

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-92-1176-PCO-WS
ISSUED: 10/16/92

ORDER DENYING MOTION FOR PROTECTIVE ORDER REGARDING
THE DEPOSITION OF KARLA TEASLEY AND BRIAN ARMSTRONG AND
DENYING REQUEST FOR ORAL ARGUMENT

On October 2, 1992, the Office of Public Counsel (OPC) filed a Notice of Deposition of Karla Teasley and Brian Armstrong. On October 8, 1992, Southern States Utilities, Inc. (SSU), filed a Motion for Protective Order and a Request for Oral Argument on the Motion. The Motion filed by SSU requests the following relief: 1) that the deposition of Ms. Teasley be rescheduled to October 23, 1992; 2) that Mr. Armstrong not be compelled to appear for deposition; and that; 3) if Mr. Armstrong is compelled to appear for deposition, that the deposition be rescheduled for October 23, 1992. On October 13, 1992, OPC filed a Response to SSU's motion.

In the Motion for Protective Order, SSU states counsel for SSU would not be available for depositions on October 13, 1992, and that OPC had not contacted counsel for SSU concerning availability prior to noticing the deposition. Further, SSU states that Mr. Armstrong is co-counsel of record and that all of his activities and communications related to this rate case are protected by the attorney-client and/or work product privileges. SSU also raises the concern that the intent of the deposition is to disqualify Mr. Armstrong from appearing as co-counsel in this proceeding.

OPC's response states that unless another mutually acceptable time is agreed to by the parties, OPC agrees to hold Ms. Teasley's deposition on October 23, 1992, at SSU's offices in Apopka. OPC states a willingness to stipulate that there is no intention on the

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part of OPC to seek Mr. Armstrong's disqualification. Further, OPC states that the subject matter of the questions intended for Mr. Armstrong do not involve any communication with or work product for his client, but that if a question calls for an answer which SSU considers to be privileged, the objection can be raised and the witness instructed not to answer the question.

Based on the pleadings in this matter, the parties have agreed to reschedule the deposition of Ms. Teasley to another mutually convenient time. Therefore, I find that the issue of scheduling Ms. Teasley's deposition is moot.

On the matter of Mr. Armstrong's deposition, it is well recognized that there must be a balance in the inherent conflict presented between allowing full pretrial discovery and protecting the integrity of the adversary process. An attorney needs to be able to prepare a case with some protection from the possibility that he will be called as a witness in the case. For these reasons, there is both the attorney/client privilege and the work product privilege.

Should any privileged information be sought by OPC it would not be discoverable. In that instance, as OPC acknowledged in their response, the witness may decline or be instructed not to answer a particular question on the grounds that the information sought is privileged. However, it is possible that Mr. Armstrong may be able to provide relevant information which is not privileged. For example, there is no privilege where Mr. Armstrong met with his clients and an outside party, such as Commission staff, because such a meeting would not constitute a confidential communication protected by the privilege.

It is also a well established principle that an attorney appearing as a witness in a case should retire from the case if he is to be a witness in a case because having the attorney appear as a witness is likely to create the impression that the attorney is manufacturing testimony on behalf of his client. OPC has stated that scheduling Mr. Armstrong's deposition was not done with any intention of attempting to disqualify him from appearing as co-counsel for the utility. It is not clear from the pleading whether it is OPC's intention to require Mr. Armstrong to also appear as a witness in the hearing. However, I find that it is appropriate to require the appearance of Mr. Armstrong for deposition on the premise that Mr. Armstrong may be in possession of material

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information reasonably calculated to lead to the discovery of relevant evidence.

If necessary, the more significant and difficult question of whether Mr. Armstrong may be required to appear as a witness in this case will be ruled on at a later date. However, it should be noted that even though OPC has stated that they would not move for disqualification, Mr. Armstrong is still bound by the Rules Regulating the Florida Bar, specifically Rule 4-3.7 of the Florida Rules of Professional Conduct.

Based on the foregoing, the Motion for Protective Order as to Brian Armstrong is denied to the extent set forth above. Both the deposition of Ms. Teasley and Mr. Armstrong shall be scheduled at a mutually agreeable time and day, no later than October 23, 1992.

Further, the pleadings filed by the parties provide sufficient information for making this decision without Oral Argument. Therefore, SSU's Request for Oral Argument is denied.

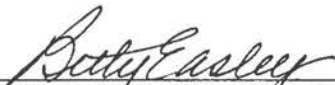
It is , therefore

ORDERED by Commissioner Betty Easley, as Prehearing Officer, that the Motion for Protective Order is denied to the extent set forth in the body of this order. It is further

ORDERED that the deposition of Karla Teasley and Brian Armstrong shall be held at a mutually agreeable time and place no later than October 23, 1992. It is further

ORDERED that the Request by Southern States Utilities, Inc. for Oral Argument is denied.

By ORDER of Commissioner Betty Easley, as Prehearing Officer, this 16th day of OCTOBER, 1992.



BETTY EASLEY, Commissioner
and Prehearing Officer

(S E A L)

BE/CB

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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.