

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for rate ) DOCKET NO. 950495-WS  
increase and increase in service ) ORDER NO. PSC-95-1504-PCO-WS  
availability charges by Southern ) ISSUED: December 5, 1995  
States Utilities, Inc. for )  
Orange-Osceola Utilities, Inc. )  
in Osceola County, and in )  
Bradford, Brevard, Charlotte, )  
Citrus, Clay, Collier, Duval, )  
Highlands, Lake, Lee, Marion, )  
Martin, Nassau, Orange, Osceola, )  
Pasco, Putnam, Seminole, St. )  
Johns, St. Lucie, Volusia, and )  
Washington Counties. )

ORDER GRANTING OFFICE OF PUBLIC COUNSEL'S FIFTH MOTION  
TO COMPEL, DENYING SOUTHERN STATES UTILITIES, INC.'S  
MOTION FOR A PROTECTIVE ORDER, DENYING OFFICE OF PUBLIC  
COUNSEL'S SIXTH MOTION TO COMPEL, DENYING OFFICE OF  
PUBLIC COUNSEL'S MOTION TO IMPOSE SANCTIONS AND  
DECLINING TO RULE ON OFFICE OF PUBLIC COUNSEL'S FIFTH  
AND SIXTH MOTIONS TO POSTPONE DATE FOR FILING  
INTERVENOR TESTIMONY

On September 22, 1995, the Office of Public Counsel (OPC) filed two separate motions: Citizens' Fifth Motion to Compel and Fifth Motion to Postpone Date for Filing Intervenor Testimony, and Citizen's Sixth Motion to Compel, Sixth Motion to Postpone Date for Filing Intervenor Testimony, and Motion to Impose Sanctions. On September 29, 1995, Southern States Utilities, Inc., (SSU or utility) filed a separate response to each of OPC's motions and a motion for a protective order.

**OPC's Fifth Motion to Compel and SSU's Motion for a Protective Order**

In its fifth motion to compel, OPC states that its Request for Production of Document No. 71, required SSU to provide a copy of all federal income tax returns and all schedules, workpapers, and consolidating schedules for Minnesota Power and Light (MP&L) for the years 1992 through 1994. OPC alleges that while SSU produced those documents for inspection at the utility's office on September 19 and 20, 1995, the utility refused to allow OPC to duplicate the documents. OPC contends that Rule 1.350, Florida Rules of Civil Procedure, which the Commission has adopted, allows parties to inspect and copy documents. OPC contends that SSU's refusal to

DOCUMENT NUMBER-DATE

12124 DEC-5 95

FPSC-RECORDS/REPORTING

ORDER NO. PSC-95-1504-PCO-WS  
DOCKET NO. 950495-WS  
PAGE 2

permit duplication of the documents impedes OPC's preparation in this docket.

In its response, filed September 29, 1995, SSU contends that OPC initially consented to SSU's manner of producing the documents, and has therefore essentially waived any objection. SSU states that it notified OPC in its September 7, 1995, response that "since these items are confidential, they will be available for review but may not be copied," and that OPC did not object to this method of production and made arrangements to view the documents. SSU argues that this method of production is an accepted practice that OPC and SSU have employed in past rate filings. SSU states that it was not until OPC representatives were inspecting the documents on September 19, 1995, that OPC first demanded that copies of the documents be made. OPC representatives compiled a list of documents which they wished to copy. SSU attached that list to its response as Exhibit C. SSU also states that arrangements must be made for an MP&L employee to travel with the documents to Apopka.

SSU's response to OPC's fifth motion to compel also includes a request for a protective order for the documents. SSU raises arguments regarding the confidentiality of the documents, the relevance of the request, the burden of the request, and that some of the information sought has already been provided in other reports. SSU also contends that standard practice in the industries is to allow inspection but not the copying of tax returns, and that OPC is singling out SSU and MP&L for disparate treatment.

Neither merely informing a party of the intent to produce, but to deny copying, nor prior practice in that regard, will provide protection from copying of material produced under the discovery rules. SSU could have, and should have, requested such protection at the time it filed for a temporary protective order on September 21, 1995, at which time SSU already knew that copying of the documents was at issue.

In its second motion for protective order related to Document Request No. 71, SSU fails to allege any compelling reason to deny OPC the opportunity to obtain copies of the consolidated tax returns. The confidentiality of the returns has been protected by Order No. PSC-95-1286-CFO-WS, issued October 19, 1995. Based on the foregoing, OPC's Fifth Motion to Compel is granted and SSU's Motion for a Protective Order is denied. SSU is hereby directed to produce the consolidated tax returns for copying or provide copies of the documents listed in Exhibit C of SSU's response filed September 29, 1995, within ten days of this Order.

