



# Public Service Commission

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RECORDS AND REPORTING

**DATE:** JANUARY 25, 2001

**TO:** DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

**FROM:** DIVISION OF LEGAL SERVICES (JAEGER) *RES*  
 DIVISION OF APPEALS (MOORE) *OST m*  
 DIVISION OF ECONOMIC REGULATION (RENDELL, WILLIS) *RNT*

**RE:** DOCKET NO. 920199-WS - 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).

**AGENDA:** 02/06/2001 - REGULAR AGENDA - POST-HEARING DECISION - PARTICIPATION IS DEPENDENT UPON VOTE IN ISSUE NO. 1

**CRITICAL DATES:** RELINQUISHMENT OF JURISDICTION ONLY THROUGH FEBRUARY 8, 2001, AND ORAL ARGUMENT IN FIRST DISTRICT COURT OF APPEAL ON FEBRUARY 21, 2001

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\LEG\WP\920199SO.RCM

### CASE BACKGROUND

On May 11, 1992, Southern States Utilities, Inc., now Florida Water Services Corporation (FWSC or utility) filed an application to increase the rates and charges for 127 of its water and wastewater service areas regulated by this Commission. By Order No. PSC-93-0423-FOF-WS, issued March 22, 1993, the Commission approved an increase in the utility's final rates and charges, basing the rates on a uniform rate structure.

The Office of Public Counsel (OPC) filed its Notice of Intervention on May 21, 1992, and by Order No. PSC-92-0417-PCO-WS,

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issued May 27, 1992, the Commission acknowledged OPC's intervention. On May 28, 1993, the Spring Hill Civic Association, Inc. (Spring Hill), filed its petition for intervention and reconsideration of Order No. PSC-93-0423-FOF-WS. The Petition for Intervention was initially denied by Order No. PSC-93-1598-FOF-WS, issued November 2, 1993. However, by Order No. PSC-97-1094-PCO-WS, issued September 22, 1997, the Commission ultimately granted intervention to Spring Hill.

Order No. PSC-93-0423-FOF-WS was appealed, and on April 6, 1995, the First District Court of Appeal (First District) reversed in part and affirmed in part the Commission's Order. Citrus County v. Southern States Utils., Inc., 656 So. 2d 1307 (Fla. 1st DCA 1995), rev. den., 663 So.2d 631 (Fla. 1995) (Citrus County). The First District reversed the uniform rate structure on the grounds that there was no competent substantial evidence demonstrating that the 127 systems at issue were "functionally related", a requirement found in Section 367.171(7), Florida Statutes, which addresses the respective jurisdictional authority of the Commission over private water and wastewater utilities.

On October 19, 1995, the Commission issued its initial order on remand, Order No. PSC-95-1292-FOF-WS, Order Complying with Mandate, Requiring Refund, and Disposing of Joint Petition (Initial Refund Order). By that Order, FWSC was ordered to implement a modified stand-alone rate structure, develop rates based on a water benchmark of \$52 per month and a wastewater benchmark of \$65 per month, and to refund accordingly to those customers who had overpaid. However, with respect to those customers who had underpaid, the Commission found that the utility could not collect from those customers due, at least in part, to the prohibition against retroactive ratemaking.

On November 3, 1995, FWSC filed a Motion for Reconsideration of Order No. PSC-95-1292-FOF-WS, requesting that the Commission rescind any refund requirement or alternatively provide authority to impose equivalent surcharges, and requesting that the Commission reinstitute the uniform rate structure. At the February 20, 1996, Agenda Conference, the Commission voted, inter alia, to deny FWSC's Motion for Reconsideration.

The modified stand-alone rate structure was implemented on January 23, 1996, in the docket involving FWSC's subsequent rate case, Docket No. 950495-WS (the "1995 Rate Case"), as a predicate for securing interim rate relief in that case. Modified stand-alone rates were not implemented for the Spring Hill facilities in the 1995 Rate Case, however, because prior to that case being filed, the Hernando County Board of County Commissioners had rescinded the Commission's jurisdiction to regulate water and

wastewater utilities in that County, and that system was consequently removed from the 1995 Rate Case.

