

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application of Southern) DOCKET NO. 920655-WS  
States Utilities, Inc., for ) ORDER NO. PSC-93-0186-PCO-WS  
Increased Water and Wastewater ) ISSUED: 02/08/93  
Rates in Collier County (Marco )  
Island Systems) )  
\_\_\_\_\_)

ORDER DENYING SOUTHERN STATES UTILITIES, INC.'S MOTION  
FOR PROTECTIVE ORDER AND GRANTING IN PART  
PUBLIC COUNSEL'S MOTION TO COMPEL

On December 24, 1992, Southern States Utilities, Inc., (Southern States or utility) filed a Motion for Protective Order Directed to Public Counsel's (OPC) Third and Fourth Sets of Interrogatories and Document Requests. Specifically, Southern States objected to the discovery outlined below:

1. Interrogatory 121 of OPC's Third Set of Interrogatories;
2. Request for Production of Documents (POD) No. 62 of OPC's Third Set of PODs;
3. Interrogatories 139 and 140 of OPC's Fourth Set of Interrogatories;
4. Interrogatories 164, 165, and 166 of OPC's Fourth Set of Interrogatories;
5. POD 87 of OPC's Fourth Set of PODs.

OPC filed no response to Southern States' Motion, but filed, on January 11, 1993, a Motion to Compel Southern States to produce certain documents and supply answers to interrogatories submitted by OPC. On January 19, 1993, Southern States timely filed its Response to Public Counsel's Motion to Compel. This Order addresses the utility's Motion for Protective Order, OPC's Motion to Compel and the utility's Response.

In addition to the discovery listed above, in the Motion to Compel, OPC also asserted that it did not receive responses to Interrogatory 93, POD 51 and POD 52 from OPC's second set of discovery. Each discovery request has been separately addressed below.

DOCUMENT NUMBER-DATE

01524 FEB-83

FPSC-RECORDS/REPORTING

INTERROGATORY 121

In this request, OPC apparently inadvertently referred the utility to OPC'S Interrogatory 28R in Docket No. 920199-WS. In fact, Staff's Interrogatory 28R was the subject of the discovery request. The error has been corrected and Southern States served its response to Interrogatory 121 on January 19, 1993. The objection is now moot.

POD 62

Document Request No. 62 states the following:

Provide a copy of all internal memorandum, reports, studies, and other documents between or by employees of the company, Topeka, MPL, between or by consultants of the Company, Topeka, and MPL, and all memorandum to files which address the sale of St. Augustine Shores.

Southern States, in its Motion for Protective Order, originally objected to this request pursuant to the doctrine of collateral estoppel. The utility asserted that the issue of whether it is appropriate to recognize any portion of the gain on the condemnation of the St. Augustine Shores system previously has been litigated by OPC in Docket No. 920199-WS. As indicated in the pleadings of both parties, Southern States and OPC have now reached a verbal agreement with regards to producing the information concerning St. Augustine Shores. Consequently, the information requested in this POD is no longer necessary, and this objection is now moot.

INTERROGATORIES 139 AND 140

Subsection (a) of Interrogatory 139 relates to St. Augustine Shores. As discussed above, pursuant to an agreement between the utility and OPC, that information is no longer necessary.

Southern States maintains its objection to the remaining portions of the discovery requests found in Interrogatories 139 and 140 based on the collateral estoppel theory. Interrogatories 139 and 140 request information concerning Topeka Group's acquisition of the Deltona utility subsidiaries. Specifically, the interrogatories request the following:

139. (b) Please refer to page 28 of Appendix 6-B. Please indicate specifically, what the other consideration was. State any dollar value associated with this other consideration.
- (c) At the time of purchase, please indicate the amount of Deltona debt assumed by Topeka.
- (d) Please describe in detail the off-balance sheet liabilities assumed by Topeka in the settlement agreement and the current status of these liabilities?
- (e) If the response to (b) relates to the acquisition/ownership/transfer of real estate, please indicate the value of each parcel at transfer, the write downs of each parcel, and the value included on the Company's books as of April 1992.
- (f) If the response to (b) relates to the forgiveness of debt, please explain what debt was forgiven, the dollar amount of the forgiveness, and the company/system to which it applied.
- (g) Please explain in detail how the Company arrived at the value of the preferred stock of \$31,296,000.
- (h) Please explain how the \$7,000,000 cash which was paid to Deltona as a result of a settlement agreement is reflective of the purchase price of the Deltona utility systems.
- (i) Identify all value received by Topeka as a result of the \$7,000,000 cash payment.
140. For each of the systems purchased from the Deltona Corporation (from herein after Deltona includes United Florida and all other systems and assets purchased from Deltona Corporation), please state the amount of acquisition adjustment recorded at the time of the purchase, any subsequent adjustments to the acquisition

adjustment, and the acquisition adjustment as of December 1990, December 1991, April 1990, and April 1992.

