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-92-0819-PCO-WS ISSUED: 08/14/92

ORDER DENYING IN PART AND GRANTING IN PART UTILITIES' AMENDED MOTION FOR PROTECTIVE ORDER

On July 1, 1992, Southern States Utilities, Inc., and Deltona Utilities, Inc., (the utility) filed a Motion for Protective Order striking and/or Relieving Duty to Respond to Certain Portions of Public Counsel's First, Second, Third and Fourth sets of Interrogatories and First, Second and Third Sets of Document Production Requests. On July 2, 1992, the utility amended that motion, and on July 10, 1992, the Office of Public Counsel (OPC) filed its response to the amended motion.

Having reviewed the arguments in the utility's motion and in OPC's response, I hereby deny in part and grant in part the utility's motion as set forth below.

The utility objects to a number of OPC interrogatories and two document requests because the information solicited pre-dates the calendar 1991 test year by more than two years. The subject discovery requests are Interrogatories Nos. 28, 40, 43, 48, 49, 59, 62, 65-68, 72, 81, 84, 85, 87, 88, 90, 93, 94, 99, 104, 110, 113, 115, 122, 124, 144-147, and 171-173 and Document Requests Nos. 33 and 55. The utility argues that data for years prior to 1989 is not relevant nor reasonably calculated to lead to the discovery of admissible evidence because of the changes in the composition and structure of the utility since 1989. The utility complains that there is no consistency to the information requested: one discovery request seeks information from ten years ago, others from

six years ago, and so on. The utility also argues that these particular discovery requests are excessive.

In its response, OPC argues that the Chairman's approval of the utilities' test year is interim in nature and that OPC intends to make an issue of whether or not the approved test year in this case is appropriate. The discovery which the utility objects to, OPC asserts, is designed to obtain evidence relevant to the test year issue. In addition, OPC counters that the volume of discovery is commensurate to the size of the case and that the utility should have calculated that its resources would be strained by filing the case in the manner it did.

I find OPC's arguments persuasive and its discovery in this area proper. The scope of discovery should not be arbitrarily limited to data which came into existence within a set proximity to the approved test year. Further, I find no significance to the utility's complaint about a lack of consistency to the discovery requests. The mere variability in the age of the information requested does not dictate a finding that the information is outside the scope of discovery, nor is it indicative of prohibited excessive discovery.

The utility objects to OPC Interrogatories Nos. 38, 48(c), 52, 94 (a) and (b), 97, 181-183, 185, 189-191, 193, and 210 and Document Request No. 28 because the solicited projections go beyond the calendar 1991 test year which, are not known and quantifiable, and which are not relevant nor reasonably calculated to lead to the discovery of admissible evidence.

In its response, OPC argues that the utility's objection to this information is based on its misunderstanding of the interim nature of the test year approval decision. Since the appropriateness of the test year is anticipated to be an issue in the case, OPC maintains that matters probative of that issue are within the scope of permissible discovery.

Although OPC makes a cogent point, I cannot agree that the utility should be required to produce information or answer questions based on information which is not presently in existence. I think the utility's objection can be subdivided into three categories: projections, estimates, and anticipated occurrences. Therefore, if an interrogatory or document request solicits a projection or estimate and the projection or estimate has already been prepared by the utility for its own purposes, the utility shall answer the discovery. However, if the discovery solicits a projection or estimate and the projection or estimate does not

exist, the utility need not answer the discovery. Discovery requests which solicit occurrences which the utility anticipates, however, shall be answered directly. So, for instance, if the utility anticipates refunding or retiring any debt or preferred stock in 1992 or 1993, as asked in Interrogatory No. 189, the utility shall answer the question in the affirmative if it does so anticipate, giving whatever explanation may be requested, or in the negative if it does not.

The utility objects to OPC Interrogatories Nos. 1 and 2, which solicit the substance of any and all communication between the utility and the Public Service Commission's Staff (staff) concerning this case, including filing dates discussed, rate design plans considered, how accounting information should be presented, whether the proposed agency action procedure could be used, and whether any rule waivers were considered. The utility states that the information solicited is not relevant nor reasonably calculated to lead to the discovery of admissible evidence. Furthermore, the utility argues that it would be unduly burdensome for it to respond to the requests since so many of its personnel may have had contacts with staff and locating records would require considerable time.

OPC responds that the information is within the scope of permissible discovery and that according to Florida case law, it is insufficient for the utility to make a bare assertion that responding would be unduly burdensome. Under the case law, OPC argues, the utility must show the Commission some quantitative information describing the manner in which the discovery might be burdensome.

