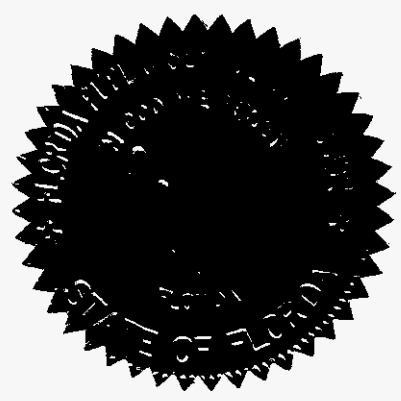


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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In the Matter of
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

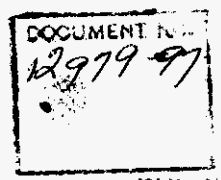


VOLUME 2

Pages 159 through 251

PROCEEDINGS: SPECIAL AGENDA CONFERENCE
BEFORE: CHAIRMAN JULIA L. JOHNSON
COMMISSIONER J. TERRY DEASON
COMMISSIONER SUSAN F. CLARK
COMMISSIONER DIANE K. KIESLING
COMMISSIONER JOE GARCIA
DATE: Monday, December 15, 1997
TIME: Commenced at 1:00 p.m.
Concluded at 7:00 p.m.
PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida
REPORTED BY: H. RUTHE POTAMI, CSR, RPR
Official Commission Reporter
PARTICIPATING:

(As heretofore noted.)



I N D E X

MISCELLANEOUS

3	ITEM	PAGE NO.
4	CERTIFICATE OF REPORTERS	251

ISSUES

7	ISSUE NO.	PAGE NO.
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9	Issue No. 4	233
10	Issue No. 5	233

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P R O C E E D I N G S

(Hearing reconvened at 5:10 p.m.)

(Transcript continues in sequence from
Volume 1.)

CHAIRMAN JOHNSON: Ladies and gentlemen,
we're going to reconvene the hearing. It is now 5:10
and we're going to reconvene the hearing. Staff
counsel?

MS. JABER: Commissioners, we are at
Issue 3. That is Staff's recommendation on the
appropriate action the Commission should take in light
of the Southern States decision. This is a good time
to hear from the parties on the merits of the issue.

CHAIRMAN JOHNSON: Okay. We're going to
hear from the parties on the merits of the issue.
We'll be voting on Issue 3.

At this point in time I will be limiting the
parties to five minutes. The customers have been
waiting patiently and participating in this process,
and we're going to limit the parties strictly to their
five-minute presentations.

Where do we begin? Company?

MR. ARMSTRONG: Thank you, Madame Chair,
Commissioners.

CHAIRMAN JOHNSON: If you'd like to save

1 some of your time for rebuttal, you might want to do
2 that up front; otherwise, you'll only be able to
3 answer Commissioners' questions.

4 **MR. ARMSTRONG:** Thank you. The PSC ordered
5 uniform rates in 1993. When was the first time
6 Florida Water informed the Commission that if its
7 uniform rate structure was reversed, the only
8 necessary remedy was to change rates prospectively?
9 The first time was in 1993.

10 When was the first time Florida Water
11 informed the PSC that it could not require a refund
12 1993? When was the next time the PSC ignored Florida
13 Water advice that to require refunds without
14 surcharges would be illegal? In 1995.

15 The PSC ignored us and issued a one-sided
16 refund order in October 1995. If the PSC had
17 researched the issue first, it would have known
18 Florida Water was right. No refund could be made
19 without surcharges when a rate structure is reversed.

20 If the PSC had listened to Florida Water, it
21 would have realized that when a rate structure is
22 reversed, the remedy used by every other regulatory
23 Commission in the country during the 100 years or so
24 of utility ratemaking regulation would solely be a
25 prospective change in rates, not refunds and

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1 surcharges.

2 Even after the PSC issued its one-sided
3 refund order in October of 1995, the Supreme Court of
4 Florida confirmed what Florida Water has maintained
5 all along; that fairness and equity applies to the
6 utility as well as its customers.

7 A majority of this Commission repeatedly
8 ignored that fact and continued to ignore fairness by
9 attempting to distinguish the Supreme Court's GTE
10 decision for reasons which the 1st Court of Appeals
11 concluded, and I quote, "did not hold water."

12 Staff on two separate occasions, in
13 October 1995 and again in August of 1996, argued and
14 recommended that no refunds and no surcharges should
15 be made.

16 Staff recommended that a prospective change
17 in rates is all that is required, and Staff argued
18 that Florida Water did not assume a risk by placing
19 the uniform rate into effect and asking the Commission
20 to vacate the Citrus County automatic stay.

21 Now Staff argues that this Commission's
22 one-sided refund order, which was reversed, has made
23 the refund part of the order the law of the case.

24 The Black's Law Dictionary defines "to
25 reverse" as "to vacate or set aside". Black's Law

1 Dictionary defines "to vacate" as "to set aside". The
2 terms are interchangeable from a legal perspective.
3 Staff's argument is purely a cop-out.

4 Another fact that must be remembered, this
5 Commission never even issued a final order
6 establishing an alternative rate structure in this
7 case other than uniform rates until August of 1996,
8 and the appeal by the City of Keystone Heights created
9 an automatic stay of that order in its entirety.

10 No party lifted that stay or requested that
11 that stay be lifted. No alternative to the uniform
12 rate structure was available to Florida Water Services
13 as a result of that stay. The result? The PSC's
14 prior mistakes in October 1995 and August 1996 and the
15 implementation of the automatic stay caused the
16 accumulation of potential refunds and surcharges, and
17 Florida Water Services could do nothing to avoid it.

18 Staff's recommendation also ignores the fact
19 that this Commission first ordered Florida Water to
20 include Spring Hill in a 1995 rate case, but then, on
21 the Commission's own motion, removed Spring Hill from
22 the rate case while the Commission fought with
23 Hernando County over jurisdiction. It is wrong to try
24 to hold Florida Water accountable for such activities.

25 Why did Florida Water do nothing in 1996

1 regarding the Spring Hill rates? Because in 1993
2 Florida Water acted by vacating an automatic stay so
3 that Florida Water could receive the higher revenues
4 this Commission had authorized it to collect and to
5 stop an increasing refund liability.

6 What did this Commission do? The majority
7 of this Commission tried to hold Florida Water
8 accountable for the Commission's rate structure
9 mistakes suggesting that Florida Water had assumed the
10 risk of a one-sided refund when it asked the
11 Commission to vacate the automatic stay.

12 The Court of Appeals rejected the
13 Commission's novel assumption of the risk argument,
14 but not until June of 1997. Prior to June of 1997,
15 all that Florida Water knew was that the request that
16 an automatic stay be vacated was to risk further
17 retribution from this Commission. So we did nothing.

18 Incredibly, now Staff is suggesting to this
19 Commission that Florida Water be held accountable for
20 not vacating or otherwise acting in a manner contrary
21 to the automatic stay of Keystone Heights, which arose
22 when the Commission issued its August 1996 refund
23 order, and Keystone Heights appealed.

24 **CHAIRMAN JOHNSON:** You have 30 seconds.

25 **MR. ARMSTRONG:** Staff suggests that because

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1 the Commission modified a stay which had been awarded
2 to Florida Water, the City's automatic stay magically
3 was modified. This is a preposterous legal
4 proposition.

5 One party's statutory right to a stay cannot
6 be modified just because some other party's stay is
7 modified. The Commission's August 1996 order,
8 including that part of the order imposing a modified
9 stand-alone rate structure, was on appeal.

10 We could only imagine how this Commission
11 would have punished Florida Water if we had moved to
12 vacate the City's automatic stay, put modified
13 stand-alone rates in effect, and then a uniform rate
14 structure was upheld by the Court of Appeals.

15 **CHAIRMAN JOHNSON:** Mr. Armstrong, your time
16 is up.

17 **MR. ARMSTRONG:** I have one more comment
18 regarding this issue, Madame Chair.

19 **CHAIRMAN JOHNSON:** I'm sorry. You have
20 what?

21 **MR. ARMSTRONG:** I have one more comment
22 regarding this issue on the stay, which Mr. Shreve had
23 unrestrained time and ability to address. (Audience
24 comments.)

25 **CHAIRMAN JOHNSON:** Your time is up.

7581

1 **MR. HANRATTY:** Joseph Hanratty here on
2 behalf of potential surcharge victims.

3 We have filed our brief in this matter
4 alleging that the PSC has no authority to issue
5 surcharges in this case. If you review the statutory
6 authorities that create the Public Service Commission
7 and authorize it to regulate water and wastewater
8 matters, you will find nowhere in those statutes does
9 the word "surcharge" even appear, much less is it
10 discussed.

11 But I think further beyond that, before you
12 even answer whether or not is a surcharge appropriate
13 in this instance, why don't you question whether or
14 not a refund is even appropriate in this instance.

15 The statutes go into great detail outlining
16 the procedures under which refunds will be required
17 when a rate increase is requested. And those
18 instances -- in the provisions of the statutes under
19 which you are authorized to act, the only provisions
20 for refunds are when there is an error in the revenue
21 requirement.

22 Staff has brought this matter to your
23 attention on numerous occasions during this procedure
24 throughout the years that this is not an appropriate
25 manner in which a refund to be -- in which to order a

7582

1 refund. They're now arguing in their recommendation
2 that it's now a matter of law of the case.

3 Essentially, I would submit to you that that
4 goes to the issue of subject matter jurisdiction. The
5 subject matter jurisdiction of this board cannot be
6 waived or cannot be subject to the law of the case.
7 You do not have jurisdiction in this instance to order
8 a refund.

9 The Legislature would not have gone through
10 such explicit details in describing the matter and the
11 method in which you could issue a refund only to have
12 you or Staff say, we're authorized to do refunds under
13 the broad powers that are granted us under the other
14 provisions of the statutes.

15 The statutes are specific when refunds are
16 allowed and required, and this is not one of those
17 instances.

18 I would go further to say that there is no
19 provision in the statutes that provide for surcharges
20 in a situation such as this.

21 Prospective ratemaking concepts have created
22 a process whereby errors are handled by allowing
23 utilities to collect the rates subject to them being
24 required to make refunds. That did not happen in this
25 instance. The error that is claimed here does not

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1 trigger the statutory powers that enable the PSC to
2 collect refunds.

3 We're simply saying that you do not have
4 authority to act in this situation, and it would be
5 appealable error for you to require a refund in this
6 situation, and there is no authority for this board to
7 issue surcharges.

8 **CHAIRMAN JOHNSON:** Thank you.
9 Mr. McGlothlin?

10 **MR. MCGLOTHLIN:** A refund is not required as
11 a matter of law in this case, and when one takes into
12 account all the equities, the better course is to
13 order neither a refund nor a surcharge.

14 The one rationale that has been put forward
15 by those who contend that the Commission must order a
16 refund is the doctrine of the law of the case. The
17 law of the case doctrine applies to bar
18 reconsideration of questions that were actually
19 considered and decided on a former appeal involving
20 the same action.

21 I've just read from the Commission's brief
22 in the most recent appeal before the 1st DCA. In that
23 case Florida Water was contending that because the
24 matter had been to court earlier, it was entitled to
25 have its entire revenue requirements undisturbed.

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1 The Commission, my clients, and Citrus
2 County and the others who contend for the refund all
3 opposed that interpretation of law of the case,
4 because the only point in that earlier appeal had been
5 the ratemaking disposition of a gain on the sale of
6 one asset.

7 Here's what the brief of Citrus County and
8 Sugarmill Woods Civic Association said about the law
9 of the case at that point: "The law of the case
10 doctrine does not apply to protect SSU's revenue
11 requirements in this case. There was no issue in the
12 prior appeal concerning SSU's combined or individual
13 revenue requirements in that sense. Only an issue
14 concerning whether the gain from sale of a
15 nonjurisdictional system should be included in the
16 county." And based on that they adopted the arguments
17 presented by the Commission and by my clients.

18 But in this case the same parties have taken
19 a very different position. At Page 9 they say "The
20 Commission's goal, therefore, must be the full and
21 complete implementation of the 1st DCA's mandate
22 reached through full compliance with the controlling
23 appellate court decisions, as well as the holdings of
24 the Commission's prior orders in this docket to the
25 extent these orders have not otherwise been reversed."

7585

1 The controlling appellate decisions are GTE
2 Florida, Inc., the Clark and Southern States, Inc. v.
3 Public Service Commission.