On February 29, 1996, subsequent to the Commission's decision on the utility's motion for reconsideration, but prior to the issuance of the order memorializing the decision, the Florida Supreme Court issued its opinion in GTE Florida, Inc. v. Clark, 668 So. 2d 971 (Fla. 1996) (GTE). By Order No. PSC-96-0406-FOF-WS, issued March 21, 1996, after finding that the GTE decision could have an impact on the decision in this case, the Commission voted to reconsider, on its own motion, the entire decision on remand.

By Order No. PSC-96-1046-FOF-WS, issued August 14, 1996, the Commission affirmed its earlier determination that FWSC was required to implement the modified stand-alone rate structure and to make refunds to customers who had overpaid. However, the Commission determined that FWSC could not impose a surcharge on those customers who paid less under the uniform rate structure. The utility was ordered to make refunds (within 90 days of the issuance of the order) to its customers for the period between the implementation of final rates in September, 1993, and the date that interim rates were placed into effect in Docket No. 950495-WS.

That decision was appealed by the utility to the First District. On June 17, 1997, the First District issued its opinion reversing the Commission's Order (Order No. PSC-96-1046-FOF-WS) implementing the remand of the Citrus County decision in Southern States Utils., Inc. v. FPSC, 704 So. 2d 555 (Fla. 1st DCA 1997) (Southern States).

On July 17, 1997, FWSC and Hernando County (Hernando) entered into a Settlement Agreement (Agreement). Pursuant to that agreement, among other things, FWSC and Hernando agreed on the rates to be charged by the utility for the period between June 14, 1997, going through September 1, 2000. However, that agreement specifically stated that it did not settle or resolve any refund issue or refund obligation of FWSC during any period of time prior to June 14, 1997, and that each party would abide by any final, nonappealable Order of the Commission.

By Order No. PSC-97-1033-PCO-WS, issued August 27, 1997, the Commission required FWSC to provide an exact calculation by service area of the potential refund and surcharge amounts with and without interest as of June 30, 1997. By that Order, the Commission also allowed all parties to file briefs on the appropriate action the Commission should take in light of the Southern States decision. By Order No. PSC-97-1290-PCO-WS, issued October 17, 1997, the Commission required FWSC to provide notice by October 22, 1997 to all affected customers of the Southern States decision and its potential impact. The notice provided that affected customers

could provide written comments and letters concerning their views on what action the Commission should take. Order No. PSC-97-1290-PCO-WS also established the new deadline for filing briefs as November 5, 1997. On November 5, 1997, the parties timely filed their briefs.

On December 15, 1997, the Commission held a Special Agenda Conference to address the remand of Southern States. At the Special Agenda Conference, the Commission voted on all issues related to the remand of the Southern States decision. By Order No. PSC-98-0143-FOF-WS, issued January 26, 1998, the Commission declined to order refunds and surcharges for the period between the implementation of the final uniform rates on September 15, 1993 and January 23, 1996, the date on which modified stand-alone rates were implemented in the 1995 Rate Case. However, the Commission did order FWSC to provide refunds, without commensurate surcharges, to the Spring Hill water and wastewater customers for the period of January 23, 1996 through June 14, 1997, the effective date of FWSC's initial settlement agreement with Hernando establishing rates for the Spring Hill systems on a prospective basis.

On February 18, 1998, Sugarmill Woods Civic Association, Inc., formerly known as Cypress and Oaks Villages Association (Sugarmill Woods), filed a Notice of Appeal of Order No. PSC-98-0143-FOF-WS. On February 24, 1998, FWSC notified the Commission that it had appealed Order No. PSC-98-0143-FOF-WS to the First District as well. On that same day, FWSC filed a Motion for Stay of Order No. PSC-98-0143-FOF-WS. On February 24, 1998, Joseph J. DeRouin, Victoria M. DeRouin, Peter H. Heeschen, Elizabeth A. Riordan, Carvel Simpson and Edward Slezak (DeRouin, et al.) notified the Commission that they were joining the appeal as appellees, and on February 25, 1998, the Citizens of Nassau County (Nassau County) notified the Commission of its appeal. On February 26, 1998, Senator Ginny Brown-Waite, Mr. Morty Miller, the Board of County Commissioners of Citrus County, Spring Hill, Sugarmill Manor, Inc., Cypress Village Property Owners Association, Inc., Harbour Woods Civic Association, Inc., and Hidden Mills Country Club Homeowners Association, Inc. (Associations) notified the Commission that they had joined the appeal as appellants. By Order No. PSC-98-0749-FOF-WS, issued May 29, 1998, FWSC's Motion to Stay the Spring Hill refund requirement pending the court's decision was granted by the Commission.

