BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: 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 ORDER NO. PSC-93-1788-FOF-WS ISSUED: December 14, 1993

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
SUSAN F. CLARK
JULIA L. JOHNSON

ORDER VACATING AUTOMATIC STAY

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 various counties in the State of Florida. By Order No. PSC-93-0423-FOF-WS (also referred to as the Final Order), issued on March 22, 1993, the Commission approved an increase in the utility's rates and charges which set rates based on a uniform statewide rate structure. Numerous motions for reconsideration were decided by this Commission. Upon the filing of petitions for reconsideration, Southern States Utilities, Inc. filed a motion for Stay of the Provisions of the Final Order requiring refunds of interim revenues within 90 days. This motion was approved by Order Number PSC-93-0861-FOF-WS, issued June 8, 1993.

All of the motions for reconsideration, except for SSU's motion, were decided at the July 20, 1993 Agenda Conference. However, the Commission panel's vote was split on one of the

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motions. The Chairman cast a deciding vote on the remaining issue at the August 3, 1993 Agenda Conference. On August 17, 1993, Commissioner Clark moved for reconsideration of the calculation of the interim refund in the Final Order. Commissioner Clark's motion was decided at the September 28, 1993 Agenda Conference.

On September 15, 1993, pursuant to the provisions of the Final Order, Commission staff approved the revised tariff sheets and the utility proceeded to implement the final rates. On October 8, 1993, Citrus County and Cypress and Oak Villages (COVA) filed a Notice of Appeal of the Final Order at the First District Court of Appeal. That Notice was amended to include the Commission as a party on October 12, 1993. On October 18, 1993, the utility filed a Motion to Vacate Automatic Stay which is discussed below. The Order on Reconsideration, Order No. PSC-93-1598-FOF-WS was issued on November 2, 1993.

REQUEST FOR ORAL ARGUMENT

On October 26, 1993, Citrus County filed a Request for Oral Argument with its Motion for Reduced Interim Rates, Recalculated Bills, Refunds and Penalty. On November 8, 1993, the utility filed its response to the request for oral argument asserting that the motion filed by the County was deficient. On November 10, 1993, the County filed an amended request for Oral Argument. On November 17, 1993, the utility filed its response to the amended request.

Notwithstanding any legal insufficiency in the request for oral argument, we find it appropriate to grant oral argument in this matter because, unlike other requests related to a stay on appeal of a rate case decision, there are unique circumstances to be considered. Argument on the motions was heard at the November 23rd Agenda Conference.

Motion to Vacate Automatic Stay

As stated above, on November 2, 1993, the Commission issued the Order on Reconsideration which rendered the Final Order final for purposes of appeal pursuant to the pertinent portion of Section 367.084, Florida Statutes, and Rule 25-22.060, Florida Administrative Code. However, before the Order on Reconsideration was issued, the utility implemented the final, uniform, statewide rates effective September 15, 1993, pursuant to Sections 367.081(6) and .084, Florida Statutes, the provisions of the Final Order, and

the approved tariffs. The applicable portions of Section 367.084, Florida Statutes, provide as follows:

> Any order issued by the commission adjusting general increases or reductions of the rates and charges of any utility or regulated company must be reduced to writing.... Such an order is not considered rendered for purposes of appeal, rehearing, or judicial review until the date the copies are mailed as required by this section. This provision does not delay the effective date of the order. Such an order is considered rendered on the date of the official vote for the purposes of s.367.081(6).

On October 8, 1993, Citrus County filed an appeal in the First District Court of Appeal. On October 12, 1993 Citrus County filed an amended notice of appeal to add the Commission as a named appellee. It is Citrus County's position that this filing of an appeal before the written Order on Reconsideration was issued operated as an automatic stay.

On October 19, 1993, the utility filed its Motion to Vacate Automatic Stay. As grounds for its motion, the utility averred that: the likelihood of Citrus County's prevailing on appeal is remote; the uniform rates benefit a majority of customers located in Citrus County; the implementation of uniform rates is in the public interest; and, no refund liability would exist if the Final Order is affirmed on appeal. Based on the argument that no refund liability would exist if the Final Order is affirmed, the utility argued that no bond should be required.

On October 26, 1993, Citrus County filed its Response in opposition to the utility's Motion to Vacate. The County's responsive pleading also contained a Motion For Reduced Interim Rates, Recalculated Bills, Refunds and Penalties. Citrus County's motion is discussed below. The basis for the County's opposition to the Motion to Vacate is that the customers will be irreparably harmed based on their age and the relative size of the increase.

Rule 25-22.061 (3)(a), Florida Administrative Code, provides that when a public body, such as Citrus County, appeals an order of the Commission increasing a utility's rates which appeal operates as an automatic stay, "the Commission shall vacate the stay upon motion by the utility ...and the posting of good and sufficient bond or corporate undertaking." The language of the rule is

straightforward and unambiguous. Citrus County has raised the argument that there are special circumstances to be considered in this case which mitigate against vacating the stay.