4 "The unaltered provisions of the
5 Commission's previous final orders that must now be
6 observed are those mandating refunds within 90 days
7 and, most importantly, the payment of interest
8 pursuant to Commission rule."

9 So we have a complete flip-flop. Instead of
10 arguing that only those points actually considered in
11 the same case are the law of the case, they first of
12 all bring in GTE, which isn't the same case, and they
13 also contend that even details such as a refund within
14 90 days and with interest are somehow law of the case,
15 even though it's clear that those were not points on
16 appeal.

17 Furthermore, neither was the issue of a
18 refund, a point decided on in the earlier appeal as is
19 evident by the language in the 1st DCA's opinion which
20 said in the course of directing the Commission to
21 consider petitions to intervene by my clients, "These
22 people are exposed to potential surcharges."

23 If there was such a thing as a potential
24 surcharge in a case in which the court had ordered
25 refunds, the word "potential" would not have been in 7586

1 its vocabulary. That's also true because of the way
2 the appealing entity, the utility, posed the question
3 on appeal.

4 In its prayer for relief, it asked the court
5 to either order a refund with surcharges or,
6 alternatively, to order neither a refund nor a
7 surcharge. So it's clear, based upon the way the
8 question was presented and by the language in the
9 court's order, that the refund was not a matter that
10 was adjudicated by the reviewing court; therefore,
11 it's not law of the case. So it isn't required as a
12 matter of law. What do the equities say?

13 Well, bear in mind that at the point in time
14 when you made the decision to refund, you
15 Commissioners regarded the possibilities -- the
16 surcharge as a legal impossibility. And I think it's
17 for that reason in part that you were willing to go in
18 the direction of a refund.

19 Now the court has told you that that's not
20 the case, and like the commercial on TV, "This changes
21 everything." And it's exemplified by numerous
22 customers who have appeared to tell you some of the
23 practical impacts of the implementation. There are
24 some very serious competing equities, and I won't go
25 into repeating those, but I want you to consider one

7587

1 more point.

2 **CHAIRMAN JOHNSON:** You have about 30
3 seconds.

4 **MR. McGLOTHLIN:** All right. In the Staff's
5 recommendation, at this point they are already looking
6 forward in time and anticipating such things as those
7 customers who can't afford to pay the surcharge, the
8 possibility that the Commission may -- that the
9 utility may move to discontinue service for the
10 refusal or inability to pay a surcharge.

11 And so it's clear to me, and it should be
12 clear to you, that at this point in time to order a
13 refund and surcharge would not be a resolution of this
14 matter, it would be an escalation of the matter; and
15 instead of achieving justice, you're simply creating
16 worse problems.

17 The mayor from Keystone Heights said it well
18 when he says --

19 **CHAIRMAN JOHNSON:** Your time is up.

20 **MR. McGLOTHLIN:** -- cut your losses, because
21 sometimes the best course in order to achieve equity
22 is to avoid worse inequities in the future.

23 Thank you.

24 **MS. FOX:** Susan Fox on behalf of Sugarmill
25 Woods.

7588

1 I believe four of you were here in the fall
2 of 1993 when Southern States Utilities moved to lift
3 the stay, and I believe you remember your promise to
4 the customers of Sugarmill Woods at that time that
5 they would be protected in the event of a reversal.

6 I'd like to remind you, also -- I don't want
7 to dwell on this -- but I would like for you to
8 discount what Southern States Utilities has to say
9 today, and let me read what they said to you when they
10 asked you to reconsider your prior refund order.

11 "Southern takes no position on refunds for
12 customers. The Commission is free to provide refunds
13 for those who overpaid pending appeal and whose
14 efforts secured prospective benefits through the
15 implementation of modified stand-alone rates so long
16 as the Commission draws the revenues for any refunds
17 from those who underpaid during the period of time
18 that the refunds were calculated."

19 That's the position that they've taken all
20 along. Now, you've already ordered a refund. It went
21 up on appeal. SSU raised a point on appeal that said
22 "no refunds, no surcharges". You have an order from
23 the 1st District that disposes of that issue. It says
24 "affirmed in part, reversed in part."

25 The court's opinion says "We reverse that

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1 part of the order -- and I don't want to quote at
2 length -- we reverse that part of the order that --
3 let's see -- the PSC erred in its consideration of GTE
4 with regard to the issue of whether SSU may surcharge
5 the customers who underpaid under the erroneously
6 approved uniform rate."

7 They reversed as to that issue. They said
8 "The PSC in this case has allowed those customers who
9 underpaid for services they received to benefit from
10 its erroneous order. As a legal proposition this will
11 not hold water." That was the proposition that did
12 not hold water.

13 We've cited the cases over and over again.
14 Restitution is required here. We paid money. The
15 customers of Sugarmill Woods paid money that they
16 shouldn't have had to pay. They're entitled to get it
17 back. The refund portion of the order still stands.

18 As to the authority to surcharge, it's in
19 the GTE case. It says that when the money has changed
20 hands erroneously, then a surcharge is appropriate.
21 It's in the Southern States case. I mean, the 1st
22 District remanded --

23 **COMMISSIONER CLARK:** You need to get closer.
24 They can't hear you.

25 **MS. FOX:** Okay. Can you hear?

7590

1 **COMMISSIONER CLARK:** I can. They can't back
2 there.

3 **MS. FOX:** All right. Now, just very briefly
4 on the fairness issue.

5 This case has been extremely painful and
6 expensive for all of us, no less so for the customers
7 of Sugarmill Woods who suffered all the same kind of
8 hardships that were talked about earlier today during
9 the period that they were paying about \$500 a year
10 more than -- than they should have been paying under
11 modified stand-alone rates.

12 We don't think you have any choice but to
13 order the refund here. It's unfortunate that we're in
14 the situation that we're in, and I hope the
15 Legislature comes up with a solution that avoids
16 surcharges, but given the present legal status of the
17 case, I don't see what other choice you have.

18 **CHAIRMAN JOHNSON:** Thank you. Mr. Jacobs?

19 **MR. JACOBS:** Thank you, Madame Chairman.
20 I'm sure everybody can hear me fairly well.

21 I'd like to think that there is a solution
22 that people could go home tonight and feel good about,
23 and I would offer you the following: In your Staff
24 analysis on Page 33 in their conclusion of
25 no refund/no surcharges, they say "In conclusion,

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1 Staff believes that the Commission can reasonably
2 infer that the refund portion of its order has been
3 affirmed by the court and/or that the Southern States
4 decision requires refunds and surcharges to be made,
5 because to do otherwise would result in one group of
6 customers receiving a windfall."

7 Then they go on to say on Page 53 -- and I
8 think that your Staff deserves a lot of credit for
9 having a crystal ball. Myself, when I predict the
10 future, I just do it often. That way I'm successful.

11 But they have, in their wisdom, placed in
12 here on Page 53, they say "Therefore, Staff does not
13 believe that the Commission should nor can, absent
14 statutory vision, utilize funds generated by
15 regulatory assessment fees to refund to those FWSC's
16 customers who overpaid under the uniform rate
17 structure."

18 It seems to me that -- I don't disagree at
19 all with Susan or Mike's remarks about what the law
20 is, and I think your Staff agrees that a refund is an
21 order on the customers; and I guess logically and
22 legally you have to order a surcharge in order to get
23 that done.

24 However, if you're going to do that, why not
25 place that surcharge to begin being paid back so that

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1 a rebate can happen on or about August 1st of 1998,
2 which gives the Legislature plenty of time -- it gives
3 it to past July 1, which is the fiscal year of the
4 state, because if they put in the appropriations bill
5 that you're authorized to expend your trust funds in
6 the appropriations bill, then you have plenty of time
7 to get that put together. They may try to do a
8 general act, and a general act would certainly have
9 plenty of time to be done by August 1st.

10 So I'd submit to you that I think that folks
11 that are here today would rest easier knowing that
12 there is that solution out there.

13 I would also suggest that you might want to
14 place in this order that the Public Service Commission
15 would recommend that the Legislature do this so that
16 we know we have all of your support. And so then,
17 from what I hear today, everybody is in agreement that
18 this ought to be done, and we move forward. And we
19 ought to all work together for a change, instead of
20 just pulling at each other to try to find the
21 solution. That's all I have.

22 **CHAIRMAN JOHNSON:** Thank you. Mr. Twomey?

23 **MR. TWOMEY:** Thank you, Madam Chairman,
24 Commissioners.

25 Let me say first that I think Mr. Jacobs'

7593

1 comments, to the extent that I understand them, if I
2 understand them correctly, are excellent in terms of
3 the timing.

4 Mr. Hanratty says that he finds no statutory
5 authority for the Commission to do surcharges. As
6 suggested by Ms. Fox, he hasn't read the case law.
7 Apparently case law is controlling as well as
8 statutes. The courts interpret the statutes, and
9 that's why we're here.

10 As we discussed before, you're here on
11 remand from a reversal by the 1st District Court of
12 Appeals. It's the Southern States decision.

13 Southern States decision tells you you must
14 do certain things. We all disagree about what it
15 says. Don't take my word for what it says. Listen to
16 what your Staff has to say that it says.

17 They say essentially that if it's law of the
18 case -- if it's not law of the case, that is, on the
19 refund, Southern States, you've got two choices; no
20 refunds/no surcharges, refunds/surcharges.

21 They say if it is law of the case -- and
22 they say this strongly in the recommendation -- if
23 it's law of the case on the refund issue, then you
24 must choose the refund surcharges. That's what they
25 say. I hope they will tell you again.

7594

1 GTE decision speaks to surcharges. You
2 don't need a statute. GTE made you give back customer
3 money to the telephone monopoly company. With
4 interest, by the way.

5 The GTE decision says that it would be
6 inequitable for one side to have a windfall as a
7 result of an erroneous order. We clearly have an
8 erroneous order here. We have a couple of them. The
9 uniform rate order was reversed. The order in
10 Southern States was reversed.

11 Was there a windfall? We know there was a
12 windfall. The \$15 million we're talking about didn't
13 come out of the thin air. SSU has established who
14 will get refunds, who will pay surcharges. People
15 that underpaid got windfalls, and the court recognized
16 that.

17 And the court, as quoted by your Staff,
18 said -- and I think Ms. Fox said it a minute ago --
19 the 1st District said, "Contrary to this principle,
20 the PSC in this case has allowed customers who
21 underpaid for services they received under the uniform
22 rates to benefit from its erroneous order adopting
23 uniform rates. As a legal position, this will not
24 hold water."

25 What they're saying is, is you can't let

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1 those people underpay, especially at the expense of
2 those that overpaid.

3 Southern States is law of the case on the
4 refunds. Your Staff said, at the middle of Page 25 of
5 their excellent recommendation, "It's law of the case.
6 Staff believes the 1st District's statements,
7 specifically the issue on remand as to whether SSU can
8 charge its customers, has limited the Commission's
9 options on remand to the implementation of a
10 surcharge, a concept used in GTE, which the
11 1st District expressly has stated is applicable in
12 this case."

13 They go on -- this is the most important
14 part -- they say "Staff believes that this language
15 constitutes an implicit affirmance by the court of the
16 Commission's decision to require refunds. In fact,
17 the only portion of the order that the court
18 criticized and found to be in error was the
19 Commission's failure to require surcharges, not the
20 decision to require refunds."

21 Your Staff says the court opinion says the
22 only error was not to require surcharges, and not the
23 part that says you had to do refunds.

24 "Therefore, Staff believes that the refund
25 portion of the Commission's order may have been

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1 decided by the court and, accordingly, has become law
2 of the case.

3 That's your Staff speaking. It's not me. I
4 happen to agree with what they've said. They have
5 recommended to you that it's law of the case. They
6 say at the outset of their excellent recommendation
7 that if it's found to be law of the case, you can't do
8 the refund; no refund/no surcharge. You don't have a
9 choice.

10 They say if it's law of the case, you're
11 bound by the court's determination. You can't go back
12 and make other determinations on functional
13 relatedness and those type things. If it's law of the
14 case, which they say it is, and I agree, Ms. Fox and
15 Mr. Jacobs, I think, then you can only go with the
16 refund and surcharges.

17 Thank you.

18 **CHAIRMAN JOHNSON:** Thank you. I'm sorry,
19 Mr. Marks. I forgot you were sitting over there.

20 **MR. MARKS:** I'm stuck over here in the
21 corner.

22 **CHAIRMAN JOHNSON:** Sorry about that.

