

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Investigation Into the ) DOCKET NO. 930880-WS  
Appropriate Rate Structure for ) ORDER NO. PSC-94-0371-PCO-WS  
SOUTHERN STATES UTILITIES, INC. ) ISSUED: March 30, 1994  
for all Regulated Systems in )  
Bradford, Brevard, Citrus, Clay, )  
Collier, Duval, Hernando, )  
Highlands, Lake, Lee/Charlotte, )  
Marion, Martin, Nassau, Orange, )  
Osceola, Pasco, Putnam, )  
Seminole, St. Johns, St. Lucie, )  
Volusia, and Washington )  
Counties. )  
\_\_\_\_\_ )

ORDER GRANTING SOUTHERN STATES UTILITIES, INC.'S  
MOTION TO STRIKE TESTIMONY AND DENYING  
COVA'S REQUEST FOR ORAL ARGUMENT

By motion filed March 7, 1994, Southern States Utilities, Inc. (SSU or utility) has moved to strike portions of the direct testimony filed by Robert T. Mann, Esquire. SSU asserts that portions of Mr. Mann's testimony consist of his legal opinion concerning the constitutionality of uniform rates, as well as his legal opinion concerning whether the Commission has "jurisdiction to establish conservation rates under various provisions of the Florida Statutes." SSU requests that these portions of Mr. Mann's testimony should be stricken because: 1) although the issues proposed by Citrus and Hernando Counties included an issue regarding the constitutionality of uniform rates, the Prehearing Officer did not include that issue as appropriate for this proceeding; 2) the pertinent portions of Mr. Mann's testimony are not evidentiary, but legal arguments; 3) legal issues are the province of the court and not to be decided by expert witnesses; and 4) the issue of the constitutionality of uniform rates has been identified by COVA and Citrus County in their pending appeal to the First District Court of Appeal of Order No. PSC-93-0423-FOF-WS which would make consideration of this issue by the Commission in this proceeding superfluous. SSU cites T.J.R. Holding Co., Inc. v. Alachua County, 617 So.2d 798, 800 (Fla. 1st DCA 1993) and Williams v. Department of Transportation, 579 So.2d 226 (Fla. 1st DCA 1991) as support for its position that it is inappropriate for the Commission to receive expert testimony on a legal issue.

Specifically, SSU requests that the following portions of Mr. Mann's prefiled direct testimony related to the constitutionality of uniform rates be stricken:

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FPSC-RECORDS/REPORTING

- (a) Page 10, line 4 through Page 10, line 25;
- (b) Page 14, line 13 strike the words, "The Constitutions and the";
- (c) Page 16, line 23 through page 17, line 2; and
- (d) Page 17, line 6 to page 17, line 7.

SSU also requests that Page 4, line 11 through Page 5, line 18 of Mr. Mann's prefiled direct testimony related to the Commission's authority to establish conservation rates be stricken.

On March 21, 1994, Cypress & Oak Villages Association (COVA) timely filed a response to SSU's motion to strike, as did Citrus and Hernando Counties on the same date. In its response, COVA asserts that SSU's motion should be deferred until Mr. Mann's prefiled direct testimony is moved into evidence at the final hearing because that is the customary time to consider such a motion and because the Commission will be better equipped to judge whether the testimony is relevant and appropriate. In the alternative, COVA argues that SSU's motion should be denied because: 1) Mr. Mann's testimony addresses issues that have been established in this proceeding, including the legality of conservation rates and the consideration of contributions-in-aid-of-construction (CIAC) levels as they impact rate structure; 2) many other witnesses, including some of SSU's, have addressed legal issues in their testimony; and 3) the cases cited by SSU relate to jury trials in which jurors must follow the judge's instructions on matters of law, which is why in those cases expert testimony on legal issues is not appropriate; there is no reason not to allow discussion of legal and constitutional issues in an "overall investigation".

COVA also filed, on March 21, 1994, a request for oral argument on the motion to strike at the final hearing, in which it states that the testimony SSU has requested to have stricken is important to COVA's right to be heard in this proceeding and necessary to complete the Commission's investigation.

Citrus and Hernando Counties' response argues that SSU's motion to strike should be denied because: 1) this proceeding is not a jury trial and the cases cited by SSU supporting the proposition that expert testimony on legal issues is inappropriate were jury trials; 2) the statutes involved in this case are not "susceptible to being given plain effect consistent with their ordinary meaning" and, therefore, the Commission should receive expert testimony from Mr. Mann, as he is a former Commission

Chairman, legislator, jurist and law professor on the interpretation of the statutes involved; 3) SSU's witnesses' testimony contains legal conclusions; and 4) the Commission is capable of giving the appropriate weight to all of the relevant evidence in this case and "filtering out that which is not relevant."

