

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for rate) DOCKET NO. 950495-WS
increase and increase in service) ORDER NO. PSC-95-1368-PCO-WS
availability charges by Southern) ISSUED: November 3, 1995
States Utilities, Inc. for)
Orange-Osceola Utilities, Inc.)
in Osceola County, and in)
Bradford, Brevard, Charlotte,)
Citrus, Clay, Collier, Duval,)
Hernando, Highlands,)
Hillsborough, Lake, Lee, Marion,)
Martin, Nassau, Orange, Osceola,)
Pasco, Polk, Putnam, Seminole,)
St. Johns, St. Lucie, Volusia,)
and Washington Counties.)

ORDER DEFERRING RULING IN PART, GRANTING IN
PART AND DENYING IN PART THE OFFICE OF PUBLIC
COUNSEL'S FOURTH MOTION TO COMPEL AND DENYING FOURTH
MOTION TO POSTPONE DATE FOR FILING INTERVENOR TESTIMONY

On September 18, 1995, the Office of Public Counsel (OPC) filed the Citizens' Fourth Motion to Compel and Fourth Motion to Postpone Date for Filing Intervenor Testimony. On September 25, 1995, Southern States Utilities, Inc., (SSU or utility) filed a response to OPC's motions. Having reviewed the arguments in OPC's motions and in the utility's response, OPC's fourth motion to compel is deferred in part, granted in part and denied in part and its fourth motion to postpone the date for filing intervenor testimony is denied.

MOTION TO COMPEL

In its motion to compel, OPC states that SSU insufficiently answered its interrogatories numbered 68 and 81. Further, OPC states that SSU did not sufficiently respond to its document requests numbered 121, 144, and 154. SSU responded by stating that the information sought was either confidential, not available, or subject to the work product and/or attorney client privilege.

Interrogatories Nos. 68 and 81

Interrogatories Nos. 68 and 81 ask for information relating to the annual salaries of Minnesota Power & Light (MPL) employees. SSU responded by stating that the utility believes that the individual employee salary information is confidential. OPC argues that SSU failed to pursue the appropriate procedure for pleading confidentiality. In the response to the motion to compel, SSU

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agreed to provide the requested salary information to the extent it is available, subject to confidential treatment, within fourteen days of its response.

On October 11, 1995, SSU filed its Fifth Motion for Temporary Protective Order, which in part requests that the information responsive to interrogatories nos. 68 and 81 be granted the protection of a temporary protective order as provided for by Rule 25-22.006(5)(c), Florida Administrative Code. Since the granting of SSU's Fifth Motion for a Temporary Protective Order will result in OPC obtaining the requested information, a ruling on OPC's motion to compel as to these interrogatories is unnecessary here.

Document Request No. 121

OPC's Document Request No. 121 states as follows:

Please provide any reports, studies, or other documents in the Company's custody or control which address the subject of economies of scale of the Company's storage, treatment, collection, and distribution systems, or the storage, treatment, collection and distribution systems of water and sewer companies in general.

SSU stated in its response that none were available, but in its August 29, 1995 Objections to OPC's First Set of Interrogatories and Document Requests and Motion for Protective Order, the utility stated that the request solicits work product prepared in anticipation of litigation, and therefore is exempt from discovery pursuant to Rule 1.280(b)(3), Fla. R. Civ. P. In its motion to compel, OPC states that the utility's apparently contradictory statements should operate to waive any objection to the document request. In SSU's response to OPC's motion, it explains that SSU has requested that an economies of scale study be prepared which the utility asserts will be subject to the work product privilege and, therefore, exempt from discovery unless and until such time as the study is completed and formulates the basis for the opinion of a witness who will testify at hearing. The utility asserts that the study has not yet been completed, and that OPC has not made the requisite showing of need to compel production of work product, pursuant to Rule 1.280(b)(3), Fla. R. Civ. P.

Having considered the parties' arguments, OPC's motion to compel is hereby denied to the extent that the requested information falls within the work product exception. The utility need not produce the economies of scale study unless and until the

study is completed and formulates the basis for the opinion of a witness who will testify at hearing. Therefore, communications between the utility's counsel and any consultants or between the utility and any consultants which contain either factual or opinion work product prepared in anticipation of litigation or for hearing need not be produced until OPC makes the required showing of need under Fla. R. Civ. P. 1.280. If a communication does not fall within the work product exception, such as a communication concerning fees, the utility shall produce the communication.

Document Request No. 144

OPC's Document Request No. 144 states as follows:

Provide a copy of all internal memoranda, reports, or studies which address how rain and/or weather has affected the Company's revenues during the years 1992, 1993, and 1994.

SSU stated in its response that other than the copy of Dr. Whitcomb's report to SSU on "Financial Risk and Water Conserving Rate Structures", dated April 1995 and included with SSU's response to OPC's document request no. 24, no other statistical analyses have been performed to correlate rainfall and revenues of 1992, 1993, and 1994. OPC argues in its motion to compel that SSU's response is incomplete since the utility restricts it to "statistical analyses" when the request asks for "memoranda, reports, or studies." SSU's response to OPC's motion states that the instant situation is a result of misinterpretation and lack of communication between the parties.

