The Commission's brief to the court characterized that action by GTE as a "waiver" of its rights to a rate recovery. (*Id.*). The Florida Supreme Court squarely addressed and rejected that blame-laying characterization:

> The rule providing for stays does not indicate that a stay is a prerequisite to the recovery of an overcharge or the imposition of a surcharge. The rule says nothing about a waiver . . . .

(App. 1 at p. 2).

3. **Customer notice as to rates being changed**. The brief filed by counsel for the Commission also urged a "notice to customers" theory, to the effect that utility customers are entitled to know what charges are being made pending appellate review of a rate order so they can adjust their consumption accordingly. (App. 4 at pp. 14-15). This contention, put forward as a reason not to allow a surcharge to customers, was met by GTE's response that all of the ratepayers of the utility *had* notice that rates might change since all of them were fully represented throughout the proceeding by Public Counsel. (App. 6). The court addressed and rejected any "notice to customers" theory, as well.

> We cannot accept the contention that customers will now be subjected to unexpected charges. The Office of Public Counsel has represented the citizen ratepayers at every step of this procedure.

(App. 1 at p. 2).[4]

---

[4] There is no valid "customer notice" concern here in any event, because any surcharge to offset a refund expense would be prospective. (App. 2 at p. 21-24).

BACKGROUND OF THE REMAND IN THIS PROCEEDING

This ratemaking proceeding was initiated by Southern in 1992 to secure a rate increase. The Commission ordered a rate increase in September of 1993, following which three of the participants in the proceeding filed an appeal to the First District Court of Appeal. Due to the happenstance of one of the appellants being Citrus County, an automatic stay went into effect which, unless vacated, would have prevented Southern's collection of the increased revenue requirements that the Commission had ordered. Consequently, Southern moved to vacate the stay and the Commission obliged, subject to bond being posted.

Two basic issues were presented to the First District. Some appellants challenged only the uniform rate structure established by the Commission. Public Counsel, however, representing **all** of Southern's customers, challenged the revenue requirement itself.

The First District reversed the Commission's imposition of a uniform rate structure, but it **affirmed** the Commission's rate increase order.[5] On remand, Sugarmill Woods, Citrus County and Public Counsel nonetheless argued for a one-sided result — that those customers who had overpaid utility bills under the rate structure erroneously prescribed should be given a refund out of Southern's revenues, without any offsetting surcharge from customers who underpaid in order to keep Southern whole. Staff, however, urged the Commission **not** to order refunds. (App. 7 at p. 3). Accepting the arguments for a one-sided remedy, and without regard for the impact of that remedy as Southern's financial integrity, the Commission entered the Refund Order that has now been reconsidered.

---

[5] *Citrus County v. Southern States Utilities, Inc.*, 656 So. 2d 1307, 1311 (Fla. 1st DCA), *review denied*, 663 So. 2d 631 (Fla. 1995) ("Lastly, we address the Office of Public Counsel's contention [regarding revenue requirements]. . . . We are not persuaded . . . ."). In subsequently denying rehearing, the court dismissed attempts by appellants to have the court prescribe a specific remand remedy (whether by way of refunds or otherwise), and left to the Commission ample discretion on remand to apply equitable principles to fashion a fair and sound remand remedy.

ARGUMENT

1. The *GTE Florida* decision governs this proceeding

The posture of this proceeding is identical to the posture of the *GTE Florida* proceeding. In both cases:

a. a utility company had initiated a rate proceeding which culminated in the entry of a final rate order that was appealed;[6]

b. no stay of the rate order was in effect pending appeal, with the consequence in both cases that the Commission's order remained operative during appellate court review;[7]

c. the appellate court reversed some portion of the Commission's order and remanded for proceedings consistent with its decision;[8] and

d. on remand the Commission adopted the view that ratepayers were entitled to have the utility company bear the entire financial burden which resulted from the company's collection of erroneously prescribed rates (here

---

[6] In *GTE Florida*, the order decreased revenues whereas in this case the Commission increased revenues. These are opposite sides of the same coin, *United Telephone Co. v. Mann*, 403 So. 2d 962 (Fla. 1981), and are of no decisional consequence here.