23 **MR. MARKS:** Thank you very much, Madam
24 Chairman.

25 You know, two words come to mind when I look

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1 at the Staff's recommendation and I look at the
2 matters associated with that case, and those two words
3 are equity and fairness.

4 You've heard lot of legal arguments so far
5 this afternoon, or this evening. I think there's
6 another doctrine that's worthy of your consideration,
7 and that doctrine in the law is equity and fairness.
8 I realize that you're not a court of equity, but I
9 also realize that on many occasions you consider
10 equitable positions.

11 And as a matter of fact, in the Staff's
12 recommendation on Page 40 it states quite clearly
13 this: "What is legally correct may be impossible to
14 implement in any reasonable and equitable manner."
15 early on, Commissioner Garcia espoused essentially the
16 same comment.

17 No matter what you do today -- and there are
18 going to be some winners and there are going to be
19 some losers, and I don't know how you're going to get
20 around that -- but I would submit to you that it's
21 time to stop the bleeding, and you've been bleeding
22 for a long time, and the customers of these utilities
23 have been bleeding for a long time, and it's time to
24 move forward. And I think equity is the key.

25 A former colleague of mine used to say it in 7598

1 another way. He used to say "What's always legal
2 ain't always right," and that's the case here.

3 And again, as I said, in the Staff's
4 recommendation they're saying the same thing. And
5 it's an excellent, an outstanding Staff
6 recommendation, although it's not the only one that
7 I've seen in my 20-odd years being associated with
8 this Commission. But it's time to get to reason.
9 It's time to think about what we have here and what
10 these circumstances are.

11 And in the comments by Mr. McGlothlin on
12 behalf of his people, I had to agree with him, the
13 people that he represents; and there were a number --
14 and his arguments primarily dealt with equity and
15 what's fair and what's equitable under these
16 circumstances, and I would urge you to consider that.

17 Now, in addition to that, if you remember
18 earlier the mayor from Keystone Heights, Mr. Archie
19 Greene, spoke. And I think Mr. Archie Greene said the
20 same thing. In essence he says "It's time to cut your
21 losses." And it is time to cut the losses.

22 And it's time to act again, as I said
23 before, in an equitable manner; and we believe, and I
24 believe on behalf of Charlotte County, that will
25 require you to impose no refund or no surcharge, and I

1 think you legally can do that.

2 I don't think that the cases that have been
3 cited would preclude you from reaching that
4 conclusion, and I would urge you on behalf of the
5 utility, I would urge you on behalf of the customers
6 of this utility that that would be the appropriate
7 solution under these circumstances.

8 Thank you very much. (Applause)

9 **CHAIRMAN JOHNSON:** There may be questions.

10 **COMMISSIONER CLARK:** I would like to ask
11 Staff something and also inquire of Commissioner
12 Deason. I think one of the things that keeps -- I
13 think we have to go forward and make some decisions,
14 but leave the option of the Legislature addressing the
15 funding of refunds a viable option.

16 And I am concerned that if we make a
17 decision that if there is going to be surcharges,
18 we're not going to order refunds, if that's our final
19 decision, I'm concerned it will go up to the court and
20 the court will say, you're wrong again, and you've got
21 to do both; and we're that much further down the line.

22 And what I want to suggest is that we take
23 Staff's recommendation with respect to an evidentiary
24 hearing on how we would implement a refund and a
25 surcharge so that it is clear what the impact would

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1 be, so that both the Legislature and the court,
2 hopefully, will get a clear picture of what this
3 means. Because I have frankly been frustrated with
4 what I think is the court's not looking at what these
5 rates mean.

6 Even these stand-alone rates, as some people
7 have indicated, create enormous economic pressure on
8 them, and that's exactly why I think the Staff
9 recommended uniform rates besides the other arguments
10 that were supportive of that.

11 And I appreciate there's a debate on uniform
12 rates, but I want you all to know that we pursued that
13 because we thought it was in the best interests of all
14 customers. And, yes, we made a mistake, but I want to
15 assure you that we were thinking of you all who have
16 to pay high rates. (Audience comments.)

17 I'm telling you what we did. I appreciate
18 the fact we're here now. What I want to suggest is
19 that we go ahead and hold that evidentiary hearing; we
20 also make -- allow the parties to address -- that
21 there be three issues; basically Issues 3, 4 and 5;
22 but that we focus most of our attention on how to
23 implement the refund and the -- refund and surcharge
24 and the ramifications of that, and that one of the
25 options we would pursue in a final order that I hope

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1 would be issued -- I hope we would hold that
2 evidentiary hearing in January, issue that order,
3 hopefully in February, and then the order would take
4 the view that -- or it would make a decision on
5 issuing refunds and surcharges.

6 Let me just -- I'm thinking on my feet. But
7 order refunds if it does not require a surcharge. And
8 in there mention the fact that the Legislature has
9 suggested there may be an opportunity to use other
10 funds to make that.

11 Then make a decision on whether or not -- if
12 it is not so funded by the Legislature, would our
13 decision be not to order the refunds because it
14 requires a surcharge. And then say "If the court
15 tells us that we cannot not order a refund, here's how
16 we think the refund and surcharge have to be done."
17 So the whole thing is before the Legislature and the
18 whole thing is before the courts, and we don't extend
19 this anymore. (Audience comments.)

20 We can't continue to leave this in abeyance,
21 and that's why I didn't think the continuance. But I
22 want to leave open the option of having a legislative
23 solution, and that's how I think we should proceed.

24 **CHAIRMAN JOHNSON:** Let me make --

25 **COMMISSIONER CLARK:** That order would be

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1 final --

2 **COMMISSIONER GARCIA:** Susan, let's --

3 **COMMISSIONER CLARK:** Let me say that order
4 would be final, but it would not be effective until
5 after the legislative session, so that by being final,
6 it can be taken up on appeal immediately and,
7 hopefully, the courts will be prompted to act as
8 expeditiously as possible.

9 One thing that has been difficult is that we
10 think we know the law. We thought we knew the law on
11 intervention, we thought we knew the law on rate
12 structure, and we've been frankly surprised by what
13 they have said the law is.

14 **MS. JABER:** I need to make sure that I
15 understand.

16 **CHAIRMAN JOHNSON:** You're going to have to
17 speak directly into the microphone, Ms. Jaber.

18 **MS. JABER:** Commissioner Clark, I need to
19 make sure that I understand what you're thinking
20 about.

21 Basically you're saying, "Go to hearing as
22 we recommend, but not limit the issues." And you see
23 three main issues; the first being can refunds be
24 ordered without a surcharge because --

25 **COMMISSIONER CLARK:** The first one --

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1 **MS. JABER:** -- there is a legislative
2 option.

3 **COMMISSIONER CLARK:** Can we say that we are
4 not going to order refunds if it requires a surcharge?
5 That leaves open two options. The Legislature decides
6 to fund the refund. If it decides not to, then
7 there's no refund; and if the court says it doesn't
8 matter what the Legislature does -- (Audience
9 comments.)

10 I'm just trying to expedite it and get
11 information from the court, and if the --

12 **CHAIRMAN JOHNSON:** Ladies and gentlemen --
13 hold on, Susan. Ladies and gentlemen, you're going to
14 have to contain yourself and not make any statements.
15 We have a court reporter who is trying to record these
16 statements so that this record can be used for
17 whichever party decides to take this up on appeal. So
18 if you could please just sit and listen to the
19 comments and the statements and the dialogue that's
20 occurring, we're all trying to reach an appropriate
21 resolution to help protect everyone here in the
22 fairest manner possible, but we do need the
23 opportunity to have that dialogue.

24 So if you could just -- I know this is an
25 emotional issue. It's emotional for all us, but if

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1 you could, just try to restrain yourself and allow us
2 to deliberate.

3 **COMMISSIONER CLARK:** So what I'm suggesting
4 is if the court says it doesn't matter what the
5 Legislature does, or if it says the law of the case is
6 that you will order refunds, and that we can't order
7 refunds without surcharges, they will know how we
8 intend to implement it; and they could also rule on
9 that.

10 Here's what I'm concerned about; is that we
11 do something and the court says, no, you're wrong, and
12 we have to do it again; and it is -- extends the
13 process and it extends the uncertainty and it extends
14 interest accruing.

15 **MS. JABER:** It sounds, though, to me that
16 what you may be attempting to do is to recommend
17 something in the version of a final order and have
18 that appealed and have the court come back and tell
19 you whether what you're contemplating is going to
20 work --

21 **COMMISSIONER CLARK:** No, no, no. What we
22 would say is "If you tell us in fact the law of the
23 case was you have to do a refund and you have to do a
24 surcharge, here's how we would implement it."

25 **MS. JABER:** And you would --

1 **COMMISSIONER CLARK:** You know, we may decide
2 that that's appropriate, but Commissioner Deason
3 seems -- if I understood his comments, he suggested
4 the notion of -- that we would not order a refund if
5 it required a surcharge.

6 Now, if the Legislature steps in and says
7 it's going to be funded otherwise and it doesn't
8 require a surcharge, "That answers the question. But
9 if the court says, that's not an option for you, no
10 refund," then they have before them how we would do
11 the refund and surcharge. One of the advantages of
12 that is the court to see exactly what the impact is.

13 **MS. JABER:** So you would have alternatives
14 built into your order, basically?

15 **COMMISSIONER CLARK:** Yeah, and it would be a
16 final order; that when the court acted, it would --
17 there would be no further steps to take.

18 **MS. JABER:** "If, court, you say we're wrong,
19 here's what we'll do"? And that would be in the form
20 of an order --

21 **COMMISSIONER DEASON:** It seems to me we're
22 answering questions that aren't legitimately before us
23 if we do that. Now, I share Commissioner Clark's
24 concern that the court be fully informed of all of the
25 ramifications and complexities and perhaps inequities

1 that could result from any type of a refund, because
2 it's just impossible to do it.

3 Sometimes it's easy to sit on the bench and
4 make a decision; do it this way, it sounds fair and
5 equitable. And then when you try to implement it, you
6 think of all kinds of problems and uncertainties and
7 concerns and inequities that make it very, very
8 difficult from a practical standpoint to do what
9 sounds fair and, quote, unquote, legal.

10 But it seems to me that we can include in
11 our order all of the complexities that our Staff has
12 delineated for us in their very complete
13 recommendation here.

14 A number of problems arise in trying to make
15 any type of a refund. That makes it difficult,
16 time-consuming, and also questions of equity arise in
17 any type of a refund. And I think it's very critical
18 that -- I tend to agree with the arguments of
19 Mr. Marks.

20 I think we've got to look at GTE, what it
21 stands for, and not read any more into it than is
22 absolutely necessary. It seems to me that the
23 paramount thing GTE is saying to this Commission is
24 "be fair and equitable," and it doesn't dictate to us
25 how we have to be fair and equitable.

1 And I think it's reading too much in the
2 1st DCA opinion to say that we have to do refunds, we
3 have to do surcharges, because to me it is more
4 inequitable to surcharge these customers who had no
5 ability to change their consumption, or even choose to
6 remain a customer of Southern States at the time, and
7 now to go back to them and tell them that they're
8 obligated to pay back an amount that they had no
9 control over, and then on top of that, perhaps to make
10 up the difference for those customers who have left
11 the system.

12 That is a double inequity, and there's no
13 way around that inequity, and that is what GTE is
14 saying to us, "be fair, be equitable".

15 Now, my heart goes out to those persons that
16 have overpaid. I have from day one advocated, first
17 of all, against uniform rates. But that's all water
18 under the bridge now. And I didn't argue against
19 uniform rates because I thought they were illegal, I
20 argued against uniform rates because I thought they
21 were bad public policy.

22 The court in essence agreed, but disagreed.
23 They said they were illegal. I still think this
24 Commission had a valid order that was legal. Those
25 were the rates that were in effect. I thought that a

1 better rate structure could have been implemented, but
2 I didn't ever say that the uniform rates were illegal.

3 Now, I think in the best of all situations
4 there should be a refund, but if the 1st DCA says the
5 only way we can do a refund is with a surcharge, I
6 think that is trying to cure one inequity with a much
7 worse inequity to the surcharge customers. We're in a
8 no win situation. I think that is the only way we can
9 treat this. (Applause)

10 Now, I think it is very important that if
11 there is to be some type of a legislative fix, that
12 that be given full opportunity to be proposed,
13 discussed and perhaps come to fruition, and if we can
14 do in any way to provide information and expedite
15 that, I'm not opposed to doing that.