I find OPC's arguments persuasive and its discovery in this area proper. I believe that the discovery solicits information which is reasonably calculated to lead to the discovery of admissible evidence, and I am not convinced of the utility's claim of an undue burden.

The utility objects to Interrogatories Nos. 139, 213, and 214 and Document Request No. 51 because the requests solicit information concerning the utility's affiliates, including parent companies and non-regulated affiliates, which do not share or allocate costs with the utility. For this reason, the utility argues the requested information is not relevant nor reasonably calculated to lead to the discovery of admissible evidence.

In its response, OPC argues that it has the right to determine if and how costs are allocated among the various companies and if

"direct charges" are, in fact, directly charged or allocated. For these reasons, OPC asserts, the requested information is within the scope of discovery.

I find OPC's argument persuasive and its discovery in this area proper. Allocations among the utility and its various affiliates are relevant to the instant proceeding.

The utility objects to Interrogatories Nos. 171-174 because information concerning the capital structure of the utility's parent companies for up to three years prior to the test year is not relevant nor reasonably calculated to lead to the discovery of admissible evidence. OPC responds that since the acceptance of the test year is an interim decision, the objection to information outside the test year is within the scope of discovery.

I find OPC's argument persuasive and its discovery in this area proper. The information requested is relevant to the capital structure issues in this case, including parent-debt adjustment and inter-company transactions.

The utility objects to Interrogatory No. 175 because the requested capital structure information of Minnesota Power and Light (MPL) is not relevant nor reasonably calculated to lead to the discovery of admissible evidence and because the information is a matter of public record, readily obtainable from other sources. OPC responds that the information sought is relevant, as it relates to the relative risk between MPL and the utility, and that the information can be easily obtained by the utility.

I find OPC's argument persuasive and its discovery in this area proper. The information sought is relevant. Further, the availability of the information from other sources, in my view, would be a valid objection if it were tied to a related problem, such as an undue burden. In this instance, I believe that the utility should be able to obtain the information without difficulty.

The utility objects to Interrogatory No. 207 (b) and (c) because the question of whether the Commission has approved the utility's method of calculating interest synchronization solicits legal research and not factual information. OPC responds that the information sought will reflect the expertise of the individual who prepared the subject portion of the MFRs and, therefore, pertain to that person's credibility.

I find the utility's argument persuasive. The request appears to solicit legal information--a Commission precedent or lack thereof--not factual information and, thus, is not appropriate for discovery. OPC's response implies that the interrogatory asks something other than what it appears to, so, perhaps, clarification of the question would be appropriate. This suggestion notwithstanding, the utility shall not be required to answer the interrogatory as it is stated.

The utility objects to Document Request No. 32 because the requested documents which were provided to lot buyers by the utility or its present or former affiliates are not relevant nor reasonably calculated to lead to the discovery of admissible evidence. Citing the Florida Supreme Court's decision in Deltona Corp. v. Mayo, 342 So. 2d 510 (1977), the utility argues that the Commission does not have jurisdiction over contracts, agreements, etc., of the nature sought by this discovery request.

In its response, OPC argues that the utility misinterprets Deltona Corp. v. Mayo, which only prohibited the Commission from imputing contributions-in-aid-of-construction (CIAC) on the basis of representations made in sales literature. OPC asserts it has solicited the information for the purpose of determining whether CIAC was paid to the utility or its predecessors.

I find OPC's argument persuasive and its discovery in this area proper. The information solicited is relevant to the proper amount of CIAC in rate base.

The utility objects to that portion of Document Request No. 46 which would require it to index and cross-reference the workpapers solicited because that task is unreasonable and overly burdensome under Evangelos v. Dachiel, 553 So.2d 245 (Fla. 3rd DCA 1989). OPC points out that even though the utility did not object to producing the documents, only to the requested format, the utility still did not produce the documents. In addition, OPC argues that Evangelos v. Dachiel holds it is inappropriate to require a party to reorganize a large volume of records, but the plain import of its request in this case is not similar. OPC then states that it would prefer to have the records in the order in which the utility developed them.

Given OPC's apparent withdrawal of the indexing and cross-referencing requirement, I find that the discovery is proper but that the utility should produce the documents in the order in which they were developed.

The utility objects to Document Request No. 76 because the requested parent company travel reimbursement policies and procedures documents are not relevant nor reasonably calculated to lead to the discovery of admissible evidence. In its response, OPC counters that the information sought is relevant because the utility's parent companies charge costs to the utility. OPC asserts that if the parent company charges to the utility include travel costs, the reimbursement policies and procedures are relevant.

