

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Increase in Brevard,) DOCKET NO. 920199-WS
Charlotte/Lee, Citrus, Clay,) ORDER NO. PSC-93-0281-FOF-WS
Duval, Highlands, Lake, Marion,) ISSUED: 02/23/93
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).)
_____)

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD
SUSAN F. CLARK

ORDER GRANTING IN PART AND DENYING IN PART
SOUTHERN STATES UTILITIES, INC.'S MOTION TO STRIKE

BY THE COMMISSION:

BACKGROUND

Southern States Utilities, Inc., and Deltona Utilities, Inc., (hereinafter referred to as the utility or SSU) are collectively a class "A" water and wastewater utility operating in numerous counties in the State of Florida. On May 11, 1992, the utility filed an application to increase the rates of 127 of its water and wastewater systems regulated by this Commission. Upon the utility's correcting deficiencies to its minimum filing requirements (MFRs), we established the official date of filing as June 17, 1992.

According to the MFRs, total test year revenue for the water systems filed in this application was \$12,319,321, and the net operating income was \$1,616,165. Total test year revenue for the wastewater systems was \$6,669,468, and the net operating income was \$324,177. The systems included in this rate application serve a total of 75,055 water customers and 25,966 wastewater customers.

DOCUMENT NUMBER-DATE

02103 FEB 23 93

FPSC-RECORDS, REPORTING

The utility requested interim rates designed to generate annual revenues of \$16,806,594 for water and \$10,270,606 for wastewater, increases of \$3,981,192 (31.57 percent) for water and \$2,997,359 (41.22 percent) for wastewater. The utility requested final rates designed to generate annual revenues of \$17,998,776 for water and \$10,872,112 for wastewater, increases of \$5,064,353 (40.16 percent) for water and \$3,601,165 (49.53 percent) for wastewater. The test year for both interim and final purposes is the historical period ended December 31, 1991.

By Order No. PSC-92-0832-FOF-WS, issued August 27, 1992, we suspended the utility's requested rates. By Order No. PSC-92-0948-FOF-WS, issued September 8, 1992, as amended by Order No. PSC-92-0948A-FOF-WS, issued October 13, 1992, we approved interim rates designed to generate annual water and wastewater revenues of \$16,347,596 and \$10,270,606, respectively.

Between August, 1992, and November, 1992, we held a total of ten service hearings throughout the state for the purpose of receiving customer testimony for this case. Beginning November 6, 1992, we conducted a five-day hearing in Tallahassee. Subsequent to that hearing, the parties submitted briefs. On December 17, 1992, SSU filed its Motion to Strike New Legal Issues in Citrus County's Brief. Citrus County did not file a response. This Order disposes of SSU's motion.

MOTION TO STRIKE

Citrus County filed its petition to intervene in this case on October 23, 1992. It did not file a prehearing statement, as required by the Order Establishing Procedure, and did not appear at the October 28th prehearing conference. As a result, the Prehearing Order, Order No. PSC-92-1265-PHO-WS, issued November 4, 1992, lists no issues raised by or positions held by Citrus County. Citrus County was formally granted intervention in Order No. PSC-92-1243-FOF-WS, issued November 2, 1992. Citrus County's participation in this proceeding began at the November hearing in Tallahassee.

In its motion, SSU argues that Citrus County's brief improperly raises two new legal issues: (1) whether the Commission has statutory authority to set rates other than so-called system rates (rates based on each system's individual cost of service) and (2) whether the customer notice was defective because it failed to mention the possibility that rates other than system rates might be

established. SSU asserts that, according to the Order Establishing Procedure, issues not raised prior to the issuance of the Prehearing Order are waived unless good cause is shown. Citrus County, SSU maintains, has not made the requisite good cause showing. SSU also points out that at the hearing, counsel for Citrus County emphasized that he was not attempting to raise any new issues when he announced that he believed the Commission did not have statutory authority to set rates that were not system rates.

As stated in the Case Background above, Citrus County did not respond to SSU's motion. And in its brief, Citrus County only confuses its position in the matter. Its brief is a six page document which begins with a duplication of issue 92, as stated in the Prehearing Order. Immediately thereafter, Citrus County states that it adopts COVA's position on the issue. However, the County then inserts another heading, "Jurisdictional Legal Issue," followed by an issue statement (in question form), a position, discussion, and conclusion. At page 5, the County repeats the same pattern under the heading "Procedural Legal Issue."

For the reasons set forth below, we shall grant SSU's motion only as to that portion of Citrus County's brief which refers to the "Procedural Legal Issue," beginning at the bottom of page five of the brief and ending on page six.

First, we note that this Commission has previously stricken portions of a party's brief when the party raised new issues in its brief. In Order No. PSC-92-0104-FOF-WS, issued March 27, 1992, Docket No. 910114-WU, In re: Application of ECFS for an original certificate in Brevard, Orange and Osceola Counties, the Commission granted ECFS's motion to strike two legal issues raised for the first time in another party's brief. In that case, the Commission found that ECFS would be prejudiced by the Commission's considering the new issues--which related to whether ECFS would be exempt--when ECFS had no opportunity to address the factual bases for the issues.

In this instance, we are confronted with what Citrus County itself seems to have labelled as two new issues: statutory authority and procedural due process. We believe that Citrus County's position regarding statutory authority can fairly be considered under existing issue 92 without any prejudice to SSU. Indeed, when Citrus County announced its concern with statutory authority at the hearing, the presiding officer indicated he

believed Citrus County was merely announcing its position on issue 92 and was not raising a new issue. SSU voiced no objection to Citrus County's new position at the hearing and apparently does not do so now in its motion.

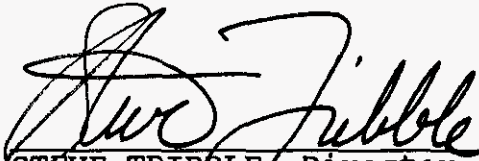
We view Citrus County's perceived noticing flaw differently. We do not believe that we can, at this late date, consider Citrus County's claim that the customer notice was deficient without prejudice to SSU. This new issue cannot be said to fall within the scope of an existing issue, and none of the parties have made prior mention that they viewed noticing as an issue. Thus, SSU has had no opportunity whatsoever to address the alleged noticing defect.

When a new issue raised in a brief is one of grave concern and significance, we might be of a different opinion. However, this is not one of those instances. In short, this Commission cannot realistically expect a utility to give the customers direct notice of every issue in a rate case that might have an affect on those customers. The tariffs filed with the utility's MFRs reflect the utility's proposed rate structure, which is a variation of the rate structure which Citrus County complains of. Furthermore, OPC, which is charged with representing all of SSU's customers, participated in this proceeding since its inception and was surely aware from the onset that rate structure was an issue. This Commission's established noticing procedures are designed to keep customers as informed as reasonably practical, and no one has alleged or proved SSU failed to follow those procedures.

Based upon the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that Southern States Utilities, Inc.'s Motion to Strike New Legal Issues in Citrus County's Brief is granted in part and denied in part as set forth in the body of this Order.

By ORDER of the Florida Public Service Commission this 23rd day of February, 1993.


STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)
MJF

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 this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) 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 wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.