16 I think there are some very real problems
17 when you come to the amount of the money. I'm not so
18 sure there's that amount of money in our regulatory
19 trust fund to start with, and I guess there could be
20 some arguments about its constitutionality and things
21 like that. I'm not trying to throw cold water on it.
22 There's going to be a very serious debate in the
23 Legislature about this, but I don't want to do
24 anything that would preclude that opportunity.

25 But I think this Commission -- I also agree

1 with Mr. Marks that this Commission has an obligation
2 to make a decision and that we need to make it today,
3 and if anything that we can do to shed light on all
4 the complexities in our order and share that with the
5 court so that perhaps before they make a decision,
6 they understand some of the things that we have to
7 deal with, I say by all means include it --

8 **COMMISSIONER GARCIA:** So what you're
9 suggesting is that we deny Staff?

10 **COMMISSIONER DEASON:** My suggestion is we
11 deny our Staff. It --

12 **COMMISSIONER GARCIA:** We deny Staff, and we
13 do no surcharge/no refund.

14 **COMMISSIONER DEASON:** No surcharge/no
15 refund, but we leave the door open.

16 (Applause)

17 **COMMISSIONER GARCIA:** Let me just --

18 (Applause)

19 **COMMISSIONER GARCIA:** Let me --

20 **COMMISSIONER CLARK:** Commissioner Garcia,
21 let Commissioner Deason finish his thought on leaving
22 the door open.

23 **COMMISSIONER DEASON:** I think we need to
24 leave the door open. I think that we need to make the
25 decision. Under our interpretation of what is fair

1 and equitable, there can be no surcharges. That to me
2 is I don't see how you can call it anything else but
3 retroactive ratemaking.

4 If there is a way that refunds can be funded
5 by some means other than surcharging the customers,
6 we're open to that; and the only way I know to do that
7 is through a legislative action. I think everyone
8 here has expressed, if not outright support, at least
9 the hope that perhaps that is a solution.

10 I think I have a hope that that's the
11 solution, and if it can come to fruition, I would say
12 by all means, refund those moneys, because I think
13 those folks have overpaid. But I cannot in good
14 faith, and in trying to reach a fair and equitable
15 judgment here, say that those refunds while they
16 should be made, have to be funded by surcharges.
17 That, to me, is a greater inequity.

18 **COMMISSIONER GARCIA:** Let me just say that
19 if that's a motion, I'll second it; and I'll go
20 further. I think what the court has asked us to do is
21 impossible. They can ask us to turn water into wine
22 all they want. We just can't do it here.

23 The issue before us -- and -- is where we
24 get in money from, and I just don't see any way to do
25 it; and, further, I don't see any way to do it

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1 equitably.

2 It is unjust and unfair for us to ask those
3 people who paid a lower rate, not knowing it, to come
4 up with more money for that service, and on top of
5 that, to pay for those that are not in the system
6 because they've left.

7 You add to that the fact that I think it is,
8 again, impossible for the company, if we put this
9 burden on the company, to fine these people, and to
10 somehow encumber those who aren't even on the system,
11 and it becomes that much more ludicrous.

12 I know that this Commission -- and let me
13 speak for myself. I know we made an error here, or at
14 least the court has told us we made an error. But to
15 try to do refunds and surcharges would be a far worse
16 error, because it's just not -- it doesn't meet what
17 the court was talking about, which is fairness and
18 equity in these cases.

19 So with that, I have a few questions to ask
20 some of the parties here, Madam Chairman, but I'll
21 second that motion.

22 **COMMISSIONER DEASON:** One other thought
23 before we go on -- and we can have as much discussion
24 as we like -- but I think one of the things that we're
25 going to have to concentrate on if we go forward with

1 this decision is try to somehow -- and we've tried it
2 before when it was not successful -- but try to
3 distinguish GTE from what is happening here presently.

4 And to me it is very important that what the
5 Commission did in GTE was that there was a one-time
6 surcharge on all customers, not one segment of the
7 customer group versus another, generally all customers
8 who subscribed to local service, and it was not a
9 usage based surcharge.

10 The customers that were on the system paid
11 the surcharge. It was a one-time thing, and it wasn't
12 in any way related to number of toll calls they made
13 or anything; so that it was that, a one-time flat
14 charge on every customer.

15 If we do a surcharge here, one of the gross
16 inequities is applying it to customers who cannot now
17 go back and change their consumption. If they had
18 known what those rates would have been back then,
19 perhaps their consumption would have changed. Perhaps
20 they would have chosen not to even be a customer of
21 Southern States if they knew what the rates were. But
22 now we're precluding that option from them, and how
23 you cannot call that retroactive ratemaking is beyond
24 me.

25 But I want to distinguish that what we did

1 in GTE was no usage based surcharge whatsoever; what's
2 being proposed here is a usage based surcharge.

3 **COMMISSIONER GARCIA:** And I also think that
4 in GTE it was easier to do equity because the amounts
5 were smaller, and you were only dealing with one
6 system and one base of customer. At least on that
7 ground, this is nowhere near that.

8 **COMMISSIONER DEASON:** And I think it's
9 important that GTE was just to the question of equity
10 between customers and --

11 **COMMISSIONER GARCIA:** Exactly.

12 **COMMISSIONER DEASON:** -- not a question of
13 equity between one customer group versus another
14 customer group.

15 **CHAIRMAN JOHNSON:** There --

16 **COMMISSIONER GARCIA:** Mike, I wanted to ask
17 you some questions. Mike, you -- I want to hear from
18 you what you think in terms of equity and how we do
19 equity.

20 I don't know how we do it, and perhaps you
21 know a way to do it, but I just can't see it. And I
22 know Staff is trained to do it, and I think that it
23 was a good recommendation on what they had before
24 them; but if you look at the broader picture, I just
25 don't see how we can meet the refund with surcharges

1 while I want to keep that option open of a legislative
2 fix.

3 **MR. TWOMEY:** Commissioner, first I would ask
4 you to seriously consider giving your Staff the
5 courtesy of explaining their explanation before you
6 vote on this. I would implore you to do that.

7 Now, you are not a court of equity. I don't
8 care what anybody else at these tables says, you are
9 not a court of equity. This is not a determination of
10 first impression. You are here on a remand.

11 Now, all I can say, Commissioner Garcia, is
12 as your Staff said, the court said they seemed to
13 think I know or believe that the court said that --
14 two things; you have to do two things. You have to
15 make refunds and you have to make surcharges.

16 They didn't ask you to weigh any equities
17 involved in it. I don't care what that surplusage
18 language is. It's dicta.

19 Now, it's not just that opinion,
20 Commissioner. GTE -- and GTE didn't have any
21 problems. I don't -- there's differences. GTE didn't
22 have any problem whatsoever. The court made you take
23 customer money and give it to the utility, made you
24 take more than they, on an individual basis, received
25 the benefit of and give back more plus interest on

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1 top.

2 So it's not a question of equity. You have
3 to look closely at what the court said that you had to
4 do to follow those directions. And don't -- again,
5 don't take my word for it. Please listen to what your
6 Staff has to say in this. It is an excellent
7 recommendation.

8 Now, as far as the mechanics and the
9 practicalities of this, SSU gave you that great big
10 box that has -- you made them do it. They did it
11 wrong the first time. I didn't -- I shouldn't say
12 wrong. They didn't give you what you wanted the first
13 time. They gave you back 5,000 sheets of paper.

14 And what you decided a long time ago, I
15 think, was is that if there was going to be refunds
16 and there were going to be surcharges, it wouldn't be
17 on an average basis, it would be based upon the
18 consumption of each person during the 28 months
19 involved; and they went and calculated that.

20 I don't know if it's right. I haven't
21 audited it. It's beyond my abilities to do that. But
22 they used their computers and they calculated a bill,
23 and they said, somebody got paid this too much and
24 somebody paid that.

25 Now, in terms of the mechanics of it, they

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1 implement it; order surcharges over whatever time
2 period you would decide they pay it back; pay back
3 refunds over whatever period you decide. So I hope
4 that answers your question.

5 I understand the difficulty that you all are
6 facing in trying to deal with this, because there are
7 a lot of people out here who genuinely -- I don't
8 doubt anybody that's testified --

9 **COMMISSIONER GARCIA:** But, Mike, let's say
10 none of these people here -- let's say it's just you
11 and I. And I want to you tell me how I figure out,
12 how I can in some rational way figure out how to get
13 these people's money back to them, taking it from this
14 group in the changing reality that that is a consumer
15 base.

16 Let's say we give each of the parties two
17 years to pay this back. We surcharge one group and we
18 credit one group for the same amount until eventually
19 we reach that balance. What do we do when people move
20 away? What do we do when people die? What do we do
21 when people have disputes? I mean, all these things
22 are going to be happening.

23 And some of these are such huge amounts,
24 like the church where you can actually show up -- and
25 I'm sure that you can attach something -- but when

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1 you're talking about a few hundred dollars, I mean,
2 the costs involved in getting that money back from
3 that client, what do I do with a client who simply
4 says, I'm no longer at this address, and puts the bill
5 in his wife's name? I just don't know how I can do
6 that, and that's what I'm asking, for some guidance
7 because --

8 **MR. TWOMEY:** Yes, sir. I --

9 **COMMISSIONER GARCIA:** -- you've seen that
10 problem.

11 **MR. TWOMEY:** I understand. And my response
12 to that is, is that that's the area I think your Staff
13 suggested that you needed to have the evidentiary
14 hearing after you made your decision on this; and
15 that's where you decide these things.

16 I think they're all capable of being
17 resolved. If you're asking me what kind of answer I
18 can give you to make you feel better about not taking
19 money away from these people by depriving my clients
20 of it, keep in mind out of every dollar that these
21 folks -- I'm saying the ones that were undercharged
22 under the rate structure -- every dollar, every penny
23 that there was a person that was undercharged, there
24 was somebody that was overcharged.

25 And I think it was incorrect for you all, if

1 you're assuming this, to assume that the people that
2 were forced to overpay over the course of 28 months
3 were any less financially disadvantaged or
4 economically disadvantaged than the ones that have to
5 pay it back. (Applause)

6 And what's your decision that it appears
7 you're on the verge of making is saying that what's
8 done is done, and the people that were overcharged,
9 they're out of luck. So I can't give you an easy
10 solution, because it is clear there is not an easy
11 solution to this problem. I appreciate your asking.

12 **CHAIRMAN JOHNSON:** Mr. Twomey, listening to
13 your comments and to Mr. Marks and to the other
14 Commissioners here, in a lot of ways you are correct.

15 When we talk about the GTE opinion, and
16 perhaps even the Southern States opinion, and we talk
17 about equity and fairness, certainly the court said we
18 had to look at the ratepayers and the company and make
19 sure that what we did was equitable and fair.

20 But as it relates to the customers,
21 certainly I agree that it is not fair to make
22 customers who perhaps paid less than they will be
23 required to pay under the new regulatory regime, it's
24 not fair to go back and say, oh, even though you
25 didn't know how much your water costs, and it cost

1 more than you thought, you've got to give us that
2 money.

3 But on the other hand it's not fair to make
4 the customers who thought they were paying too much,
5 who filed all of these appeals, who said from the
6 beginning, no, we shouldn't have to pay this, but they
7 were forced to pay it or their water would have been
8 turned off. So the fair -- it is a very, very, very
9 difficult predicament to be in, because there is no
10 way for this Commission to come up with a decision
11 that is equitable and fair to everyone.

12 So I'm sympathetic to your arguments about
13 what do these people do that overpaid, and we've been
14 trying to get that rectified. But we've got to do
15 something. You know, you send one order up that said
16 require refunds but don't surcharge, and they sent
17 that back to us. So what are our other solutions?

18 **MR. TWOMEY:** Commissioner, I implore you,
19 listen to your Staff explain their -- give them a
20 chance to explain their recommendation.

21 **MR. MCGLOTHLIN:** Excuse me. Chairman
22 Johnson and Commissioner Garcia, before you all go
23 further down the road, could I --

24 **CHAIRMAN JOHNSON:** Yeah. Hold on a second.
25 This gentleman, Mr. Jacobs, he raised his hand a long

1 time ago, and I'm going to allow him to speak first,
2 and I did -- I acknowledged him. And I'll allow you
3 to speak.

