BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for a rate increase in Citrus, Martin, Marion, and Charlotte/Lee Counties by SOUTHERN STATES UTILITIES, INC.; in Collier County by MARCO ISLAND UTILITIES (DELTONA) and MARCO SHORES UTILITIES (DELTONA); in Marion County by MARION OAKS UTILITIES (UNITED FLORIDA); and in Washington County by SUNNY HILLS UTILITIES (UNITED FLORIDA)	DOCKET NO. 900329-WS ORDER NO. 25122 ISSUED: 9/26/91

The following Commissioners participated in the disposition of this matter:

BETTY EASLEY
MICHAEL McK. WILSON

ORDER DENYING MOTIONS FOR RECONSIDERATION AND STAY

BY THE COMMISSION:

BACKGROUND

Southern States Utilities, Inc., Deltona Utilities, Inc. and United Florida Utilities Corporation, hereinafter referred to as "utility", are Class A utilities with many different systems located across the State of Florida. All three utilities are wholly-owned subsidiaries of the Topeka Group, Inc.

On July 13, 1990, the utility filed its minimum filing requirements (MFRs) for a rate increase which were determined to be deficient. On September 28,1990, the utility refiled the MFRs, which were accepted as complete, and that date was established as the official date of filing. On October 15, 1990, the utility filed an amended application for increased rates which reflected the changes made in the MFRs on September 28, 1990. October 15, 1990 was then established as the official date of filing. The test year for final rate determination is the projected twelve-month period ended December 31, 1991, based on the historical year ended December 31, 1989. The interim test period is the twelve-months ended December 31, 1989.

The Commission acknowledged the intervention of the Office of Public Counsel (OPC) by Order No. 23496, issued on September 17, 1990. On November 26, 1990, the Commission issued Order No. 23803 granting the intervention of the Cypress and Oak Villages Association.

The utility requested interim water rates designed to generate $1,667,066 annually. These revenues exceeded test year revenues by $500,519, for an increase of 42.91 percent. The utility requested interim wastewater rates designed to generate annual revenues of $3,510,010. These requested revenues exceeded test year revenues by $991,265, for an increase of 39.36 percent. The utility requested no interim increase for Collier County water and Citrus County wastewater.

The utility requested final water rates designed to generate annual revenues based on four uniform rate structures for the systems included in this application which have like types of treatment.

On December 11, 1990, the Commission issued Order No. 23860 which suspended the proposed rates and granted interim rates. The Commission granted a county-wide uniform percentage increase applicable to each system for both water and wastewater. The following is a summary of the interim increases granted:

	Water	Wastewater
Martin County (SSUI)	41.92%	57.14%
Charlotte/Lee County (SSUI)	42.00%	140.56%
Marion County (UFUC)	50.14%	27.70%
Washington County (UFUC)	50.00%	50.00%
Collier County (DUI)	0.00%	37.59%
Citrus County (SSUI)	33.45%	0.00%
Marion County (SSUI)	7.11%	99.67%

The hearing in this case was held February 11-16, 1991. On June 26, 1991, the Commission issued Order No. 24715 in which we denied the utility's rate request and ordered a refund. The utility filed a timely Motion for Reconsideration and a Motion for Stay. OPC filed a timely response thereto. Intervenor Cypress and Oak Villages Association did not file any response. Subsequently,

the utility filed a Motion for Leave to File Reply to Citizens' Response to Motion for Reconsideration.

Commissioners Easley and Gunter rendered the original decision in this proceeding. Commissioner Wilson was assigned to this panel after the death of Commissioner Gunter.

Disposition of Motions

The purpose of a motion for reconsideration is to bring to the Commission's attention matters of fact or law that were misapprehended or that were not considered in reaching its decision.

In its Motion for Reconsideration, Southern States makes three primary arguments:

1. Staff's Primary Recommendation For Rate Relief Based On A Projected 1991 Test Year Is Supported By Competent And Substantial Record Evidence.

2. Denial Of Rate Relief Based Upon Known 1989 Expenditures And Capital Investments Which Were Audited By Staff And Undisputed In The Record Contravenes Basic Ratemaking Principles And Is Unlawful.

3. The Commission's Denial Of Applicants' Request For Rate Relief Violates Applicants' Constitutional Rights.

In its Response, OPC argues that the utility seeks by its motion to reargue the case so the Commission will change its mind. OPC states that the utility "laboriously leads the reader through dismally familiar territory: it says that the applicant sustained its burden before the Commission. The Commission's order is an on-point, bulls eye rejection of that contention." OPC further states that "It cannot be argued that the Commission overlooked or failed to consider the question of burden." In conclusion, OPC states that the language used by the Commission panel at agenda indicates "a laborious and conscientious consideration of the record" and that the Commission should not revisit "issues already weighed and resolved."

The gist of the utility's arguments in Point 1 is that its MFRs were accepted; staff auditors reviewed the filing, analyzed its books and records and tested the data in the MFRs; and that staff's recommendation was that the utility's projections, as adjusted, were reasonable and prudent and therefore should be approved by the Commission. The utility argues that case law requires that "the Commission may not ignore existing facts establishing with certainty the existence of expense items that will affect future rates" and that "once a utility produces evidence of a need for rate relief, such rate relief may not be denied unless the Commission or another party to the proceeding presents competent, substantial evidence which justifies the disallowance of such relief." Further, the utility argues that based on other case law, "[I]n determining whether the Applicants have met their burden of proof, the Commission is required to give appropriate weight and credence to the findings made by Commission Staff as a result of its audits of Applicant's operations, books and records."