[7] In *GTE Florida*, the utility company collected the revenues that the Commission had ordered by declining to seek a stay. In this proceeding, Southern collected the revenue requirements ordered by the Commission by obtaining an order vacating the automatic stay resulting from an appeal by a governmental body.

[8] In the predecessor decision to *GTE Florida*, the Court had sustained the Commission's rejection of many of GTE's rate increase components but reversed as to that component which denied its recovery of certain costs incurred through affiliate transactions. *GTE Florida, Inc. v. Deason*, *supra*, n. 2. In this case, the First District affirmed the revenue requirements that the Commission had approved but rejected the uniform rate structure for failure of the Commission to find explicitly a functional relationship among Southern's systems.

only erroneously *designed* rates) during the pendency of the appeal, and during the remand consideration process.[9]

The outcome of the two cases should be identical. In *GTE Florida*, the Court made the company whole, as if the correct level of revenue had been ordered by the Commission in the first instance. The Commission can do no less in this proceeding. There is no principled distinction between the "make whole" result in *GTE Florida* and in this case, and there is *no* authority or equitable justification for a remand impairment of lawfully-authorized revenue requirements.[10]

There are, of course, obvious *fact* differences between the two cases: *GTE Florida* involved a rate decrease and no request for stay requested pending appeal; this case involves a rate increase and the vacation of an automatic stay pending appeal. These differences provide no basis to distinguish the **principles** iterated in *GTE Florida*, though, which are:

(i) that a rate making proceeding is a continuum, from the Commission's initial decision to allow or disallow a rate increase until the conclusion of appellate and any resulting remand proceedings. *GTE Florida* stands four-square for the proposition that a utility company's decision to take advantage of procedures for a stay, or not, has nothing whatever to do with the utility company's entitlement to be made whole as if the proper rates had been established by the Commission in the first instance, even if surcharges are required to accomplish that result;

---

[9] In *GTE Florida*, the Commission declined to provide a recovery of uncollected costs, while here the Commission required Southern to pay a sum it had never collected from underpaying customers.

[10] *See* App. 2 at pp. 17-21, 32-34, 43-47.

(ii) that there is **no** requirement of special notification to utility ratepayers as to the amounts they will pay during the course of appellate review from a rate order. *GTE Florida* stands for the sound principle that notification of the **commencement** of a rate proceeding (and indisputably one in which Public Counsel has chosen to participate) is adequate and sufficient advice that no particular level of rates is guaranteed during the ratemaking processing *from its start until the conclusion of appellate review*;

(iii) that a surcharge imposed after appellate review, to recoup under-collection during the pendency of review by virtue of an erroneous order, does **not** constitute retroactive ratemaking;

(iv) that the Commission **must** be fair to the utility company. This is not a new principle, of course, as Southern has earlier noted. (App. 2 at pp. 8-9, 11, 16-24; App. 3 at p. 15); and *Tamaron Homeowners Ass'n, Inc. v. Tamaron Utilities, Inc.*, 460 So. 2d 347 (Fla. 1984).

In sum, the *GTE Florida* decision governs this proceeding fully with respect to the Commission's responsibility to maintain the integrity of its 1993 revenue requirements decision, and with respect to Southern's collection of revenue at the approved $26 million level pending appellate review and remand. There is no equitable or legal reason to conclude otherwise. Any impairment of the revenue requirements awarded by the Commission in 1993 will do violence to the principles of ratemaking so plainly re-affirmed in *GTE Florida*. Any doubt on the point was laid to rest in *GTE Florida*:

> We find that the surcharge for recovery of costs expended is not retroactive ratemaking any more so than an order directing a refund would be.

(App. 1 at p. 2).