4 **MR. JACOBS:** Thank you very much, Madam
5 Chairman. I would submit to you I think there is a
6 way to solve this problem. And I stated earlier, you
7 know, I'm not very good at predicting the courts, but
8 I'm a fair predictor of the Legislature. Fair; fair
9 as anybody can be. I've been involved in both
10 processes over 30 years.

11 And I would submit to you that today you had
12 a senator and a representative here who said "I know
13 where the money is. The money is in your coffers."
14 Y'all didn't object to them coming after your money in
15 your coffers. And they said, "We'll get that
16 authority for you to spend that money and then you can
17 do equity, you can be fair, and you can pay back to
18 those folks who have been overcharged."

19 Both those representatives of the
20 Legislature said they thought that folks who overpaid
21 ought to be rebated. They just said that the people
22 who are going to be surcharged ought not to be
23 surcharged. And they offered you a solution. It's a
24 win/win for everybody.

25 I would submit to you that if you vote to

1 have no rebate -- and certainly incumbent with that is
2 no surcharge -- that that's going to be in the courts;
3 it's going to be appealed. We're going to be dragging
4 it out again, and then it's up to us who are
5 representing the folks that ought to be rebated to go
6 out and get busloads of folks and drive them all over
7 the place and show up and get everybody aggravated and
8 upset and we go on with another year or so. The
9 millennium is close upon us. I'd like to see the end
10 of this prior to that date.

11 And I submit to you that you have the money,
12 the money is there. You didn't object to them talking
13 about taking your money.

14 **COMMISSIONER DEASON:** Mr. Jacobs, that's not
15 our money.

16 **MR. JACOBS:** Okay. I mean --

17 **COMMISSIONER DEASON:** It's regulatory trust
18 fund --

19 **MR. JACOBS:** Who's --

20 **COMMISSIONER DEASON:** We have no control
21 whatsoever --

22 **MR. JACOBS:** Who's everyone --

23 **COMMISSIONER DEASON:** -- that fund unless
24 the Legislature appropriates it --

25 **MR. JACOBS:** I know you don't have

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1 control --

2 (Simultaneous conversation.)

3 **MR. JACOBS:** I know you don't have control.
4 If I misstated that, I'm sorry. Some people call it a
5 slush fund. I know it's not a slush fund. So you
6 didn't object to that, so I didn't think you'd object
7 to this. (Laughter)

8 But I would submit to you --

9 **COMMISSIONER DEASON:** I asked Mr. Ward where
10 our slush fund was. He assured me that there's no
11 such --

12 **MR. JACOBS:** I was going to say I hadn't
13 seen a whole lot of slush around here, so I -- but I
14 would submit to you that there is a solution out
15 there, and if you take what I consider to be
16 precipitous acts, and you vote and then it's again a
17 confrontation and we go forward, to me the idea of
18 waiting a couple months, a few months -- and I
19 represent folks who are supposed to get money back,
20 and if we don't mind waiting to see if the Legislature
21 can't solve this problem with your cooperation, with
22 our cooperation, the utility company is not opposed.
23 I don't know anybody who is opposed to that at all all
24 day long.

25 And so I submit to you, why raise another

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1 issue which has to be confronted in the courts for
2 more delay, more cause to be concerned by everybody
3 and the machinations of all kinds of folks and the
4 anguish over it, why not just let's just wait through
5 the process and see if the Legislature won't fund this
6 thing? I believe they will.

7 I think if you took the energy that I've
8 seen in this room today and you put it behind that
9 issue before the Legislature, it's going to pass. And
10 I'm a guy that's supposed to receive money.

11 So I would submit to you that I think that's
12 an equitable way to move. Everybody here can go home
13 and enjoy Christmas, not worry about it. But if you
14 make a decision tonight that's going to cause one side
15 or the other to appeal you, you know, you haven't
16 served anybody, and that's -- I firmly believe that.

17 I think you have been given an opportunity
18 here today to solve this problem in an equitable and a
19 fair way and so it has an end. And there's a certain
20 equality that this project finally coming to some
21 conclusion --

22 **COMMISSIONER GARCIA:** Let me just --

23 **COMMISSIONER DEASON:** There's two thoughts.
24 First of all, we're under a remand from the court. I
25 think we have an obligation to affirmatively go

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1 forward. The second thing is I don't want to give
2 false hope out there that there's going to be a
3 legislative fix to this thing and solve everybody's
4 problems.

5 If there is a legislative solution, great,
6 but I don't want this Commission's decision to give
7 false hope to customers that they're going to get a
8 refund via legislative action.

9 **MR. JACOBS:** May I respond?

10 **CHAIRMAN JOHNSON:** Yes.

11 **MR. JACOBS:** I submit to you, Commissioner
12 Deason -- and I want you to know I agreed with
13 everything you said about all these processes except
14 right now -- and I submit to you that you're giving
15 them false hope when you vote tonight to say
16 no refund/no surcharge, because that's going to be
17 appealed and you don't know what the court is going to
18 do.

19 I would also submit to you that the court
20 has not said, do this in six months, do this in eight
21 months, or do it in ten months.

22 **COMMISSIONER GARCIA:** So what would you
23 suggest we do, Mr. Jacobs?

24 **MR. JACOBS:** I would suggest that you defer
25 this matter until after the Legislature meets --

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1 (Audience comments.)

2 MR. JACOBS: -- that the pressure is on the
3 Legislature to solve the problem.

4 CHAIRMAN JOHNSON: Hold on, Mr. Jacobs.

5 MR. JACOBS: In that way -- and again --

6 CHAIRMAN JOHNSON: Ladies and gentlemen in
7 the audience, we cannot hear his comments, and we need
8 to do that as a part our deliberative process. If you
9 could hold down the noise.

10 Mr. Jabobs?

11 MR. JACOBS: I'm not here to ride the wave
12 of popularity up and down. I just would submit to you
13 that there are both sides of this issue. There are
14 folks who have paid overly over 28 and a-third months.
15 They deserve to have the money returned. You agree
16 with that. The senator agreed with that and the
17 representative agreed with that. I don't think
18 anybody in this room would disagree with that.

19 All right. How do you solve that problem?
20 Well, I submit to you the way you solve it is that you
21 have this -- excuse me -- there's a trust fund out
22 there that the Legislature has to give you authority
23 to spend, so let them give you that authority; and I
24 submit to you I think the chances are very, very
25 excellent that that will be done.

1 I think there also -- I can almost guarantee
2 you if you vote tonight -- and I'm not -- that's not a
3 threat on anybody's part. There's just lawyers out
4 here -- but if you vote tonight no rebate, you know
5 that's going to be tied up in the courts, and you know
6 we're going to be back here at some further juncture.
7 And I think our chances of winning are better than the
8 other side because we have some real good indicia from
9 the court as to how they would rule.

10 So I think the best path for everybody to
11 have security that this is going to be done, and one
12 that's within their control, one that's in the control
13 of the people in this room tonight, is to have your
14 elected representatives pass this measure in the
15 Legislature. And they have a lot more control over
16 that than they do over the 1st District Court of
17 Appeals, and their best forum for their resolution and
18 our resolution is in the Legislature, not in the
19 1st DCA.

20 And so I would submit to you that if we move
21 forward tonight to defer this matter beyond the
22 legislative session, I think you have an opportunity
23 for a win/win, and if we would utilize the energy the
24 company had committed, that they would support that.

25 The other lawyers in this table have

1 committed that they would support that rebate coming
2 from the Legislature's authority to spend that money.
3 I would submit to you we're all better served, we have
4 an end in sight and it's over, and there is control by
5 the people to see that that does get done; and I offer
6 that to you as, I think, a solution for everybody.

7 **CHAIRMAN JOHNSON:** Thank you.

8 **UNIDENTIFIED SPEAKER:** Madam Chair?

9 **CHAIRMAN JOHNSON:** One moment.

10 Mr. McGlothlin is next.

11 **MR. MCGLOTHLIN:** This is not in response to
12 the last comments, but in response to the dialogue
13 between Commissioner Garcia and Mr. Twomey. And so
14 that you have the full picture of the issue of law of
15 the case, including your Staff's view of law of the
16 case -- and I'm certain they will speak for
17 themselves -- but there was the suggestion that goes
18 beyond the assertion that you have no discretion,
19 which has always been Mr. Twomey's argument.

20 His suggestion now is that even the Staff
21 sees this as a hard and fast situation. I'm reading
22 from Page 27 of the Staff recommendation. "However,
23 consistent with the positions of Keystone-Marion,
24 Derouin et al and FWSC, it can reasonably be argued
25 that since the refund issue was a material issue

1 before the 1st District, the court would not impliedly
2 affirm by silence such a core issue. If the court
3 intended to affirm the refund portion of the
4 Commission's order, it could have expressly done so.
5 Further, courts do not always reach all issues
6 presented to them, answer only those questions that
7 need to be answered to dispose of a matter. Thus, a
8 good faith argument can be made that the Commission
9 should review not only the issue of surcharge, but the
10 issue of refund also."

11 Commissioners, my view is that the stronger
12 legal analysis is that the 1st District Court did not
13 give you a decision that you have to require refunds.
14 And that being the case, Commissioners, you needn't
15 feel badly before about the fact that you're wrestling
16 with fairness and equity, because if there is no legal
17 requirement that a refund be made, then the whole case
18 is what is fair and what is equitable, and your focus
19 is where it should be.

20 **CHAIRMAN JOHNSON:** Thank you. Mr. Marks?

21 **MR. MARKS:** Thank you, Madam Chair.

22 Mr. Twomey indicated that this is not a court of
23 equity. I think that's correct, but that does not
24 preclude you from imposing an equitable solution.
25 This Commission has done that on many, many occasions

1 in the past.

2 I want to comment also on Mr. Jacob's
3 comments related to the legislative solution. I know
4 he represented that all the attorneys at this table --
5 and I'm not at that table right there -- would not
6 disagree with that legislative solution. But I have
7 not conferred with my client on that. So I cannot
8 stand here or sit here this afternoon and tell you
9 that I would agree with that legislative solution.

10 And I'm not sure whether or not that
11 legislative solution would be appropriate in the first
12 place, because as I understand it, obtaining those
13 funds from the regulatory trust fund will require all
14 of the ratepayers in the state of Florida to fund that
15 surcharge to fund those refunds. And I'm not so sure
16 if there's an equitable solution for all other
17 ratepayers to do that, to be very honest with you. It
18 may be, and it may be that the Legislature can do
19 that.

20 Now, as far as the courts are concerned, I
21 think that if this matter is approached in an
22 appropriate manner, as we have suggested here, and
23 that there not be any refunds or a surcharge, I'm
24 inclined to think the courts can resolve that issue
25 and take a very, very close look at it. And I think

1 it would stop, as I indicated earlier, stop the
2 bleeding in this matter and we can all move forward.
3 Thank you.

4 **CHAIRMAN JOHNSON:** Mr. Marks, I have a
5 question for you. Understanding your argument and
6 your position as it relates to equity, how is it
7 equitable for us to not provide those customers with
8 the refunds?

9 There are two issues that we need to
10 resolve; one, the law of the case and how it should be
11 applied. I've heard the arguments as to why it's not
12 really applicable here. But we also have the
13 standards of fairness and equity. How will we be able
14 to argue -- because I'm certain if we don't allow the
15 refunds, this will go up -- how do we argue that this
16 is consistent with GTE, that this is consistent with
17 the DCA opinion?

18 **MR. MARKS:** First of all, I guess we all can
19 be convinced if you say no surcharges and no refunds,
20 that it will be appealed. I'm not absolutely
21 convinced of that. I think that if the parties take a
22 look at that, maybe they will see the wisdom in that
23 kind of a decision in not taking this up on appeal.

24 But, nevertheless, having said that and
25 realizing that it might draw a few snickers through

1 this crowd, let me address the second part of that. I
2 think you have to look at --

3 **COMMISSIONER GARCIA:** Just in case you don't
4 know, we're in appeal now, if I'm not mistaken, with
5 the modified stand-alone rates, correct? We're before
6 the court. So we could get even that --

7 **MR. MARKS:** That's --

8 **COMMISSIONER GARCIA:** -- as we went forward
9 with a refund -- if we went forward with a refund
10 surcharge, then we'd have to look at what outcome the
11 court deciding against this Commission on that would
12 have and how that would play out with what we have.