In its Motion for Protective Order, the utility asserts that the underlying substantive issues pertaining to potential acquisition adjustments for systems purchased from the Deltona Corporation have been previously litigated in Docket No. 920199-WS. The utility believes that the Commission's decision on Issues 34 and 40 of Docket No. 920199-WS should control in this docket. Under the doctrine of collateral estoppel, the utility believes that OPC is barred from relitigating these issues in this proceeding as such decisions apply to Marco Island. The utility cites Albrecht v. State, 444 So. 2d 8 (Fla. 1984) in support of its position.

OPC maintains that information related to Topeka's purchase of the Deltona utility subsidiaries is of critical importance to this docket. In its Motion to Compel, OPC asserts that the general principle behind the doctrine of res judicata is that final judgment by a court of competent jurisdiction is absolute and puts to rest every justiciable, as well as every actually litigated issue. OPC argues that the doctrines of collateral estoppel and res judicata cannot be applicable in this instance because the Commission is not a court of competent jurisdiction, but a quasi-judicial body. One Commission panel cannot bind a subsequent panel, which might discover different information about an identical or similar issue decided by a prior Commission panel. OPC cites Matthews v. State, 149 So. 648 (Fla. 1933) in stating that "the Commission has the power to modify, and, indeed, it is the duty to modify its pre-existing order, when new evidence is presented which warrants a change."

The utility's argument is not well founded. The Commission has not yet made its final decision in Docket No. 920199-WS. Therefore, the utility's theory that the case has been litigated fails at this point. Nevertheless, even if the Commission had made a final determination in Docket No. 920199-WS, OPC cannot be estopped from raising the issue once again in a rate-making proceeding. The Commission has a statutory obligation to decide issues in the public interest and has continuing regulatory jurisdiction over utilities.

In Order No. 20066, issued September 26, 1988, In re Application of Miles Grant Water and Sewer Company for an Increase

in Water and Sewer Rates in Martin County, this Commission recognized that collateral estoppel is not appropriate in rate proceedings because the Commission should exercise its sound discretion to adjust a utility's rate base. The Commission's decision in the Miles Grant case was affirmed by the 1st District Court of Appeals. Miles Grant Water and Sewer Company v. Florida Public Service Commission, 545 So. 2d 871 (Fla. 1st DCA 1989), aff'd per curiam.

The Commission cannot limit the discovery process in one case based on issues presented in a different case which does not even have a final ruling. By encouraging the discovery process, information which may not otherwise be apparent may be revealed, giving rise to additional issues. Pursuant to Rule 1.280(b)(1), Florida Rules of Civil Procedure, "parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action..." Therefore, discovery which could lead to the production of admissible evidence is appropriate.

Based on the foregoing, the utility must submit its responses to OPC's interrogatories 139 and 140.

INTERROGATORIES 164, 165, AND 166

The utility asserted that information requested in Interrogatories 164, 165 and 166 would be unduly burdensome to produce. The requests involved providing over 21 years of historical information to OPC. Since the objection, OPC agreed to reduce the request to 10 years of monthly data. On January 19, 1993, Southern States served its responses to these requests for 10 years worth of data. Thus, this objection is moot.

POD 87

POD 87 states the following:

Please provide copies of the requests made and the responses received by the Company or its predecessors(s) for the gross-up of CIAC.

This request did not appear to be specific to Marco Island. Therefore, the utility objected to this request on the grounds that it was overly broad and burdensome. However, the utility did not

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object to producing documents as pertain to the Marco Island systems. OPC agreed and Southern States served its response on January 19, 1993. Therefore, this objection is moot.

INTERROGATORY 93, POD 51, AND POD 52

The responses to these discovery requests were submitted through diskettes. OPC asserted that certain attachments were not submitted. On January 12, 1993, Southern States provided OPC with a copy of the response, along with the attachments requested. Therefore, this objection is also moot.

Based upon the foregoing, it is, therefore,

ORDERED by Commissioner Susan F. Clark, as Prehearing Officer, that Southern States Utilities Inc.'s Motion for Protective Order Directed to Public Counsel's Third and Fourth Sets of Interrogatories and Document Requests is hereby denied. It is further

ORDERED that Public Counsel's Motion to Compel is granted with regards to interrogatories 139(b) through (i) and 140. Southern States Utilities, Inc., shall respond to these interrogatories within 14 days of the issuance date of this Order.

By ORDER of Susan F. Clark, as Prehearing Officer, this 8th day of February, 1993.



SUSAN F. CLARK, Commissioner  
and Prehearing Officer

( S E A L )

LAJ

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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.