I find OPC's argument persuasive and its discovery in this area proper. Whether the parent company charges to the utility include travel expenses, the dollar amounts for travel expenses, and the reasonableness of the parent's reimbursement policies are relevant.

The utility objects to Document Request No. 77 because the requested parent company prospectuses are not relevant nor reasonably calculated to lead to the discovery of admissible evidence. OPC did not respond to this objection. Although I do not think it proper to consider OPC's failure to respond as a withdrawal of the request, I shall not require the utility to respond to the request at this time. It is questionable whether the requested prospectuses will contain any discoverable information which OPC would not have already received through other discovery requests.

The utility objects to Document Request No. 84 because the requested communications between the utility and consultants retained to assist with this case are protected under the work product exception and are immune from discovery absent a showing that the information could not be obtained from another source without undue hardship. OPC did not respond to this objection.

Again, I do not think it proper to consider OPC's failure to respond as a withdrawal of the request. However, given the great scope of the request and the equal breadth of the objection, I find that the utility shall provide the requested information, but only to the extent it does not fall within the work product exception. 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. However, since it seems to me virtually certain that not all of the requested information is the proper subject of a claim to the work product exception, I hold that if a communication does

not fall within the work product exception, such as a communication concerning fees, the utility shall produce the communication.

The utility objects to Document Request No. 85 because the requested communications in the utility's possession which address the substance of this case are protected under the work product exception and attorney-client privilege. In its response, OPC argues that the utility fails to draw the connection between the requested information and the work product exception and attorney-client privilege.

Here, as with the previous request and objection, both the request and the objection are great in scope. However, I agree with OPC in that the utility has failed to tie its objection to anything specific. It seems to me virtually certain that not all of the requested information is the proper subject of a claim to the work product exception or to attorney-client privilege. Therefore, I find that the utility shall provide the requested information, but only to the extent it does not fall within the work product exception, as described above, and to the extent it does not fall within the attorney-client privilege, which is basically, any communication between attorney and client.

The utility objects to Document Request No. 88 because the requested drafts of all utility testimony for this case are protected under the work product exception and attorney-client privilege. In its response, OPC argues only that the requested information will be admissible at hearing as prior inconsistent statements which go directly to the credibility of the utility's witnesses.

I find the utility's argument persuasive and OPC's discovery in this area to be improper. Therefore, the utility shall not be required to respond to Document Request 88.

The utility objected to Interrogatories Nos. 92-114 because they were repetitious of Interrogatories Nos. 69-91, and the utility cited objections to Interrogatories Nos. 163, 164, 168, and 223, and Document Request No. 86. Since OPC voluntarily withdrew those discovery requests, the objections need not be ruled on. In addition, at an August 3, 1992, meeting between the utility, OPC, and staff, OPC accepted the utility's offer to provide OPC a list of the documents requested in Document Request No. 87, rather than the documents themselves, by August 7, 1992. Therefore, the utility's objection to Document Request No. 87 need not be ruled on. Also, the utility sought clarification from OPC on Document Request No. 83. In its response, OPC provided the requested

clarification. If the utility has any objection to the request as clarified, it shall file its objection within five days of the date of this Order.

Finally, since the discovery in dispute has been outstanding for a period of several weeks and filing dates are quickly approaching, I hereby direct the utility to respond to the discovery deemed appropriate in this Order to OPC within seven days of the date of this Order.

Based upon the foregoing, it is

ORDERED by Commissioner Betty Easley, as Prehearing Officer, that the Amended Motion for Protective Order striking and/or Relieving Duty to Respond to Certain Portions of Public Counsel's First, Second, Third and Fourth sets of Interrogatories and First, Second and Third Sets of Document Production Requests filed July 2, 1992 by Southern States Utilities, Inc., and Deltona Utilities, Inc., is hereby denied in part and granted in part as set forth in the body of this Order. It is further

ORDERED that any objection to Document Request No. 83 as clarified shall be filed within five days of the date of this Order. It is further

ORDERED that Southern States Utilities, Inc., and Deltona Utilities, Inc., are hereby directed to respond to the discovery deemed proper in this Order within seven days of the date of this Order.

By ORDER of Commissioner Betty Easley, as Prehearing Officer, this 14th day of August, 1992.

Betty Easley

BETTY EASLEY, Commissioner
and Prehearing Officer

(S E A L)

BE/SFS/CB/MF

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 sewer 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.