GTE Florida establishes that any refund remedy adopted on remand here *must* include an offsetting surcharge or comparable rate adjustment, so that Southern will be kept whole in connection with any rate adjustment among customers. Such a balanced remand remedy will not constitute retroactive ratemaking, but would meet the *GTE Florida* requirement that the Commission accommodate the legitimate interests of Southern as well as ratepayers. (App. 2 at pp. 21-24).

2. No interest on refunds from Southern is permissible

A denial of refunds to any of Southern's customers would eliminate altogether the issue of paying interest on refunds. The Commission certainly has the authority and discretion to provide refunds without interest. Under the circumstances of this case, and in light of *GTE Florida,* equitable and legal considerations justify a denial of any interest on refunds. (App. 2 at pp. 38-40, 43-47).

Alternatively, the Commission could allow refunds with interest to some customers and add an offsetting surcharge in the amount of that interest to others. Thus, any interest on refunds would be paid by the customers who had underpaid.

It is not an alternative for the Commission that interest on refunds come from Southern itself, as both *GTE Florida* and other applicable precedents establish. An interest-on-refund award without recoupment would impair Southern's revenue requirements as determined in September of 1993, and as confirmed in the Refund Order. (See Refund Order at 5). Such an erosion of revenues would simply be a penalty against Southern — in effect a confiscation of the company's property stemming from its *compliance* with the Commission's September 1993 rate order. Southern had no "excess" revenue from its collections during appellate review; it collected only what had lawfully been ordered.

3. Southern takes no position on refunds for customers who appealed the rate design order

The question undoubtedly on the minds of Commissioners is whether those parties who prosecuted the rate structure appeal should be afforded a refund as part of a remand remedy. Southern takes no position on that question.

The Commission, Southern believes, is free to provide refunds to those who overpaid pending appeal, and whose efforts secured prospective benefits through implementation of modified stand-alone rates, *so long as the Commission draws the revenue for any refunds from those who underpaid during the period of time for which refunds are calculated.*[11] Southern has placed before the commission a refund/recoupment plan that would fairly accomplish this result. (App. 2 at 21-24; App. 3 at 9-10).[12] In sum, refunds can be ordered in the discretion of the Commission,[13] *but the Commission lacks any discretion to impair Southern's recovery of the aggregate revenue requirements which the district court approved.* The *Citrus County* decision of the district court is the law of this case as to revenue requirements. *Strazzulla v. Hendrich*, 177 So. 2d 1, 2-3 (Fla. 1965); *Barry Hinnant v. Spottswood*, 481 So. 2d 80, 82 (Fla. 1st DCA 1986); *Mendelson v. Mendelson*, 341 So. 2d 811, 813-14 (Fla. 2d DCA 1977).

---

[11] The Commission may choose to limit the offsetting effects of refunds and surcharges to those persons who were in fact customers of Southern during the pendency of the appeal and remand proceedings, and thus avoid a result that imposes the remand remedy on new customers. See the penultimate paragraph in *GTE Florida* (App. 1 at p. 2).

[12] Southern has recommended that any ordered refunds be implemented through prospective billing credits over a four-year period, that the corresponding surcharges required to recoup the refund expense be implemented over the same four-year period, and that interest payments and recoupments thereof be limited or eliminated. (App. 2 at pp. 6, 11-15, 47-48 and appended affidavit of Forrest Ludsen). Each of these recommendations warrants serious consideration by the Commission, as they are measures the Commission may wish to adopt to mitigate the rate and financial impacts of the remand remedy it prescribes.

[13] *E.g., Tamiami Trail Tours, Inc. v. Railroad Comm'n*, 174 So. 451 (Fla. 1937).

It is not necessary to reward any customers with a refund, however. They had no vested rights to a refund, as *GTE Florida* firmly establishes. It follows that the issue of granting refunds, or not, so far as Southern is concerned, is a matter wholly within the discretion of the Commission. The *Citrus County* decision that uniform rates were not properly authorized necessarily meant that some customers might be found on remand to have overpaid the utility during the pendency of the appeal, while others would have underpaid. The choice of a revised rate structure on remand, however, cannot result in a penalty to Southern, or an impairment of its entitlement to earn the overall performance requirements authorized by the district court.