During the pendency of the appeal, on December 12, 2000, FWSC and Hernando entered into a Settlement Agreement Extension (Settlement Extension). Pursuant to this Settlement Extension, FWSC and Hernando state that they have reached a settlement "resolving all issues arising out of the Spring Hill refund appeal." The Settlement Extension was approved by the Hernando

County Board of County Commissioners by order issued on December 12, 2000, and both the Settlement Extension and Order were transmitted by letter dated December 15, 2000, to Mr. Ken Hoffman from Mr. Kent Weissinger, Assistant County Attorney. Copies of that letter, the Settlement Extension, the July 1997 Settlement Agreement, and the Order of the County approving the Settlement Extension are attached to this recommendation as Composite Exhibit A.

On December 20, 2000, FWSC filed a motion for the First District to relinquish jurisdiction of the Spring Hill appeal to allow the Commission to consider and take action on the Settlement Extension Agreement between FWSC and Hernando. The court granted the motion on December 22, 2000, and relinquished jurisdiction to the Commission until February 8, 2001.

On January 10, FWSC filed its Motion to Approve Settlement Agreement Extension Concerning Spring Hill Appeal (Motion to Approve Settlement Extension). Because the relinquishment of jurisdiction is only through February 8, 2001, and because oral argument on the appeal is scheduled for February 21, 2001, the utility specifically requests that the Commission act on this Motion and approve the Settlement Agreement Extension no later than the February 6, 2001 Agenda Conference.

Pursuant to the relinquishment of jurisdiction by the First District, and pursuant to the Commission's jurisdiction under 367.011, 367.171, and 367.081, Florida Statutes, the Commission has jurisdiction to consider FWSC's Motion to Approve Settlement Extension.

**DISCUSSION OF ISSUES**

**ISSUE 1:** Should parties be allowed to participate?

**RECOMMENDATION:** Yes. Participation should be limited to ten minutes for each party. (JAEGER)

**STAFF ANALYSIS:** Typically, post-remand recommendations are noticed as "Parties May Not Participate," with participation limited to Commissioners and staff. Rule 25-22.0021, Florida Administrative Code, provides that:

[w]hen a recommendation is presented and considered in a proceeding where a hearing has been held, no person other than staff who did not testify at the hearing and the Commissioners may participate at the agenda conference. Oral or written presentation by any other person . . . is not permitted, unless the Commission is considering new matters related to but not addressed at the hearing.

Staff believes that the Commission will be considering matters contained in the Settlement Agreement Extension, which are related to, but were not addressed at, the hearing. In addition, given the complex nature of the issues which have been raised, staff believes that participation by the parties would be helpful to the Commission's understanding of the issues. Therefore, staff recommends that participation at the agenda conference should be allowed, but limited to ten minutes for each party.



**ISSUE 2:** Should the Commission grant the Motion to Approve Settlement Agreement Extension entered into between Florida Water Services Corporation and Hernando County?

**RECOMMENDATION:** Yes, the Commission should grant the motion and approve the Settlement Agreement Extension. (RENDELL, JAEGER, MOORE)

**STAFF ANALYSIS:** By Hernando County Resolution No. 94-77, effective April 5, 1994, Hernando County rescinded jurisdiction of this Commission over water and wastewater utilities located in that County. By Order No. PSC-94-0719-FOF-WS, issued June 9, 1994, in Docket No. 940408-WS, the Commission acknowledged the rescission of Commission jurisdiction and established the procedures for cancellation of certificates in Hernando County. That Order specifically quoted Section 367.171(5), Florida Statutes, which states that:

When a utility becomes subject to regulation by a county, all cases in which the utility is a party then pending before the commission, or in any court by appeal from any order of the commission, shall remain within the jurisdiction of the commission or court until disposed of in accordance with the law in effect on the day such case was filed by any party with the commission or initiated by the commission, whether or not the parties or the subject of any case relates to a utility in a county wherein this chapter no longer applies.

