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. 25442 ISSUED: 12/6/91

The following Commissioners participated in the disposition of this matter:

BETTY EASLEY
MICHAEL McK. WILSON

ORDER GRANTING STAY OF REFUND PENDING APPEAL CONDITIONED UPON OBTAINING LETTERS OF CREDIT, BONDS, OR ESCROW AGREEMENTS AS SECURITY FOR POTENTIAL REFUND

BY THE COMMISSION:

CASE 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. (Topeka).

On July 13, 1990, the utility filed its minimum filing requirements (MFRs) for a rate increase. The MFRs 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 was the projected twelve-month period ending December 31, 1991, based on

the historical year ended December 31, 1989. The interim test period was 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 hearing in this case was held February 11-16, 1991. On June 26, 1991, the Commission issued Order No. 24715, in which the utility's rate request was denied and a refund of the interim rates was ordered. 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.

By Order No. 25122, issued September 26, 1991, the Motions for Reconsideration and Stay were denied.

On September 17, 1991, OPC filed a Motion to Enforce Order No. 24715 and Suggestion for Order to Show Cause. The utility filed a response on September 30, 1991. By letter dated October 1, 1991, OPC requested a hearing on its motion. On October 28, 1991, the utility filed its Notice of Appeal and a Motion for Stay of Portion of Order No. 24715. OPC filed a response on October 31, 1991, and a Request for Evidentiary Hearing on the Sufficiency of Security.

OPC's MOTION TO ENFORCE ORDER NO. 24715 AND REQUEST FOR ORAL ARGUMENT

OPC's Motion was filed subsequent to the Commission's vote to deny the utility's Motion for Reconsideration of Order No. 24715, but prior to the issuance of Order No. 25122 which memorialized the decision to deny the Motion for Reconsideration. OPC's Motion and Request are now moot by virtue of the utility's filing its Notice of Appeal and Motion for Stay.

UTILITY'S MOTION FOR STAY OF PORTION OF ORDER NO. 24715

Rule 25-22.061(1)(a), Florida Administrative Code, provides:

> When the order being appealed involves the refund of moneys to customers or a decrease in rates charged to customers, the Commission shall, upon motion filed by the utility or company affected, grant a stay pending judicial proceedings. The stay shall be conditioned upon the posting of good and sufficient bond, or the posting of a corporate undertaking, and such other conditions as the Commission finds appropriate.

As stated in the Case Background, the utility filed its Notice of Appeal and Motion for Stay of Portion of Order No. 24715 on October 28, 1991. The utility submitted a corporate undertaking guaranteed by its parent company, Topeka.

On October 31, 1991, OPC filed its response in opposition and requested an evidentiary hearing on the sufficiency of the security. OPC argues that a ruling on the utility's motion is unnecessary since OPC's pending motion for enforcement filed September 17, 1991, has not yet been addressed. OPC also argues that the motion has already been denied by Order No. 25122, which denied the utility's motions for reconsideration and stay. Further, OPC argues that the tendered security, a corporate undertaking by the parent company is illusory because: Topeka, the parent, could be dissolved by its parent Minnesota Power and Light Company; Topeka is not qualified to do business in Florida and is not subject to this Commission's jurisdiction; and Topeka is not a surety company, bonding company, insurance company or banking institution required to maintain cash or securities to serve as security for its guaranty.

Subsequent to our Staff's filing their recommendation to us on this matter, the utility filed a Response to OPC's Response to the Motion for Stay and Request for Hearing. Such a filing is not contemplated by our rules, but we will consider it nonetheless.

When the utility filed its Motion for Stay, it included a corporate undertaking by Southern States Utilities, Inc., Deltona Utilities, Inc., and United Florida Utilities Corporation,

guaranteed by the parent, Topeka. No financial information was submitted to support the guarantee. In the utility's Response to OPC's Response mentioned above, financial information of the parent company was included.

Upon consideration, we will grant the stay, but the granting is conditioned upon the provision of other types of security than those offered by the utility, as will be discussed below. We do not agree with OPC that the utility's Motion for Stay has already been denied because the motion that we denied by Order No. 25122 related to a stay during the reconsideration phase of this proceeding. We do agree with OPC that the tendered corporate undertaking guaranteed by Topeka should not be accepted.