13 **MR. MARKS:** Madam Chair, equity, as I
14 understand it, generally will impose some inequitable
15 solutions on some parties, and I don't think you can
16 get around that. I think it's quite clear that if
17 you, under these circumstances, do not allow a refund,
18 that some people are going to lose as a result of
19 that. And there are going to be some winners, because
20 they don't have to -- they won't have to provide a
21 surcharge.

22 I really honestly believe that under those
23 circumstances, I don't think equity would allow you to
24 get around that particular result.

25 The fact of the matter is you might want to

1 look at this in terms, as I think it may have been
2 said, in terms of a rate case proceeding, and
3 prospectively go forward.

4 Those persons who had to pay more,
5 unfortunately had a rate increase. Those persons who
6 had to pay less, fortunately had a rate decrease. But
7 I would suggest to you that probably the appropriate
8 solution is just to move forward at this point in
9 time, and that would resolve a lot of the problems
10 that we have. Thank you.

11 **CHAIRMAN JOHNSON:** Did you have a question?

12 **COMMISSIONER CLARK:** There's a motion. Can
13 you restate your motion? And I know you indicated you
14 wanted to give some accommodation to the possibility
15 of the Legislature acting, and I was just wondering
16 how we could do that, given the idea that there might
17 be a problem with ex post facto, although I don't see
18 it, but how would we --

19 **COMMISSIONER DEASON:** It seems to me that we
20 can include in our order, we can order Southern States
21 or Florida Water Services to keep all the information
22 intact to provide a refund if there is a funding
23 source obtained and have the mechanism in place, or at
24 least the concept that it's going to be funded from
25 that source, not surcharges, and for them to have the

1 necessary information to identify these people who are
2 entitled to a refund and to implement that refund.

3 Now, if that is the decision that's made by
4 the Legislature, we may have to have some type of
5 further proceeding to further define and refine the
6 actual process that's going to take place. I can't at
7 this point envision all that may be involved in that.
8 A great deal of that may depend on actually the way
9 the legislation is written and adopted.

10 But I think that in our order we can require
11 that information to preserve so if that were the
12 decision of the Legislature, to go ahead and have that
13 implemented. I think we can have language in the
14 order doing that.

15 I also think it's important to have language
16 in our order describing all of the different, various
17 scenarios that we considered if there were to be a
18 refund and surcharges, and that that, all of the
19 complexities and the inherent inequities within each
20 one of those options, is one of the reasons we
21 factored in in coming to our ultimate decision that
22 the most equitable solution -- not saying that it is
23 pure 100% equitable to every individual customer --
24 that the most equitable solution is
25 no refunds/no surcharges, and have that part of the

1 order.

2 **COMMISSIONER CLARK:** Thank you. I
3 understand it now.

4 **MS. JABER:** Commissioners, may I ask a
5 question in the event this is moved?

6 Your motion is no refund/no surcharge, but
7 you want the utility to maintain all of the records in
8 the event the Legislature does do something in the
9 interim while there's an appeal pending?

10 **COMMISSIONER DEASON:** I guess the decision
11 is no surcharge, which under the 1st DCA means there
12 can be no refund, okay; unless there is another
13 source, that the source of the refund cannot be --
14 under our interpretation of equity, which the court
15 may overturn -- but under our interpretation of equity
16 that the source of the refund cannot be surcharges on
17 these customers.

18 A lot of the reasons which I've tried to
19 describe are reasons contained in your own
20 recommendation and some things, I think, that
21 distinguish this case from GTE.

22 **MS. JABER:** And I need to ask you about
23 that, too. I understand the impossibility of
24 implementing some sort of mechanism that's feasible.
25 We all recognize that. That's not a problem. I think

1 I can write an order that says you reject the legal
2 analysis of the no refund part, and you're moving no
3 surcharge because of the new inequities that arise.

4 **COMMISSIONER DEASON:** Absolutely.

5 **MS. JABER:** As Staff counsel, I need to
6 caution you against trying to find a distinguishing
7 factor between GTE and this case again. I think that
8 that part of the opinion is very clear. I think that
9 they are saying GTE is applicable. So in writing the
10 order, I know I would have difficulty writing that
11 order.

12 **COMMISSIONER DEASON:** It's applicable, but
13 only to the extent that the company has to be made
14 whole from customers. It doesn't say a word about
15 customer to customer inequities or a way to try to
16 eliminate --

17 **MS. JABER:** But actually it does.

18 **COMMISSIONER DEASON:** -- to rectify that.

19 **MS. JABER:** Actually it does. It --

20 **COMMISSIONER GARCIA:** Ms. Davis maybe could
21 help us with formulating that, because I believe that
22 Noreen, I think, agreed with the position of
23 no refund/no surcharge, and so maybe she could lend --

24 **COMMISSIONER CLARK:** While she's coming up,
25 Lila, would you say what it is that you have concern

1 with?

2 **MS. JABER:** It's just that the Southern
3 States opinion in talking about GTE does recognize
4 that you have three interests. They've been there.
5 They've done that. They've said, yeah, we know that
6 in GTE it was the customers versus the utility, so to
7 speak.

8 But in Southern States you've got three
9 groups, and you've got to keep the interests of all
10 three groups in mind, and where you erred was that you
11 only took the interests of the refund people into
12 account and, of course, the surcharge people because
13 you didn't order a surcharge.

14 **COMMISSIONER CLARK:** You can't say "and of
15 course the surcharge people."

16 **MS. JABER:** Well, the potential --

17 **COMMISSIONER CLARK:** Because they told us to
18 hold a hearing and consider the potential refund
19 charges, and I think what Commissioner Deason is
20 saying is that while GTE considered it between two
21 parties, you recognized yourself, court, that there
22 were three parties, and now we have looked at the
23 equities from a surcharge standpoint. I think that's
24 what he's saying --

25 **COMMISSIONER DEASON:** We've done exactly

1 what the court told us to do. We have listened to
2 those persons that we have given intervention status
3 to, and they have informed us about what they consider
4 to be the inequities of a surcharge. And I think
5 that's exactly what the court decision wanted us to
6 do.

7 See, I'm not -- but I'm not at the point of
8 interpreting that that says there must be refunds and
9 surcharges and the only question is what mechanism we
10 put in place.

11 MS. JABER: And, again, I go back to say I
12 can understand that. That's not what I'm cautioning
13 you to be careful about. I'm cautioning you to be
14 careful about looking for a distinction between the
15 two cases that might not be there.

16 This is Lila two years ago saying SSU didn't
17 assume the risk. That's not a distinct -- a
18 distinguishing factor. I'm doing it again. I'm
19 saying, be careful in looking for a distinguishing
20 factor that may not be there.

21 I think that the Southern States decision is
22 very clear in that regard. They've taken every factor
23 in your order for saying no surcharge previously, and
24 they've said it didn't work, it didn't work, it didn't
25 work. SSU didn't assume the risk. The notice wasn't

1 a problem. The lack of representation was a problem.

2 I can write an order that says "We the
3 Commission as a body can't implement any sort of
4 surcharge mechanism because it's practically
5 impossible."

6 **COMMISSIONER DEASON:** Do you disagree that
7 the GTE decision was not a usage based surcharge and
8 what is contemplated here is a usaged based surcharge,
9 and you think that is not a distinction --

10 **MS. JABER:** No, but here's --

11 **COMMISSIONER DEASON:** -- has any
12 importance --

13 **MS. JABER:** No, but where they're alike, gTE
14 was an order -- was an opinion that recognized that
15 the clear -- that the Commission issued an order that
16 was clearly erroneous; the same thing with this case.
17 What the court has said is this was a clearly
18 erroneous order. GTE is applicable in that regard.
19 They don't get to the facts and the circumstances of
20 the case. It's more -- it's broad.

21 **COMMISSIONER CLARK:** But, Lila, I think
22 you're talking past each other, because what
23 Commissioner Deason is saying is you sent it back to
24 us and said we need to consider the equities between
25 the three parties, and they also said to us, you

1 better hear from potential surcharges. Why would we
2 hear from them if it wasn't an option to say if it's
3 inequitable to the -- either refund?

4 **MS. JABER:** What if they just wanted you to
5 hear from them to determine what the mechanism should
6 be or what the period of time should be, or whether
7 there were other --

8 **COMMISSIONER CLARK:** Well, I agree with you,
9 Lila, that that may be, in fact, what they said, but
10 for you to conclude right now that it isn't one of
11 the -- they specifically precluded that, I'm not sure
12 they have.

13 **COMMISSIONER GARCIA:** But I think that
14 should be part of the rationale that it can't be done.
15 I mean -- and obviously you said you have no problem
16 in stating that part of it; and I think that's part of
17 the reason that it should be included, because --
18 Commissioner, you're an accountant. You probably know
19 that there's only a certain way you can do things, and
20 I just don't see that we can do this, and that's, I
21 think, something that has to be included in this
22 Commission's order so that the court understands --
23 and I'm not saying it didn't when it made this
24 decision -- but so that the court understands the
25 complexities involved here and the impossibility of

1 what we were trying to do.

2 **COMMISSIONER DEASON:** To me, there's a
3 distinction between a one-time surcharge on every
4 customer not based upon any type of consumption level
5 or any choice that the customer had, other than they
6 were just signed up as a customer, they had to pay it.

7 To me, here was a very different situation,
8 and, again, along with the fact that there's a huge
9 difference in the amount of the refund, or surcharge
10 rather, the fact that that surcharge as it is proposed
11 would be based upon consumption that took place years
12 ago, and to me it is fundamentally unfair; and it goes
13 backs to the whole equity concept of what is in GTE.

14 It said, "Commission, you've got to do
15 what's fair and equitable," and, in GTE, said it
16 wasn't fair to GTE not to have their revenue
17 requirements met.

18 And we've tried to devise a way to try to do
19 it the most fair way that we could, and that's what we
20 did. I think we're under the same obligation here,
21 and I think that we have an obligation to weigh what
22 did we think is most equitable, and I'm coming down on
23 the side that there is no 100% equitable treatment for
24 everybody involved.

25 What is the -- to coin a new phrase, what is

1 the least inequitable? And to me the least
2 inequitable is to have no surcharges, and if that
3 means no refunds, so be it; even though I think that's
4 still inequitable.

5 **MS. DAVIS:** Commissioner, I think you've
6 nailed the issue right on the head. It seems to me
7 that we're not necessarily -- if you do decide to go
8 the no surcharge route, you're not necessarily
9 distinguishing GTE. You've applied GTE in your
10 analysis in that you have now looked at the interests
11 of all three of the players; the utility, the two
12 customer groups. And in applying the equity concept
13 enunciated in the GTE decision, you've come to the
14 conclusion that the only equity is to not make the
15 situation even worse by surcharging, because that
16 would have an iniquitous result by trying to do the
17 formula kind of equity that GTE seems to say.

18 **COMMISSIONER DEASON:** If it is poor legal
19 strategy to try to further distinguish GTE, I'll
20 remove that from my motion, because I think it's
21 still -- my motion is valid, I think, for the reasons
22 I've stated; that it is my interpretation of what I
23 consider to be equity is. And I think GTE stands for
24 the proposition that we have to infuse equity in our
25 decisions.

1 **MS. DAVIS:** Yes.

2 **COMMISSIONER DEASON:** And that we do have
3 some discretion, and I don't think that the 1st DCA
4 opinions mandated refunds and rebates -- I mean,
5 sorry -- and surcharges.

6 **MR. McGLOTHLIN:** Mr. Deason, could I offer
7 just one thought on the discussion?

8 **CHAIRMAN JOHNSON:** Hold on. Hold --

9 **COMMISSIONER GARCIA:** Hold on --

10 **CHAIRMAN JOHNSON:** -- on. There's a motion
11 and a second. Did the Commissioners -- do you have
12 any more --

13 **COMMISSIONER GARCIA:** I just wanted -- I
14 want our rationale to include what you discussed
15 earlier, Lila, which is the impossibility -- and I
16 hope that the Commissioner isn't precluding that with
17 his distinction of GTE.

18 I just think that we have to go beyond that
19 so that when we make the -- I'm sorry -- so that when
20 this order comes out, we address this, because I think
21 it is central, at least to my thinking.

22 We've been asked to do something that cannot
23 be done. We tried to do it. That's why we heard from
24 the customers, and we can't do it. And I think that's
25 also got to be part of the rationale that we use in

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1 arriving at this decision.

2 **CHAIRMAN JOHNSON:** Did you have a question,
3 commissioner Clark?

4 **COMMISSIONER CLARK:** No, I have no more
5 questions.