That Order further noted that FWSC held valid Certificates Nos. 046-W and 047-S, that the rate case in Docket No. 920199-WS was still pending before this Commission, and that the Commission would retain jurisdiction over that case until it was concluded.

As stated in the Case Background, the issue of refunds for the customers of the Spring Hill Division is still pending on appeal. However, the First District has relinquished jurisdiction until February 8, 2001, in order for the Commission to consider the Settlement Extension which Hernando and FWSC have submitted.

In its Motion to Approve Settlement Extension, FWSC notes that in the Spring Hill appeal, the Commission and the OPC defend and support that portion of the Final Order imposing the Spring Hill refund requirement. The utility states that it:

challenges the Spring Hill refund requirement on numerous grounds, specifically that: (a) in light of the First District Court of Appeal's decision rescinding the

"functionally related" test for a uniform rate structure in Southern States II,<sup>1</sup> the uniform rate structure ordered by the Commission in its March 1993 final order was lawful and could not provide the basis for refunds; (b) under GTE Florida, any refund requirement must be accompanied by authority for Florida Water to collect commensurate surcharges from Florida Water's remaining customers; (c) the revenue derived from the uniform rates collected by Florida Water from January 23, 1996 through June 13, 1997 was less than the revenue Florida Water would have collected under stand-alone rates for the same time period, and therefore, Florida Water should be authorized to collect surcharges - - not make refunds - - for the appropriate time period at issue; and (d) any refund liability of Florida Water should be limited to the period of August 14, 1996, the date of the Final Refund Order through June 13, 1997, the effective date of the initial settlement agreement with Hernando County.

However, FWSC goes on to state that on December 12, 2000, FWSC and Hernando executed a Settlement Extension resolving all issues arising out of the Spring Hill refund appeal. The Settlement Extension is an extension of the Settlement Agreement entered into between FWSC and Hernando dated July 17, 1997, which established new water and wastewater rates for the period June 14, 1997, through September 1, 2000. FWSC states that the Settlement Extension is supported by Intervenor Spring Hill, a group comprising the substantial portion of FWSC's customers in the Spring Hill service area, and was approved by the Hernando County Board of County Commissioners by Order entered December 12, 2000.

The current amount of any Spring Hill refund remains at issue before the court. FWSC claims:

that the appropriate lawful period for any refunds (and surcharges) is August 14, 1996 through June 13, 1997, which equates to potential refunds (and surcharges), including interest, of approximately \$1.62 million. The Commission and the Office of Public Counsel, on the other hand, maintain that the appropriate lawful refund period is January 23, 1996 through June 13, 1997, which equates to potential refunds, including interest, of approximately \$3.1 million.

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<sup>1</sup>Southern States Utils. v. FPSC, 714 So.2d 1046 (Fla. 1st DCA 1998).



Upon approval of the Settlement Extension, FWSC has agreed to provide rate reductions over the next three-year period totaling \$1,862,000. The utility has also agreed to abstain from filing for a rate increase for the Spring Hill water or wastewater systems for a period of three years "following execution of all necessary Court, County, and PSC orders accepting the terms set forth herein and thereby relieving Florida Water of any liability associated with a refund surcharge order on appeal in the First District Court of Appeal, Case No. 98-727," unless a petition or complaint is filed by or with Hernando County seeking a decrease in FWSC's Spring Hill rates or if Hernando County pursues an earnings investigation or decrease in FWSC's rates. The Settlement Extension does allow FWSC to implement indexing and pass-through increases for the three-year period. FWSC further alleges that "[t]he terms and conditions of the three-year stay-out period reflected in the Settlement Extension are consistent with those previously approved by the Commission for Florida Water [and] for the Palm Coast water and wastewater systems which were ultimately acquired by Florida Water."