Having considered the parties' arguments, it is apparent that OPC's request is not limited to statistical analyses. Accordingly, OPC's motion to compel is granted to the extent that any documents which the request encompasses exist and SSU has not already produced them. If such documents exist, the utility shall produce them within 15 days of the issuance of this order.

Document Request No. 154

OPC's Document Request No. 154 states as follows:

For purposes of this request, please refer to the Company's response to OPC's Interrogatory 168 (c) and (d) in Docket No. 920655-WS. Please provide a copy of the four documents identified in this response.

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SSU's response to Interrogatory No. 168 (c) and (d) in Docket No. 920655-WS states as follows:

1. Document marked "Private & Confidential - Attorney/Client Privilege" and "Deltona Issues" dated May 15, 1989 authored by "JRM" (Jack R. McDonald, a Minnesota Power executive).
2. Document marked "Confidential Attorney - Client Privilege" and "Settlement Possibilities" dated October 19, 1989. Author not indicated. Distribution not indicated.
3. Document marked "Confidential Attorney Client Privilege" and "Settlement Possibilities" dated October 25, 1989. Author not indicated. Distribution not indicated.
4. Letter dated October 23, 1989 from Ronald L. Sorenson, Esq. (Topeka Group Incorporated at Briggs and Morgan) to B. Kenneth Gatlin, Esq. (Topeka Group Incorporated co-counsel), copied to Jack R. McDonald, Minnesota Power executive and Topeka co-counsel, David Forsberg, Esq. and Barry Davidson, Esq.

SSU response to Document Request No. 154 states in part as follows:

Company counsel has advised that the documents requested are covered by the attorney-client privilege and thus are not subject to disclosure.

In its motion to compel, OPC argues that SSU's time for objection to this document request has run, and that any objection is thereby waived. Further, OPC states that even were SSU's objection not waived, privilege is not credibly asserted, and the privilege does not apply since none of the requested documents were prepared in connection with the instant case or in contemplation of litigation. SSU responds to the motion by stating that its assertion of privilege was made timely, and the privilege does apply.

Upon consideration of the parties' arguments, OPC's motion to compel is denied to the extent that the documents requested fall under the attorney/client privilege. SSU filed its Objections to the Office of Public Counsel's First Set of Interrogatories and First Set of Requests for Production of Documents and Motion for Protective Order (the Motion) on August 29, 1995. SSU and OPC agreed that the Motion was timely filed. Although SSU's assertion of privilege to Document Request No. 154 was not included in the Motion, SSU served OPC its answer asserting privilege to Document

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Request No. 154 on the same day that the objections were filed. Further, SSU sufficiently asserted privilege through its response. Document Request No. 154 was part of OPC's first set of interrogatories. OPC agreed to the utility's filing the Motion on August 29, 1995 objections. SSU's assertion of privilege through its response was also made on August 29, 1995. Accordingly, the assertion of privilege was timely made. If the documents are communications between the utility's counsel and any consultants or between the utility and any consultants which contain either factual or opinion work product prepared in anticipation of litigation or for hearing, they need not be produced until OPC makes the required showing of need under Fla. R. Civ. P. 1.280. If any of the requested documents do not fall within the above exception, such as a communication concerning fees, the utility shall produce the document(s).

MOTION TO POSTPONE

OPC argues that it suffers an irrevocable delay because SSU has provided incomplete responses to certain discovery requests. SSU responds that no comprehensive presumption of prejudice should attach to discovery responses in dispute at this stage of the case.

OPC's argument is unpersuasive. SSU has answered the majority of OPC's discovery in a manner that gives OPC sufficient time to file its testimony on November 20, 1995, the date established in Order No. PSC-95-1208-PCO-WS. Accordingly, OPC's motion is hereby denied.

Based on the foregoing, it is, therefore

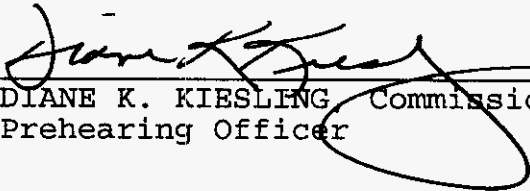
ORDERED by Commissioner Diane K. Kiesling, as Prehearing Officer, that a ruling on the Office of Public Counsel's Fourth Motion to Compel as it pertains to Interrogatories Nos. 68 and 81 is hereby deferred as set forth in the body of this Order. It is further

ORDERED that the Office of Public Counsel's Fourth Motion to Compel is granted in part and denied in part as set forth in the body of this Order. It is further

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ORDERED that the Office of Public Counsel's Fourth Motion to Postpone Date for Filing Intervenor Testimony is denied.

By ORDER of Commissioner Diane K. Kiesling, as Prehearing Officer, this 3rd day of November, 1995.


DIANE K. KIESLING Commissioner and
Prehearing Officer

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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 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.

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Based on the foregoing, it is, therefore


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ORDERED that the Office of Public Counsel's Fourth Motion to Postpone Date for Filing Intervenor Testimony is denied.

By ORDER of Commissioner Diane K. Kiesling, as Prehearing Officer, this 3rd day of November, 1995.


DIANE K. KIESLING, Commissioner and
Prehearing Officer

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