6 **COMMISSIONER DEASON:** Well, if I can indulge
7 the Commission for a moment, I'd like to hear from
8 Mr. McGlothlin. I thought he had a comment in
9 relation to the motion, and I would like to hear that.

10 **CHAIRMAN JOHNSON:** Mr. McGlothlin?

11 **MR. MCGLOTHLIN:** It's very brief.

12 **CHAIRMAN JOHNSON:** One of the attorneys is
13 getting ready to respond to Commissioner Deason.

14 (Audience comments.)

15 Mr. McGlothlin, if you could continue.

16 **COMMISSIONER DEASON:** Briefly.

17 **MR. MCGLOTHLIN:** It will be very brief. On
18 the subject of the applicability or distinction --
19 distinguishing of the --

20 **CHAIRMAN JOHNSON:** Speak loudly.

21 **MR. MCGLOTHLIN:** As to the GTE case, one
22 observation is that in that case a surcharge was
23 necessary in order to make the utility whole because
24 the utility had been disallowed the collection
25 expenses. That's not true here, but in addition to

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1 that, there's this language in the opinion.

2 "Finally we address the structure of the
3 current surcharge. The PSC has acknowledged it has
4 the ability to closely tailor the implementation of
5 refunds and to accurately monitor refund payments to
6 ensure that the recipients of such refunds truly are
7 those who were overcharged. While no procedure can
8 perfectly account for the transient nature of utility
9 customers, we envision that the surcharge in this case
10 can be administered with the same standard of care
11 afforded to refunds," et cetera.

12 So it appears to me that the GTE court
13 viewed the implementation of a refund and surcharge,
14 or that type of a step, as manageable with a certain
15 degree of precision. And I think what you
16 Commissioners have discussed today is the very
17 different circumstances you have here.

18 **CHAIRMAN JOHNSON:** Okay. There's a motion
19 and a second. The Commissioners don't have any other
20 questions and we've heard from all the attorneys. Any
21 further discussion? (Audience comments.)

22 **COMMISSIONER DEASON:** The motion is no
23 refunds/no surcharges, and the only way there could be
24 a refund, if there's a source of funding that refund
25 other than surcharging customers. (Applause)

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1 **CHAIRMAN JOHNSON:** There's a motion and a
2 second. Any further discussion? Seeing none, all
3 those in favor signify by saying aye.

4 Opposed? (Audience comments.)

5 The motion passes on a three to two vote.
6 (Applause and audience comments.)

7 **COMMISSIONER CLARK:** Madame Chair, the
8 only -- I guess it's not -- (Audience comments.)

9 **CHAIRMAN JOHNSON:** We'll go off the record
10 and let them leave.

11 **COMMISSIONER CLARK:** I just wanted to
12 indicate that I voted in favor of it. I would go one
13 step further --

14 **CHAIRMAN JOHNSON:** Susan, wait. Let's wait.

15 **COMMISSIONER CLARK:** Okay.

16 **CHAIRMAN JOHNSON:** We're going to go off the
17 record until the room settles down. If you'd like to
18 sit and hear the rest of our proceeding, that's fine.
19 If not, if you could as quickly as possible exit the
20 room, that would be helpful. (Pause)

21 We'll go back on the record. Commissioner
22 Clark?

23 **COMMISSIONER CLARK:** Madam Chair, I voted
24 for the motion. The only thing I would have done was
25 also have said, you know, if the court tells us we

1 have to do it, I would have gone ahead and had the
2 hearing and gotten a method to do that, because I'm
3 just concerned about it coming back to us when we
4 think we've done the right thing. But there seemed to
5 be no sentiment for that, and --

6 **COMMISSIONER GARCIA:** Madame --

7 **COMMISSIONER CLARK:** -- that's -- and I am
8 supportive of what was moved.

9 **COMMISSIONER GARCIA:** Commissioner --

10 **CHAIRMAN JOHNSON:** We need to vote again,
11 because she couldn't even record the vote and then we
12 can go through the explanations of the vote.

13 She recorded the motion. So I can go back
14 to all those in favor -- she recorded the motion and
15 the second.

16 All those in favor, signify by saying aye.

17 **COMMISSIONER CLARK:** Aye.

18 **COMMISSIONER DEASON:** Aye.

19 **COMMISSIONER GARCIA:** Aye.

20 **CHAIRMAN JOHNSON:** Opposed, nay.

21 **COMMISSIONER KIESLING:** Nay.

22 **CHAIRMAN JOHNSON:** Nay. The vote passes on
23 a three to two vote.

24 **COMMISSIONER GARCIA:** Let me just say,
25 Commissioner Clark, while I thought your idea had

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1 merit, I just don't know how you give the court a
2 suggestion in case you overturn us, and God knows what
3 they're going to have in that decision. We've been
4 surprised several times throughout this proceeding in
5 how they interpreted what we had done before.

6 But let me ask Staff. Issue 4 doesn't have
7 to be addressed now?

8 **MS. JABER:** No.

9 **COMMISSIONER CLARK:** But Issue 5 does.

10 **COMMISSIONER GARCIA:** But Issue 5 does.

11 **MS. JABER:** Right.

12 **COMMISSIONER GARCIA:** And in Issue 5 are we
13 going to listen to the parties, or can we just move
14 it?

15 **CHAIRMAN JOHNSON:** We can move, I think.
16 Wait. Let me make sure I know what it is. Oh. Is
17 this --

18 **COMMISSIONER CLARK:** Spring Hill.

19 **CHAIRMAN JOHNSON:** This is Spring Hill
20 issue. We did say we would give the parties five
21 minutes to address it.

22 **MS. JABER:** Commissioners, I believe that
23 OPC has already addressed it.

24 **CHAIRMAN JOHNSON:** They've waived. Okay.
25 Fine. Do you have any additional comments, or it's

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1 been waived?

2 **MR. ARMSTRONG:** Madame Chair, we do have
3 some additional comments regarding this issue. As I
4 indicated in my prior comments -- and I won't
5 re-address it -- but the facts and circumstances that
6 existed put Southern States in a -- or Florida Water
7 in a quandary as to whether or not we can go ahead and
8 modify an automatic stay which applied as a result of
9 the Keystone Heights appeal.

10 And since we had been in the position at
11 that time and had an order of this Commission before
12 the court of appeals that said "You moved to modify an
13 automatic stay, therefore, we're holding you
14 accountable for the ramifications of that," we
15 couldn't do anything, because we knew, as I said
16 before, if we had appealed the Commission's
17 determination to change the rate structure of -- to a
18 modified stand-alone rate; if we had vacated that had
19 automatic stay, come in and said put in the modified
20 stand-alone rates, and then found that the court of
21 appeals affirmed and upheld our appeal, then what
22 would happen?

23 **COMMISSIONER KIESLING:** Could I ask you a
24 question to help me clarify these arguments?

25 **MR. ARMSTRONG:** Sure.

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1 **COMMISSIONER KIESLING:** And my question is
2 really a very simple one. We know what revenue
3 requirement you are entitled to collect, and we know
4 now what you collected from while the uniform rates
5 were in effect and while the modified rates were in
6 effect.

7 Did you collect from the Spring Hill
8 customers more than was -- than should have been --
9 more than the modified stand-alone rates during that
10 time period that we're talking about from January to
11 June?

12 **MR. ARMSTRONG:** During that period of time
13 the company collected more under -- because the
14 uniform rates remained in effect and we had no other
15 alternative structure to go to.

16 **COMMISSIONER KIESLING:** I don't need to hear
17 your arguments. All I want to know is follow the
18 dollars.

19 **MR. ARMSTRONG:** We collected more than we
20 would have collected under the modified stand-alone
21 rate structure.

22 **COMMISSIONER KIESLING:** So you collected
23 more than what we had designed as it related to your
24 revenue requirement?

25 **MR. ARMSTRONG:** No. And that's the crux of

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1 the matter; that this Commission never did design
2 modified stand-alone rates for Spring Hill, because
3 where you designed the modified stand-alone rates was
4 in January of 1996 in another docket for those other
5 facilities. It wasn't until August of 1996 that you
6 designed anything that had to do with Spring Hill.

7 **COMMISSIONER CLARK:** Yes. And at that time
8 didn't we say you need to reduce the rates?

9 **MR. ARMSTRONG:** At that time you suggested
10 we needed to reduce the rates. At that time the issue
11 was pending before the court of appeals as to whether
12 or not we will be held accountable if you move to
13 vacate a stay that applied when Keystone Heights
14 appealed the decision.

15 **COMMISSIONER CLARK:** Well, I guess what it
16 boils down to me what was -- we had adjusted the
17 revenue coming in for the other systems to the
18 stand-alone, so you recovered your rates.

19 I felt like you should have on your own
20 adjusted the Spring Hill rates. And I know that you
21 also entered into an agreement on rates with them, and
22 it seems to me at that time you should have addressed
23 the issue; and I feel like the refund is due.

24 **MR. ARMSTRONG:** And in answer to that,
25 there's no evidence before this Commission that we

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1 were overearning at any time during the period of time
2 these rates were in effect.

3 **COMMISSIONER CLARK:** Yes. But then we would
4 have a whole new rate case to see what you were doing
5 otherwise to not overearn. What you're saying to me,
6 Mr. Armstrong, is the only reason you didn't overearn
7 is the rate structure.

8 **MR. ARMSTRONG:** What I'm saying is we did
9 not overearn, period. And I think before -- if you're
10 going to say no refunds and no surcharges regarding
11 the other issue, I don't see how it's even possible to
12 suggest that now the company can be held accountable
13 for what happened in another docket, irrespective of
14 this docket, what happened in another docket when
15 rates changed there.

16 Now we get held accountable even though we
17 were not overearning at any point in time. I don't
18 think that's the fairness that we're talking about.
19 What the Staff recommendation says is use the cudgel
20 of not -- these aren't guaranteed rates of return;
21 these are just allowed rates of return.

22 The company was not overearning during that
23 period of time, and yet we are told "You should have
24 reduced rates to underearn, and by the way, you only
25 could have reduced those rates if you modified a stay,

1 and by the way, we just nailed you and extracted
2 retribution against you for modifying a stay before;
3 so should you be successful on your appeal, don't come
4 and ask us to give you back that uniform rate and give
5 you those -- when people come and claim, why did you
6 switch me from modified stand-alone rates to something
7 else, don't come back and talk to me about it."

8 **COMMISSIONER CLARK:** Let me ask the question
9 this way: Did we address all the other rates to the
10 necessary stand-alone rates for your revenue
11 requirement?

12 **MR. ARMSTRONG:** In another docket in the
13 1995 rate case --

14 **COMMISSIONER CLARK:** Don't tell me about
15 dockets. Did we do that?

16 **MR. ARMSTRONG:** Based on another test year,
17 based on other facts and circumstances, based on an
18 docket where you first said bring in Spring Hill, then
19 you said let them out, which wasted a lot of time and
20 money and effort, and denied us a rate relief for
21 another period of time based on the Hernando County
22 board having taken back jurisdiction, the Hernando
23 County Board now having come in and spoken with us and
24 we reached a settlement, and no counsel at this table
25 participated in that settlement other than I and the

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1 Hernando County Board, and we reached a settlement
2 where we agreed that we would take \$1.6 million less
3 than our cost of service through the year 2,000.

4 And we all acknowledged this was a give-back
5 because the -- Spring Hill had paid higher rates. And
6 we said, and specifically in that agreement, "Let's
7 let the Commission decide the refund issue." But
8 there we knew if there was going to be a determination
9 of refunds for this company, we're going to appeal
10 that, and it's going to go on for three years.

11 And I would like to caution as well, if
12 we're going to have the legislative solution based on
13 the ex post facto prohibitions, if you make a
14 determination of refunds in this case, the ex post
15 facto prohibition probably would say that the
16 Legislature can't take care of that situation. So,
17 Spring Hill won't get the refunds, because we'll
18 appeal and we'll be successful there as well.

19 **COMMISSIONER KIESLING:** Well, I'm willing to
20 test that.

21 **CHAIRMAN JOHNSON:** Public Counsel?

22 **MR. SHREVE:** Thank you, Madame Chairman.

23 I'll be very brief. I think all of you know what the
24 situation is here. You ordered -- after the court
25 made their finding, you ordered modified stand-alone

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1 rates for the company across the board while Spring
2 Hill was still in. Spring Hill did not implement
3 those rates, so Spring Hill's rates were not lowered
4 at that point.