FWSC further states that:

[A]pproval of the Settlement Agreement Extension is in the public interest. If the court were to reverse that portion of the final order concerning the Spring Hill refund and remand for further proceedings addressing surcharges, Florida Water and its customers will be faced with another round of Commission hearings and appeals and the substantial rate case expense associated therewith. Florida Water, the Spring Hill Civic Association and Hernando County have entered into an agreement which brings at least a portion of this rate case, which has been on-going for over eight years, to a close. The Settlement Agreement Extension provides substantial benefits in the form of reduced rates to the Spring Hill water and wastewater customers of Florida Water as well as rate stability and elimination of additional rate case expense.

Finally, FWSC notes that oral argument on both the refund/surcharge appeal and the Spring Hill appeal is scheduled to take place before the First District on February 21, 2001. At FWSC's request, the court has relinquished jurisdiction of the Spring Hill refund appeal for a period up to and until February 8, 2001, for the purpose of allowing the Commission to consider the Settlement Extension. Accordingly, FWSC requests that the

Commission act on this Motion and approve the Settlement Extension no later than at its February 6, 2001 Agenda Conference.

Staff has contacted both OPC and Mr. Mike Twomey (who originally represented Spring Hill). Mr. Twomey stated that he thought that OPC is now representing the interests of Spring Hill, and that, while he did not know for sure, it was his understanding that Spring Hill supports the Settlement Extension. Mr. Jack Shreve, the Public Counsel, has advised staff that OPC will neither support nor oppose the Settlement Extension.

In considering this Settlement Extension, staff has analyzed whether it is in the public interest for the Commission to approve this offer. In addition to determining whether the Settlement Extension is in the public interest, staff believes that the Commission must also determine whether any of the provisions of the Settlement Extension are in contravention of the law, due process, or the law of the case as set forth in the previous opinions of the First District. Staff's analysis is based on all of the above-noted conditions.

Reviewing FWSC's Motion and the Settlement Extension, staff believes that the benefits of this offer include:

- 1) Substantial rate reductions over the three-year period totaling \$1,862,000.
- 2) Abstention from filing for a rate increase for the Spring Hill water or wastewater systems for a period of three years, and the potential for higher rates and additional rate case expense associated with another rate case being deferred until at least February 6, 2004 due to the 3-year stayout provision.
- 3) Elimination of additional rate case expense for this system.
- 4) Rate stability for at least three years.
- 5) FWSC states that in addition to the county having approved and signed this Settlement Extension, that the Settlement Extension "is supported by Intervenor Spring Hill Civic Association, Inc., a group comprising the substantial portion of Florida Water's customers in the Spring Hill service area."

6) Avoidance of the uncertainty of further litigation and the possibility of another reversal by the First District, causing customers to be faced with another round of Commission hearings and appeals and the substantial additional rate case expense associated therewith.

The utility's calculations of the possible refund liabilities and the annual rate reduction pursuant to the settlement are shown on page 1 of 10 of Attachment 1 in Composite Exhibit A, attached to this recommendation. Pursuant to those calculations, FWSC faced a possible refund totaling \$3,144,801. However, pursuant to the settlement, FWSC would only reduce rates over three years by \$1,862,000.

Based on all the above, staff believes that it is in the public interest for the Commission to approve the Settlement Extension. Both Hernando and Spring Hill support this Extension Agreement, and OPC states that it will not oppose the Settlement Extension. Moreover, staff believes that the Commission may approve the Settlement Extension without being in contravention of the law, due process, or the law of the case. Therefore, staff recommends that the Commission grant FWSC's motion and approve the Settlement Extension as submitted.

DOCKET NO. 920199-WS  
DATE: JANUARY 25, 2001

**ISSUE 3:** Should this docket be closed?

**RECOMMENDATION:** No, the docket should remain open pending the outcome of the appeal. (RENDELL, JAEGER, MOORE)

**STAFF ANALYSIS:** The docket should remain open pending the outcome of the appeal.