**OPC's Sixth Motion to Compel**

Price Waterhouse L.L.P. (Price Waterhouse or auditor) conducted independent audits of SSU in the years 1992 through 1994. In its Request for Production of Document No. 63, OPC requested that the utility produce copies of the Price Waterhouse workpapers related to those audits. In its Sixth Motion to Compel, OPC contends that on September 18, 1995, its consultants traveled to Price Waterhouse's location in Orlando to review those documents. OPC contends that while some of the workpapers were provided, the utility and Price Waterhouse refused to provide portions of the audit summary file. OPC argues that the Price Waterhouse conducted the audit under contract with SSU, and that SSU has included the cost of that audit in its test year. OPC argues that the withheld documents are relevant because they relate to the utility's financial reports.

In its response, the utility contends that the requested documents are the property of Price Waterhouse, and that the utility has no control or legal interest in those documents. The utility states that it has consented to OPC's review of the workpapers, but that Price Waterhouse has the final determination as to what papers will be released. SSU states that it has no ownership interest in the workpapers owned by Price Waterhouse, and that those documents remain the property of Price Waterhouse pursuant to Section 473.318, Florida Statutes, which provides as follows:

All statements, records, schedules, working papers, and memoranda made by a licensee or his employee incident to, or in the course of, professional services to a client, except the reports submitted by the licensee to the client and except for records which are part of the client's records, shall be and remain the property of the licensee in the absence of an express agreement between the licensee and the client to the contrary.

SSU states that it did not enter into an express agreement with the auditor which would permit access to those documents.

Before addressing the instant motion to compel, it must be noted that on August 30, 1995, the utility filed an objection to several documents included in OPC's first set of discovery, and requested a protective order. SSU objected to OPC's Request for Production of Document No. 63 on the grounds that the documents were not relevant and that while SSU would consent to OPC's review of the workpapers, the workpapers were in the custody and control of the auditors. Order No. PSC-95-1258-PCO-WS, issued October 13,

1995, addressed SSU's objections. That order noted that with the exception of 5 specific discovery requests, SSU had responded to a significant portion of OPC's requests. Request for Production No. 63 was not included in the list of 5 outstanding requests, which would indicate that at that time, it appeared that SSU had responded to SSU's request. Reconsideration of that order was not sought.

Nevertheless, OPC's Sixth Motion to Compel was filed before the issuance of Order No. 95-1258-PCO-WS, and therefore will be ruled upon herein specifically. In consideration of the parties' arguments, OPC's motion to compel as it is related to its Request for Production No. 63 is denied. SSU has indicated that it has complied with the discovery request to the extent that it provided documents that were in its control, and consented to allow Price Waterhouse to disclose documents to OPC. However, as to the documents which are in the custody and control of Price Waterhouse, over which SSU has no control or legal interest, OPC's motion is denied. Section 473.318, Florida Statutes, clearly indicates that absent an express agreement, the workpapers are the property of the auditors. SSU cannot be reasonably expected to produce such documents if they are not within the utility's control.

OPC's sixth motion to compel also addressed its Request for Production of Documents Nos. 61 and 62. SSU has since provided responses to those requests, and therefore no further ruling is necessary here.

#### **OPC's Motion to Impose Sanctions**

OPC also requested sanctions in its sixth motion to compel. Specifically, it states that because SSU has refused to provide documents from the audit, the Commission should deny SSU's request to recover the cost of the audit in this proceeding.

This Commission is authorized, pursuant to Rule 25-22.034, Florida Administrative Code, to impose sanctions against a party that does not comply with discovery procedures or an order requiring discovery. OPC's sixth motion to compel has been denied herein, and therefore, its request for sanctions is also denied.

#### **OPC's Motions to Postpone**

Based on a belief that SSU has significantly hindered discovery efforts, OPC also requests postponement of the filing date for intervenor testimony. However, the Commission's decision on November 21, 1995, to reschedule all controlling dates in this proceeding renders moot the issue raised by OPC.

ORDER NO. PSC-95-1504-PCO-WS  
DOCKET NO. 950495-WS  
PAGE 5

Based on the foregoing, it is, therefore

ORDERED by Commissioner Diane K. Kiesling, as Prehearing Officer, that the Office of Public Counsel's fifth motion to compel is granted. It is further



ORDERED that the request for a protective order filed by Southern States Utilities, Inc., is denied. It is further

ORDERED that the Office of Public Counsel's sixth motion to compel is denied. It is further

ORDERED that the Office of Public Counsel's request that the Commission sanction SSU by denying recovery of the cost of the audit related to Request for Production of Document No. 63 is denied. It is further

ORDERED that the Office of Public Counsel's fifth and sixth motions to postpone filing intervenor testimony are moot.

By ORDER of Commissioner Diane K. Kiesling, as Prehearing Officer, this 5th day of December, 1995.

  
DIANE K. KIESLING, Commissioner and  
Prehearing Officer 

( S E A L )

MEO

ORDER NO. PSC-95-1504-PCO-WS  
DOCKET NO. 950495-WS  
PAGE 6

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.