Currently, there is a $1,248,083 corporate undertaking previously accepted by the Commission to secure the interim rates, which was filed pursuant to the interim order, Order No. 23860, issued December 11, 1990. In that order we stated:

> ...We are advised that on a stand-alone basis, Deltona and United Florida have equity ratios that indicated an acceptable level of safety and, therefore, these companies qualified for corporate undertakings. The ratios for Southern States are borderline. Nevertheless, Southern States, Deltona, and United Florida have each agreed to guarantee their own corporate undertakings as well as the corporate undertakings of the other two.

We have calculated that the revenues to be collected during the 12-month anticipated pendency of the appeal will be approximately $1,611,806. Additional security in that amount is needed to secure this portion of a potential refund at the conclusion of the appeal.

Based on review of the utility's Annual Reports filed with the Commission and 1990 audited financial statements, the audited financial information through 1990 submitted regarding Topeka, and the total size of the potential refund ($2,859,889), we do not believe continued corporate undertakings, even guaranteed by Topeka, offer sufficient protection to secure a potential refund. One of the criteria we look at in determining whether to grant a stay is the likelihood of the utility prevailing on appeal. We do

not believe the utility will prevail on appeal. We do believe that a conservative approach is necessary to protect the ratepayers during the appeal process. Thus, we find it appropriate to deny the offered corporate undertaking and guarantee submitted by the utility and Topeka, respectively. We will give the utility options from which to choose in securing the $2,858,889 potential refund.

Each utility can either obtain and file with the Commission a letter of credit or bond totalling $2,859,889, or obtain and file with the Commission letters of credit or bonds for the approximately $1,248,083 in revenues collected that are presently secured by the corporate undertaking and establish escrow accounts into which each would place revenues collected from this point forward. The latter approach would minimize the impact of the cost of the potential refund since the letters of credit or bonds would only have to cover the revenues collected up to the point of the escrow. If the utility chooses to establish escrow accounts, the escrow agreements shall be submitted to staff for their review and approval. The escrow agreements shall be established between the utility and an independent financial institution pursuant to a written escrow agreement. The Commission shall be a party to the written escrow agreements and a signatory to the escrow account. The written escrow agreements shall state, at a minimum, that the account is established at the direction of this Commission for the purpose set forth above, that the account is to be an interest bearing account, that no withdrawals of funds shall occur without the prior written approval of the Commission through the Director of the Division of Records and Reporting, that the ultimate disposition of the escrow funds, including interest, is subject to the authority of the Commission, and that pursuant to Consentino v. Elson, 263 So.2d 253 (Fla. 3d DCA 1972), escrow accounts are not subject to garnishments.

The utility must continue to keep an accurate and detailed account of the interim revenues received and continue to file a monthly report showing the amount of revenues collected pursuant to the interim order.

If the security is provided through bonds or letters of credit, such bonds or letters of credit shall be irrevocable without the consent of the Commission for the period each is in effect. Whichever option the utility chooses, the utility must file the letters of credit or bonds and/or escrow agreements within 30 days of our vote on this matter; that is, by December 19, 1991.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Motion of Southern States Utilities, Inc., Deltona Utilities, Inc., and United Florida Utilities Corporation for Stay of Portion of Order No. 24715 is granted as to the stay and denied as to the type of security offered to secure the potential refund. It is further

ORDERED that as a condition of the stay, Southern States Utilities, Inc., Deltona Utilities, Inc., and United Florida Utilities Corporation shall each submit for staff's approval either a letter of credit or bond totalling $2,859,889. In the alternative, Southern States Utilities, Inc., Deltona Utilities, Inc., and United Florida Utilities Corporation shall each establish an escrow account pursuant to the terms set forth in the body of this Order into which revenues collected during the pendency of the appeal shall be deposited and obtain a bond or letter of credit securing the approximately $1,248,083 of revenues collected up to the point of the establishment of the escrow account. It is further

ORDERED that the utility shall submit the security ordered above by December 19, 1991, for staff's approval.

By ORDER of the Florida Public Service Commission, this 6th day of DECEMBER, 1991.

STEVE TRIBBLE, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR 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: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) 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.