Having reviewed the pleadings and arguments of the parties, SSU's motion to strike the above-identified specific portions of Mr. Mann's testimony is granted. By Order No. PSC-93-1795-PCO-WS, issued December 16, 1993, the Prehearing Officer established the issues to be addressed in this proceeding. It was determined that the issue, raised by some of the parties, which addressed the Commission's authority with respect to approving a uniform rate structure, was not appropriate for this proceeding. The Order specifically stated that the Commission determined and reaffirmed its legal authority to set rates using a statewide, uniform rate structure. Therefore, as stated earlier in Order No. PSC-93-1795-PCO-WS, this issue is not appropriately raised in this docket, but rather in the appeal of the Final Order in Docket No. 920199-WS. By Order No. PSC-94-0176-FOF-WS, issued February 11, 1994, the full Commission in denying Citrus and Hernando Counties' Motion for Reconsideration, upheld the Prehearing Officer's determination of the appropriate issues for this proceeding. Since the issue addressing the Commission's authority to approve a uniform rate structure has already been addressed in Docket No. 920199-WS and is being addressed in the pending appeal, it is not relevant to this proceeding. Therefore, the portions of Mr. Mann's testimony related to that issue are likewise not relevant.

It has not been Commission practice to allow expert testimony on legal issues. I concur. The most appropriate place for legal discussion is in a post-hearing filing, such as a brief, where all of the parties have equal opportunity to present case law and argument in support of their position on the issue. Cross-examination of a witness on legal opinion is not contemplated by Section 120.57, Florida Statutes, which provides for a fact finding proceeding. Legal argument is more appropriately reserved for argument of counsel in a party's brief. The parties must remember that although this proceeding is an investigation into the appropriate rate structure for SSU, it is also an evidentiary hearing as contemplated by Section 120.57, Florida Statutes. For this reason, the portion of Mr. Mann's testimony that addresses the Commission's authority to consider conservation when setting rates is not appropriately raised in the testimony. In the pertinent portions of Mr. Mann's testimony, the only expertise he employs is his legal opinion regarding the appropriate interpretation of certain statutes. The parties may incorporate such interpretation



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in their briefs. Pursuant to Rule 25-22.056(1)(a), Florida Administrative Code, parties are permitted to file legal briefs in Section 120.57, Florida Statutes, hearings before the Commission.

By granting SSU's motion to strike, COVA will not be denied due process. COVA asserts in its response that the Commission should wait to rule on the utility's motion at the hearing. I disagree. Waiting to address such a motion at the final hearing would be an inefficient use of time and resources. Rather than leaving a motion pending, it would assist the parties in their preparation of the case to know ahead of time the disposition of the motion.

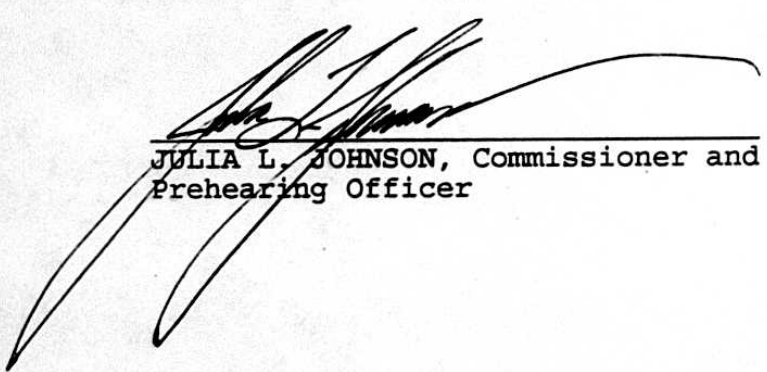
Finally, since the pleadings have fully and adequately explained the positions of the parties, COVA's request for oral argument is denied.

Based on the foregoing, it is, therefore,

ORDERED by Commissioner Julia L. Johnson, as Prehearing Officer, that Southern States Utilities, Inc.'s Motion to Strike Portions of Prefiled Direct Testimony of Robert T. Mann, Esq. is hereby granted as set forth in the body of this Order. It is further

ORDERED that Cypress and Oak Villages Association's Request for Oral Argument is hereby denied as set forth herein.

By ORDER of Commissioner Julia L. Johnson, as Prehearing Officer, this 30th day of March, 1994.



JULIA L. JOHNSON, Commissioner and  
Prehearing Officer

( S E A L )

SFS

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.