5 Then you granted, at their request, an
6 interim rate increase which was calculated without
7 Spring Hill. So the company was made whole at that
8 time. To make the company totally whole with Spring
9 Hill, all you really would have had to give them is
10 stand-alone rates.

11 The modified stand-alone rate is still a
12 little bit higher, but that's the order that was out
13 there. They're getting a windfall of that amount of
14 money anyway.

15 As far as their legislative decision, here
16 we're talking about not a situation where you had one
17 group of customers subsidizing another group of
18 customers. So it's totally different. If GTE stands
19 for anything as far as the company being able to make
20 a surcharge against a customer, surely it also means
21 that equity applies to the customers and not just to
22 the company.

23 Thank you.

24 **MR. ARMSTRONG:** Brief rebuttal, Madam Chair?

25 **MR. TWOMEY:** Let me go first, please, Madame

1 Chair. I represent Spring Hill Civic Association.

2 CHAIRMAN JOHNSON: Is your mike on?

3 MR. TWOMEY: Yes, it is.

4 CHAIRMAN JOHNSON: I'm sorry.

5 MR. TWOMEY: I represent Spring Hill Civic
6 Association, and Mr. Morrey Miller and Senator Ginny
7 Brown-Waite who, if I didn't mention it earlier, is
8 ill today and couldn't be here.

9 As Mr. Shreve said, this is pretty
10 clear-cut, or it should be pretty clear-cut. After
11 the uniform rates were found unlawful and reversed,
12 you went ahead and waited for the rest of the systems,
13 and you changed over by adopting modified stand-alone
14 rates, as I recall, in the interim rates in the new
15 rate case. You ordered at that time that all the
16 uniform rates would be eliminated.

17 Hernando County had taken back jurisdiction
18 from the Commission, and SSU did not lower the rates
19 from the uniform rates. They were still charging the
20 uniform rates which contained massive subsidies.

21 Because the rest of the systems at your
22 direction and order had gone to modified stand-alone
23 rates, which eliminated the vast majority of the
24 subsidies amongst the customer groups, the difference
25 was no longer; that is the massive subsidy inherent in

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1 the Spring Hill uniform rate which is still being
2 charged didn't go anyplace else.

3 It couldn't go anyplace else, because that
4 system was now on a stand-alone basis truly in the
5 sense that it was regulated by Hernando County and not
6 this Commission.

7 SSU took the difference and they pocketed
8 it. That's my term. I like it. They took the
9 difference and they pocketed it for the benefit of
10 their shareholders until -- and they slipped through
11 the crack; and until you all came along later and
12 said, hey, wait a minute -- Mr. Shreve brought it to
13 your attention and said, "There's been a mistake here,
14 fix this," and you all do.

15 **COMMISSIONER CLARK:** You agree with Staff's
16 recommendation on this one?

17 **MR. TWOMEY:** Yes, I do; I do, indeed. And
18 I'll be brief. And now they come along and what
19 they're suggesting to you is they start -- they say,
20 let's look at earnings, okay. And that's totally
21 disingenuous. You don't look at earnings of anything.
22 What you look at is, is what the difference between
23 what the unlawful uniform rate was and what the
24 modified stand-alone rate was, which is still too
25 much, as Mr. Shreve pointed out. But you look at the

1 difference and you make them give that back.

2 And the last failing they had when they were
3 arguing about earnings is, if I understand it
4 correctly, is they want you to drag in -- they want
5 you to look at earnings on a company-wide basis, and
6 they want to drag in systems beyond your jurisdiction
7 that are included in Hillsborough County and other
8 places so they can say whatever the failings are --
9 regulation in there, the operation of our systems --
10 overall we weren't earning our return; therefore we
11 should keep it.

12 So I would urge you to adopt your Staff
13 recommendation and make them -- make the refunds.

14 Thank you.

15 **MR. ARMSTRONG:** The brief rebuttal is, there
16 is absolutely no windfall to the company. The rate
17 filing we made with the Hernando County Board
18 indicated a revenue requirement of \$7.9 million. We
19 agreed to \$6.3 revenue requirement on the basis that
20 the Spring Hill customers had paid more under uniform
21 rate for a period of time. So that the continuous
22 allegations of windfalls to the company are totally
23 inaccurate.

24 Thank you.

25 **CHAIRMAN JOHNSON:** Okay. Commissioners, any

1 questions? Is there a motion?

2 **COMMISSIONER CLARK:** I move Staff.

3 **COMMISSIONER KIESLING:** Second.

4 **CHAIRMAN JOHNSON:** There's a motion and a
5 second. Any further discussion?

6 Seeing none, all those in favor signify by
7 say aye.

8 **COMMISSIONER CLARK:** Aye.

9 **COMMISSIONER DEASON:** Aye.

10 **COMMISSIONER GARCIA:** Aye.

11 **COMMISSIONER KIESLING:** Aye.

12 **CHAIRMAN JOHNSON:** Aye. Opposed? Show it
13 approved unanimously.

14 **MS. JABER:** Commissioners, in Issue 6 I need
15 to modify the recommendation now. It should read that
16 the docket should be closed upon expiration of the
17 appeal time. I do want to clarify also that we will
18 be doing an order during the normal course of the 20
19 days.

20 **COMMISSIONER KIESLING:** I'm probably going
21 to write a dissent, and so I'll need to coordinate
22 that with you.

23 **MS. JABER:** No problem.

24 **CHAIRMAN JOHNSON:** Mr. Twomey, you had one
25 question?

1 **MR. TWOMEY:** Yes, ma'am. I don't mean to
2 belabor this, Madame Chairman, but, I mean, you voted
3 and everything. I don't understand the -- which --
4 what the impossibility is, and I don't know if your
5 Staff attorneys understand, but if it's at all
6 possible, I would request that you specifically, or
7 more specifically, state what the impossibility is
8 that you find in carrying out any refunds and
9 surcharges that led you to decide that you can't do
10 this.

11 I mean, I don't know if it's a mechanical
12 impossibility, accounting impossibility, the
13 impossibility to do equity both ways. I mean, there's
14 a difference. And rather than just let your Staff
15 wander about trying to -- maybe they understand it
16 better than I do, but I would ask you to state what is
17 the impossibility. Is it equity impossibility, ease
18 of administration of the refunds, or what is it?

19 **COMMISSIONER DEASON:** In my opinion, the
20 impossibility is 100% equity to every customer
21 involved. That, to me, is the impossibility. Now
22 it's highlighted by a lot of the other practical
23 considerations which were considered in the issue
24 which we did not vote on, but Staff has a very, under
25 your own words, a very excellent recommendation under

1 your own words concerning that. That's what my
2 concern is.

3 I think there's no way to be 100% equitable
4 to every customer. That's where the impossibility
5 lies. Now, the people that voted with that motion may
6 have further amplification. I don't know. But that's
7 the basis of the motion.

8 **CHAIRMAN JOHNSON:** Are there any further
9 issues?

10 **MR. ARMSTRONG:** Madame Chair and
11 Commissioners, I hate to be the last one with notice,
12 but Mr. Pino introduced the documents regarding the --

13 **UNIDENTIFIED SPEAKER:** (Inaudible comment.)

14 **MR. ARMSTRONG:** I just -- clarification just
15 for the record. I believe -- and I don't have the
16 exact numbers -- but I know that the assets of -- the
17 water assets of MP, possibly about 14%. As he
18 mentioned, five cents per share was the earning. The
19 total earnings for Minnesota Power that year was in
20 the neighborhood of \$2.30.

21 The electric assets constitute about 44%, I
22 believe you indicated. The total earnings per share
23 coming from electric was somewhere in the neighbor of
24 \$1.30. So it's a \$1.30 for 40%. 16% came up with
25 five cents a share.

1 **CHAIRMAN JOHNSON:** Thank you for the
2 clarification.

3 **MR. ARMSTRONG:** Thank you.

4 **MR. JACOBS:** I want to do Mr. Armstrong a
5 favor and not let him be last, and just would offer to
6 you that as you're writing up this final order, I hope
7 that -- see, I'm quite concerned you've now closed the
8 door for the legislative solution and that we're going
9 to go to court and be back here without a solution
10 through the Legislature, and that's what I'm about
11 here today.

12 And I would just suggest to you that
13 whenever you write up this order, if you do make some
14 remarks, that there perhaps is a solution with the
15 Legislature to do equity to both sides. And you might
16 amplify that a bit more in obiter dictum, or however
17 you call it up here, in writing that order, because
18 I'm concerned that now we won't see any legislation to
19 try to get the rebate folks taken care of.

20 So as you write that, if you would kind of
21 give that some eye, I'd appreciate it.

22 **CHAIRMAN JOHNSON:** I think that that was
23 encompassed in the motion. The Commissioner did state
24 that to the extent that that's where the refund could
25 be found, then that that would be wonderful. So we'd

1 make sure that Staff considers that.

2 And, Mr. Jacobs, I share your concern, and
3 that was one of the reasons why I voted -- and I
4 didn't speak earlier because the audience was pretty
5 rowdy, but that's one of the reasons why I voted
6 against it.

7 And the other was the issue of whether or
8 not we could, indeed, do refunds and surcharge; and to
9 me it wasn't necessarily clear in our record. There
10 were issues raised, but it wasn't definitive as to the
11 impossibility of doing that.

12 **MR. JACOBS:** All right. Thank you very
13 much.

14 **COMMISSIONER KIESLING:** Then let me go
15 ahead. You're right, they were a little rowdy, and we
16 didn't have a chance to -- I'm quite willing to
17 explain why I voted the way I did, and I will amplify
18 on that.

19 I believe that the refund and a surcharge is
20 the appropriate outcome, and I think that the
21 equitable problems would be best addressed in the
22 mechanisms that we use to implement these things in
23 order to reduce, to the maximum extent possible, the
24 inequities that could result.

25 **CHAIRMAN JOHNSON:** I think we were in the

1 same place, then. Certainly Staff had raised several
2 concerns, but that went to implementation.

3 **COMMISSIONER GARCIA:** Let me just ask. I'm
4 sorry. I wanted just to understand. You believe that
5 we should have gone and had a hearing so that --

6 **COMMISSIONER KIESLING:** No. I believe we
7 should have ordered refunds and surcharges today and
8 not done a hearing. We never got to the issue on the
9 hearing or I would have addressed that. But I don't
10 think that the hearing was necessary. I think that we
11 can fashion the mechanics without the need for a
12 hearing. Could have.

13 **CHAIRMAN JOHNSON:** I would have gone for the
14 hearing, but it would end up in the same place.

15 **COMMISSIONER GARCIA:** I just wanted to
16 clarify that for the record.

17 **CHAIRMAN JOHNSON:** I think with that, we are
18 adjourned. Oh, I'm sorry.

19 **MS. REYES:** Did you take a vote on Issue 6?

20 **COMMISSIONER KIESLING:** I don't think so. I
21 move it.

22 **CHAIRMAN JOHNSON:** Oh. Go ahead. There's a
23 motion. Is there a second?

24 **COMMISSIONER CLARK:** Second.

25 **CHAIRMAN JOHNSON:** Show it approved

1 unanimously. Thank you. Any other issues?

2 COMMISSIONER KIESLING: No, that's it.

3 CHAIRMAN JOHNSON: We're adjourned.

4 (Thereupon, the hearing concluded at

5 7:00 p.m.)

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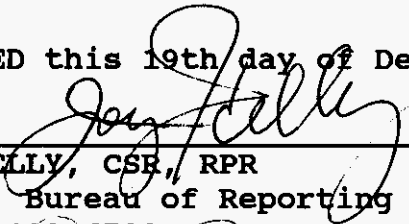
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We, JOY KELLY, CSR, RPR, Chief, Bureau of Reporting and H. RUTHE POTAMI, CSR, RPR, Official Commission Reporters,

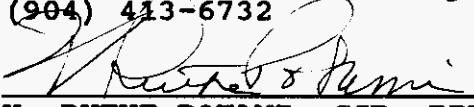
DO HEREBY CERTIFY that the Special Agenda Conference in Docket No. 920199-WS was heard by the Florida Public Service Commission at the time and place herein stated; it is further

CERTIFIED that we stenographically reported the said proceedings; that the same has been transcribed under our direct supervision; and that this transcript, consisting of 250 pages, Volumes 1 and 2, constitutes a true transcription of our notes of said proceedings.

DATED this 19th day of December, 1996.



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