4. The Commission has authority to reopen the record when an appellate court reverses a Commission order

In its March 21 Order, the Commission asked the parties to brief whether reopening the record is appropriate. That request stems from Chairman's question at the March 5 hearing concerning the Commission's authority on remand from an appellate decision which vacates a Commission order based on a newly-adopted standard. Specifically, Chairman Clark requested the parties to address whether the Commission's only option is to act narrowly on the matter that the court addressed by reference only to the existing record, or whether the Commission has broader authority on remand.

The Commission's concern, obviously, stems from the district court's decision in this case.[14] In *Citrus County*, the court required a finding of functional relatedness as a

---

[14] The *GTE Florida* decision did not involve a standard newly-adopted at the appellate level. The Florida Supreme Court in fact made clear in its opinion that it was following established precedent, quoting with approval a prior decision of the Court dating from 1966 saying that:

(continued ..)

prerequisite to authorization of a uniform rate structure, although (i) no one had argued that position in the course of the Commission proceeding and (ii) the statute that requires functional relatedness as a basis for jurisdiction had no apparent relation to the rate structure issue.

Southern fully addressed the Commission's authority to reopen the record and reconsider its prior rate structure decision in Southern's Motion for Reconsideration. (App. 2 at 11-15). To this discussion Southern would add a reference to the *Village of North Palm Beach* case,[15] cited with approval by the *GTE Florida* court. In that case, the Florida Supreme Court affirmed action on remand by the Commission to supply findings and conclusions in support of a prior rate order that had been quashed by the Court, *and* to affirm the right of the affected utility to recovery of its authorized revenue requirements back to the date of the rate order that had been reversed on appeal.

CONCLUSION

The polestar principle as regards Southern and all of its customers is that any decision of the Commission on remand should be "revenue neutral" for Southern. That result is compelled by the *Citrus County* decision, other applicable precedent, all relevant equitable considerations, and the Commission's own recognition (both in establishing the proper revenue requirements for Southern in September of 1993 and in the Refund Order that has been reconsidered) that the level of revenues established for Southern "results in rates that are just, fair, and reasonable."[16]

(..continued)

> While the facts of *Village of North Palm Beach v. Mason*, 188 So. 2d 788 (Fla. 1966), were different from those we now encounter, we find that Justice O'Connell's reasoning is appropriate in this case.

(App. 1 at p. 2).

[15] *Village of North Palm Beach v. Mason*, 188 So. 2d 778 (Fla. 1966).

[16] 93 F.P.S.C. 3:504 at 595-96, 607; Refund Order at 5.

Southern has only one means to recover its authorized revenue requirements — through proper rates and remand remedies applicable to *all* of its customers. There is no lawful way to distinguish customer rate refunds from customer rate surcharges, and no one in this proceeding has suggested any lawful basis for differentiation. Within its discretionary authority to establish rates appropriately designed, however, the Commission has the authority either to provide a combination of refunds and equivalent surcharges, or simply deny refunds altogether and move from uniform rates to such other rate structure as is found justified on a fully prospective basis only.

Respectfully submitted,

Arthur J. England, Jr., Esq.
Florida Bar No. 022730
Greenberg, Traurig, Hoffman,
Lipoff, Rosen & Quentel, P.A.
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0500

- and -

Kenneth A. Hoffman, Esq.
Rutledge, Ecenia, Underwood,
Purnell & Hoffman, P.A.
215 So. Monroe Street, Suite 420
Post Office Box 551
Tallahassee, Florida 32302
Telephone: (904) 681-6788

- and -

Brian P. Armstrong, Esq.
Southern States Utilities, Inc.
1000 Color Place
Apopka, Florida 32703
Telephone: (407) 880-0058

Co-counsel for Southern States Utilities, Inc.