We find that Rule 25-22.061(3), Florida Administrative Code, is not a discretionary provision and that it mandates that an automatic stay will be lifted when a utility so requests and posts good and sufficient bond or corporate undertaking. This section of the rule does not direct consideration of any specific factors in determining whether to grant a stay. On this basis, we find it appropriate to vacate the automatic stay.

The change in the rate structure in this docket creates a unique situation, particularly in light of Citrus County's statement that the amount of the revenue requirement will not be at issue. In a typical rate case appeal, any issue raised would have an effect on the final revenue requirement, and the security for the possible change in rates would be a straight forward calculation. Therefore, the focus of our determination is whether lifting the stay will cause irreparable harm and whether some form of security will adequately protect customers adversely affected. The purpose of security on appeal has always been to insure that if the utility has overcollected revenues by implementing final rates, the customers who have overpaid will have the overpayments refunded with interest. However, in this case, although the appeal may be revenue neutral, SSU's customers will still be protected.

We are concerned that the utility may not be afforded its statutory opportunity to earn a fair rate of return, whether it implements the final rates and loses the appeal or does not implement final rates and prevails on appeal. Since the utility has implemented the final rates and has asked to have the stay lifted, we find that the utility has made the choice to bear the risk of loss that may be associated with implementing the final rates pending the resolution of the appeal. In its motion, the utility asserts that it does not believe that it will suffer any losses, based on its position that it will prevail on appeal. We find that an appropriate estimate of the amount to be refunded where the stay is vacated and then the final decision is reversed may be as much as $3,000,000 per year over the course of the appeal. Citrus County argues that it would be impossible to get a bond or corporate undertaking for this amount.

The utility currently has a $5,800,000 bond which has been renewed through September 4, 1994. We find that this bond, which

was originally the security for the interim rate increase, would be sufficient for the purposes of appeal if the bond issuer is willing to accept the change in the nature of the purpose of the bond. The bond shall remain in effect and must be renewed in September of 1994 if the appeal is still pending at that time.

We previously determined that the uniform rate structure is appropriate and that the rates based on that rate structure are just, reasonable, compensatory, and not unfairly discriminatory. By providing security for those customers who may have overpaid in the event the Final Order is overturned, the customers of this utility will be protected in the event a refund may be required. The County argues that these particular customers will be irreparably harmed because of their age and income status. We find that by requiring security from the utility, the customers of SSU who may possibly be affected are adequately protected. In fact, once the security is in place, the unique circumstance of this case is reduced to the simple distinction that in the event the Final Order is not affirmed, the utility may lose revenues which this Commission determined the utility to be entitled to have the opportunity to earn.

The County argued at the Agenda Conference that by interpreting Rule 25-22.061(3)(a), Florida Administrative Code, as being mandatory in nature, we have unconstitutionally encroached on the rulemaking authority of the Florida Supreme Court and abdicated our responsibility to exercise discretion required under Rule 9.310 (b)(2), Florida Rules of Appellate Procedure. We disagree. Our adoption of Rule 25-22.061(3)(a), Florida Administrative Code, is a valid exercise of our authority. The Appellate Rules do not prohibit this Commission's setting policy for granting stays on appeal of Commission orders. This exercise of discretion, adopted by rule, sets forth the specific conditions under which a stay may be granted. We have in no way abdicated any responsibilities required by the Appellate Rules.

Citrus County also suggests that the utility is not entitled to the relief sought because Rule 25-22.061(1), Florida Administrative Code, only refers to cases where there is a refund or a rate decrease. While Citrus County is correct in its interpretation of Subsection 1 of the Rule, the County has neglected to see that Subsection 3, which deals specifically with instances such as these in which the County, a governmental entity, has filed a notice of appeal of "an order involving an <u>increase</u> in

a utility's ...rates"(emphasis added). These two subsections have completely different purposes which should not be confused.

In summary, we find it appropriate to grant SSU's Motion to Vacate Automatic Stay and to require the utility to provide security in the form of a bond; either the bond which the utility has in effect until September, 1994, or a similar one for $3,000,000. In the event the appeal should take longer than two years, the Commission will evaluate the sufficiency of the bond at that time.

Citrus County's Motion

On October 26, 1993, Citrus County filed its Motion For Reduced Interim Rates, Recalculated Bills, Refunds and Penalties. As grounds for its motion, the County alleged that by implementing the final rates on September 15, 1993, the utility violated the automatic stay resulting from the County's filing an appeal on October 8, 1993. The County further argued that by filing its Notice of Appeal prior to the issuance of a written order on reconsideration that for purposes of the issues between Citrus County, COVA and SSU, the Order was final and all issues raised for reconsideration by Citrus County and COVA were deemed abandoned pursuant to Rule 9.020 (g), Florida Rules of Appellate Procedure. The County argued that because the order was final as of October 8, 1993, the utility should have filed a motion to vacate the stay prior to implementing the rates.