We do not find the utility's arguments to be persuasive. The filing and acceptance of the MFRs proves nothing. The Supreme Court in South Florida Natural Gas v. Florida Public Service Commission, 534 So.2d 695 (Fla. 1988) stated that the act of filing creates issues of material fact for all factors comprising the justification for the increase and that the utility seeking a change must demonstrate that the present rates are unreasonable. Acceptance of the MFRs by the Commission's designee merely means that all schedules have been filled out and information has been filed as required by Commission rules.

The utility argues that an "incredible amount of supporting information" was presented in its MFRs and in other record evidence. That is true, and when the Commission closely scrutinized the volumes of information in the record, it found the information lacking in the quality needed to prove that the relief requested should be granted.

It is also correct that staff auditors reviewed the utility's books and records and that the staff recommended that a rate increase should be granted to the utility. However, the Commission is not bound to accept staff's recommendations. Our review of the evidence resulted in different conclusions than staff's. In the South Florida Natural Gas case the Court found that the Commission is authorized to utilize its staff to test the evidence presented

in support of a requested increase. It did not find that the Commission is bound by its staff's conclusions and recommendations. In its argument relying on Deltona Corp. v. Mayo, 342 So.2d 510 (Fla. 1977), as requiring the Commission to give appropriate weight and credence to the findings made by Commission staff, the utility apparently overlooked the fact that there was a staff witness in those Deltona cases who testified regarding the matter at issue. A staff recommendation is not evidence; it is staff's conclusions based on its review of the record and does not bind the Commission to anything.

Point 2 makes many of the same arguments contained in Point 1, only it directs them to the 1989 historic test year and staff's alternative recommendation to grant increased rates based on that period.

In Point 3 the utility states that Section 367.081 "provides that no public utility shall be denied a fair rate of return on its investment in property dedicated to utility service." Actually, the statute says that the "Commission shall . . . fix rates which are just, reasonable and compensatory . . . " In accomplishing that mandate the Commission must consider, among other things, "a fair return on the investment of the utility in property used and useful in the public service." The utility further cites federal cases regarding fair rate of return. The utility argues that its actual returns on equity demonstrate that it did not have an opportunity to achieve a fair return on its investments in used and useful property during 1988-1990 and that therefore the denial of its requested rate relief violates its rights under the State and Federal Constitutions.

We are unpersuaded by this argument. While the utility is to be given the opportunity to earn a fair return on it investment in property used and useful in the public service, the Commission's decision was that rate base could not be determined because of the lack of credibility and flaws in the data submitted. If the rate base cannot be properly demonstrated, the Commission cannot determine the fair return required by the statute and Constitutions.

As we stated in Order No. 24715 at page 7:

> Looking at the record as a whole, we find the utility's data to be so flawed and incomplete as to

> have little probative value. Because we cannot depend on the base data, we cannot in good faith make adjustments to try to save the utility's case. We know of no way to alternatively group these systems or design rate structure based on persuasive data in the record. The rates requested by the utility were based on the investment and expenses shown in the MFRs and that data has been shown to be suspect. If we were to utilize an alternative 1989 test year and design system - specific rates, we would be basing that design on underlying data that was not justified during the course of the hearing. At various times during the six days of the hearing, we expressed our frustration with the quality of the evidence being presented. We allowed utility witnesses to return to the stand to present additional evidence. However, the utility was unable, in our view of the record, to present credible evidence that could withstand our scrutiny. Since it is not our responsibility to make the utility's case, we will not do so.

We believe that we did not overlook or misapprehend any facts or law in rendering our decision in this case. Accordingly, the utility's Motion for Reconsideration is denied on all points.

As previously stated, the utility also filed a Motion for Leave to File Reply to Citizen's Response to Motion for Reconsideration. The basis of the Motion is that the utility believes there are erroneous contentions in OPC's Response.

Commission rules authorize no such pleading. They also do not prohibit such a pleading. However, if we were to allow the Reply, there is the possibility of Reply to the Reply ad infinitum. The Reply presents repetitive argument and a differing analysis of a case discussed in OPC's Response. We believe no benefit would be derived from granting this Motion. Therefore, it is also denied.

Finally, the utility also filed a Motion for Stay of the portion of Order No. 24715 requiring a refund. OPC filed a timely response in which it stated that the rule relied on by the utility for the stay is inapplicable because it pertains only to stays pending judicial appeal and no appeal has been filed.

The Commission has granted a stay to a portion of an order regarding a rate reduction in a telecommunications case without an appeal having been filed, as stated by the utility in its motion. However, there were several motions for reconsideration filed in that case which were to be addressed at a subsequent agenda conference. Since no such time lag is present in this case, and since we have denied the Motion for Reconsideration, we will also deny the Motion for Stay.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Motions for Reconsideration, for Leave to File Reply to Citizens' Response to Motion for Reconsideration, and for Stay, filed by Southern States Utilities, Inc., Deltona Utilities, Inc., and United Florida Utilities Corporation, are hereby denied.

By ORDER of the Florida Public Service Commission, this 26th day of SEPTEMBER, 1991.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

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NOTICE OF JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.