On November 8, 1993, the utility filed its response arguing that Citrus County lacks standing to argue its motion on behalf of customers of the Spring Hill system when that system serves residents outside of Citrus County. The utility also argued that the "status quo" on October 8, 1993, urged by Citrus County would be uniform rates pursuant to the Final Order, not the interim rates. The utility states that even the interim rates were not strictly stand-alone rates and that to the extent the County argued the uniform rates are unfair because of subsidies, continuing interim rates at a reduced revenue level would have the same result as that which the County seeks to prohibit. In addition, the utility asserted that the County failed to ask for a stay pending reconsideration.

We find that, pursuant to Rule 25-22.060 (c), Florida Administrative Code, Sections 367.081 and .084, Florida Statutes, and the Final Order, the utility was entitled to implement the

uniform rates when the tariffs were approved. Rule 25-22.060(c), Florida Administrative Code, provides in pertinent part:

> A final order shall not be deemed rendered for the purpose of judicial review until the Commission disposes of any motion and cross motion for reconsideration of that order, but this provision does not serve to automatically stay the effectiveness of any such final order....

Also, Section 367.084, Florida Statutes, states that a rate adjustment order is considered rendered on the date of the official vote of the Commission for the purposes of Section 367.081 (6), Florida Statutes. Section 367.081 (6), F.S., establishes the time frames within which the Commission must make decisions on requests for rate relief. Based on these provisions of rule and statute, we find that the utility had the authority to charge the rates set forth in the Final Order, pursuant to the provisions of the Final Order and the tariffs which were approved on September 15, 1993.

The County argued at the Agenda Conference that the utility violated a Commission Order to Stay the final order by implementing rates. The County has failed to recognize that Order No. PSC-93-0861-FOF-WS, issued June 8, 1993, granted the utility's motion for a stay of the provisions of the Final Order which required the refund of a portion of the interim revenues within 90 days of the issuance of the Final Order.

We find that it is the County which has placed the utility in this situation by waiting months to invoke the automatic stay through the filing of the appeal without seeking any kind of stay pending reconsideration. The County knew through discussions at a previous Agenda Conference that the utility would have the authority, pursuant to the Final Order and applicable rules and statutes, to implement the final rates prior to the conclusion of reconsideration. The Commission's oral decision to deny the County's and COVA's motions for reconsideration was made on July 20, 1993. Yet, the County waited until October 8, 1993, to abandon its request for reconsideration and file its appeal which initiated the automatic stay. In the time between the Commission decision and the filing of the appeal the utility implemented final rates. Once the utility implemented final rates, the County's automatic stay placed the utility in the difficult situation of having to change its rate structure again or to expeditiously seek relief from the stay.

We have also considered that the purpose of the automatic stay that the County seeks to have enforced is not the purpose of the County's appeal. The purpose of the rule is to accord deference to a governmental entity's decision which is deemed to have been made in the public interest. St. Lucie County v. North Palm Development Corporation, 444 So. 2d 1133 (Fla. 4th DCA 1984); City of Lauderdale Lakes v. Corn, 415 So. 2d 1270 (Fla. 1982). In this instance, the role of the County is as a customer of the utility appealing a decision of this Commission. The County has made no decisions herein, and has no governmental function in this proceeding. Therefore, the protection the County seeks is not the protection the automatic stay was intended to provide.

We find that the utility acted with reasonable speed in bringing this motion to the Commission. In addition, the County has not alleged any violation of any Commission rule, statute or order. Therefore, we deny the County's Motion.

Again, as in all pleadings, the County raises the issue that the uniform rates are unfair. The fairness issue has been ruled upon innumerable times in this docket and others and need not be addressed here. This Commission made a determination in the Final Order that the rates approved in the Order were just, reasonable, compensatory, and not unfairly discriminatory. It is the County's prerogative to raise the issue of fairness in the appellate court but its argument is inappropriate in this forum.

We find that to the extent that the County is a customer of the utility, it has standing to file this motion. Therefore, lack of standing is not the basis of our decision herein.

Accordingly, Citrus County's motion is denied.

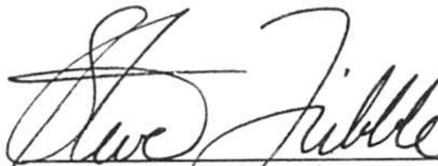
Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that the Motion to Vacate Automatic Stay filed by Southern States Utilities, Inc. is granted. It is further

ORDERED that the Motion for Reduced Interim Rates, Recalculated Bills, Refunds and Penalties filed by Citrus County is denied. It is further

ORDERED that Southern States Utilities, Inc. shall maintain security pursuant to the provisions set forth in the body of this Order during the pendency of the Appeal of Order No. PSC-93-0423-FOF-WS.

By ORDER of the Florida Public Service Commission, this 14th day of December, 1993.



STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

CB

Chairman Deason dissented on the issue of granting the motion to Vacate the Automatic Stay.

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

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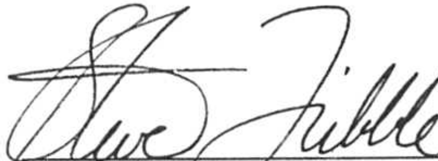

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the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.